

ORIGINAL

IN THE SUPREME COURT OF OHIO

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

APPENDIX TO MERIT BRIEF OF APPELLEE FATHER ANTHONY WYLIE

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APPELLEE FATHER OF C.B.

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E-mail: georgecoghill@aol.com
GUARDIAN AD LITEM FOR FATHER

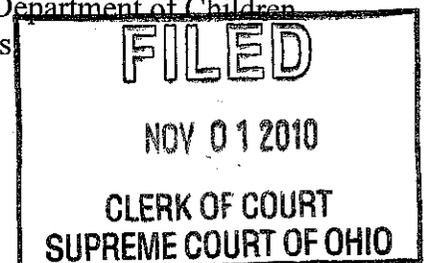
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COUNSEL FOR APPELLANT
Thomas Kozel, Guardian Ad Litem

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Betty Farley, Esq. (#0039651)(C.R.)
1801 East 12th Street, Suite 211
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COUNSEL FOR APPELLEE MOTHER

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GUARDIAN AD LITEM FOR MOTHER

William D. Mason, Esq. (0037540)
Cuyahoga County Prosecuting Attorney
By: Greg Millas (#0066769) (C.R.)
James Price (#0073356)
Cuyahoga County Department of Children
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COUNSEL FOR C.C.D.C.F.S.

ORIGINAL

IN THE SUPREME COURT OF OHIO

In The Matter Of:

10-0180

C.B.

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

Court of Appeals

Case No. 92775

JOINT NOTICE OF APPEAL OF
APPELLANT GUARDIAN AD LITEM THOMAS KOZEL
AND
APPELLANT C.B.

William D. Mason, Esq.
Cuyahoga County Prosecuting Attorney
By: Greg Millas (#0066769)
James Price (#0073356)(C.R.)
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GUARDIAN AD LITEM FOR FATHER

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ATTORNEY FOR MOTHER

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GUARDIAN AD LITEM FOR MOTHER

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E-mail: bmoriarty@marketal.com
ATTORNEY FOR CHILD

FILED
JAN 29 2013
CLERK OF COURT
SUPREME COURT OF OHIO

Dale M. Hartman (#0039354)(C.R.)
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ATTORNEY FOR FATHER

Thomas Kozel (#0040889)
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(440) 937-4416
(440) 937-4417 (fax)
E-mail: t.kozel@roadrunner.com
GUARDIAN AD LITEM FOR CHILD

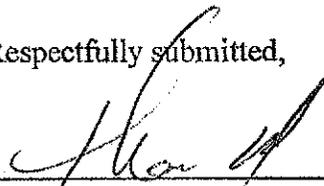
Joint Notice of Appeal of Appellant
Guardian ad litem Thomas Kozel
And
Appellant C.B.

Appellant Guardian ad litem Thomas Kozel and Appellant C.B. hereby give notice of appeal to the Supreme Court of Ohio from the judgment of the Cuyahoga County Court of Appeals, Eighth Appellate District, filed in the Court of Appeals Case No. 92775 on December 16, 2009 (which is attached and marked Exhibit A).

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

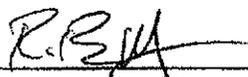
This case is distinguishable from *In re: Adams*, 115 Ohio St.3d 86, 2007-Ohio-4840, Syllabus, which was relied upon by the Court of Appeals for its dismissal of the child's appeal and does not involve an agency's appeal of the denial of permanent custody.

Respectfully submitted,



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Guardian ad litem for Caroline Bartok

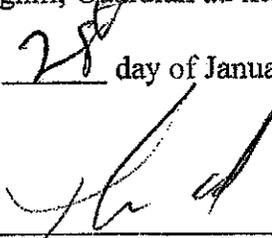


R. Brian Moriarty (#0064128)
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(216) 566-8228
(216) 623-7314 (fax)
Email: bmoriartylaw@gmail.com

Attorney for Child

CERTIFICATE OF SERVICE

A copy of the foregoing **Joint Notice of Appeal of Appellant Guardian ad litem Thomas Kozel and Appellant C.B.** was sent via ordinary U.S. mail to, James Price, Assistant Prosecutor, 8111 Quincy Ave., Rm 341, Cleveland, OH 44104, Greg Millas, Assistant Prosecutor, 8111 Quincy Ave., Rm 341, Cleveland, OH 44104, Dale M. Hartman, Attorney for Father, 12195 South Green Rd., University Heights, OH 44121, Carla Golubovic, Guardian ad litem for Mother, P.O. Box 29127, Parma, OH 44129, Betty Farley, Attorney for Mother, 1801 E. 12th St., Ste. 211, Cleveland, OH 44114, and George Coghill, Guardian ad litem for Father, 10211 Lake Shore Blvd., Bratenahal, OH 44108 on this 28th day of January, 2010.



Thomas Kozel
R. Brian Moriarty

Case Number: CA-09-092775

Case Title: IN RE: C.B. vs. .

Case Summary

Case Number: CA-09-092775
 Case Title: IN RE: C.B. vs. .
 Case Designation: N/A
 Filing Date: 02/06/2009
 Judge: N/A
 Magistrate: N/A
 Room: N/A
 Next Action: N/A
 File Location: PEND.FILE
 Last Status: ACTIVE
 Last Status Date: 02/06/2009
 Last Disposition: APPEALED TO OHIO SUPREME COURT
 Last Disposition Date: 02/08/2010
 Prayer Amount: \$.00

Service

Party	Role Name	Service Date	Response Date
E(1)	C.C.D.C.F.S.		N/A
E(2)	/ GUARDIAN AD LITEM FOR CHILD		N/A
E(3)	ANTHONY WYLIE		N/A
A(1)	MARY B.		N/A

Case Parties

APPELLEE (1) C.C.D.C.F.S.	ATTORNEY YVONNE C BILLINGSLEY (0008809) C.C.D.C.F.S. 3955 EUCLID AVE., RM. 305E CLEVELAND, OH 44115-0000 Ph: 216-432-3324 Answer Filed: N/A
APPELLEE (2) / GUARDIAN AD LITEM FOR CHILD	ATTORNEY R. BRIAN MORIARTY (0064128) 2000 STANDARD BLDG. 1370 ONTARIO STREET CLEVELAND, OH 44113-0000 Ph: 216-566-8228 Answer Filed: N/A
APPELLEE (3) ANTHONY WYLIE	ATTORNEY DALE M HARTMAN (0039354) 2195 SOUTH GREEN ROAD CLEVELAND, OH 44121-0000 Ph: 216-291-1554 Answer Filed: N/A
APPELLANT (1) MARY B. 8175 EAST NORTSHORE BLVD. APT.. #9 LAKESIDE MARBLEHEAD, OH 43440-0000	ATTORNEY BETTY C FARLEY (0039651) 17316 DORCHESTER DR CLEVELAND, OH 44119-0000 Ph: 216-621-1922 Answer Filed: N/A

Docket Information

DOCKET INFORMATION

Date	Side	Type	Description	Image
07/29/2010	N/A	JE	MOTION TO APPOINT LEGAL COUNSEL FOR APPELLEE, C.B. FOR APPEAL TO THE OHIO SUPREME COURT IS GRANTED. ATTORNEY R. BRIAN MORIARTY IS APPOINTED TO REPRESENT, APPELLEE, C.B. VOL. 709 PG. 562. NOTICE ISSUED.	
07/28/2010	N/A	MO	MOTION BY ATTORNEY R. BRIAN MORIARTY TO APPOINT LEGAL COUNSEL FOR C.B. FOR APPEAL TO THE OHIO SUPREME COURT	
07/27/2010	A1	SF	CERTIFIED MAIL RECEIPT NO: 7008 0500 0000 8499 1788 RETURNED BY U.S. POSTAL DEPT.07-12-2010.MAIL RECEIVED BY ADDRESSEE SUPREME COURT OF OHIO OFFICE OF THE CLERK . POSTAGE AMOUNT \$28.41	
07/07/2010	A1	SF	COPIES MAILED TO COUNSEL FOR ALL PARTIES. COSTS TAXED.	
07/07/2010	A1	EV	RECORD SENT TO THE OHIO SUPREME COURT.	

06/28/2010 N/A JE SUPREME COURT OF OHIO SUPREME COURT NO. 2010-0180. ORDER TO CERTIFY RECORD TO THE SUPREME COURT OF OHIO GRANTED. VOL. 706 PG. 938. NOTICE ISSUED.

06/28/2010 N/A JE OHIO SUPREME COURT CASE NO. 2010-0180. UPON CONSIDERATION OF THE JURISDICTIONAL MEMORANDA FILED IN THIS CASE, THE COURT ACCEPTS THE APPEAL. THE CLERK SHALL ISSUE AN ORDER FOR THE TRANSMITTAL OF THE RECORD FROM THE COURT OF APPEALS FOR CUYAHOGA COUNTY, AND THE PARTIES SHALL BRIEF THIS CASE IN ACCORDANCE WITH THE RULES OF PRACTICE OF THE SUPREME COURT OF OHIO. VOL. 706 PG. 937. NOTICE ISSUED.

02/12/2010 N/A JE MOTION BY APPELLEE, ANTHONY WYLIE TO APPOINT COUNSEL TO THE OHIO SUPREME COURT IS GRANTED. ATTORNEY TIMOTHY STERKEL IS APPOINTED TO REPRESENT APPELLEE, ANTHONY WYLIE IN THE OHIO SUPREME COURT. VOL. 698 PG. 976. NOTICE ISSUED.

02/09/2010 N/A MO APPELLEES' FATHER ANTHONY WYLIE'S MOTION TO APPOINT LEGAL COUNSEL FOR THE FATHER TO THE OHIO SUPREME COURT FOR PURPOSES OF APPEAL/DEFENDING THE JUDGMENT OF THIS APPELLATE COURT

02/08/2010 N/A JE MOTION BY APPELLANT'S COUNSEL, R. BRIAN MORIARTY, FOR EXTRAORDINARY FEES IS GRANTED. ATTORNEY R. BRIAN MORIARTY SHALL BE PAID THE TOTAL SUM OF \$1,860.00 FOR WORK ON THIS APPEAL. VOL. 698 PG. 436. NOTICE ISSUED.

02/08/2010 N/A JE APPLICATION BY APPELLANT'S COUNSEL FOR ASSIGNED COUNSEL FEES FILED BY R. BRIAN MORIARTY IS GRANTED IN THE AMOUNT OF \$1,860.00. VOL. 698 PG. 432. NOTICE ISSUED.

02/08/2010 N/A JE MOTION BY GUARDIAN AD LITEM, THOMAS KOZEL TO APPOINT LEGAL COUNSEL FOR GUARDIAN AD LITEM FOR APPEAL TO THE OHIO SUPREME COURT IS GRANTED. ATTORNEY JONATHAN GARVER IS APPOINTED TO REPRESENT THE CHILD'S GUARDIAN AD LITEM IN THE OHIO SUPREME COURT. VOL. 698 PG. 437. NOTICE ISSUED.

02/08/2010 N/A JE MOTION BY ATTORNEY FOR CHILD, R. BRIAN MORIARTY TO APPOINT LEGAL COUNSEL FOR CHILD FOR APPEAL TO THE OHIO SUPREME COURT IS GRANTED. ATTORNEY R. BRIAN MORIARTY IS APPOINTED TO REPRESENT THE CHILD IN THE OHIO SUPREME COURT. VOL. 698 PG. 438. NOTICE ISSUED.

02/08/2010 N/A EV OHIO SUPREME COURT CASE NO:10-0180: JOINT NOTICE OF APPEAL TO THE SUPREME COURT OF OHIO FILED BY THE APPELLANT GUARDIAN AD LITEM THOMAS KOZEL AND APPELLANT C.B IN THE OSC ON 01-29-2010.

01/29/2010 N/A MO MOTION BY ATTORNEY FOR CHILD, R. BRIAN MORIARTY, TO APPOINT LEGAL COUNSEL FOR CHILD FOR APPEAL TO THE OHIO SUPREME COURT

01/29/2010 N/A MO MOTION BY GUARDIAN AD LITEM, THOMAS KOZEL, TO APPOINT LEGAL COUNSEL FOR GUARDIAN AD LITEM FOR APPEAL TO THE OHIO SUPREME COURT

01/26/2010 N/A JE MOTION BY THOMAS KOZEL, GUARDIAN AD LITEM, AND R. BRIAN MORIARTY, COUNSEL FOR CHILD, TO CORRECT THE RECORD IS DENIED. COUNSEL ARE ADVISED THAT THE TIME TO REQUEST EN BANC CONSIDERATION IS WITHIN 10 DAYS OF THE ANNOUNCEMENT OF THE DECISION, NOT JOURNALIZATION. SEE LOC.APP.R. 25.1. VOL. 697 PG. 851. NOTICE ISSUED.

01/26/2010 N/A JE MOTION BY THOMAS KOZEL, GUARDIAN AD LITEM, AND R. BRIAN MORIARTY, COUNSEL FOR CHILD, FOR RECONSIDERATION OF DENIAL OF MOTION FOR CONSIDERATION EN BANC IS DENIED. MOTION FOR CONSIDERATION EN BANC WAS UNTIMELY FILED. ONCE AGAIN, THE DENIAL OF A STATE'S MOTION FOR PERMANENT CUSTODY IS NOT A FINAL APPEALABLE ORDER. CHILD IS IN PROTECTIVE CUSTODY OF THE COUNTY. ISSUES REMAIN PENDING IN THE TRIAL COURT. VOL. 697 PG. 850. NOTICE ISSUED.

01/25/2010 N/A MO MOTION BY APPELLANTS TO CORRECT THE RECORD

01/22/2010 N/A MO MOTION BY THOMAS KOZEL, GUARDIAN AD LITEM, AND R. BRIAN MORIARTY, COUNSEL FOR CHILD, FOR RECONSIDERATION OF DENIAL OF MOTION FOR CONSIDERATION EN BANC

01/15/2010 N/A JE MOTION BY THOMAS KOZEL, THE GUARDIAN AD LITEM, AND R. BRIAN MORIARTY, COUNSEL FOR CHILD, FOR CONSIDERATION EN BANC IS DENIED AS UNTIMELY. VOL. 697 PG. 112. NOTICE ISSUED.

01/12/2010 N/A JE MOTION BY THOMAS KOZEL, THE GUARDIAN AD LITEM, AND R. BRIAN MORIARTY, COUNSEL FOR CHILD, TO CERTIFY A CONFLICT IS DENIED. VOL. 697 PG. 21. NOTICE ISSUED.

12/23/2009 N/A MO MOTION BY THOMAS KOZEL, THE GUARDIAN AD LITEM, AND R. BRIAN MORIARTY, COUNSEL FOR CHILD, FOR CONSIDERATION EN BANC

12/23/2009 N/A MO MOTION BY THOMAS KOZEL, THE GUARDIAN AD LITEM, AND R. BRIAN MORIARTY, COUNSEL FOR CHILD, TO CERTIFY A CONFLICT

12/22/2009 N/A JE APPLICATION BY APPELLANT'S COUNSEL FOR ASSIGNED COUNSEL FEES FILED BY BETTY C. FARLEY IS GRANTED IN THE AMOUNT OF \$750.00. VOL. 696 PG. 206. NOTICE ISSUED.

12/22/2009 N/A MO MOTION BY APPELLANT'S COUNSEL, R. BRIAN MORIARTY, FOR EXTRA-ORDINARY FEES

12/21/2009 N/A SF CERTIFIED COPY OF JOURNAL ENTRY BOOK 695 PAGE 827 ISSUED TO JUVENILE COURT DIVISION.

12/18/2009 N/A MO APPLICATION BY APPELLANT'S COUNSEL FOR ASSIGNED COUNSEL FEES FILED BY BRIAN MORIARTY

12/16/2009 N/A BL December 16, 2009: DISMISSED. SEE MOTION NO. 423594 OF SAME DATE. VOL. 695 PG. 827. NOTICE ISSUED.

12/16/2009 N/A JE December 16, 2009: DISMISSED. SEE MOTION NO. 423594 OF SAME DATE. VOL. 695 PG. 827. NOTICE ISSUED.

12/16/2009 N/A JE MOTION BY GUARDIAN AD LITEM, THOMAS KOZEL, FOR RECONSIDERATION, OR, ALTERNATIVELY, MOTION TO VACATE, OR, ALTERNATIVELY, MOTION FOR RELIEF FROM JUDGMENT IS DENIED. VOL. 695 PG. 818. NOTICE ISSUED.

12/16/2009 N/A JE SUA SPONTE, THE CLERK'S OFFICE IS INSTRUCTED TO VACATE THE DECEMBER 10, 2009 JOURNALIZATION DUE TO THE TIMELY MOTION FOR RECONSIDERATION FILED ON DECEMBER 9, 2009. THUS, THE JOURNALIZATION OF THIS COURT'S DENIAL OF THE MOTIONS FOR RECONSIDERATION SHALL BE DATED DECEMBER 16, 2009. VOL. 695 PG. 815. NOTICE ISSUED.

12/14/2009 N/A MO APPLICATION BY APPELLANT'S COUNSEL FOR ASSIGNED COUNSEL FEES FILED BY BETTY C. FARLEY

12/10/2009 N/A JE MOTION BY APPELLANT FOR RECONSIDERATION IS DENIED. VOL. 695 PG. 426. NOTICE ISSUED.

12/10/2009 N/A JE APPLICATION BY APPELLEE'S COUNSEL FOR ASSIGNED COUNSEL FEES FILED BY DALE M. HARTMAN IS GRANTED IN THE AMOUNT OF \$750.00. VOL. 695 PG. 386. NOTICE ISSUED.

12/09/2009 N/A MO MOTION BY GUARDIAN AD LITEM, THOMAS KOZEL, FOR RECONSIDERATION, OR, ALTERNATIVELY, MOTION TO VACATE, OR, ALTERNATIVELY, MOTION FOR RELIEF FROM JUDGMENT

12/09/2009 N/A MO APPLICATION BY APPELLEE'S COUNSEL FOR ASSIGNED COUNSEL FEES FILED BY DALE M. HARTMAN

12/07/2009 N/A MO MOTION BY APPELLANT FOR RECONSIDERATION

12/01/2009 N/A JE ANNOUNCEMENT OF COURT'S DECISION FILED (SEE APPELLATE RULE 26). COPIES MAILED COST TAXED

12/01/2009 N/A JE MOTION BY APPELLEE ANTHONY WYLIE TO STRIKE MERIT BRIEF FILED BY BRIAN MORIARTY IS DENIED AS MOOT. VOL 694 PG 746

12/01/2009 N/A JE MOTION BY APPELLEE, ANTHONY WYLIE, TO DISMISS FOR LACK OF STANDING IS DENIED AS MOOT. VOL 694 PG 745 NOTICE ISSUED

12/01/2009 N/A JE MOTION BY APPELLEE, ANTHONY WYLIE, TO DISMISS FOR LACK OF A FINAL APPEALABLE ORDER IS GRANTED. SEE IN RE: K.M., CUYAHOGA APP. NOS. 87882 AND 87883, 2006-OHIO-4878 (AFFIRM 115 OHIO ST. 3D 435, 2007-OHIO-5269, ON AUTHORITY OF IN RE: ADAMS, 115 OHIO ST.3D 86, 2007-OHIO-4840, SYLLABUS) R.C. 2505.02. VOL 694 PG 744 NOTICE ISSUED

10/06/2009 N/A JE MOTION BY CROSS-APPELLEE CHILD TO SUPPLEMENT THE RECORD IS DENIED. VOL. 691 PG. 148. NOTICE ISSUED.

10/05/2009 N/A MO APPELLEE ANTHONY WYLIE'S BRIEF IN OPPOSITION TO MORIARTY'S MOTION TO SUPPLEMENT THE RECORD.

10/01/2009 N/A MO MOTION BY CROSS-APPELLEE CHILD TO SUPPLEMENT THE RECORD

09/29/2009 N/A JE MOTION BY APPELLEE, ANTHONY WYLIE TO DISQUALIFY BRIAN MORIARTY AS ATTORNEY FOR APPELLEE CHILD IS DENIED. VOL. 690 PG. 572. NOTICE ISSUED.

09/29/2009 N/A JE MOTION BY APPELLEE, ANTHONY WYLIE TO STRIKE MERIT BRIEF FILED BY BRIAN MORIARTY IS REFERRED TO THE PANEL HEARING THE CASE ON THE MERITS. VOL. 690 PG. 573. NOTICE ISSUED.

09/10/2009 E3 EV APPELLEE'S BRIEF FILED.

09/10/2009 N/A MO MOTION BY APPELLEE, ANTHONY WYLIE TO STRIKE MERIT BRIEF FILED BY BRIAN MORIARTY

09/10/2009 N/A MO MOTION BY APPELLEE, ANTHONY WYLIE TO DISQUALIFY BRIAN MORIARTY AS ATTORNEY FOR APPELLEE CHILD

08/18/2009 N/A JE MOTION BY APPELLEE, BABY BARTOK TO CORRECT MERIT BRIEF OF THE CHILD INSTANTER IS GRANTED. VOL. 688 PG. 205. NOTICE ISSUED.

08/10/2009 N/A JE MOTION BY APPELLEE, ANTHONY WYLIE, TO EXTEND TIME TO FILE ANSWER BRIEF IS DENIED AS MOOT. VOL. 687 PG. 455. NOTICE ISSUED.

08/10/2009 N/A MO MOTION BY APPELLANT TO CORRECT MERIT BRIEF OF THE CHILD INSTANTER

08/07/2009 N/A JE MOTION BY APPELLEE, ANTHONY WYLIE, TO CLARIFY IS DENIED AS MOOT. APPELLEE, ANTHONY WYLIE'S BRIEF IS DUE SEPTEMBER 18, 2009. VOL. 687 PG. 428. NOTICE ISSUED.

08/07/2009 N/A JE MOTION BY APPELLEE, ANTHONY WYLIE, TO DISMISS FOR LACK OF A FINAL APPEALABLE ORDER IS REFERRED TO THE PANEL HEARING THE CASE ON THE MERITS. VOL. 687 PG. 429. NOTICE ISSUED.

08/07/2009 N/A JE MOTION BY APPELLEE, ANTHONY WYLIE, TO DISMISS FOR LACK OF STANDING IS REFERRED TO THE PANEL HEARING THE CASE ON THE MERITS. VOL. 687 PG. 430. NOTICE ISSUED.

08/07/2009 N/A JE MOTION BY APPELLEE, ANTHONY WYLIE TO CLARIFY POSTCARD DATED JULY 1ST, 2009 IS DENIED AS MOOT. SEE ENTRY 423593. VOL. 687 PG. 431. NOTICE ISSUED.

08/07/2009 N/A JE MOTION BY APPELLEE, ANTHONY WYLIE TO STRIKE CROSS-APPELLANT THOMAS KOZEL'S BRIEF IN OPPOSITION TO APPELLEE ANTHONY WYLIE'S MOTION TO DISMISS IS DENIED. VOL. 687 PG. 432. NOTICE ISSUED.

08/07/2009 N/A JE MOTION BY APPELLEE, BABY BARTOK, TO EXTEND TIME TO FILE ANSWER BRIEF IS DENIED AS MOOT. VOL. 687 PG. 433. NOTICE ISSUED.

08/07/2009 N/A JE MOTION BY APPELLEE, BABY BARTOK, FOR LEAVE TO FILE BRIEF INSTANTER IS GRANTED. VOL. 687 PG. 434. NOTICE ISSUED.

08/05/2009 E2 EV APPELLEE'S BRIEF FILED.

08/05/2009 N/A MO MOTION BY APPELLEE FOR LEAVE TO FILE BRIEF INSTANTER

08/03/2009 N/A MO APPELLEE ANTHONY WYLIE'S BRIEF IN OPPOSITION TO MORIARTY'S MOTION FOR AN EXTENSION OF TIME

07/29/2009 N/A MO MOTION BY APPELLEE TO EXTEND TIME TO FILE ANSWER BRIEF

07/20/2009 N/A MO APPELLEE ANTHONY WYLIE'S MOTION TO STRIKE CROSS-APPELLANT THOMAS KOZEL'S BRIEF IN OPPOSITION TO APPELLEE ANTHONY WYLIE'S MOTION TO DISMISS

07/15/2009 N/A MO CROSS-APPELLANT, THOMAS KOZEL'S, BRIEF IN OPPOSITION TO APPELLEE, ANTHONY WYLIE'S, MOTION TO DISMISS

07/06/2009 N/A MO MOTION BY APPELLEE, ANTHONY WYLIE TO CLARIFY POSTCARD DATED JULY 1ST, 2009

07/01/2009 N/A JE MOTION BY APPELLEE TO EXTEND TIME TO FILE ANSWER BRIEF IS GRANTED TO JULY 29, 2009. NO FURTHER EXTENSION WILL BE CONSIDERED. VOL. 685 PG. 89. NOTICE ISSUED.

07/01/2009 N/A JE MOTION BY APPELLEE TO SUPPLEMENT RECORD INSTANTER IS GRANTED. VOL. 685 PG. 90. NOTICE ISSUED.

06/29/2009 N/A MO MOTION BY APPELLEE, ANTHONY WYLIE, TO DISMISS FOR LACK OF STANDING

06/29/2009 N/A MO MOTION BY APPELLEE, ANTHONY WYLIE, TO DISMISS FOR LACK OF A FINAL APPEALABLE ORDER

06/29/2009 N/A MO MOTION BY APPELLEE, ANTHONY WYLIE, TO CLARIFY

06/29/2009 N/A MO MOTION BY APPELLEE, ANTHONY WYLIE, TO EXTEND TIME TO FILE ANSWER BRIEF

06/10/2009 N/A MO MOTION BY APPELLEE TO SUPPLEMENT RECORD INSTANTER

06/10/2009 N/A MO MOTION BY APPELLEE TO EXTEND TIME TO FILE ANSWER BRIEF

06/05/2009 N/A MO NOTICE OF WITHDRAWAL AS COUNSEL FOR APPELLEE, ANTHONY WYLIE FILED BY ATTORNEY GEORGE K. SIMAKIS

06/01/2009 N/A JE MOTION BY APPELLEE TO CLARIFY FILING DEADLINES FOR ANSWER BRIEFS IS DENIED AS MOOT. VOL. 682 PG. 764. NOTICE ISSUED.

06/01/2009 N/A JE MOTION BY APPELLEE, GUARDIAN AD LITEM, TO EXTEND TIME TO FILE ANSWER BRIEF AND REQUEST FOR LEAVE TO SUPPLEMENT THE RECORD WITH POST-JUDGMENT ENTRIES IS GRANTED. THE GUARDIAN AD LITEM'S BRIEF IS DUE ON JUNE 10, 2009. VOL. 682 PG. 763. NOTICE ISSUED.

06/01/2009 N/A JE MOTION BY APPELLEE, ANTHONY WYLIE, FOR RECONSIDERATION OF GRANTING STAY OF PROCEEDINGS MOTIONS OF APPELLANT AND CROSS-APPELLANT, AND MOTION TO STRIKE REPRESENTATIONS AND EVIDENTIARY ITEMS THAT ARE NOT PART OF THE TRIAL COURT RECORD BEFORE THIS COURT OF APPEALS IS DENIED. VOL. 682 PG. 762. NOTICE ISSUED.

06/01/2009 N/A JE MOTION BY APPELLEE, ANTHONY WYLIE TO CLARIFY FILING DEADLINE FOR BRIEF OF APPELLEE, ANTHONY WYLIE IS GRANTED. APPELLEE'S BRIEF IS DUE JUNE 29, 2009. VOL. 682 PG. 761. NOTICE ISSUED.

06/01/2009 N/A JE MOTION BY APPELLEE, ANTHONY WYLIE, TO APPOINT APPELLATE COUNSEL FOR APPEAL IS GRANTED. ATTORNEY DALE HARTMAN IS APPOINTED TO REPRESENT ANTHONY WYLIE, PER LOCAL APP.R. 46. VOL. 682 PG. 760. NOTICE ISSUED.

05/18/2009 N/A MO APPELLEE'S RESPONSE IN OPPOSITION TO GAL'S MOTION FOR EXTENSION OF TIME TO FILE MERIT BRIEF AND REQUEST FOR LEAVE TO SUPPLEMENT RECORD WITH POST-JUDGMENT ENTRIES

05/18/2009 N/A MO MOTION BY APPELLEE TO CLARIFY FILING DEADLINES FOR ANSWER BRIEFS

05/04/2009 N/A MO MOTION BY APPELLEE, GUARDIAN AD LITEM, TO EXTEND TIME TO FILE ANSWER BRIEF AND REQUEST FOR LEAVE TO SUPPLEMENT THE RECORD WITH POST-JUDGMENT ENTRIES

04/14/2009 N/A MO APPELLEE, ANTHONY WYLIE'S MEMORANDUM IN SUPPORT OF APPLICATION FOR RECONSIDERATION OF GRANTING STAY OF PROCEEDINGS MOTIONS OF APPELLANT AND CROSS-APPELLANT, AND MOTION TO STRIKE ITEMS THAT ARE NOT PART OF THE TRIAL COURT RECORD BEFORE THIS COURT OF APPEALS

04/13/2009 N/A MO MOTION BY APPELLEE, ANTHONY WYLIE, FOR RECONSIDERATION OF GRANTING STAY OF PROCEEDINGS MOTIONS OF APPELLANT AND CROSS-APPELLANT, AND MOTION TO STRIKE REPRESENTATIONS AND EVIDENTIARY ITEMS THAT ARE NOT PART OF THE TRIAL COURT RECORD BEFORE THIS COURT OF APPEALS

04/07/2009 N/A MO MOTION BY APPELLEE, ANTHONY WYLIE TO CLARIFY FILING DEADLINE FOR BRIEF OF APPELLEE, ANTHONY WYLIE

04/06/2009 N/A MO MOTION BY APPELLEE, ANTHONY WYLIE, TO APPOINT APPELLATE COUNSEL FOR APPEAL

04/01/2009 N/A JE MOTION BY APPELLEE, ANTHONY WYLIE, TO DISMISS CROSS APPEAL IS DENIED. VOL. 679 PG. 3. NOTICE ISSUED.

04/01/2009 N/A JE MOTION BY INTERVENOR, GUARDIAN AD LITEM FOR CHILD, TO APPOINT APPELLATE COUNSEL FOR CHILD IS GRANTED. ATTY. R. BRIAN MORIARTY IS APPOINTED AS COUNSEL FOR APPEAL. ATTORNEY SHALL APPLY FOR COMPENSATION WITHIN THIRTY DAYS OF THIS COURT'S DECISION. ATTY. MORIARTY SHALL FILE A BRIEF ON THE CHILD'S BEHALF BY MAY 1, 2009. APPELLEE'S BRIEF DUE TWENTY (20) DAYS THEREAFTER. VOL. 679 PG. 2. NOTICE ISSUED.

04/01/2009 N/A JE MOTION BY INTERVENOR, GUARDIAN AD LITEM FOR CHILD, THOMAS KOZEL, TO STAY LOWER COURT PROCEEDINGS IS GRANTED. VOL. 679 PG. 1. NOTICE ISSUED.

04/01/2009 N/A JE MOTION BY APPELLANT TO STAY LOWER COURT PROCEEDING IS GRANTED. VOL. 678 PG. 1000. NOTICE ISSUED.

03/30/2009 N/A MO APPELLEE, GUARDIAN AD LITEM'S RESPONSE TO APPELLEE, ANTHONY WYLIE'S MOTION TO DISMISS CROSS APPEAL

03/25/2009 A1 EV APPELLANT'S BRIEF FILED.

03/23/2009 NA MO APPELLEE, ANTHONY WYLIE'S OPPOSITION TO MOTION TO APPOINT APPELLATE COUNSEL FOR CHILD

03/23/2009 NA MO MOTION BY APPELLEE, ANTHONY WYLIE, TO DISMISS CROSS APPEAL

03/19/2009 NA MO APPELLEE, ANTHONY WYLIE'S RESPONSE IN OPPOSITION TO APPELLANT, MARY BARTOK'S MOTION TO STAY LOWER COURT PROCEEDINGS

03/10/2009 NA EV NOTICE OF CROSS-APPEAL FILED BY GUARDIAN AD LITEM, THOMAS KOZEL, WITH PRAECIPE, DOCKETING STATEMENT, & JOURNAL ENTRY.

03/09/2009 NA MO MOTION BY INTERVENOR, GUARDIAN AD LITEM FOR CHILD, THOMAS KOZEL, TO APPOINT APPELLATE COUNSEL FOR CHLD

03/09/2009 NA MO MOTION BY INTERVENOR, GUARDIAN AD LITEM FOR CHILD, THOMAS KOZEL, TO STAY LOWER COURT PROCEEDINGS

03/06/2009 NA MU MOTION BY APPELLANT TO STAY LOWER COURT PROCEEDING

03/05/2009 NA EV ORIGINAL PAPERS FILED BY TRIAL COURT.

03/05/2009 A1 EV TRANSCRIPT OF PROCEEDINGS FILED BY APPELLANT. 21 VOL

03/05/2009 NA NT RECORD ON APPEAL FILED AND NOTICE ISSUED TO ALL PARTIES.

02/10/2009 NA JE MOTION BY APPELLANT, PRO SE, FOR APPOINTMENT OF COUNSEL, TRANSCRIPT AT STATE'S EXPENSE AND RECORD DATE IS GRANTED. ATTY. BETTY FARLEY IS APPOINTED AS COUNSEL FOR APPEAL. ATTORNEY SHALL APPLY FOR COMPENSATION WITHIN THIRTY DAYS OF THIS COURT'S DECISION. RECORD IS DUE MARCH 20, 2009. VOL. 675 PG. 424. NOTICE ISSUED.

02/06/2009 A1 SF LEGAL RESEARCH

02/06/2009 A1 SF COMPUTER FEE

02/06/2009 A1 SF CLERK'S FEE

02/06/2009 A1 SF COURT OF APPEALS SPECIAL PROJECTS

02/06/2009 A1 SF LEGAL NEWS

02/06/2009 A1 SF POVERTY AFFIDAVIT FILED

02/06/2009 NA SF CASE INITIATED

02/06/2009 A1 EV NOTICE OF APPEAL FILED FROM COMMON PLEAS, JUVENILE DIVISION COURT , CASE # AD 06900501 WITH JOURNAL ENTRY, PRAECIPE, DOCKETING STATEMENT, AFFIDAVIT OF INDIGENCY AND COPY OF DOCKET SHEET.

02/06/2009 NA MO MOTION BY APPELLANT, PRO SE, FOR APPOINTMENT OF COUNSEL, TRANSCRIPT AT STATE'S EXPENSE AND RECORD DATE

Case Cost Detail

Account	Amount
C A SPECIAL PROJECTS FUND	\$25.00
CLERK'S FEES	\$383.41
COMPUTER FEES	\$10.00
LEGAL NEWS	\$10.00
LEGAL RESEARCH - CIVIL	\$3.00
TOTAL COST	\$431.41

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Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

IN RE: CAROLINE BARTOK

Appellee

COA NO.
92775

LOWER COURT NO.
AD 06900501

JUVENILE COURT DIVISION

MOTION NO. 428743

Date 12/01/2009

Journal Entry

DISMISSED. SEE MOTION NO. 423594 OF SAME DATE.

FILED AND JOURNALIZED
PER APP.R. 22(C)

DEC 16 2009

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY [Signature] DEP.

SM/Bo



8-2009-12-16 10:20 AM
FROM MAIL DELIVERY SERVICE TO CLERK

Adm. Judge, COLLEEN CONWAY COONEY,
Concurs

Judge MARY J. BOYLE, Concurs

[Signature]
Judge SEAN C. GALLAGHER

VOL 695 PG 827

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

IN RE: CAROLINE BARTOK

Appellee

COA NO.
92775

LOWER COURT NO.
AD 06900501

JUVENILE COURT DIVISION

MOTION NO. 423594

Date 12/01/2009

Journal Entry

MOTION BY APPELLEE, ANTHON' WYLIE, TO DISMISS FOR LACK OF A FINAL APPEALABLE ORDER IS GRANTED. SEE IN RE: K.M., CUYAHOGA APP. NOS. 87882 AND 87883, 2008-OHIO-4878 (AFFIRM 115 OHIO ST.3D 435, 2007-OHIO-5289, ON AUTHORITY OF IN RE: ADAMS, 115 OHIO ST.3D 86, 2007-OHIO-4840, SYLLABUS); R.C. 2505.02.

RECEIVED FOR FILING

DEC 01 2009

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY [Signature] DEP.

Adm. Judge, COLLEEN CONWAY C DONEY,
Concurs _____

Judge MARY J. BOYLE, Concurs _____

[Signature]
Judge SEAN E. GALLAGHER

YOLK 694 980744

NOTICE MAILED TO COURSE
FOR ALL PAGES 08/11/09



COURT OF COMMON PLEAS, JUVENILE COURT DIVISION
CUYAHOGA COUNTY, OHIO

IN THE MATTER OF: CAROLINE BARTOK

CASE NO : AD06900501
JUDGE: Allison L. Floyd
Journal Entry and Findings of Fact
P/C Motion

This matter came on for hearing this 3rd day of November, 2008 before the Honorable Judge Allison L. Floyd upon the motion to modify temporary custody to Permanent Custody filed by the Cuyahoga County Department of Children and Family Services as to the child heretofore adjudged to be Dependent.

The following persons were present for the hearing: ANTHONY WYLIE, Father; CFS Prosecutors Millas and Brewster; THOMAS KOZEL, Guardian ad Litem for CAROLINE BARTOK; GEORGE COGHILL, Guardian ad Litem for ANTHONY WYLIE; LORETHA KNIGHT, Caseworker.

Notices for these proceedings were issued by ordinary mail to all necessary parties. No Notice has been returned undelivered.

The Court finds that:

The Mother, MARY BARTOK, has counsel.

The Father, ANTHONY WYLIE, waives counsel.

On September 12, 2007, the Court finds that the mother had previously stipulated to the allegations of the motion. The Court accepted such stipulations pursuant to Ohio Juvenile Rule 29 after personally addressing the mother.

The Court heard testimony and accepted evidence.

Pursuant to R.C. 2151.414, the court finds that the allegations of the motion have not been proven by clear and convincing evidence.

The Court finds that:

The child is not abandoned or orphaned but has been in temporary custody of a public children services agency or private child placing agency under one or more separate orders of disposition for twelve or more months of a consecutive twenty-two month period.

There are no relatives of the Child who are able to take permanent custody.

The Court further finds that as to the child's mother:

Following the placement of the child outside the child's home and notwithstanding reasonable case planning and diligent efforts by the agency to assist the mother to remedy the problems that initially caused the child to be placed outside the home, the child's mother has failed continuously and repeatedly to substantially remedy the conditions causing the child to be placed outside the child's home. The chronic mental illness, chronic emotional illness, mental retardation, physical disability, or chemical dependency of the mother that is so severe that it makes the parent unable to provide an adequate permanent home for the child at the present time and, as anticipated, within one year.

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

The Court further finds that as to the child's father:

Following the placement of the child outside the child's home and with reasonable case planning and diligent efforts by the agency to assist the father to remedy the problems that initially caused the child to be placed outside the home, the child's father has substantially remedied the conditions causing the child to be placed outside the child's home.

The Court finds that there was insufficient evidence presented to support the allegations that father has a chronic mental illness or chronic emotional illness of the father that is so severe that it makes the parent unable to provide an adequate permanent home for the child at the present time and, as anticipated, within one year.

The father has demonstrated a commitment toward the child by regularly visiting, or communicating with the child when able to do so, or by other actions showing a willingness to provide an adequate permanent home for the child.

The father did not and has not abandoned the child.

The Court finds that: the continued residence of the child in the home would not be contrary to her best interest and welfare.

The Court further finds that reasonable efforts were made to prevent the removal of the child from her home, or to return the child to the home, and to finalize the permanency plan, to wit: reunification. Case specific findings: Despite father's maladaptive and personality characteristics, father has substantially remedied the conditions causing the child to be placed outside the child's home by establishing paternity, participating in supervised and unsupervised visitation with the child, cooperating with the investigations of the agency regarding sexual abuse, maintaining employment and housing, completion of parenting classes, demonstrating a benefit from parenting classes and supervision, development of a parent-child relationship.

Upon considering the interaction and interrelationship of the child with the child's parents, siblings, relatives, and foster parents; the wishes of the child; the custodial history of the child, including whether the child has been in temporary custody of a public children services agency or private child placing agency under one or more separate orders of disposition for twelve or more months of a consecutive twenty-two month period; the child's need for a legally secure permanent placement and whether that type of placement can be achieved without a grant of permanent custody; and, the report of the Guardian Ad Litem, the Court does not find that there is clear and convincing evidence that a grant of permanent custody is in the best interests of the child and the child can be placed with one of the child's parents within a reasonable time or should be placed with either parent.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED THAT:

The Motion for Permanent Custody is denied.

The order heretofore made committing the child to the temporary custody of the Cuyahoga County Department of Children and Family Services is terminated effective February 5, 2009. The child is committed to the protective supervision of CCDCFCS with the legal custody of the father, Anthony Wylie, residing at 2720 Wooster Road, Apt. 4, Rocky River, Ohio 44116.

Amended case plan to be filed with the following modifications: reinstatement of unsupervised visitation; progressive implementation for in-home visitation, bi-weekly extended visitation, and overnight weekend visitation; referral for family preservation to assist child and parent with transition needs and services including appropriate day care, medical care, etc.

This matter is continued to February 27, 2009 at 9:30 a.m. for a custody review hearing pursuant to ORC §2151.147 (C), for preliminary hearing upon the CSEA's motion to establish support filed April 18, 2006 and Attorney Witt's motion for attorney fees filed 4-28-08.

Parties are advised that they have thirty (30) days from the date of this entry to file an appeal with the Court of Appeals.

The clerk is directed to serve upon the parties' notice of this judgment and its date of entry upon the journal of the court pursuant to Civil Rule 5B(B).



Judge Alison L. Floyd
February 01, 2009

Filed with the clerk and journalized by Cuyahoga County Juvenile Court Clerks Office,
Volume 10, Page 2556, February 05, 2009, cjdmb

1 of 13 DOCUMENTS

CCLEVELAND OH REALTY I, L.L.C., ET AL., APPELLANTS, v. CUYAHOGA COUNTY BOARD OF REVISION ET AL., APPELLEES.

No. 2008-0636

SUPREME COURT OF OHIO

121 Ohio St. 3d 253; 2009 Ohio 757; 903 N.E.2d 622; 2009 Ohio LEXIS 520

February 18, 2009, Submitted

February 25, 2009, Decided

PRIOR HISTORY:

APPEAL from the Board of Tax Appeals Nos. 2006-A-331, 2006-A-333, and 2006-A-345.

CCleveland OH Realty I, L.L.C. v. Bd. of Educ., 118 Ohio St. 3d 1415, 2008 Ohio 2516, 887 N.E.2d 353, 2008 Ohio LEXIS 1464 (2008)

DISPOSITION: Decision affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellee board of education made appraisal taxpayer sought review before the Board of Tax Appeals (BTA). On appeal board of revision's decision affirming to change its valuation of the taxpayer's real property. The BTA adopted the property's recent sale price as its true value as the board of education requested, and the taxpayer sought judicial review.

OVERVIEW: The taxpayer said the recent sale price was not the property's true value because the property was encumbered with a long-term leasehold (1) stemmed from an oral sale leaseback and (2) furnished a stream of rent in excess of maintenance. The taxpayers could bear in mind factors such as argument in another case because the concern associated with sale leaseback transactions was that the parties might collude to depress the property's value for tax purposes. Nothing in the record raised this concern as it was asserted that the parties to the sale leaseback maximized the realty's value. Since the seller received an elevated sale price and, as consideration, committed to pay the buyer higher rent, allowing the buyer to obtain a higher sale price later. The BTA properly disregarded the taxpayer's appraisal evidence because the recent arm's-length sale price established the property's value. The court had no jurisdiction to consider the taxpayer's arguments that were not included in its notice of appeal.

DISPOSITION: The decision of the Board of Tax Appeals was affirmed.

CORE TERMS: sale price, rent, sale-leaseback, arm's-length, lease, school board, property's value, notice of appeal, appraisal, revision's, true value, long-term, ancillary, elevated, valuing, realty, square foot, valuation, case law, tax year, assignments of error, purchaser, stream, fee simple, consolidated, auditor, tenant

LexisNexis(R) Headnotes

Tax Law > State & Local Taxes > Real Property Tax > Assessment & Valuation > Valuation

[HN1] When determining the valuation of real property for tax purposes, appraisal evidence may not be considered in valuing the property when there is a recent, arm's-length sale price.

121 Ohio St. 3d 253, *; 2009 Ohio 757, **;
903 N.E.2d 622, ***; 2009 Ohio LEXIS 520

Civil Procedure > Appeals > Appellate Jurisdiction > General Overview

Civil Procedure > Appeals > Reviewability > Notice of Appeal

[HN2] When a litigant fails to raise a particular argument in a notice of appeal to a reviewing court, the court does not have jurisdiction to consider the argument.

HEADNOTES

Real property taxation--Property subject to long--term lease--Recent sale price upheld as basis for valuation.

COUNSEL: Sleggs, Danzinger & Gill Co., L.P.A., and Todd W. Sleggs, for appellant.

Brindza, McIntyre & Seed, L.L.P., Robert A. Brindza, Daniel M. McIntyre, David H. Seed, David A. Rose, and Jennifer A. Hoehnen, for appellee Board of Education of the Cleveland Municipal School District.

JUDGES: MOYER, C.J., and PFEIFER, LUNDBERG STRATTON, O'CONNOR, O'DONNELL, LANZINGER, and CUPP, JJ., concur.

OPINION

[*254] **Per Curiam.**

[**P1] Appellants, CCleveland OH Realty I, L.L.C. and CCleveland OH Realty II, L.L.C. (collectively, "CCleveland"), appeal from a decision of the Board of Tax Appeals ("BTA") for tax year 2004 that adopted as the true value of certain property its June 26, 2004 sale price of \$ 4,084,750. CCleveland had argued at the board of revision and at the BTA that the price did not reflect true value because the property was encumbered with a long-term lease that (1) stemmed from an earlier sale-leaseback and (2) furnished a stream of rent in excess of market rent. We recently rejected similar arguments in *AEI Net Lease Income & Growth Fund v. Erie Cty. Bd. of Revision*, 119 Ohio St.3d 563, 2008 Ohio 5203, 895 N.E.2d 830. 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. Accordingly, we affirm the decision of the BTA.

Facts

[**P2] On March 31, 2005, the Board of Education of the Cleveland Municipal School District ("school board") filed a complaint against the county auditor's \$ 2,040,000 valuation of the 1.75-acre parcel, located at West Boulevard and Lorain Avenue in Cleveland. The property is improved with a CVS drugstore with "net rentable area" of 10,125 square feet. Revco Discount Drug Centers, Inc. had acquired the property on November 15, 1999, and Revco had sold it together with a number of other properties as part of a sale-leaseback transaction in 2000. That [***623] purchase contract obligated the parties to enter into a long-term leaseback, with an initial 23-year term with up to ten renewals. The documents submitted to the board of revision did not reveal the amount of rent to be paid under the lease.

[**P3] CCleveland purchased the property on June 26, 2004, in an arm's-length sale from a successor of Revco. That event led the school board to initiate the complaint in this case, seeking to increase the property's value to \$ 4,084,750, the purchase price. CCleveland filed a countercomplaint, seeking to decrease the property's value to \$ 2,000,000, the November 15, 1999 price that Revco had initially paid for the property. The board of revision declined to change the value determined by the auditor, and both the school board and CCleveland appealed. The appeals were consolidated by the BTA for hearing and decision.

[*255] [**P4] At the BTA hearing, CCleveland presented the appraisal report and testimony of Richard Racek. Racek valued the "fee simple interest, disregarding the current contract rent in [sic] the property." Racek opined that based on rent comparisons that he had undertaken, the contract rent of \$ 31.20 per square foot greatly exceeded market rents in the area, which ranged from \$ 3.75 to \$ 12.87 per square foot. Racek utilized a market rent figure of \$ 9.50 per square foot as a basis for his income approach and specifically identified comparison properties that would "show how an investor would look at an income producing property that isn't necessarily tied into the specific tenant in building [sic]." For sales comparisons, Racek selected large stores that were no longer occupied by the original tenant or owner. Racek ultimately reconciled his approaches, valuing the property at \$ 865,000 as of January 1, 2004.

121 Ohio St. 3d 253, *; 2009 Ohio 757, **;
903 N.E.2d 622, ***; 2009 Ohio LEXIS 520

[**P5] The BTA issued its decision in the consolidated cases on March 7, 2008. Noting that the school board had presented the conveyance fee statement and deed showing the sale of the property on June 26, 2004, for \$ 4,084,752, the BTA found that this constituted the best evidence of the property's value as of January 1, 2004. The BTA relied on case law to reject CCleveland's theory that the sale did not indicate true value because it constituted a sale of the leased fee, rather than the fee simple.

Analysis

[**P6] In its brief CCleveland asserts two propositions of law. Both challenge the use of the 2004 sale price by arguing that (1) the long-term lease entered into pursuant to the 2000 sale-leaseback elevated that price and (2) the lease was not itself at arm's length, so that the price could not be regarded as indicating true value. In so arguing, CCleveland relies on *Cummins Property Servs., L.L.C. v. Franklin Cty. Bd. of Revision*, 117 Ohio St.3d 516, 2008 Ohio 1473, 885 N.E.2d 222, P 30, fn. 4.

[**P7] We have already fully considered and rejected this argument in *AEI Net Lease Income & Growth Fund v. Erie Cty. Bd. of Revision*, 119 Ohio St. 3d 563, 2008 Ohio 5203, P19, 20, 895 N.E.2d 830. ¹ In [***624] that case, we stated that the "concern associated with sale-leaseback transactions lies in collusion between the [*256] parties to depress property value for tax purposes." *Id.*, P 20. Nothing in the record of this case raises this concern; indeed, CCleveland's central objection arises because the parties to the sale-leaseback succeeded in maximizing the value of the realty: the seller received an elevated sale price and, as consideration, committed to paying the purchaser a stream of elevated lease payments, which in turn allowed the purchaser to fetch a greater sale price later on. That was also the situation in *AEI*, and it furnishes an equally sound basis for rejecting CCleveland's position in this case. *Id.* at P 21, 25.

¹ At oral argument, CCleveland attempted to distinguish the present case from *AEI* by stating that the BTA rejected the probative value of the owner's evidence in *AEI*, but not in this case. We disagree. In both cases, the BTA properly disregarded the appraisal evidence because a recent arm's-length sale price established the value of the property. See *AEI*, P 22, fn. 1 ([HN1] "appraisal evidence may not be considered in valuing the property when there is a recent, arm's-length sale price"); *Cummins Property Servs., L.L.C. v. Franklin Cty. Bd. of Revision*, 117 Ohio St.3d 516, 2008 Ohio 1473, 885 N.E.2d 222, P 13 (case law mandates "rejection of appraisal evidence of the value of the property whenever a recent, arm's-length sale price has been offered as evidence of value").

[**P8] Perhaps realizing that *AEI* has foreclosed the line of argument it had previously pursued, CCleveland now focuses on two ancillary points. CCleveland contends first that the board of revision's decision on a valuation complaint filed by the school board as to tax year 2000 established that the 2000 sale-leaseback could not form the basis for valuing the property. Second, CCleveland asserts that the record does not support the BTA's allocation of value to the land.

[**P9] 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. See *Newman v. Levin*, 120 Ohio St.3d 127, 2008 Ohio 5202, 896 N.E.2d 995, P 28 ([HN2] "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' "), quoting *Norandex, Inc. v. Limbach* (1994), 69 Ohio St.3d 26, 31, 1994 Ohio 536, 630 N.E.2d 329, fn. 1.

Conclusion

[**P10] For all the foregoing reasons, the BTA reasonably and lawfully concluded that the June 26, 2004 sale furnished a recent, arm's-length sale price that constituted the value of the property. We therefore affirm the BTA's decision.

Decision affirmed.

MOYER, C.J., and PFEIFER, LUNDBERG STRATTON, O'CONNOR, O'DONNELL, LANZINGER, and CUPP, JJ., concur.

1 of 1 DOCUMENT

**CHRISTIAN CHURCH OF OHIO, APPELLEE, v. LIMBACH, TAX COMMR.,
APPELLANT**

No. 89-1464

Supreme Court of Ohio

53 Ohio St. 3d 270; 560 N.E.2d 199; 1990 Ohio LEXIS 1037

June 8, 1990, Submitted
September 12, 1990, Decided**SUBSEQUENT HISTORY:** [***1] Rehearing Denied October 24, 1990. As Corrected**PRIOR HISTORY:** APPEAL from the Board of Tax Appeals, No. 87-H-32.

Appellant, Christian Church of Ohio, is a religious organization with member churches located throughout Ohio. It acquired the subject property, a one-story building situated on a 1.73-acre parcel in Elyria, Ohio, by gift, for use as its regional head-quarters. Appellant's application for real property tax exemption of the subject property was denied by the Tax Commissioner and an appeal was taken to the Board of Tax Appeals ("BTA") where the parties stipulated to the facts, and no additional evidence was presented.

Appellant's claim for tax exemption was based upon R.C. 5709.07 and, alternatively, R.C. 5709.12. The BTA, finding that the subject property was a house used exclusively for public worship under R.C. 5709.07, granted exemption. It did not pass upon the issue of exemption under R.C. 5709.12.

The cause is now before this court upon an appeal as of right.

DISPOSITION: *Decision reversed.***CASE SUMMARY:**

PROCEDURAL POSTURE: Appellant tax commissioner sought review of a decision of the Board of Tax Appeals (Ohio), which found that appellant church's property was a house used exclusively for public worship under Ohio Rev. Code Ann. § 5709.07, and granted a tax exemption.

OVERVIEW: The church was a religious organization with member churches located throughout Ohio. It acquired a one-story building situated on a 1.73-acre parcel of land by gift for use as its regional head-quarters. The church's application for real property tax exemption of the subject property was denied by the commissioner and an appeal was taken to the BTA. The church's claim for tax exemption was based upon Ohio Rev. Code Ann. § 5709.07 and, alternatively, Ohio Rev. Code Ann. § 5709.12. The BTA, finding that the subject property was a house used exclusively for public worship under § 5709.07, granted exemption. It did not pass upon the issue of exemption under § 5709.12. On appeal, the court reversed the BTA decision. The court found that the activities conducted at the property consisted of general supervision of all member churches and cooperative programs for religious training, the establishment of new churches, staff training, counseling, and providing Christian ministry on college campuses. No public worship services were conducted on the subject property.

OUTCOME: The court reversed.**CORE TERMS:** public worship, exemption, church, subject property, used exclusively, taxation, religious, training

53 Ohio St. 3d 270, *, 560 N.E.2d 199, **;
1990 Ohio LEXIS 1037, ***

LexisNexis(R) Headnotes

Tax Law > Federal Tax Administration & Procedure > Audits & Investigations > Examinations (IRC secs. 7601-7606, 7608-7613) > General Overview

Tax Law > State & Local Taxes > Sales Tax > Exemptions

[HN1] Ohio Rev. Code Ann. § 5709.07 provides that houses used exclusively for public worship and the ground attached to such buildings necessary for the proper occupancy, use, and enjoyment thereof shall be exempt from taxation.

Tax Law > Federal Tax Administration & Procedure > Audits & Investigations > Examinations (IRC secs. 7601-7606, 7608-7613) > General Overview

Tax Law > State & Local Taxes > Personal Property Tax > Exempt Property > General Overview

[HN2] It is not enough that property is used only in support of public worship. To qualify for exemption from real property taxation as a house used exclusively for public worship under Ohio Rev. Code Ann. § 5709.07, such property must be used in a principal, primary, and essential way to facilitate the public worship. The property under review, to be entitled to exemption, must facilitate the public worship occurring on the premises.

HEADNOTES

Taxation -- Real property taxes -- Church regional headquarters where no public worship services were conducted is not entitled to exemption under R.C. 5709.07.

COUNSEL: *Squire, Sanders & Dempsey* [***2] and *Bebe A. Fairchild*, for appellee.

Anthony J. Celebrezze, Jr., attorney general, and *Richard C. Farrin*, for appellant.

JUDGES: Moyer, C.J., Sweeney, Holmes, Douglas, Wright, H. Brown and Resnick, JJ., concur.

OPINION BY: PER CURIAM

OPINION

[*271] [**200] The Tax Commissioner contends that the BTA erred in granting tax exemption because the subject property was not used exclusively for public worship. We agree.

The essence of R.C. 5709.07 is:

"* * * [HN1] [H]ouses used exclusively for public worship * * * and the ground attached to such buildings necessary for the proper occupancy, use, and enjoyment thereof * * * shall be exempt from taxation. * * *"

The parties stipulated that no other party used, rented, or leased the subject property at any time. The activities conducted at the property consisted of general supervision of member churches and cooperative programs for religious training, the establishment of new churches, staff training, counseling, and providing Christian ministry on college campuses. No public worship services were conducted on the subject property.

[HN2] It is not enough that property is used only in support of public worship. We held in *Faith Fellowship Ministries v. Limbach* (1987), 32 Ohio St. 3d 432, 513 N.E. 2d 1340, [***3] at paragraph two of the syllabus: "To qualify for exemption from real property taxation as a house used exclusively for public worship under R.C. 5709.07, such property must be used in a principal, primary, and essential way to facilitate the public worship." In *Faith Fellowship, supra*, we dealt with multiple use of a complex of buildings and approved exemption for the parts of those buildings which were used in connection with the public worship being conducted within the complex. Thus, the property under review, to be entitled to exemption, must facilitate the public worship occurring on the premises. See, also, *Bishop v. Kinney* (1982), 2 Ohio St. 3d 52, 2 OBR 594, 442 N.E. 2d 764, where we granted exemption for the parish hall operated by the church in a single building which included facilities for the church, administrative offices, residences, classrooms and the furnace room. We reasoned that the primary use of the parish hall controlled, *i.e.*, the use was religious in nature.

In the case before us, there was no public worship conducted in the single building constituting the subject property.

[***4] Since the application of R.C. 5709.07 was the gravamen of the BTA's decision, its action in granting exemption was unreasonable and unlawful. ¹

53 Ohio St. 3d 270, *; 560 N.E.2d 199, **;
1990 Ohio LEXIS 1037, ***

¹ Although appellee contended before the BTA that it was entitled to exemption under R.C. 5709.12, no cross-appeal has been filed and that issue is not presented in this appeal. Accordingly, we lack jurisdiction to decide that issue.

For the foregoing reasons, the decision of the BTA is reversed.

Decision reversed.

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HAINES v. KERNER ET AL.

No. 70-5025

SUPREME COURT OF THE UNITED STATES

404 U.S. 519; 92 S. Ct. 594; 30 L. Ed. 2d 652; 1972 U.S. LEXIS 99; 16 Fed. R. Serv.
2d (Callaghan) 1December 6, 1971, Argued
January 13, 1972, Decided**PRIOR HISTORY:** CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.**DISPOSITION:** 427 F.2d 71, reversed and remanded.**CASE SUMMARY:**

PROCEDURAL POSTURE: Petitioner-inmate sought review of a decision by the United States Court of Appeals for the Seventh Circuit, which affirmed dismissal of his action under 42 U.S.C.S. § 1983 and 28 U.S.C.S. § 1343(c) against respondents, state of Texas and prison officials.

OVERVIEW: The inmate sought to recover damages for claimed injuries and deprivation of rights while he was incarcerated under a previous judgment. The inmate's pro se complaint was predicated on the alleged action of prison officials placing him in solitary confinement after he had struck another inmate on the head with a shovelful. The complaint included general allegations of physical injuries suffered while the inmate was in disciplinary confinement and denial of due process in the steps leading to that confinement. The district court dismissed the complaint for failure to state a claim upon which relief could be granted, suggesting that only under exceptional circumstances could courts inquire into the internal operations of state penitentiaries and concluding that the inmate had failed to show a deprivation of federally protected rights. The inmate contended that the district court erred in dismissing his complaint without allowing him to present evidence on his claims. The court held that the inmate's allegations were sufficient to require that he be provided the opportunity to offer supporting evidence.

OUTCOME: The court reversed the district court's judgment and remanded the case.

CORE TERMS: pro se, disciplinary, confinement, prison officials, inmate, recover damages, physical injuries, deprivation of rights, state penitentiaries

LexisNexis(R) Headnotes

*Civil Procedure > Parties > Self-Representation > Pleading Standards**Criminal Law & Procedure > Counsel > Right to Self-Representation**Criminal Law & Procedure > Postconviction Proceedings > Imprisonment*

[HN1] Whatever may be the limits on the scope of inquiry of courts into the internal administration of prisons, allegations of physical injuries suffered by an inmate and the denial of due process by prison officials, however inartfully pleaded, are sufficient to call for the opportunity to offer supporting evidence. The allegations of a pro se complaint are held to less stringent standards than formal pleadings drafted by lawyers.

SUMMARY: An Illinois State Penitentiary inmate sued state officials pro se in the United States District Court for the Eastern District of Illinois, seeking damages for a deprivation of his civil rights and alleging (1) a denial of due process in the steps leading to his solitary confinement and (2) physical injuries suffered while in solitary confinement. The District Court dismissed the complaint for failure to state a claim upon which relief could be granted, and the United States Court of Appeals for the Seventh Circuit affirmed (427 F2d 71).

On certiorari, the United States Supreme Court reversed. In a per curiam opinion, expressing the unanimous views of the court, it was held that since it did not appear beyond doubt that the inmate could prove no set of facts in support of his claim which would entitle him to relief, he was entitled to an opportunity to offer proof.

Powell and Rehnquist, JJ., did not participate.

LAWYERS' EDITION HEADNOTES:

[***LEdHN1]

PLEADING §130

pro se complaint --

Headnote:[1]

The United States Supreme Court holds allegations of a pro se complaint to less stringent standards than formal pleadings drafted by lawyers.

[***LEdHN2]

PLEADING §130

failure to state a claim --

Headnote:[2]

A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

[***LEdHN3]

RIGHTS §10

PLEADING §179

solitary confinement --

Headnote:[3]

In a suit under 42 USC 1983, which gives a right of action for the deprivation of civil rights under color of state law, a state penitentiary inmate is entitled to an opportunity to offer proof under his pro se allegations that he was denied due process in the steps leading to his solitary confinement and that in solitary confinement he was forced to sleep on the floor of a cell with only blankets, which aggravated a pre-existing foot injury and a circulatory ailment.

SYLLABUS

Prisoner's *pro se* complaint seeking to recover damages for claimed physical injuries and deprivation of rights in imposing disciplinary confinement should not have been dismissed without affording him the opportunity to present evidence on his claims.

COUNSEL: Stanley A. Bass, by appointment of the Court, 401 U.S. 1008, argued the cause for petitioner. With him on the briefs were Jack Greenberg, James M. Nabrit III, William B. Turner, Alice Daniel, and Max Stern.

Warren K. Smoot, Assistant Attorney General of Illinois, argued the cause for respondents pro hac vice. With him on the brief were William J. Scott, Attorney General, Joel M. Flaum, First Assistant Attorney General, and James B. Zagel, Morton E. Friedman, and Jayne A. Carr, Assistant Attorneys General.

Briefs of amici curiae were filed by Charles H. Baron for Boston College Center for Corrections and the Law, and by Julian Tepper and Marshall J. Hartman for the National Law Office of the National Legal Aid and Defender Assn.

OPINION BY: PER CURIAM

OPINION

[*519] Petitioner, an inmate at the Illinois State Penitentiary, Menard, Illinois, commenced this action against the Governor of Illinois and other state officers and prison officials under the Civil Rights Act of 1871, 17 Stat. 13, 42 U. S. C. § 1983, and 28 U. S. C. § 1343 (3), seeking to recover damages for claimed injuries and deprivation of rights while incarcerated under a judgment not challenged here. [*520] Petitioner's *pro se* complaint was premised on alleged action of prison officials placing him in solitary confinement as a disciplinary measure after he had struck another inmate on the head with a shovel following a verbal altercation. The assault by petitioner on another inmate is not denied. Petitioner's *pro se* complaint included general allegations of physical injuries suffered while in disciplinary confinement and denial of due process in the steps leading to that confinement. The claimed physical suffering was aggravation of a pre-existing foot injury and a circulatory ailment caused by forcing him to sleep on the floor of his cell with only blankets.

The District Court granted respondents' motion under Rule 12 (b)(6) of the Federal Rules of Civil Procedure to dismiss the complaint for failure to state a claim upon which relief could be granted, suggesting that only under exceptional circumstances should courts inquire into the internal operations of state penitentiaries and concluding that petitioner had failed to show a deprivation of federally protected rights. The Court of Appeals affirmed, emphasizing that prison officials are vested with "wide discretion" in disciplinary matters. We granted certiorari and appointed [***654] counsel to represent petitioner. The only issue now before us is petitioner's contention that the District Court erred in dismissing his *pro se* complaint without allowing him to present evidence on his claims.

[***LEdHR1] [1] [***LEdHR2] [2] [HN1] Whatever may be the limits on the scope of inquiry of courts into the internal administration of prisons, allegations such as those asserted by petitioner, [**596] however inartfully pleaded, are sufficient to call for the opportunity to offer supporting evidence. We cannot say with assurance that under the allegations of the *pro se* complaint, which we hold to less stringent standards than formal pleadings drafted by lawyers, it appears [*521] "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). See *Dioguardi v. Durning*, 139 F.2d 774 (CA2 1944).

[***LEdHR3] [3] Accordingly, although we intimate no view whatever on the merits of petitioner's allegations, we conclude that he is entitled to an opportunity to offer proof. The judgment is reversed and the case is remanded for further proceedings consistent herewith.

Reversed and remanded.

MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

REFERENCES

21 Am Jur 2d, Criminal Law 615

US L Ed Digest, Civil Rights 10; Pleading 179

ALR Digests, Criminal Law 180

L Ed Index to Anno, Civil Rights; Pleading

ALR Quick Index, Complaint, Petition, or Declaration; Sentence and Punishment

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IN RE ADAMS.

No. 2006-1695

SUPREME COURT OF OHIO

115 Ohio St. 3d 86; 2007 Ohio 4840; 873 N.E.2d 886; 2007 Ohio LEXIS 2402

May 1, 2007, Submitted
October 3, 2007, Decided**PRIOR HISTORY:**

APPEAL from the Court of Appeals for Cuyahoga County, No. 87881.

In re Adams, 112 Ohio St. 3d 1485, 2007 Ohio 788, 862 N.E.2d 113, 2007 Ohio LEXIS 499 (2007)

DISPOSITION: Judgment affirmed.**CASE SUMMARY:**

PROCEDURAL POSTURE: Appellant children's services agency filed a motion to change the custody of appellee parent's children from temporary to permanent. The trial court denied the motion and ordered the continuation of temporary custody. While the appeal was pending, the father filed a motion to dismiss the appeal for lack of a final, appealable order. The Eighth District Court of Appeals of Ohio granted the motion and dismissed the appeal. The agency appealed.

OVERVIEW: The state supreme court held that the trial court's order denying the motion of the children's services agency to modify temporary custody to permanent custody and continuing temporary custody was not a final, appealable order under R.C. 2305.02(B)(1) or (2). The trial court continued the temporary custody order because it did not find that the agency had proved by clear and convincing evidence that a grant of permanent custody to the agency was proper for the children. The agency was responsible for presenting to the trial court a motion for a dispositional order; however, the trial court was not bound to accept the agency's plea for children in its custody. The denial of the agency's motion to modify temporary custody to permanent custody did not "determine the action," as the continuation of temporary custody did not determine the outcome of the action for neglect and dependency. Instead, all parties remained subject to further court orders during the temporary-custody phase. Also, the order did not prevent the agency from seeking any applicable dispositional order or renewing a request for permanent custody, and it did not foreclose appropriate relief in the future.

OUTCOME: The judgment of the appellate court was affirmed.

CORE TERMS: custody, temporary, appealable order, dispositional order, modify, substantial right, temporary-custody, neglect, children-services, dependency, juvenile, final orders, requesting, continuation, neglected, common law, custody order, special proceeding, terminate, child's parents, parental rights, terminating, permanently, statutorily, foreclose, entitles, abused, rule of procedure, dependency action, convincing evidence

LexisNexis(R) Headnotes

Constitutional Law > Substantive Due Process > Privacy > Personal Decisions
Family Law > Parental Duties & Rights > Termination of Rights > General Overview

[HN1] The right to raise one's children is an essential and basic civil right. Parents have a fundamental liberty interest in the care, custody, and management of the child. Further, it has been deemed cardinal that the custody, care, and nurture of the child reside, first, in the parents. Similarly, an appellate court has long stated that parents who are suitable persons have a paramount right to the custody of their minor children. Children and their parents have an interest in reunification following a temporary-custody order. Except for some narrowly defined statutory exceptions, the State must make reasonable efforts to reunify the family before terminating parental rights.

Family Law > Delinquency & Dependency > Dependency Proceedings

Family Law > Family Protection & Welfare > Children > Abuse, Endangerment & Neglect

[HN2] Temporary custody is a status created by statute to provide interim care for Ohio children alleged to be, among other things, neglected (pursuant to R.C. 2151.03) or dependent (pursuant to R.C. 2151.04). R.C. 2151.353 lists the various orders of disposition available to a trial court following the adjudication of a child as neglected or dependent.

Family Law > Delinquency & Dependency > Dependency Proceedings

Family Law > Family Protection & Welfare > Children > Abuse, Endangerment & Neglect

[HN3] See R.C. 2151.353(A) and (F).

Family Law > Delinquency & Dependency > Dependency Proceedings

Family Law > Family Protection & Welfare > Children > Abuse, Endangerment & Neglect

Family Law > Parental Duties & Rights > Termination of Rights > General Overview

[HN4] R.C. 2151.415(A) requires an agency to file a motion requesting a dispositional order and lists six possible dispositional orders that may be issued by a court after a grant of temporary custody: except for cases in which a motion for permanent custody described in R.C. 2151.413(D)(1) is required to be made, a public children services agency or private child placing agency that has been given temporary custody of a child pursuant to R.C. 2151.353, not later than 30 days prior to the earlier of the date for the termination of the custody order pursuant to R.C. 2151.353(F) or the date set at the dispositional hearing for the hearing to be held pursuant to this section, shall file a motion with the court that issued the order of disposition requesting that any of the following orders of disposition of the child be issued by the court: (1) an order that the child be returned home and to the custody of the child's parents, guardian, or custodian without any restrictions; (2) an order for protective supervision; (3) an order that the child be placed in the legal custody of a relative or other interested individual; (4) an order permanently terminating the parental rights of the child's parents; (5) an order that the child be placed in a planned permanent living arrangement; (6) in accordance with division (D) of this section, an order for the extension of temporary custody.

Family Law > Delinquency & Dependency > Dependency Proceedings

Family Law > Family Protection & Welfare > Children > Abuse, Endangerment & Neglect

[HN5] R.C. 2151.415(D) permits a children's services agency to seek two extensions of a temporary-custody order, up to six months each. However, no more than two extensions of a temporary-custody order may be given. R.C. 2151.415(D)(4). Prior to the end of the first extension of a temporary-custody order, the agency must file another motion seeking one of the dispositional orders outlined in R.C. 2151.415(A)(1) through (5) or request the court to extend the temporary-custody order for an additional six months. R.C. 2151.415(D)(1) and (2). Prior to the end of the second extension of the temporary-custody order, the agency must file a motion with the court requesting the court to make a dispositional order under R.C. 2151.415(A)(1) through (5). R.C. 2151.415(D)(3). In sum, a temporary custody order will terminate in a maximum of two years from the earlier of the date the complaint was first filed or the date which the child was first placed into shelter care.

Family Law > Delinquency & Dependency > Dependency Proceedings

Family Law > Family Protection & Welfare > Children > Abuse, Endangerment & Neglect

Family Law > Parental Duties & Rights > Termination of Rights > General Overview

[HN6] Statutory law states that a children's services agency shall file a motion requesting permanent custody when a child has been in temporary custody for 12 or more months of a consecutive 22 month period ending on or after March 18, 1999. R.C. 2151.413(D)(1). In the event that a motion for permanent custody is not required pursuant to R.C. 2151.413(D)(1), R.C. 2151.415 controls and requires an agency with temporary custody of a child to file a motion with the court requesting that an order of disposition regarding the child be issued by the court.

Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

[HN7] Under Ohio Const. art. IV, § 3(B)(2), courts of appeals shall have such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments of final orders of the courts of record inferior to the court of appeals within the district. R.C. 2501.02 defines the jurisdiction of the courts. In addition to the original jurisdiction conferred by Ohio Const. art. IV, § 3, a court shall have jurisdiction upon an appeal upon questions of law to review, affirm, modify, set aside, or reverse judgments or final orders of courts of record inferior to the court of appeals within the district, including the finding, order, or judgment of a juvenile court that a child is delinquent, neglected, abused, or dependent, for prejudicial error committed by such lower court. Both grants of jurisdiction to the courts require that a trial court's order be a final order. As a result, it is well-established that an order must be final before it can be reviewed by an appellate court. If an order is not final, then an appellate court has no jurisdiction.

Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

[HN8] For a court order to be a final, appealable order, the requirements of both R.C. 2505.02 and, if applicable, Civ. R. 54(B), must be met. R.C. 2505.02(A) statutorily defines a final order as: (1) "substantial right" means a right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect; and (2) "special proceeding" means an action or proceeding that is specially created by statute and that prior to 1853 was not denoted as an action at law or a suit in equity. Under R.C. 2505.02(B), an order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following: (1) an order that affects a substantial right in an action that in effect determines the action and prevents a judgment; or (2) an order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment.

Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

Family Law > Delinquency & Dependency > Dependency Proceedings

Family Law > Family Protection & Welfare > Children > Abuse, Endangerment & Neglect

[HN9] A trial court's order denying an agency's motion to modify temporary custody to permanent custody and continuing temporary custody does not qualify as a final, appealable order under either R.C. 2505.02(B)(1) or (2). First, in order to be a final, appealable order under R.C. 2505.02(B)(1), the order must affect "a substantial right" and must determine the action and prevent a judgment. The denial of an agency's motion to modify temporary custody to permanent custody does not "determine the action," because the continuation of the agency's temporary custody does not determine the outcome of the action for neglect and dependency. Instead, all parties remain subject to further court order during the temporary-custody phase. A juvenile court has several ultimate dispositional options pursuant to R.C. 2151.415(A), and ordering the continuation of temporary custody does not preclude a juvenile court from exercising any of these options.

Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

Family Law > Delinquency & Dependency > Dependency Proceedings

Family Law > Family Protection & Welfare > Children > Abuse, Endangerment & Neglect

Family Law > Parental Duties & Rights > Termination of Rights > General Overview

[HN10] An order denying a motion to modify temporary custody to permanent custody does not qualify as a final, appealable order because it does not "prevent a judgment." In an action alleging neglect or dependency, a children-services agency may seek any of the ultimate dispositions with the presentation of appropriate proof. A denial of permanent custody and a continuation of temporary custody do not prevent a children-services agency from seeking any applicable dispositional order, or even renewing a request for permanent custody. A final judgment in a juvenile custody case will be rendered, and a trial court's ruling to deny permanent custody and to continue an agency's temporary custody does not foreclose the rendering of such a judgment.

Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

Family Law > Delinquency & Dependency > Dependency Proceedings

Family Law > Family Protection & Welfare > Children > Abuse, Endangerment & Neglect

Family Law > Parental Duties & Rights > Termination of Rights > General Overview

[HN11] The finding of neglect or dependency followed by a dispositional order awarding temporary custody to a children-services agency is an order that determines the action, and therefore the child's parents are permitted to appeal such an order. R.C. 2151.414(A) provides that the adjudication that the child is an abused, neglected, or dependent child and any dispositional order that has been issued in the case under section R.C. 2151.353 pursuant to the adjudication shall not be readjudicated at the hearing and shall not be affected by a denial of the motion for permanent custody. Although

the statute does provide time limits on a temporary-custody order, there is no assurance that an original adjudication of neglect or dependency would ever be reviewable if a parent is denied the ability to immediately appeal such a finding. There is no requirement that the agency having custody of the child be required to seek permanent custody. If the agency fails to seek permanent custody and the temporary order remains in effect, the parent is without remedy to attempt to demonstrate errors in the initial juvenile proceedings which resulted in the loss of custody.

***Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule
Family Law > Delinquency & Dependency > Dependency Proceedings
Family Law > Family Protection & Welfare > Children > Abuse, Endangerment & Neglect
Family Law > Parental Duties & Rights > Termination of Rights > General Overview***

[HN12] With respect to a final, appealable order, the denial of an agency's motion to modify temporary custody to permanent custody does not determine the action or prevent a judgment in the same way that a finding of neglect or dependency by a trial court followed by an award of temporary custody to an agency determines the action. In the former situation, the status quo of temporary custody by the agency is maintained, and the agency can request a different dispositional order or renew its request for permanent custody. Once the neglect and dependency action is determined, the agency or the parents can appeal the decision. However, in the latter situation, a parent may not have an opportunity to appeal the trial court's initial finding of neglect or dependency until, if ever, an award of permanent custody is made to the agency. In that event, it is likely that the situation of the child would be markedly different from that time when temporary custody was initially awarded to the agency.

***Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule
Family Law > Parental Duties & Rights > Termination of Rights > General Overview***

[HN13] Important to a determination of whether an order is a final, appealable order under R.C. 2505.02(B)(1) and controlling in a discussion of a final, appealable order under R.C. 2505.02(B)(2) is the fact that a children-services agency does not have a substantial right in the permanent custody of children based on the fact that the agency has temporary custody of the children. R.C. 2505.02(B)(2) requires a court order to affect "a substantial right" made in a "special proceeding" in order to be a final, appealable order. Actions in juvenile court that are brought pursuant to statute to temporarily or permanently terminate parental rights are special proceedings, as such actions were not known at common law. While a juvenile custody hearing is a special proceeding, a juvenile court order must also affect a substantial right to be a final, appealable order under R.C. 2505.02(B)(2). R.C. 2505.02(A)(1) defines "substantial right" as a right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect. Importantly, no constitutional provision, statute, rule of common law, or procedural rule entitles a children-services agency to any inherent right to raise a child to adulthood. In contrast, a parent has a substantial right in custody.

***Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule
Family Law > Delinquency & Dependency > Dependency Proceedings
Family Law > Family Protection & Welfare > Children > Abuse, Endangerment & Neglect
Family Law > Parental Duties & Rights > Termination of Rights > General Overview***

[HN14] An order which affects a substantial right has been perceived to be one which, if not immediately appealable, would foreclose appropriate relief in the future. When a motion to modify temporary custody to permanent custody is denied and the temporary-custody order continued, an agency is not foreclosed from seeking permanent custody or a different dispositional order under R.C. 2151.415(A) at a later date. While the agency must wait longer for the final outcome of the neglect and dependency action, the continuation of temporary custody does not foreclose appropriate relief in the future. Therefore, no immediate appeal is required. However, if a parent is not permitted to appeal a trial court's finding of neglect or dependency and a grant of temporary custody to an agency, the parent is not assured an opportunity to have the decision reviewed. An agency with temporary custody is not required to seek permanent custody, unless it is statutorily required to do so. R.C. 2151.413(D)(1).

***Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule
Family Law > Delinquency & Dependency > Dependency Proceedings
Family Law > Family Protection & Welfare > Children > Abuse, Endangerment & Neglect
Family Law > Parental Duties & Rights > Termination of Rights > General Overview***

[HN15] A trial court order denying a motion of a children-services agency to modify temporary custody to permanent custody and continuing temporary custody is not a final, appealable order under R.C. 2505.02(B)(1) or (2).

HEADNOTES

A trial court order denying the motion of a children-services agency to modify temporary custody to permanent custody and continuing temporary custody is not a final, appealable order under R.C. 2505.02(B)(1) or (2).

SYLLABUS

[*86] [***887] A trial court order denying the motion of a children-services agency to modify temporary custody to permanent custody and continuing temporary custody is not a final, appealable order under R.C. 2505.02(B)(1) or (2).

COUNSEL: William D. Mason, Cuyahoga County Prosecuting Attorney, and Joseph C. Young, Assistant Prosecuting Attorney, for appellant.

Vorys, Sater, Seymour & Pease, L.L.P., John J. Kulewicz, and Melissa J. Mitchell, for appellee Michelle Adams.

Repper, Pagan, Cook, Ltd., and Christopher J. Pagan, for appellee Lee Adams Sr.

Keating Muething & Klekamp, P.P.L., and Charles M. Miller, for appellees Adams children.

Jodi M. Wallace, guardian ad litem for appellees Adams children.

Harvey E. Tessler, guardian ad litem for appellee Lee Adams Sr.

JUDGES: MOYER, C.J. PFEIFER, LUNDBERG STRATTON, O'CONNOR, O'DONNELL, LANZINGER and CUPP, JJ., concur.

OPINION BY: MOYER

OPINION

MOYER, C.J.

[**P1] Appellant, Cuyahoga County Department of Children and Family Services, appeals from the judgment of dismissal of the Cuyahoga County Court of Appeals for lack of a final, appealable order. For the following reasons, we affirm.

[*87] [**P2] Appellees Michelle and Lee Adams Sr. are the parents of three children who were placed in temporary custody with appellant following the filing of a complaint alleging neglect and dependency. Over the course of two and a half years, the family appeared in court several times regarding the custody of the children. The trial court order from which an appeal was taken followed a hearing on the department's motion to change the custody of the Adams children from temporary custody to permanent custody. The trial court found that the department had failed to show by clear and convincing evidence that a grant of permanent custody to the department was in the best interest of the children pursuant to R.C. 2151.414(D). The trial court denied the motion and ordered the continuation of temporary custody with visitation by the parents.

[**P3] While appellant's appeal to the Eighth District Court of Appeals was pending, Lee Adams Sr. filed a motion to dismiss the appeal for lack of a final, appealable order. The court of appeals granted the motion and dismissed the appeal. Appellant filed a motion for reconsideration, which was denied.

[**P4] The question presented is whether a children-services agency may appeal a trial court's order denying the agency's motion to modify temporary custody to permanent custody and continuing temporary custody.

[**P5] "The United States Supreme Court has stated that [HN1] the right to raise one's children is an 'essential' and 'basic civil right.' Parents have a 'fundamental liberty interest' in the care, custody, and management of the child. Further, it has been deemed 'cardinal' that the custody, care, and nurture of the child reside, first, in the parents.

[**P6] [***888] "Similarly, this court has long stated that parents who are suitable persons have a 'paramount' right to the custody of their minor children." (Citations omitted.) *In re Murray* (1990), 52 Ohio St.3d 155, 157, 556 N.E.2d 1169.

[**P7] Children and their parents have an interest in reunification following a temporary-custody order. We held in *In re C.F.*, 113 Ohio St.3d 73, 2007 Ohio 1104, 862 N.E.2d 816, P 4, that "except for some narrowly defined statutory exceptions, the state must make reasonable efforts to reunify the family before terminating parental rights."

[**P8] [HN2] Temporary custody is a status created by statute to provide interim care for Ohio children alleged to be, among other things, neglected (pursuant to R.C. 2151.03) or dependent (pursuant to R.C. 2151.04). R.C. 2151.353 lists the various orders of disposition available to a trial court following the adjudication of a child as neglected or dependent. It provides:

[**P9] [HN3] "(A) If a child is adjudicated an abused, neglected, or dependent child, the court may make any of the following orders of disposition:

[*88] [**P10] " * * *

[**P11] "(2) Commit the child to the temporary custody of a public children services agency * * * [.]

[**P12] " * * *

[**P13] "(F) Any temporary custody order issued pursuant to division (A) of this section shall terminate one year after the earlier of the date on which the complaint in the case was filed or the child was first placed into shelter care, except that, upon the filing of a motion pursuant to section 2151.415 of the Revised Code, the temporary custody order shall continue and not terminate until the court issues a dispositional order under that section."

[**P14] R.C. 2151.415 explains the procedure an agency must follow after a grant of temporary custody of a child to the agency. Subsection (A) [HN4] requires an agency to file a motion requesting a dispositional order and lists six possible dispositional orders that may be issued by the court:

[**P15] "(A) Except for cases in which a motion for permanent custody described in division (D)(1) of section 2151.413 of the Revised Code is required to be made, a public children services agency or private child placing agency that has been given temporary custody of a child pursuant to section 2151.353 of the Revised Code, not later than thirty days prior to the earlier of the date for the termination of the custody order pursuant to division (F) of section 2151.353 of the Revised Code or the date set at the dispositional hearing for the hearing to be held pursuant to this section, shall file a motion with the court that issued the order of disposition requesting that any of the following orders of disposition of the child be issued by the court:

[**P16] "(1) An order that the child be returned home and [to] the custody of the child's parents, guardian, or custodian without any restrictions;

[**P17] "(2) An order for protective supervision;

[**P18] "(3) An order that the child be placed in the legal custody of a relative or other interested individual;

[**P19] "(4) An order permanently terminating the parental rights of the child's parents;

[**P20] "(5) An order that the child be placed in a planned permanent living arrangement;

[**P21] "(6) In accordance with division (D) of this section, an order for the extension of temporary custody."

[**889] [**P22] [HN5] R.C. 2151.415(D) permits an agency to seek two extensions of a temporary-custody order, up to six months each. However, no more than two extensions of a temporary-custody order may be given. R.C. 2151.415(D)(4). [**89] Prior to the end of the first extension of a temporary-custody order, the agency must file another motion seeking one of the dispositional orders outlined in R.C. 2151.415(A)(1) through (5) or request the court to extend the temporary-custody order for an additional six months. R.C. 2151.415(D)(1) and (2). Prior to the end of the second extension of the temporary-custody order, the agency must file a motion with the court requesting the court to make a dispositional order under R.C. 2151.415(A)(1) through (5). R.C. 2151.415(D)(3). "In sum, * * * a temporary custody order will terminate in a maximum of two years from the earlier of the date the complaint was first filed or the date which the child was first placed into shelter care." *In re Murray*, 52 Ohio St.3d at 158, 556 N.E.2d 1169.

[**P23] [HN6] Statutory law also states that an agency "shall file a motion requesting permanent custody" when a child has been in temporary custody "for twelve or more months of a consecutive twenty-two month period ending on or after March 18, 1999." R.C. 2151.413(D)(1). In the event that a motion for permanent custody is not required pursuant to R.C. 2151.413(D)(1), R.C. 2151.415 controls and requires an agency with temporary custody of a child to file a motion with the court requesting that an order of disposition regarding the child be issued by the court.

[P24]** We must decide whether an order denying an agency's motion to modify temporary custody to permanent custody and continuing temporary custody is a final, appealable order. [HN7] Under Section 3(B)(2), Article IV, Ohio Constitution, "[c]ourts of appeals shall have such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments of final orders of the courts of record inferior to the court of appeals within the district * * *."

[P25]** R.C. 2501.02 defines the jurisdiction of the courts: "In addition to the original jurisdiction conferred by Section 3 of Article IV, Ohio Constitution, the court shall have jurisdiction upon an appeal upon questions of law to review, affirm, modify, set aside, or reverse judgments or final orders of courts of record inferior to the court of appeals within the district, including the finding, order, or judgment of a juvenile court that a child is delinquent, neglected, abused, or dependent, for prejudicial error committed by such lower court."

[P26]** Both grants of jurisdiction to the courts require that a trial court's order be a final order: "As a result, [i]t is well-established that an order must be final before it can be reviewed by an appellate court. If an order is not final, then an appellate court has no jurisdiction." *Gehm v. Timberline Post & Frame*, 112 Ohio St.3d 514, 2007 Ohio 607, 861 N.E.2d 519, P 14, quoting *Gen. Acc. Ins. Co. v. Ins. Co. of N. Am.* (1989), 44 Ohio St.3d 17, 20, 540 N.E.2d 266.

[P27]** [HN8] For a court order to be a final, appealable order, the requirements of both R.C. 2505.02 and, if applicable, Civ.R. 54(B), must be met. *Gehm*, 112 Ohio St.3d 514, 2007 Ohio 607, 861 N.E.2d 519, P 15. R.C. 2505.02 statutorily defines a **[*90]** "final order," and in this case, subsections (A) and (B) are relevant. Those subsections provide:

[P28]** "(A) As used in this section:

[P29]** "(1) 'Substantial right' means a right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect.

[P30]** **[***890]** "(2) 'Special proceeding' means an action or proceeding that is specially created by statute and that prior to 1853 was not denoted as an action at law or a suit in equity.

[P31]** * * *

[P32]** "(B) An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:

[P33]** "(1) An order that affects a substantial right in an action that in effect determines the action and prevents a judgment;

[P34]** "(2) An order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment."

[P35]** [HN9] A trial court's order denying an agency's motion to modify temporary custody to permanent custody and continuing temporary custody does not qualify as a final, appealable order under either R.C. 2505.02(B)(1) or (2). First, in order to be a final, appealable order under R.C. 2505.02(B)(1), the order must affect "a substantial right" and must "determine[] the action and prevent[] a judgment."

[P36]** The denial of an agency's motion to modify temporary custody to permanent custody does not "determine[] the action," because the continuation of the agency's temporary custody does not determine the outcome of the action for neglect and dependency. Instead, all parties remain subject to further court order during the temporary-custody phase. A juvenile court has several ultimate dispositional options pursuant to R.C. 2151.415(A), and ordering the continuation of temporary custody do not preclude the juvenile court from exercising any of these options.

[P37]** [HN10] An order denying a motion to modify temporary custody to permanent custody also does not "prevent[] a judgment." In an action alleging neglect or dependency, a children-services agency may seek any of the ultimate dispositions with the presentation of appropriate proof. A denial of permanent custody and a continuation of temporary custody do not prevent a children-services agency from seeking any applicable dispositional order, or even renewing a request for permanent custody. A final judgment in a juvenile custody case will be rendered, and a trial court's ruling to deny permanent custody and to continue an agency's temporary custody does not foreclose the rendering of such a judgment.

[*91] **[**P38]** This case is factually distinguishable from *In re Murray*, 52 Ohio St.3d 155, 556 N.E.2d 1169, as the parties appealing the trial court's grant of temporary custody in *Murray* were the parents. Also, the parents were appealing the initial order granting temporary custody to a children-services agency, as opposed to an order modifying tempo-

rary custody to permanent custody. In *Murray*, we held that [HN11] the finding of neglect or dependency followed by a dispositional order awarding temporary custody to a children-services agency is an order that determines the action, and therefore the child's parents are permitted to appeal such an order. *Id.* at 159, 556 N.E.2d 1169. Our reasoning was based in part on R.C. 2151.414(A), which provides that "[t]he adjudication that the child is an abused, neglected, or dependent child and any dispositional order that has been issued in the case under section 2151.353 of the Revised Code pursuant to the adjudication shall not be readjudicated at the hearing and shall not be affected by a denial of the motion for permanent custody."

[**P39] Although the statute does provide time limits on a temporary-custody order, there is no assurance that an original adjudication [***891] of neglect or dependency would ever be reviewable if a parent is denied the ability to immediately appeal such a finding. *In re Murray*, 52 Ohio St.3d at 158, 556 N.E.2d 1169. "There is no requirement that the agency having custody of the child be required to seek permanent custody. If the agency fails to seek permanent custody and the temporary order remains in effect, the parent is without remedy to attempt to demonstrate errors in the initial juvenile proceedings which resulted in the loss of custody." *Id.*

[**P40] [HN12] The denial of an agency's motion to modify temporary custody to permanent custody does not determine the action or prevent a judgment in the same way that a finding of neglect or dependency by a trial court followed by an award of temporary custody to an agency determines the action. In the former situation, the status quo of temporary custody by the agency is maintained, and the agency can request a different dispositional order or renew its request for permanent custody. Once the neglect and dependency action is determined, the agency or the parents can appeal the decision.

[**P41] However, in the latter situation, a parent may not have an opportunity to appeal the trial court's initial finding of neglect or dependency until, if ever, an award of permanent custody is made to the agency. "In that event, it is likely that the situation of the child would be markedly different from that time when temporary custody was initially awarded to the agency." *In re Murray*, 52 Ohio St.3d at 158, 556 N.E.2d 1169.

[**P42] Equally [HN13] important to our determination of whether an order is a final, appealable order under R.C. 2505.02(B)(1) and controlling in our discussion of a final, appealable order under R.C. 2505.02(B)(2) is the fact that a children-services [92] agency does not have a substantial right in the permanent custody of children based on the fact that the agency has temporary custody of the children. R.C. 2505.02(B)(2) requires a court order to affect "a substantial right" made in a "special proceeding" in order to be a final, appealable order.

[**P43] Actions in juvenile court that are brought pursuant to statute to temporarily or permanently terminate parental rights are special proceedings, as such actions were not known at common law. *In re Murray*, 52 Ohio St.3d at 161, 556 N.E.2d 1169 (Douglas, J., concurring in syllabus and judgment). While a juvenile custody hearing is a special proceeding, a juvenile court order must also affect a substantial right to be a final, appealable order under R.C. 2505.02(B)(2). R.C. 2505.02(A)(1) defines "substantial right" as "a right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect." Importantly, no constitutional provision, statute, rule of common law, or procedural rule entitles a children-services agency to any inherent right to raise a child to adulthood. In contrast, a parent has a substantial right in custody.

[**P44] Further, [HN14] "[a]n order which affects a substantial right has been perceived to be one which, if not immediately appealable, would foreclose appropriate relief in the future." *Wenzel v. Enright* (1993), 68 Ohio St.3d 63, 67, 1993 Ohio 53, 623 N.E.2d 69 (Sweeney, J., dissenting), quoting *Bell v. Mt. Sinai Med. Ctr.* (1993), 67 Ohio St.3d 60, 63, 616 N.E.2d 181. When a motion to modify temporary custody to permanent custody is denied and the temporary-custody order continued, an agency is not foreclosed from seeking permanent custody or a different dispositional order under R.C. 2151.415(A) at a later date. While the agency must wait longer for the final outcome of the neglect and dependency action, [***892] the continuation of temporary custody does not foreclose appropriate relief in the future. Therefore, no immediate appeal is required. However, if a parent is not permitted to appeal a trial court's finding of neglect or dependency and a grant of temporary custody to an agency, the parent is not assured an opportunity to have the decision reviewed. An agency with temporary custody is not required to seek permanent custody, *In re Murray*, 52 Ohio St.3d at 158, 556 N.E.2d 1169, unless it is statutorily required to do so, see R.C. 2151.413(D)(1).

[**P45] In conclusion, [HN15] a trial court order denying the motion of a children-services agency to modify temporary custody to permanent custody and continuing temporary custody is not a final, appealable order under R.C. 2505.02(B)(1) or (2). In this case, the trial court continued the temporary-custody order because the court did not find that the agency had proved by clear and convincing evidence that a grant of permanent custody to the agency was prop-

er for the Adams children. The agency is responsible for presenting to the court a motion [*93] for a dispositional order; however, the court is not bound to accept an agency's plan for children in its custody.

[**P46] Given that the Adams children have been in the temporary custody of the agency for more than the statutorily permitted time of two years, appellant should file a motion with the trial court requesting the issuance of an order of disposition set forth in R.C. 2151.415(A)(1) through (5). When the trial court enters its final order, all parties whose substantial rights are affected by that order will be able to appeal.

Judgment affirmed.

PFEIFER, LUNDBERG STRATTON, O'CONNOR, O'DONNELL, LANZINGER and CUPP, JJ., concur.

CONCUR BY: LUNDBERG STRATTON

CONCUR

LUNDBERG STRATTON, J., concurring.

[**P47] I concur with the majority that the order appealed from is not a final, appealable order. However, I believe that the majority's suggestion to the appellant, Cuyahoga County Department of Children and Family Services ("agency"), that it file a motion for a final order of disposition under R.C. 2151.415(A) may be inadequate given the trial court's past failures to adhere to the statutory maximum two years of temporary custody.

[**P48] As the majority explained, R.C. 2151.415(A) lists six possible dispositional orders that a trial court may issue. Subsection (A)(4) provides for an order permanently terminating parental rights. The agency already moved for permanent custody under R.C. 2151.413. If the agency decides to move for an order under R.C. 2151.415(A)(4) and the court denies that motion and continues temporary custody, the agency still will not have a final disposition and will not be able to appeal. Consequently, what the majority suggests as the agency's next step may place the agency in the same position it now finds itself.

[**P49] Ohio laws provide that children may remain in the temporary custody of the government for up to two years. See *In re Murray* (1990), 52 Ohio St.3d 155, 158, 556 N.E.2d 1169. In this case, the appellant has asked the trial court on more than one occasion to end temporary custody and to place the children in the agency's permanent custody. Although a court is permitted to grant only two six-month extensions of temporary custody, the trial court has repeatedly continued temporary custody, allowing the children to remain in the system for more than two years. Given [***893] the history of the trial court's actions in this case, it is likely that the court may deny another motion filed under R.C. 2151.415(A) and again continue temporary custody of the children. If other dispositions under [*94] R.C. 2151.415(A) are not appropriate, the agency may be forced to consider filing for extraordinary relief to compel the court to follow the law.

1 of 5 DOCUMENTS

IN RE: B. L. and J. L.

C.A. Nos. 09CA0016, 09CA0017

COURT OF APPEALS OF OHIO, NINTH APPELLATE DISTRICT, WAYNE COUNTY

2009 Ohio 3649; 2009 Ohio App. LEXIS 3132

July 27, 2009, Decided

PRIOR HISTORY: [**1]

APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF WAYNE, OHIO. CASE Nos. 07-0108-AND 08-0717-PCU.

DISPOSITION: Judgment affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellants, a mother and a father, sought review of the judgment of the Wayne County Court of Common Pleas, Juvenile Division (Ohio), which, pursuant to R.C. 2151.414, terminated their parental rights and placed one of their two children in the permanent custody of appellee children services agency and the other child in the legal custody of her aunt and uncle.

OVERVIEW: Appellants' children were removed from their home and placed in the agency's custody. After a hearing, the trial court placed the younger child in the permanent custody of the agency and the older child in the legal custody of her aunt and uncle. The court held that the trial court properly found that the children had been in the agency's custody for more than 12 of the prior 22 months, thus, the first prong of the permanent custody test was satisfied. The awards of permanent custody and legal custody, respectively, were in the best interests of the children as the evidence showed that the parents had limited interaction with their children during the almost two-year pendency of the case, that the father struggled with alcohol addiction and anger management, that the mother did not regularly attend visits with the children, that the children did not have an emotional closeness to the mother, and that the children were doing well in their placements. Further, the trial court never concluded that it did not have the authority to extend permanent custody beyond the sunset date; instead, the court concluded that its decision on the issue would be guided by the best interests of the children.

OUTCOME: The court affirmed the judgment of the trial court.

CORE TERMS: custody, best interest, aunt, temporary, uncle, legal custody, placement, alcohol, parental rights, assignments of error, juvenile, counselor, interaction, foster parents, psychologist, sunset, prong, foster home, incarceration, progress, adjusted, sobriety, case plan, clear and convincing evidence, domestic violence, reversible error, terminate, pendency, foster, mental illness

LexisNexis(R) Headnotes

Evidence > Procedural Considerations > Burdens of Proof > Clear & Convincing Proof
Family Law > Child Custody > Awards > Standards > Best Interests of Child
Family Law > Parental Duties & Rights > Termination of Rights > Involuntary Termination > General Overview

[HN1] Before a juvenile court can terminate parental rights and award to a proper moving agency permanent custody of a child, it must find clear and convincing evidence of both prongs of the permanent custody test: (1) that the child is abandoned, orphaned, has been in the temporary custody of the agency for at least 12 months of the prior 22 months, or that the child cannot be placed with either parent within a reasonable time or should not be placed with either parent, based on an analysis under R.C. 2151.414(E); and (2) the grant of permanent custody to the agency is in the best interest of the child, based on an analysis under § 2151.414(D). § 2151.414(B)(1)-(2).

Civil Procedure > Appeals > Standards of Review > Reversible Errors

[HN2] To demonstrate reversible error, a party has the burden to demonstrate error as well as prejudice resulting from that error. A prejudicial error is defined as one which affects or presumptively affects the final results of the trial.

Family Law > Child Custody > Awards > Standards > Best Interests of Child

Family Law > Parental Duties & Rights > Termination of Rights > Involuntary Termination > General Overview

[HN3] When determining whether a grant of permanent custody is in the children's best interests, the juvenile court must consider all the relevant factors, including those enumerated in R.C. 2151.414(D): the interaction and interrelationships of the children, the wishes of the children, the custodial history of the children, and the children's need for permanence in their lives.

Family Law > Child Custody > Awards > Legal Custody > General Overview

Family Law > Child Custody > Awards > Standards > Best Interests of Child

[HN4] A trial court's disposition of legal custody to a relative is a less drastic disposition than permanent custody to a children services agency because it does not terminate parental rights but instead leaves intact residual parental rights, privileges, and responsibilities. R.C. 2151.011(B)(17). Although there is no specific test or set of criteria set forth in the statutory scheme, courts agree that the trial court must base its decision on the best interest of the child. Although other best interest factors may apply to a legal custody determination, it has also held that the best interest factors set forth in R.C. 2151.414(D) provide guidance in determining whether a grant of legal custody is in the best interest of the child.

Family Law > Family Protection & Welfare > Children > Services

Family Law > Parental Duties & Rights > Termination of Rights > Involuntary Termination > General Overview

[HN5] See R.C. 2151.415(D)(4).

Civil Procedure > Counsel > Appointments

Civil Procedure > Appeals > Reviewability > Preservation for Review

Family Law > Parental Duties & Rights > Termination of Rights > Involuntary Termination > General Overview

[HN6] Where no request was made in the trial court for counsel to be appointed for the children in a permanent custody case, the issue will not be addressed for the first time on appeal.

COUNSEL: CLARKE W. OWENS, Attorney at Law, for Appellant.

CONRAD OLSON, Attorney at Law, for Appellant.

MARTIN FRANTZ, Prosecuting Attorney, and LATECIA E. WILES, Assistant Prosecuting Attorney, for Appellee.

KARIN WIEST, Attorney at Law, for GAL.

JUDGES: WHITMORE, Judge. MOORE, P. J., DICKINSON, J., CONCUR.

OPINION BY: BETH WHITMORE

OPINION

DECISION AND JOURNAL ENTRY

WHITMORE, Judge.

[*P1] Appellants, Carrie L. ("Mother") and Phillip L. ("Father"), appeal from a judgment of the Wayne County Court of Common Pleas, Juvenile Division, that terminated their parental rights and placed their two minor children in the permanent custody of Wayne County Children Services Board ("CSB"). This Court affirms.

I

[*P2] Mother and Father are the natural parents of B.L., born February 25, 1999, and J.L., born December 10, 2001. The family was already involved with CSB through a voluntary case plan to address B.L.'s poor school attendance when CSB filed this involuntary case in January 2007. Police removed both children from the home pursuant to Juv.R. 6 after receiving a call from B.L. that she and her brother had been left [**2] in the care of Father, who was in the home in violation of a protective order and was under the influence of alcohol and drugs. Although the details of the protective order are not clear from the record, Father was prohibited from having contact with Mother or the children, apparently due to an incident of domestic violence. Mother and Father were still married at that time, but they obtained a divorce during the pendency of this case.

[*P3] After the children were taken into custody, CSB learned that they had been exposed to their parents' long history of domestic violence and alcohol abuse and Mother's serious mental illness. CSB was also concerned that the parents had neglected their children's medical and dental needs. J.L.'s baby teeth were so badly decayed that he had to have all of them pulled. The decay was so extensive that it had also damaged J.L.'s permanent teeth, and his dentist had not yet determined whether the permanent teeth could be saved.

[*P4] The goals for reunification focused primarily on the parents' need to resolve their problems with drug and alcohol abuse, domestic violence, and Mother's need to receive treatment for her mental illness. The parents were also required [**3] to attend parenting classes, visit their children regularly, and provide for their basic needs. During the first year that the children were in agency custody, however, the parents made minimal progress toward any of these goals. Father made some progress during the second year, but Mother did not seek treatment for her mental illness and became involved in criminal activity that led to her incarceration.¹

¹ No further details about Mother's conviction are set forth in the record.

[*P5] After a brief stay in a foster home, the children were placed together in the home of an aunt and uncle. Although B.L. adjusted well to living there, J.L. exhibited unacceptable behavior that his aunt and uncle were unable to control. J.L. would frequently threaten others in the home, swear at his aunt, and act out sexually toward his sister and cousins. J.L. was moved to a foster home, but his inappropriate behavior again led to his removal from that home. J.L. was later placed in the home of another foster family where he apparently adjusted well to living with the foster parents and their four children.

[*P6] On June 30, 2008, CSB moved for permanent custody of J.L. and moved for B.L. to be placed in the legal [**4] custody of her aunt and uncle. Following a hearing on those motions as well as the parents' oral request for an extension of temporary custody, the trial court placed J.L. in the permanent custody of CSB and placed B.L. in the legal custody of her aunt and uncle.

[*P7] Mother and Father separately appealed and this Court later consolidated the two appeals. Mother and Father each raise two assignments of error.

II

Mother's Assignment of Error Number One

"THE JUVENILE COURT ERRED BY GRANTING PERMANENT CUSTODY OF [J.L.] TO [CSB], BECAUSE THE ORDER WAS NOT SHOWN BY CLEAR AND CONVINCING EVIDENCE TO BE IN [J.L.'S] BEST INTEREST AND WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

Father's Assignment of Error Number One

"THE TRIAL COURT'S GRANT OF PERMANENT CUSTODY OF J.L. TO [CSB] AND LEGAL CUSTODY OF B.L. TO RELATIVES WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AS THE AGENCY

FAILED TO PROVE BY CLEAR AND CONVINCING EVIDENCE THAT SUCH A DISPOSITION WAS IN THE BEST INTEREST OF THE CHILDREN."

[*P8] This Court will address Mother's and Father's first assignments of error together because they are closely related. Each parent has maintained that the evidence did not support the trial court's decision to terminate [**5] their parental rights to J.L. [HN1] Before a juvenile court can terminate parental rights and award to a proper moving agency permanent custody of a child, it must find clear and convincing evidence of both prongs of the permanent custody test: (1) that the child is abandoned, orphaned, has been in the temporary custody of the agency for at least 12 months of the prior 22 months, or that the child cannot be placed with either parent within a reasonable time or should not be placed with either parent, based on an analysis under R.C. 2151.414(E); and (2) the grant of permanent custody to the agency is in the best interest of the child, based on an analysis under R.C. 2151.414(D). See R.C. 2151.414(B)(1)-(2); see, also, *In re William S.* (1996), 75 Ohio St.3d 95, 99, 1996 Ohio 182, 661 N.E.2d 738.

[*P9] The trial court found that the first prong of the permanent custody test was satisfied for several reasons, including that J.L. had been in the temporary custody of CSB for more than 12 of the prior 22 months. Neither parent has challenged that finding. Although Mother challenges the trial court's alternate findings under R.C. 2151.414(E), any error in those findings would not constitute reversible error. [HN2] To demonstrate reversible [**6] error, Mother has the burden to demonstrate error as well as prejudice resulting from that error. *Lowry v. Lowry* (1988), 48 Ohio App.3d 184, 190, 549 N.E.2d 176, citing *Gries Sports Enterprises, Inc. v. Cleveland Browns Football Co., Inc.* (1986), 26 Ohio St.3d 15, 28, 26 Ohio B. 12, 496 N.E.2d 959. "A prejudicial error is defined as one which affects or presumptively affects the final results of the trial." *Miller v. Miller*, 5th Dist. No. 06CA3, 2006 Ohio 7019, at P12. Mother has not disputed that the trial court's "12 of 22" finding under R.C. 2151.414(B)(1)(d) was supported by the evidence, which satisfied the first prong of the permanent custody test, so she cannot demonstrate reversible error.

[*P10] Mother and Father both challenge the best interest prong of the permanent custody test. [HN3] When determining whether a grant of permanent custody is in the children's best interests, the juvenile court must consider all the relevant factors, including those enumerated in R.C. 2151.414(D): the interaction and interrelationships of the children, the wishes of the children, the custodial history of the children, and the children's need for permanence in their lives. See *In re S.N.*, 9th Dist. No. 23571, 2007 Ohio 2196, at P27.

[*P11] Father further [**7] maintains that the trial court erred in placing B.L. in the legal custody of relatives. The juvenile [HN4] court's disposition of legal custody to a relative is a less drastic disposition than permanent custody to a children services agency because it does not terminate parental rights but instead "leaves intact 'residual parental rights, privileges, and responsibilities.'" *In re Shepherd*, 4th Dist. No. 00CA12, 2001 Ohio 2499, at *7, quoting R.C. 2151.011(B)(17). "Although there is no specific test or set of criteria set forth in the statutory scheme, courts agree that the trial court must base its decision on the best interest of the child." *In re N.P.*, 9th Dist. No. 21707, 2004 Ohio 110, at P23, citing *In re Fulton*, 12th Dist. No. CA2002-09-236, 2003 Ohio 5984, at P11.

[*P12] For ease of discussing the best interests of both children, because this appeal involves challenges to the trial court's dispositions of legal custody of one child and permanent custody of the other, this Court will apply the permanent custody best interest factors set forth in R.C. 2151.414(D). Although this Court has recognized that other best interest factors may apply to a legal custody determination, it has also held [**8] that the best interest factors set forth in R.C. 2151.414(D) "provide guidance in determining whether a grant of legal custody is in the best interest of the [child]." *In re T.A.*, 9th Dist. No. 22954, 2006 Ohio 4468, at P17; see, also, *In re B.G.*, 9th Dist. No. 24187, 2008 Ohio 5003, at P11.

[*P13] During the almost two-year pendency of this case, the parents had limited interaction with their children. Father had no interaction with the children during the first year of this case, primarily due to the protection order that was in place. During the second year of the case, Father visited his children on a weekly basis, except during the several weeks that he was either incarcerated or hospitalized. Father's interaction was never expanded beyond weekly, supervised visitation because he failed to resolve his long-term drinking problem or his anger management issues.

[*P14] For well over a year after the children were removed from the home, Father kept abusing alcohol and his alcohol abuse continued to cause serious problems in his life. For example, during August 2007, Father stumbled into a bonfire while he was intoxicated and suffered burns that were severe enough to require hospitalization in the [**9] Akron Children's Hospital burn unit. During February 2008, although Father had started an anger management program, he assaulted the fifteen-year-old son of a friend while he was intoxicated. Although the original charge of assault was reduced, Father was criminally convicted as a result of the incident. One week after he was released from jail, he was admitted to a hospital psychiatric ward due to an emotional breakdown. Father entered an alcohol treatment program

shortly afterward, where he remained at the time of the hearing, but admitted that he had done so because he would be able to avoid eight months' incarceration on criminal charges if he completed the program.²

² CSB again failed to present evidence about the nature of the criminal charges connected to the potential eight months of incarceration.

[*P15] Mother's interaction with her children was also limited to weekly supervised visitation, but Mother did not attend visits on a regular basis. Mother missed many visits and, because she usually had called CSB to confirm that she would be attending, the children often sat and waited for her and were disappointed by her failure to show. At the time of the permanent custody hearing, [**10] Mother was having no interaction with her children because she was incarcerated.

[*P16] When Mother did visit with the children, according to the psychologist who observed a family visit, the children seemed to lack emotional closeness to her. The psychologist explained that the children repeatedly went to the case aide rather than Mother for direction or praise. This psychologist, who had also evaluated Mother individually, testified that she had diagnosed Mother with bipolar disorder and delusional disorder and that the degree to which Mother suffered from those disorders made it difficult for her to parent her children. The psychologist had also diagnosed Mother with borderline intellectual functioning due to her IQ of 70. The psychologist further explained that Mother was very dependent on others, had very little sense of self, tended to project blame onto others, and lacked any insight into why CSB was involved with her family.

[*P17] Due to their long-term exposure to their parents' serious problems, J.L. and B.L. worried about their parents and felt the need to protect or take care of them. B.L., because she was older than J.L., had also assumed the role of her brother's caretaker. The children's [**11] counselors expressed concern about B.L. and J.L. feeling the need to protect and care for others in their family and explained that these feelings were not normal or healthy for such young children.

[*P18] There was evidence that both children were well cared for in their current placements. J.L. had been living in the same foster home for almost a year and had adjusted well to living there. The foster parents had been working with him to provide structure and consistency and to address his academic delays. J.L. had become bonded to the foster parents and their children, and the foster parents expressed an interest in adopting J.L.

[*P19] B.L. was likewise doing well in her placement with her aunt and uncle. B.L. had become involved in cheerleading and softball for the first time and was enjoying these new activities. The aunt testified that she and her husband were prepared to provide B.L. with a permanent home.

[*P20] Several witnesses testified that there was a bond between J.L. and B.L. and that this was a bond that should be maintained. Although the parties expressed concern about placing the children in different homes, there was also evidence that J.L.'s foster parents and B.L.'s aunt and uncle [**12] were willing to work together to maintain a relationship between the two siblings.

[*P21] Each of the children had expressed their wishes in counseling. J.L., who was seven years old at the time of the hearing, had told his counselor that he would like his parents, who had divorced during the pendency of this case, to get back together and to live with him. Such a placement was not possible and, therefore, was not an option for the court. J.L. also told his counselor that he was happy living with his foster family and was bonded with that family.

[*P22] B.L., who was nine years old, told her counselor that she enjoyed living with her aunt and that she would like to stay there. The counselor further explained that B.L. had adjusted well to living with her aunt and uncle, was doing well in school, and had many friends. On the other hand, the counselor testified that B.L. was afraid to return to her father's home and that she preferred to stay with her aunt.

[*P23] The guardian ad litem expressed her opinion that permanent custody was in the best interest of J.L. and that legal custody to her aunt and uncle was in the best interest of B.L. She emphasized the unresolved problems of the parents and that Father, [**13] the only parent who was working on the goals of the case plan, had failed to make any progress until he was court ordered to do so.

[*P24] The custodial history of these children included almost 21 months spent in the temporary custody of CSB. As already detailed, the parents did not make substantial progress toward reunification during this prolonged period.

[*P25] After nearly two years living in temporary placements, both children were in need of a legally secure permanent placement. The evidence was clear that neither parent was in a position to provide the children with a suitable

home. Mother had serious mental health issues and had failed to comply with the mental health component of the case plan. Moreover, at the time of the hearing, Mother was incarcerated.

[*P26] Father had failed to adequately address his long history of drug and alcohol problems. Father's counselor testified that Father needed to become sober to parent his children appropriately. Although he had been maintaining sobriety at the time of the hearing, he was in a controlled alcohol treatment program. More than one witness explained that remaining sober while in a controlled treatment environment was not sufficient to demonstrate [**14] an ability to remain sober. The psychologist who evaluated Father testified that she would want to see Father maintain sobriety outside a controlled environment for at least 8 to 12 months for him to demonstrate his sobriety.

[*P27] Although Father suggested at the hearing that the agency had not given him enough time to demonstrate sobriety, he was the one who waited nearly 15 months to start a treatment program that he was able to stick with. Moreover, Father admitted that he had entered and stayed in the treatment program because it was an alternative to serving eight months' incarceration on a criminal conviction.

[*P28] Permanent custody was not the only permanent placement option for B.L. CSB had been able to find a less drastic permanent placement for B.L. in the legal custody of relatives. She had been living in the home of her aunt and uncle and was doing well there.

[*P29] On the other hand, although J.L. initially had been placed in the home of his aunt and uncle, his behavior was uncontrollable and he posed a threat to the other children living there. The aunt and uncle testified that they were willing to help maintain a relationship between J.L. and B.L., but that they were unable to provide [**15] a permanent home for J.L.

[*P30] CSB had been unable to find any other suitable relative placement for J.L. J.L. had been adjusting well to the foster home where he had been living for almost a year, and the foster parents had expressed an interest in adopting him. Therefore, the trial court reasonably concluded that a legally secure permanent placement could only be achieved by granting permanent custody of J.L. to CSB.

[*P31] There was ample evidence before the trial court to support its conclusion that permanent custody to CSB was in the best interest of J.L. and that legal custody to her aunt and uncle was in the best interest of B.L. Mother's and Father's first assignments of error are overruled.

Mother's Assignment of Error Number Two

"THE JUVENILE COURT ERRED IN ITS INTERPRETATION OF CASE LAW ON THE ISSUE OF THE NATURE OR SCOPE OF ITS AUTHORITY TO EXTEND TEMPORARY CUSTODY BEYOND THE STATUTORY SUNSET DATE."

[*P32] Mother contends that the trial court erred in concluding that it lacked authority to extend temporary custody beyond the so-called two-year "sunset date" or two years after CSB filed its complaint. See R.C. 2151.415(D)(4). At the hearing, the trial court had several motions pending before [**16] it, including the parents' request that it extend temporary custody for another six months. Because the two-year sunset date was approaching, however, the parties discussed and briefed in writing the legal issue of whether the trial court had authority to extend temporary custody beyond the two-year period.

[*P33] At issue was R.C. 2151.415(D)(4), which at the time of the hearing provided, in relevant part:

[HN5] "No court shall grant an agency more than two extensions of temporary custody *** and the court shall not order an existing temporary custody order to continue beyond two years after the date on which the complaint was filed or the child was first placed into shelter care, whichever date is earlier[.]"

[*P34] Although the statutory language seems to indicate that a trial court has no authority to extend temporary custody beyond the sunset date, Mother cites authority from another appellate district that held otherwise. See *In re N.B.*, 8th District No. 81392, 2003 Ohio 3656, at P11-13. This Court need not determine whether the trial court had authority to extend temporary custody beyond the sunset date, however, because that issue is not raised by this appeal. In its judgment entry, although the [**17] trial court briefly discussed the lack of binding legal authority on this question, it did not take a position on the issue. Instead, the court explained that even if it had authority to extend temporary custody any further, its decision would be guided by the best interests of the children. The court then explained why an extension of temporary custody was not in the best interests of these children. The trial court had explained in a previous sec-

tion of its judgment entry that permanent custody was in the best interest of J.L. and legal custody to relatives was in the best interest of B.L.

[*P35] Because this Court found no merit in the parents' first assignments of error regarding the best interests of the children, Mother has failed to demonstrate any error. Mother's second assignment of error is overruled.

Father's Assignment of Error Number Two

"THE TRIAL COURT DENIED [FATHER] AND THE CHILDREN THEIR DUE PROCESS RIGHTS BY FAILING TO APPOINT SEPARATE COUNSEL FOR THE CHILDREN DESPITE THE CONFLICT OF INTEREST OF THE GUARDIAN AD LITEM IN EXPRESSING THE 'BEST INTEREST' OF THE CHILD WHICH WAS CONTRARY TO THE WISHES OF THE CHILD."

[*P36] Father contends that the trial court erred by failing to appoint [**18] independent counsel for the children. None of the parties raised this issue at any time in the trial court, but Father raises it for the first time on appeal to this Court. As this Court has repeatedly stated, [HN6] "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 T.E.*, 9th Dist. No. 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 Britany T.*, 6th Dist. No. L-011369, 2001 Ohio 3099, at *6.

[*P37] Father has not asserted that the trial court committed plain error, nor has he explained why this Court should delve into this issue for the first time on appeal. In *In re T.E.*, this Court explained its rationale for not addressing this issue when a parent raised it for the first time on appeal:

"Although some courts have held that a parent cannot waive the issue of the children's right [**19] to counsel because such a result would unfairly deny the children their right to due process, see, e.g., *In re Moore*, 7th Dist. No. 04-BE-9, 158 Ohio App. 3d 679, 2004 Ohio 4544, at P31, 821 N.E.2d 1039, we disagree that the reasoning applies to this case. Mother has not appealed on behalf of her children and is not asserting their rights on appeal. This is Mother's appeal of the termination of her own parental rights and she has standing to raise the issue of her children's right to counsel only insofar as it impacts her own parental rights. See *In re Smith* (1991), 77 Ohio App.3d 1, 13, 601 N.E.2d 45.

"The Ohio General Assembly and the Ohio Supreme Court have required courts to expedite cases involving the termination of parental rights, to prevent children from lingering in foster care for a number of years. See, e.g., R.C. Chapter 2151; App.R. 11.2. Mother should not be permitted to impose an additional delay in the proceedings by raising a belated challenge for the first time on appeal, under the auspices of defending her children's due process rights. She had the opportunity at the permanent custody hearing to timely assert their rights, and therefore her derivative rights but she chose not to. This Court is not inclined to reward [**20] a parent for sitting idly on her rights by addressing an alleged error that should have been raised, and potentially rectified, in the trial court in a much more timely fashion." *In re T.E.*, at P8-9.

[*P38] Because Father did not timely raise this issue in the trial court, this Court will not reach the merits of his challenge. Father's second assignment of error is overruled.

III

[*P39] The assignments of error are overruled. The judgment of the Wayne County Court of Common Pleas, Juvenile Division, is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Wayne, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing [**21] in the docket, pursuant to App.R. 30.

Costs taxed to Appellants.

BETH WHITMORE
FOR THE COURT
MOORE, P. J.
DICKINSON, J.
CONCUR

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IN THE MATTER OF: ALEX DeVORE; [JEFFREY D. DeVORE and BEVERLY DeVORE, PARENTS-APPELLANTS]; IN THE MATTER OF: PHILIP DeVORE; [JEFFREY D. DeVORE and BEVERLY DeVORE, PARENTS-APPELLANTS]

CASE NUMBER 8-06-08, CASE NUMBER 8-06-09

COURT OF APPEALS OF OHIO, THIRD APPELLATE DISTRICT, LOGAN COUNTY

2006 Ohio 4432; 2006 Ohio App. LEXIS 4349

August 28, 2006, Date of Judgment Entries

PRIOR HISTORY: [1] CHARACTER OF PROCEEDINGS:** Civil Appeals from Common Pleas Court, Juvenile Division.

DISPOSITION: Appeals dismissed.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant father sought review of judgments from the Logan County Common Pleas Court, Juvenile Division (Ohio), which overruled his motion to order appellee county children's services agency to request permanent custody of the father's minor children and to terminate child support.

OVERVIEW: The father and mother adopted two minor children from Brazil who subsequently displayed mental, emotional, and behavioral issues. The mother's medical condition of multiple sclerosis worsened over the ensuing years, and the parents' biological daughters exhibited behavior problems. The agency filed complaints, which resulted in an adjudication of the minors being dependent. They were initially placed in the agency's temporary custody, and eventually, they were placed in planned permanent living arrangements, and child support was ordered. The father sought, inter alia, to have the agency take permanent custody of the minors and to terminate child support. The trial court denied the motion. On appeal, the court found that the trial court judgment was not a final, appealable order under Ohio Rev. Code Ann. § 2505.02(B)(2) because it did not affect a substantial right, which was required because the matter was a "special proceeding" under Ohio Rev. Code Ann. ch. 2151. The court noted that the father could have sought declaratory judgment, a writ of mandamus, or termination under an appropriate statute. However, such relief was not proper under Ohio Rev. Code Ann. ch. 2151.

OUTCOME: The court dismissed the appeal.

CORE TERMS: custody, temporary, child support, substantial right, daughters, biological, children's services, per year, appealable order, special proceedings, discretionary, multi-branch, termination, reduction, mandatory, girls, assignments of error, parental, tuition, moot, minor children, dependent children, emancipated, behavioral, worsened

LexisNexis(R) Headnotes

Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

[HN1] Appellate jurisdiction is limited to review of lower courts' final judgments. Ohio Const. art. IV, § 3(B)(2). To be a final, appealable order, a judgment must satisfy the requirements of Ohio Rev. Code Ann. § 2505.02 and, if applicable, Ohio R. Civ. P. 54(B). Juvenile court matters, brought pursuant to Ohio Rev. Code Ann. ch. 2151, are special pro-

ceedings. A "special proceeding" is an action or proceeding that is specially created by statute and that prior to 1853 was not denoted as an action at law or suit in equity. Ohio Rev. Code Ann. § 2505.02(A)(2). Court orders rendered in a special proceeding must "affect a substantial right." § 2505.02(B)(2). A substantial right is defined as a right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect. § 2505.02(A)(1). A substantial right is, in effect, a legal right that is enforced and protected by law. An order affects a substantial right if the order is one which, if not immediately appealable, would foreclose the appropriate relief in the future.

Family Law > Family Protection & Welfare > Children > General Overview

[HN2] As to Ohio Rev. Code Ann. ch. 2151, the Ohio General Assembly has specifically stated that the sections in Ohio Rev. Code Ann. ch. 2151, with the exception of those sections providing for the criminal prosecution of adults, shall be liberally interpreted and construed so as to effectuate the following purposes: To provide for the care, protection, and mental and physical development of children subject to Ohio Rev. Code Ann. ch. 2151, whenever possible, in a family environment, separating the child from the child's parents only when necessary for the child's welfare or in the interests of public safety. Ohio Rev. Code Ann. § 2151.01(A).

Family Law > Family Protection & Welfare > Children > General Overview

Family Law > Parental Duties & Rights > Termination of Rights > General Overview

[HN3] If a parent wishes to surrender, or relinquish, parental rights and permanent custody, there are separate statutory provisions allowing a parent to do so. However, no such provision exists in Ohio Rev. Code Ann. ch. 2151. In cases concerning ch. 2151, Ohio courts have noted a parent's fundamental right to have or retain custody of their children, not to terminate it.

COUNSEL: STEVEN R. FANSLER, Attorney at Law, West Liberty, OH, For Appellants.

DEBORAH K. WOLF, Assistant Prosecuting Attorney, Bellefontaine, OH, For Appellee, Logan County Children Services.

BRIDGET HAWKINS, Attorney at Law, Bellefontaine, OH, Guardian Ad Litem.

JUDGES: BRYANT, P.J. SHAW and ROGERS, JJ., concur.

OPINION BY: BRYANT

OPINION

BRYANT, P.J.

[*P1] The appellant, Jeffrey DeVore ("Jeffrey"), appeals the judgments of the Logan County Common Pleas Court, Juvenile Division, overruling his motion to order the appellee, Logan County Children's Services ("agency"), to request permanent custody of his minor children, Alex DeVore ("Alex") and Philip DeVore ("Philip").

[*P2] Jeffrey and his wife, Bev DeVore ("Bev"), have been married for over twenty years. Two daughters were born as issue of the marriage, and both are emancipated. In approximately 1997¹, Jeffrey and Bev decided to adopt through an international adoption. Although Bev had been diagnosed with multiple sclerosis shortly before the adoption, they decided to proceed and adopted Alex, born on 6/12/1989, and [*2] Philip, born on 4/21/1990, from Brazil. Alex and Philip exhibited mental, emotional, and behavioral issues after the adoption. Over the next four years, Bev's medical condition worsened, the biological daughters began exhibiting behavioral problems, and Alex and Philip's problems worsened. Jeffrey and Bev eventually decided they could no longer deal with the boys' problems. For example, Jeffrey wrote in the "Cluster report":

I feel as if we have become victims of children preying on the opportunity [to] control things with lies, deceit and manipulation. * * * Our biological girls recently got into trouble with alcohol. I feel this was a cry for help. This is so uncharacteristic of them, since they were raised in a loving Christian home. * * * The over whelming [sic] issues with the boy's [sic] have pushed out the girls['] needs. All of our energy has been focused on meeting the needs of the boys and the girls are suffering. I cannot ignore this any longer. I need to save my family.

To continue on in my opinion would be bordering on neglect. We simply cannot provide the skills so critically necessary for the boys.

Agency Memo., Nov. 28, 2005, at Ex. [**3] A.

¹ The parties do not indicate when the children were adopted. However, attached as Exhibit A to the agency's memorandum filed on Nov. 28, 2005 was a document entitled "Cluster gathering 9/3/02". The document is apparently written by Jeffrey and indicates that he and Bev made the decision to adopt "about 5 1/2 years ago".

[*P3] On October 25, 2002, the agency filed complaints alleging that Alex and Philip were dependent children. The trial court held a hearing on November 22, 2002 for purposes of adjudication and disposition. The court adjudicated Alex and Philip dependent children, ordered them into the agency's temporary custody, and established child support. The court twice ordered extensions of temporary custody, and on June 22, 2004, the trial court granted the agency's request to place both Alex and Philip in planned permanent living arrangements ("PPLA").

[*P4] On July 5, 2005, Jeffrey filed a "multi-branch" motion. As to the first "branch", Jeffrey moved the court to order Alex and Philip [**4] into the agency's permanent custody because the agency had failed to file a motion for permanent custody within the "12 of 22" rule provided in R.C. 2151.413(D). The second "branch" requested termination of child support in the event the first "branch" was granted. The other "branches" of the motion were presented as alternatives to the first and second "branches". The third "branch" asked the court to order the agency to provide a definite timeline as to the boys' placements. "Branch" four requested a reduction in child support. Jeffrey requested the reduction due to the family's other expenses, including approximately \$ 27,000.00 per year in college tuition for the daughters; approximately \$ 17,000.00 per year in law school tuition for Jeffrey; the additional \$ 40.00 per month Jeffrey must pay to extend his health insurance to a family plan; Bev's medical and pharmaceutical costs; the cost of secondary housing in Columbus so Jeffrey can attend night classes; and approximately \$ 1,500.00 per year for the daughters' car insurance policies². See Multi-Branch Mot., Jul. 5, 2005. In the fifth and final "branch", Jeffrey requested that a \$ 260.00 child support [**5] reduction be made retroactive.

² We fail to see how expenses, voluntarily accepted and related to emancipated children and post-graduate education, justify a termination of child support for minor children who were adopted and brought to this country by the parents.

[*P5] The agency filed a memorandum of law with exhibits, opposing Jeffrey's "multi-branch" motion on November 28, 2005. Jeffrey filed a memorandum in support of his motion on December 6, 2005, and the agency filed a response on February 3, 2006. The trial court filed its judgment entry on March 8, 2006, finding R.C. 2151.413(C) to be a discretionary statute. The court also found R.C. 2151.413(D)(1) inapplicable because Alex and Philip had been placed in PPLA under R.C. 2151.353(A)(5) and 2151.415(A)(5) and because the agency did "not have a disposition of temporary custody." Therefore, the court overruled the first and third "branches" [**6] of the motion and found the second "branch" to be moot. The trial court scheduled a final hearing on the fourth and fifth "branches" for March 30, 2006. On April 3, 2006, Jeffrey dismissed the unresolved portions of his motion, and he filed his notice of appeal on April 5, 2006. Jeffrey asserts the following assignments of error:

The trial court erroneously determined that it was discretionary for the Logan County Children's Service Agency to file a permanent custody motion and the court should have determined that it was statutorily mandatory.

The court's determination that Branch II of Appellant's motion is moot and is therefore denied is erroneous if it was mandatory for the children's services agency to file for permanent custody.

[*P6] In the first assignment of error, Jeffrey contends that R.C. 2151.413(C) is mandatory and requires the agency to file a motion for permanent custody "if the child or children have been in the temporary custody of that Agency for at least 12 of a 22-month period of time." Jeffrey claims that the agency "had temporary custody of Alex and Philip from October 25 of 2002 until the status was changed [**7] on June 22 of 2004." Jeffrey contends that from October 25, 2003 until June 22, 2004, the agency could have requested permanent custody, and it was required to do so. Jeffrey stresses that public policy requires permanency in a child's life³, which requires the agency to seek permanent custody when the "12 of 22 rule" is satisfied.

3 We find this argument ironic considering Jeffrey and Bev opted for an international adoption of not just one, but two boys, who were brought to Ohio only to be raised in a household where the mother's deteriorating health and the boys' "bad influence" on the biological daughters forced the family to place them in the agency's custody after only a few years.

[*P7] In response, the agency contends that R.C. 2151.413(C) is discretionary and an alternative to R.C. 2151.413(D). The agency contends that Chapter 2151 of the Revised Code clearly distinguishes the concepts of temporary custody, permanent custody, and PPLA. The [**8] agency argues that the "12 of 22 rule" only applies when a child is in temporary custody, and since a PPLA is distinguishable, R.C. 2151.413(D) does not control R.C. 2151.413(C).

[*P8] [HN1] Appellate jurisdiction is limited to review of lower courts' final judgments. See Section 3(B)(2), Article IV of the Ohio Constitution. To be a final, appealable order, a judgment must satisfy the requirements of R.C. 2505.02 and, if applicable, Civ.R. 54(B). *Chef Italiano Corp. v. Kent State Univ.* (1989), 44 Ohio St.3d 86, 88, 541 N.E.2d 64. Juvenile court matters, brought pursuant to Chapter 2151 of the Revised Code, are special proceedings. *State ex rel. Fowler v. Smith*, 68 Ohio St.3d 357, 360, 1994 Ohio 302, 626 N.E.2d 950. A "special proceeding" is "an action or proceeding that is specially created by statute and that prior to 1853 was not denoted as an action at law or suit in equity." R.C. 2505.02(A)(2). Court orders rendered in a special proceeding must "affect a substantial right". R.C. 2505.02(B)(2) [**9]. A substantial right is defined as "a right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect." R.C. 2505.02(A)(1). "A substantial right is, in effect, a legal right that is enforced and protected by law." *State v. Coffman*, 91 Ohio St. 3d 125, 127, 2001 Ohio 296 and 2001 Ohio 273, 742 N.E.2d 644 (citing *Cleveland v. Trzebuckowski*, 85 Ohio St.3d 524, 526, 1999 Ohio 285, 709 N.E.2d 1148). "[A]n order affects a substantial right if the order is one which, if not immediately appealable, would foreclose the appropriate relief in the future." 4 Ohio Jurisprudence 3d (1999), Appellate Review, Section 43 (citing *Union Camp Corp., Harchem Div. v. Whitman* (1978), 54 Ohio St.2d 159, 375 N.E.2d 417).

[*P9] We do not find the trial court's judgment entry to be a final, appealable order because it does not affect a substantial right. [HN2] As to Chapter 2151 of the Revised Code, the General Assembly specifically stated:

[t]he sections in Chapter 2151. of the Revised Code with the exception of those [**10] sections providing for the criminal prosecution of adults, shall be liberally interpreted and construed so as to effectuate the following purposes:

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

R.C. 2151.01(A). Jeffrey's prayer for relief essentially demanded the trial court to order the agency to file for permanent custody. Jeffrey's motion did not request declaratory judgment under Chapter 2721 of the Revised Code, nor was it a proper petition for a writ of mandamus under Chapter 2731 of the Revised Code. Jeffrey's motion was clearly intended to result in the termination of parental rights and the payment of child support so Jeffrey's expenses and the needs of his biological family could be met. [HN3] If a parent wishes to surrender, or relinquish, parental rights and permanent custody there are separate statutory provisions allowing a parent to do so. However, no [**11] such provision exists in Chapter 2151. In cases concerning Chapter 2151, Ohio courts have noted a parent's fundamental right to *have or retain* custody of their children, not to terminate it. See generally *In re C.W.*, 104 Ohio St. 3d 163, 2004 Ohio 6411, 818 N.E.2d 1176, at P23 (citations omitted). We cannot find that a substantial right has been implicated by the trial court's judgment entry in this case, as Jeffrey has other, more appropriate methods of seeking relief.

[*P10] Having found that the judgments of the Logan County Common Pleas Court, Juvenile Division, are not final, appealable orders, we dismiss these appeals.

Appeals dismissed.

SHAW and ROGERS, JJ., concur.

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IN RE: G.C. & M.C.

NO. 83994

COURT OF APPEALS OF OHIO, EIGHTH APPELLATE DISTRICT, CUYA-
HOGA COUNTY

2004 Ohio 5607; 2004 Ohio App. LEXIS 5066

October 21, 2004, Date of Announcement of Decision

PRIOR HISTORY: [**1] **CHARACTER OF PROCEEDING:** Appeal from Common Pleas Court, Juvenile Division, Case Nos. AD 03900414 & 03900415.

DISPOSITION: Judgment of the Court of Common Pleas affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellee agency petitioned the Cuyahoga County Court of Common Pleas, Juvenile Division (Ohio), for permanent custody of appellant mother's children. The trial court granted the petition, and the mother appeals.

OVERVIEW: The agency alleged the mother's repeated incarcerations. The appellate court held that the four-year-old's level of maturity did not warrant appointing counsel for her, based on guardian ad litem. When the trial court only let a foster mother testify about the children's condition because the agency gave no prior notice of an intent to call her, cross-examination should have been allowed, but precluding it did not abuse discretion. It was no error to admit changes the mother was acquitted of as her absence from the children was alleged, so any evidence of absence was relevant. Clear and convincing evidence supported appointment custody award as the mother could not give the children necessary her incarcerations caused her inability to care for them, and their need for a secure placement, relationship with caregivers, including the mother, and a social history were considered. Holding a permanent custody hearing in the mother's absence, as she was held without bond in another county, did not abrogate due process as she had no absolute right to be present, and (1) counsel represented her, (2) a full record of the hearing was made, and (3) she could present evidence by deposition.

OUTCOME: The trial court's judgment was affirmed.

CORE TERMS: custody, incarcerated, foster mother, assignment of error, guardian ad litem, incarceration, aggravated, best interests, appointed, foster, robbery, neglected, placement, juvenile, acquitted, murder, cross-examine, repeated, parental, abused, dispositional, adjudicatory, arrested, criminal charges, independent counsel, recommendation, announcement, continuance, safeguards, maturity

LexisNexis(R) Headnotes

Family Law > Guardians > Appointment

Family Law > Guardians > Duties & Rights

Family Law > Parental Duties & Rights > Termination of Rights > General Overview

[HN1] In Ohio, a juvenile has a right to counsel in a proceeding to terminate parental rights, based on the juvenile's status as a party to the proceeding. This is so because a child who is the subject of a juvenile court proceeding is a "party"

to that proceeding according to Ohio R. Juv. P. 2(Y). Courts must determine, however, whether the child actually needs independent counsel, taking into account the maturity of the child and the possibility of the child's guardian ad litem being appointed to represent the child. Although a guardian ad litem can serve in the dual roles of advocate and guardian, the possibility of a fundamental conflict in a dual-representation situation is acknowledged, as the duty of a guardian ad litem is to recommend to the court what the guardian feels is in the best interest of the child, while the duty of a lawyer to a child client is to provide zealous representation for the child's position.

Civil Procedure > Counsel > General Overview

Family Law > Parental Duties & Rights > Termination of Rights > General Overview

[HN2] 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 in a proceeding to terminate the child's parent's parental rights.

Civil Procedure > Judicial Officers > Judges > General Overview

Evidence > Testimony > Examination > Cross-Examination > General Overview

Evidence > Testimony > Presentation of Evidence

[HN3] In Ohio, a party is entitled to cross-examine a witness, whether that witness is called by another party or by the court. Although a trial court has discretion in controlling the mode and order of the interrogation of witnesses and, indeed, may call witnesses and interrogate them in an impartial manner, a trial judge's questions must be relevant and void of a suggestion of bias for one side over another. In a bench trial where the trial judge acts as the trier-of-fact, however, a reviewing court will presume that the trial court acted impartially and considered only properly admitted evidence. As such, the trial judge in a bench trial has more freedom in questioning witnesses.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Evidence > Procedural Considerations > Rulings on Evidence

[HN4] It is well established in Ohio that a trial court has broad discretion in the admission or exclusion of evidence, and so long as such discretion is exercised in line with the rules of procedure and evidence, its judgment will not be reversed absent a clear showing of an abuse of discretion with attendant material prejudice.

Civil Procedure > Appeals > Standards of Review > General Overview

Family Law > Parental Duties & Rights > Termination of Rights > General Overview

[HN5] An Ohio trial court's decision to award permanent custody will not be reversed on appeal unless it is against the manifest weight of the evidence. Judgments supported by competent, credible evidence going to all the essential elements of the case will not be reversed as being against the manifest weight of the evidence.

Evidence > Testimony > Credibility > General Overview

[HN6] In Ohio, issues relating to the credibility of witnesses and the weight to be given the evidence are primarily for the trier of fact.

Evidence > Procedural Considerations > Burdens of Proof > General Overview

Family Law > Delinquency & Dependency > Dependency Proceedings

Family Law > Parental Duties & Rights > Termination of Rights > General Overview

[HN7] A complainant under Ohio Rev. Code Ann. § 2151.27 must demonstrate by clear and convincing evidence that a child is abused, neglected or dependent. Ohio Rev. Code Ann. § 2151.35(A)(1). Once so adjudicated, a trial court may commit that child to the permanent custody of a public children services agency after determining that the child cannot be placed with either of the child's parents within a reasonable time in accordance with Ohio Rev. Code Ann. § 2151.414(E) and that such a commitment is in the best interest of the child in accordance with Ohio Rev. Code Ann. § 2151.414(D). Ohio Rev. Code Ann. § 2151.353(A)(4).

Family Law > Parental Duties & Rights > Termination of Rights > General Overview

[HN8] In Ohio, in determining whether a child removed from his or her parents' custody cannot be placed with either parent within a reasonable period of time, a court shall consider all relevant evidence. It must then determine, by clear and convincing evidence, that one or more of the factors contained in Ohio Rev. Code Ann. § 2151.414(E) exists and enter a corresponding finding that the child cannot be placed with either parent.

Criminal Law & Procedure > Postconviction Proceedings > Imprisonment

Family Law > Child Custody > Awards > General Overview**Family Law > Parental Duties & Rights > Termination of Rights > General Overview**

[HN9] Ohio Rev. Code Ann. § 2151.414(E)(14) pertains to a parent's inability to provide food, clothing, shelter and other basic necessities for a child, while Ohio Rev. Code Ann. § 2151.414(E)(13) pertains to a parent's repeated incarcerations and the resulting inability to provide care for the child as grounds for awarding the child's permanent custody to another.

Family Law > Child Custody > Awards > Standards > Best Interests of Child**Family Law > Parental Duties & Rights > Termination of Rights > General Overview**

[HN10] In determining the best interest of a child, in proceedings to award the child's permanent custody, Ohio Rev. Code Ann. § 2151.414(D) provides a non-exhaustive list of factors that the court must consider. These include (1) the child's interaction and interrelationship with, among others, the child's parents, siblings, relatives and foster caregivers; (2) the child's wishes expressed directly or through a guardian ad litem; (3) the child's custodial history; (4) the child's need for legally secure permanent placement and if that type of placement can be obtained without granting permanent custody to a public children services agency; and (5) whether any factors listed in Ohio Rev. Code Ann. § 2151.414(E)(7) to (11) apply. Ohio Rev. Code Ann. § 2151.414(D)(1) through (5).

Civil Procedure > Judicial Officers > Judges > Discretion**Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion > Continuances****Family Law > Parental Duties & Rights > Termination of Rights > General Overview**

[HN11] In Ohio, the grant or denial of a continuance is a matter that is entrusted to the broad, sound discretion of a trial judge. An appellate court must not reverse the denial of a continuance unless there has been an abuse of discretion. The same is true of a court's decision to proceed with a permanent custody hearing without the presence of an incarcerated parent.

Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection**Family Law > Child Custody > Procedures****Family Law > Parental Duties & Rights > Termination of Rights > General Overview**

[HN12] Although, in Ohio, an incarcerated individual does not have an absolute right to be present in a civil case in which he or she is a party, that same individual has a fundamental right to care for and have custody of his or her own children, a right that is not lost simply because the parent has lost temporary custody of the child to the state. In determining whether parental due process rights in parental termination proceedings have been infringed, courts employ a balancing test. Courts are to consider (1) the private interest affected; (2) the risk of erroneous deprivation and the probable value of additional safeguards; and (3) the governmental burden of additional procedural safeguards. An incarcerated parent's right to due process is not violated when (1) that parent is represented by counsel at the hearing; (2) a full record of the proceedings is made; and (3) any testimony that the parent may wish to present could be presented by way of deposition.

COUNSEL: For Appellant-Mother: Christopher Lenahan, Cleveland, OH.

For Appellee [Cuyahoga County Department of Children and Family Services]: William D. Mason, Cuyahoga County Prosecutor, Joseph C. Young, Assistant, Cleveland, OH.

For Guardian Ad Litem/Mother: Theodore Amata, Cleveland, OH.

For Guardian Ad Litem/Children: Mark Witt, North Olmsted, OH.

JUDGES: TIMOTHY E. McMONAGLE, JUDGE. PATRICIA A. BLACKMON, P.J., CONCURS. FRANK D. CELBREZZE, JR., J., CONCURS IN JUDGMENT ONLY.

OPINION BY: TIMOTHY E. McMONAGLE

OPINION

JOURNAL ENTRY AND OPINION

TIMOTHY E. McMONAGLE, J.:

[*P1] Appellant-mother appeals the judgment of the Cuyahoga County Common Pleas Court, Juvenile Division, awarding permanent custody of her children, G.C. & M.C., to the Cuyahoga County Department of Children and Family Services. For the reasons that follow, we affirm.

[*P2] Appellant is the mother of G.C. & M.C., whose dates of birth are June 20, 1999 and April 24, 2001, respectively. In January 2001, the Cuyahoga County Department of Children and Family Services ("CCDCFS") removed [**2] G.C. from appellant's home based on allegations of neglect and dependency. M.C. was removed in May 2001, shortly after her birth, apparently for the same reason. The children were reunited¹ with appellant in July 2002, only to be returned to the agency's temporary custody approximately three weeks later when appellant was arrested on charges of aggravated murder, attempted murder and felonious assault, as indicted in Cuyahoga County Common Pleas Case No. CR-427460.² In its amended complaint, CCDCFS alleged that appellant's repeated criminal activity and incarcerations "prevented her from being able to provide proper care and support for the children."

¹ Legal custody was awarded to appellant, with protective supervision by the agency, in July 2002. Actual physical possession, however, did not take place until August 12, 2002.

² Appellant was also indicted for robbery, two counts of felonious assault and drug possession/trafficking in Cuyahoga County Common Pleas Case Nos. CR-426251, CR-426121 and CR-443845, respectively. According to the social worker's testimony, these cases remain pending.

[**3] [*P3] The trial court appointed Mark Witt as guardian ad litem for the children. Eventually, Theodore Amata was appointed as guardian ad litem for the mother, in addition to her appointed counsel. Counsel was similarly appointed for the children's respective fathers, although neither is a party to this appeal.³ In March 2003, appellant was acquitted of all charges contained in Case No. CR-427460. In July 2003, however, she was arrested in Cuyahoga County and subsequently indicted for drug-related offenses in Case No. CR-443845. She posted bond but, in August 2003 was arrested yet again, this time in Lorain County, on several charges, including, but not limited to, aggravated murder. She remains in custody at the time of this appeal awaiting trial on those charges.⁴

³ G.C.'s father relinquished his parental rights during the course of these proceedings. M.C.'s father, though duly notified, did not participate in the adjudicatory/dispositional hearing in the trial court.

⁴ Lorain County Common Pleas Case No. 03CR063563 charges appellant with (1) aggravated murder; (2) murder; (3) involuntary manslaughter; (4) aggravated robbery; (5) robbery; (6) conspiracy to commit aggravated robbery; (7) conspiracy to commit aggravated robbery; (8) tampering with evidence; and (9) two counts of felonious assault, all with firearm specifications. Lorain County Common Pleas Case No. 03CR063765 charges appellant with aggravated robbery, with a firearm specification.

[**4] [*P4] It was CCDCFS's position that permanent custody is in the children's best interests because, among other reasons, appellant is unable to care for her children due to her frequent arrests. At the adjudicatory and dispositional hearing that took place contemporaneously in November 2003, counsel for appellant requested that separate counsel be appointed for G.C, which the court denied. The court ultimately found the children to be neglected and dependent. Relying, in part, on the recommendation of the children's guardian ad litem, the court awarded permanent custody to CCDCFS, finding it in the children's best interests and that there existed "a need for permanency" for the children.

[*P5] Appellant is now before this court and assigns five errors for our review.

I. Failure to Appoint Separate Counsel for G.C.

[*P6] In her first assignment of error, appellant contends that the trial court erred when it denied her request for the appointment of separate counsel for G.C.

[*P7] [HN1] A juvenile has a right to counsel in a proceeding to terminate parental rights, based on the juvenile's status as a party to the proceeding. See *In re Williams*, 101 Ohio St.3d 398, 2004 Ohio 1500, at P17, 805 N.E.2d 1110, [**5] citing *In re Janie M.* (1999), 131 Ohio App.3d 637, 639, 723 N.E.2d 191. This is so because "a child who is the subject of a juvenile court proceeding" is a "party" to that proceeding according to Juv.R. 2(Y). *Id.*; see, also, R.C.

2151.352; Juv.R. 4(A). Courts must determine, however, whether the child actually needs independent counsel, taking into account the maturity of the child and the possibility of the child's guardian ad litem being appointed to represent the child. Although a guardian ad litem can serve in the dual roles of advocate and guardian, the *Williams* court acknowledged the possibility of a "fundamental conflict in a dual-representation situation," noting that the duty of a guardian ad litem is to "recommend to the court what the guardian feels is in the best interest" of the child, while the duty of a lawyer to a child client is "to provide zealous representation" for the child's position. 2004 Ohio 1500, at P18.

[*P8] We see no need for independent counsel in this case. Appellant relies on comments made by the children's foster mother indicating that G.C. wanted "to see her mother." Appellant equates this comment with a desire on G.C.'s part to live [**6] with her mother, which is contrary to the guardian ad litem's recommendation to award permanent custody to CCDCFS.

[*P9] As this author expressed in a recent decision of this court, [HN2] 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. See *In re K. & K.H.*, Cuyahoga App. No. 83410, 2004 Ohio 4629. Indeed, not only did G.C. state that she wished to "see" her mother, she also stated to her guardian ad litem that she wanted to live with the foster mother. As stated by the court, it is not unusual for a young child to express a desire to see his or her parent. In individuals other than the very young, the desire to see one's parent certainly would not equate with a desire to remain in that parent's household. In the very young, such inconsistency only underscores the lack of cognitive maturity necessary for the appointment of independent counsel.

[*P10] Appellant's first assignment of error is not well taken and is overruled.

[*P11] Failure to Allow Cross-Examination

[*P12] In her second assignment of error, appellant contends that the trial court erred when [**7] it did not allow her to cross-examine the foster mother.

[*P13] The record reveals that CCDCFS called the foster mother as its witness. Because CCDCFS did not indicate in discovery that it intended to call this witness, the trial court did not permit CCDCFS to use this witness to prove any allegations contained in the amended complaint. The trial court did, however, inquire of the foster mother as to how the children were doing. The foster mother testified that both children were doing well, but that G.C. had somewhat of a setback upon return from appellant's home in August 2002. Appellant requested the opportunity to cross-examine this witness, to which CCDCFS joined. In refusing to allow appellant to do so, the trial court stated:

[*P14] "I allowed the [foster mother] to speak because I think it is important that people that take time off to come down to court and sit all day, part of the day, that they have an opportunity at least to have some say. And I did not want to let this witness leave here without being able to address the court in some limited manner.

[*P15] "She should have been a witness, listed as a witness. I was not going to allow her to be treated [**8] as an ordinary witness, but I did want to have her speak to me about the children, because I want her to know that this court certainly welcomes her input.

[*P16] "So I was not about to send her back out of here because of some technicality in whether she could testify or not. And I am able to, just as I ignore a whole lot [of] other stuff that happened, ignore testimony that is inappropriate.

[*P17] "I will sanitize what I heard and will just bear in mind what she said about how the children are doing.

[*P18] "They are okay in their placement, how long they have been with her, and that sort of thing.

[*P19] "Other things she said about the gun, ⁵ what [G.C.] may or may not have seen, I am not interested in that from this witness.

⁵ As pertains to Cuyahoga County Common Pleas Case No. CR-427460, the foster mother indicated to the court that G.C. may have witnessed appellant with a gun in her hand.

[*P20] "[CCDCFS] would have to take that up with somebody else, if it wishes, [**9] but I think it is important that people like that have an opportunity to be heard.

[*P21] "We don't have enough good foster parents as it is. I don't want to discourage somebody from being a foster parent because of the way they get treated coming to court."

[*P22] However noble the trial court's intentions, [HN3] a party is entitled to cross-examine a witness, whether that witness is called by another party or by the court. See, generally, *State v. Green* (1993), 66 Ohio St.3d 141, 147, 1993 Ohio 26, 609 N.E.2d 1253; see, also, Evid.R. 611(B) and 614(A). Although a trial court has discretion in controlling the mode and order of the interrogation of witnesses and, indeed, may call witnesses and interrogate them in an impartial manner, a trial judge's questions must be relevant and void of a suggestion of bias for one side over another. *Id.*; see, also, *Sandusky v. DeGidio* (1988), 51 Ohio App.3d 202, 204, 555 N.E.2d 680, citing *State v. Kay* (1967), 12 Ohio App.2d 38, 230 N.E.2d 652. In a bench trial where the trial judge acts as the trier-of-fact, however, a reviewing court will presume that the trial court acted impartially and considered only properly admitted evidence. *Columbus v. Guthmann* (1963), 175 Ohio St. 282, 194 N.E.2d 143, [*10] paragraph three of the syllabus; see, also, *State v. Post* (1987), 32 Ohio St.3d 380, 384, 513 N.E.2d 754, quoting *State v. White* (1968), 15 Ohio St.2d 146, 151, 239 N.E.2d 65. As such, the trial judge in a bench trial has more freedom in questioning witnesses. See *Klasa v. Rogers*, Cuyahoga App. No. 83374, 2004 Ohio 4490, at P32, citing *Lorenc v. Sciborowski* (Mar. 16, 1995), Cuyahoga App. No. 66945, 1995 Ohio App. LEXIS 951.

[*P23] In this case, the trial court expressly stated that it would only consider the testimony about how the children were doing in their current placement; in particular, their adjustment to the foster home and their physical well-being. The trial judge specifically stated that she would not consider any comments made by the foster mother regarding what G.C. may or may not have seen regarding appellant's possession of a gun. Although the better practice would have been to allow the parties to cross-examine the foster mother, under the facts of this case and for the limited purpose for which the testimony was offered, we cannot say that the trial court abused its discretion

[*P24] Appellant's second assignment of error is not [*11] well taken and is overruled.

[*P25] Admission of Appellant's Past Criminal Charges

[*P26] In her third assignment of error, appellant contends that the trial court erred when it admitted evidence of past criminal charges for which she was acquitted. Appellant argues that the evidence was prejudicial and should have been excluded.

[*P27] [HN4] It is well established that a trial court has broad discretion in the admission or exclusion of evidence, and so long as such discretion is exercised in line with the rules of procedure and evidence, its judgment will not be reversed absent a clear showing of an abuse of discretion with attendant material prejudice. *Rigby v. Lake Cty.* (1991), 58 Ohio St.3d 269, 271, 569 N.E.2d 1056. As discussed in Section II, we presume that the trial judge, when acting as the trier-of-fact as in this case, considered only "relevant, material and competent evidence" in reaching its judgment unless there exists evidence to the contrary. *Columbus v. Guthmann*, 175 Ohio St. 282, 194 N.E.2d 143, at paragraph three of the syllabus. As it did with its treatment of the foster mother's testimony, the trial court specifically stated that it was limiting its [*12] consideration of this evidence. In particular, the court stated that it would consider evidence of appellant's past criminal charges solely for the purpose of determining whether the children had been neglected or dependent. The court stated:

[*P28] "I certainly don't expect the court is going to be asked to retry the case where [appellant] was acquitted.

[*P29] "I do believe, however, that the existence of that case is relevant to the extent that it does provide evidence of whether or not the children have been neglected or dependent. [Appellant's] ability or [inability] * * * to care for the children, that is relevant.

[*P30] "As to the current [Lorain County] case, certainly I know the court is going to be asked to try that case.

[*P31] "I do think her current case is relevant for purposes of assessing whether or not the children are neglected and dependent, whether more or less incarcerations have made her unable to care for the children or whether the home environment is unsafe.

[*P32] "So I will allow some testimony about the fact that she has been incarcerated or is currently incarcerated."

[*P33] We see no error. CCDCFS alleged in [*13] its amended complaint that appellant was unable to care for her children because of her frequent arrests and resulting incarcerations. Whether she was eventually acquitted of those charges, or that she now sits in prison awaiting trial on subsequent charges, goes to the fact that she was or is now absent from the children for whom she is responsible for providing care and shelter. If she is absent from the children for whatever reason, she cannot provide the care necessary to insure their well-being.

[*P34] Appellant's third assignment of error is not well taken and is overruled.

[*P35] Award of Permanent Custody

[*P36] In her fourth assignment of error, appellant contends that the trial court's award of permanent custody to CCDCFS is not supported by the evidence.

[*P37] [HN5] A trial court's decision to award permanent custody will not be reversed on appeal unless it is against the manifest weight of the evidence. *In re Adoption of Lay* (1986), 25 Ohio St.3d 41, 42, 25 Ohio B. 66, 495 N.E.2d 9. Judgments supported by competent, credible evidence going to all the essential elements of the case will not be reversed as being against the manifest weight of the evidence. *State v. Schiebel* (1990), 55 Ohio St.3d 71, 74, 564 N.E.2d 54.

[**14] [HN6] Issues relating to the credibility of witnesses and the weight to be given the evidence are primarily for the trier of fact. *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80, 10 Ohio B. 408, 461 N.E.2d 1273.

[*P38] [HN7] A complainant under R.C. 2151.27 must demonstrate by clear and convincing evidence that a child is abused, neglected or dependent. See R.C. 2151.35(A)(1). Once so adjudicated, a trial court may commit that child to the permanent custody of a public children services agency after determining that the child cannot be placed with either of the child's parents within a reasonable time in accordance with R.C. 2151.414(E) and that such a commitment is in the best interest of the child in accordance with R.C. 2151.414(D). See R.C. 2151.353(A)(4).

[*P39] [HN8] In determining whether a child cannot be placed with either parent within a reasonable period of time, the court shall consider all relevant evidence. It must then determine, by clear and convincing evidence, that one or more of the factors contained in R.C. 2151.414(E) exists and enter a corresponding finding that the child cannot be placed with either parent. Although, in its journal entry, the court found subdivision (E)(14) [**15] relevant, the evidence before the court also indicates that subdivision (E)(13) is similarly relevant. [HN9] R.C. 2151.414(E)(14) pertains to a parent's inability to provide food, clothing, shelter and other basic necessities for the child, while subdivision (E)(13) pertains to a parent's repeated incarcerations and the resulting inability to provide care for the child.

[*P40] [HN10] In determining the best interest of the child, R.C. 2151.414(D) provides a non-exhaustive list of factors that the court must consider. These include (1) the child's interaction and interrelationship with, among others, the child's parents, siblings, relatives and foster caregivers; (2) the child's wishes expressed directly or through a guardian ad litem; (3) the child's custodial history; (4) the child's need for legally secure permanent placement and if that type of placement can be obtained without granting permanent custody to CCDCFS; and (5) whether any factors listed in R.C. 2151.414(E)(7) to (11) apply. See R.C. 2151.414(D)(1) through (5).

[*P41] Appellant relies on the social worker's testimony to the effect that appellant made a "total turn-around" and an "amazing change" in her parenting skills, [**16] justifying CCDCFS's decision to request reunification in July 2002. It appears to be appellant's position that her repeated incarcerations are of no consequence because she has yet to be convicted of any the offenses for which she is charged.

[*P42] It is true that appellant was acquitted of the charges contained in Cuyahoga County Common Pleas Case No. CR-427460. Nonetheless, several other cases remain pending, including the charges contained in Lorain County Common Pleas Case Nos. 03CR063563 & 03CR063765. She remains incarcerated on those charges and has been for more than a year. Before her present incarceration, she was incarcerated from August 2002 through March 2003. She was again arrested in July 2002 for a week and a half, posted bond, and was rearrested in August 2003 on the charges for which she is presently incarcerated. Appellant has been incarcerated for approximately 20 of the past 24 months. Moreover, she still faces trial on the outstanding Cuyahoga County indictments previously mentioned.

[*P43] In awarding permanent custody to CCDCFS, the court stated:

[*P44] "I want the record also to be clear that this court did not consider [appellant] as being [**17] guilty of any of the matters that she is currently facing trial on, but notes that those cases do raise serious questions about [appellant's] ability to provide a safe and nurturing home for the children, and the time that she has been incarcerated because of alleged criminal activity and has been away from the children.

[*P45] "This certainly is a sad case because we have a very young mother and two very young children who need some stability in their life.

[*P46] "And I was particularly persuaded by the testimony about [G.C.] being confused as to what to call who. No four year old should be confused as to who their mother, aunt or friend is. That is really not the natural way things ought to go, that I have a teacher, mommy, daddy, foster mom and a social worker; my goodness at four years old.

[*P47] "So there is a need to have some permanency here, so permanent custody is granted. Emergency temporary custody is terminated."

[*P48] It is apparent to us from this excerpt that the court considered not only the children's need for a legally secure permanent placement, but also the children's relationship with their caregivers, including appellant, and their [*18] custodial history, before finding that permanent custody was in the children's best interests.

[*P49] The record reflects diligent efforts on the part of CCDCFS to avoid permanent custody. It is true that appellant, when not incarcerated, was able to demonstrate compliance with most of the recommendations made by CCDCFS, thereby justifying the agency's reunification efforts. Nonetheless, appellant's repeated incarcerations prevented her from being present with her children and providing the care they needed, thereby satisfying not only R.C. 2151.414(E)(13) but subdivision (E)(14) as well.

[*P50] The record also reflects diligent efforts on CCDCFS's part in attempting to place the children with appellant's relatives. The evidence indicated that there was either disinterest on the part of some or lack of follow-through with CCDCFS on the part of others.

[*P51] Because there existed competent, credible evidence supporting the court's decision to award permanent custody to CCDCFS, the court's decision was not against the manifest weight of the evidence.

[*P52] Appellant's fourth assignment of error is not well taken and is overruled.

[*P53] Failure to Continue [*19] Hearing

[*P54] In her fifth assignment of error, appellant contends that the trial court abused its discretion when it denied her request to continue the hearing until her attendance could be secured.

[*P55] [HN11] "The grant or denial of a continuance is a matter [that] is entrusted to the broad, sound discretion of the trial judge. An appellate court must not reverse the denial of a continuance unless there has been an abuse of discretion." *State v. Jones* (2001), 91 Ohio St.3d 335, 342, 2001 Ohio 57, 744 N.E.2d 1163, quoting *State v. Unger* (1981), 67 Ohio St.2d 65, 67, 423 N.E.2d 1078. The same is true of a court's decision to proceed with a permanent custody hearing without the presence of an incarcerated parent. *State ex rel. Vanderlaan v. Pollex* (1994), 96 Ohio App.3d 235, 236, 644 N.E.2d 1073.

[*P56] [HN12] Although an incarcerated individual does not have an absolute right to be present in a civil case in which he or she is a party, that same individual has "a fundamental right to care for and have custody of his or her own children," a right that is not lost "simply because the parent has lost temporary custody of the child to the state." *In re Sprague* (1996), 113 Ohio App.3d 274, 276, 680 N.E.2d 1041, [*20] citing *Santosky v. Kramer* (1982), 455 U.S. 745, 753, 102 S.Ct. 1388, 1394, 71 L. Ed. 2d 599, 606, and *Mancino v. Lakewood* (1987), 36 Ohio App. 3d 219, 523 N.E.2d 332.

[*P57] In determining whether parental due process rights in parental termination proceedings have been infringed, courts have employed the balancing test set forth in *Mathews v. Eldridge* (1976), 424 U.S. 319, 96 S. Ct. 893, 903, 47 L. Ed. 2d 18, 33-34. See *Sprague*, 113 Ohio App.3d at 276. Courts are to consider (1) the private interest affected; (2) the risk of erroneous deprivation and the probable value of additional safeguards; and (3) the governmental burden of additional procedural safeguards. *Id.* Considering these factors, the Ninth District Court of Appeals concluded that an incarcerated parent's right to due process is not violated when (1) that parent is represented by counsel at the hearing; (2) a full record of the proceedings is made; and (3) any testimony that the parent may wish to present could be presented by way of deposition. *In re Robert F.* (Aug. 20, 1997), 9th App. No. 18100, 1997 Ohio App. LEXIS 3746.

[*P58] Here, appellant [*21] was represented by counsel at all stages of the proceedings, including the adjudicatory/dispositional hearing, and a full record was made. Although not requested, additional testimony could have been submitted by way of deposition. We acknowledge that an important fundamental right is involved. This right, however, needs to be balanced against the burden of additional procedural safeguards.

[*P59] The court was aware that, at the time of the hearing, appellant was being held without bond in Lorain County on very serious charges. The risk of transport, assuming it would be possible under the circumstances, balanced against the fact that appellant was represented by counsel, militates against a finding that the trial court violated appellant's due process rights and abused its discretion when it denied her request for a continuance and conducted the adjudicatory/dispositional hearing in her absence.⁶

6 Indeed, appellant's counsel acknowledged that there existed "some security issues" and that appellant "did not anticipate being transported," whereupon appellant gave her counsel authority to proceed in her absence.

[22] [*P60]** Appellant's fifth assignment of error is not well taken and is overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal. It is ordered that a special mandate issue out of this court directing the Cuyahoga County Common Pleas Court, Juvenile Division, to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

TIMOTHY E. McMONAGLE

JUDGE

PATRICIA A. BLACKMON, P.J., CONCURS

FRANK D. CELEBREZZE, JR., J., CONCURS IN JUDGMENT ONLY

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per **[**23]** App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).

10 of 315 DOCUMENTS

IN RE HAYES.

No. 96-526

SUPREME COURT OF OHIO

79 Ohio St. 3d 46; 679 N.E.2d 680; 1997 Ohio LEXIS 1192

March 18, 1997, Submitted

June 18, 1997, Decided

PRIOR HISTORY: [***1] APPEAL from the Court of Appeals for Hancock County, No. 5-95-19.

On October 15, 1993, Richard Hayes was adjudicated a dependent child, and was placed under protective supervision by appellant, Hancock County Department of Human Services, Children's Protective Services Unit ("CPSU"). Approximately one month later, on November 19, 1993, Richard was placed in the temporary custody of the CPSU, after the Court of Common Pleas of Hancock County determined by clear and convincing evidence that the mother, appellee Rachelle Hayes Sparks, was not complying with the terms and objectives of the case plan ordered when Richard was initially placed under protective supervision. Specifically, the court found that the mother had failed to attend mental health counseling, failed to provide adequate parental supervision, and continued to display violent tendencies towards Richard.

Richard remained in the CPSU's temporary custody until May 16, 1994, when he was returned to his mother's custody pursuant to court order. Though returned, Richard remained under the protective supervision of the CPSU.

Approximately six months later, on November 23, 1994, Richard was again ordered removed from his mother's [***2] custody, since he exhibited a series of bruises of a suspicious nature. After a hearing held on November 30, 1994, Richard was placed in the emergency temporary custody of the CPSU.

Three days later, on December 2, 1994, the CPSU filed a motion for permanent custody of Richard. A permanent custody hearing was eventually held beginning on April 18, 1995. Prior to the hearing, the mother filed a motion to dismiss for failure to comply with the procedural requirements set forth in former R.C. 2151.413(A). According to the mother, the statute required the CPSU to have had continuing custody of Richard for at least six months before requesting permanent custody. The mother's motion was ultimately denied, as the trial court found that the statute did not require six months of current temporary custody. Instead, the court held that the statute required that only six months must have elapsed from the date a temporary custody order was issued, regardless of intervening changes in disposition. Because more than six months had passed since the November 1993 order, the court found that it was unnecessary for the agency to reacquire temporary custody before filing a motion for permanent custody. [***3] The trial judge ultimately granted the CPSU's motion for permanent custody of Richard.

On appeal, the Court of Appeals for Hancock County reversed the trial court's judgment granting permanent custody to the CPSU and remanded the cause. The appellate court determined that the CPSU had failed to comply with the procedures set forth in former R.C. 2151.413(A).

The cause is now before this court pursuant to the allowance of a discretionary appeal.

DISPOSITION: Judgment affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant Hancock County Department of Human Services, Children's Protective Services Unit (Ohio) (CPSU), sought review of a judgment of the Court of Appeals for Hancock County (Ohio), which

reversed the trial court's judgment granting permanent custody of a child to the CPSU and remanded the cause. The CPSU sought termination of the parental rights of appellee mother.

OVERVIEW: The child was adjudicated a dependent child and placed in the temporary custody of the CPSU. Seven months later, he was returned to his mother's custody. He was removed again from her custody because of suspicious onuses. The CPSU filed a motion for permanent custody, and the mother filed a motion to dismiss because the CPSU had not had custody of the child for six months as required by Ohio Rev. Code Ann. § 2151.413(A). The trial court denied the mother's motion, holding that only six months had to have elapsed from the date a temporary custody order was issued, regardless of intervening changes in disposition, and granted the motion for permanent custody. The court of appeals reversed the judgment because the CPSU failed to comply with § 2151.413(A). In affirming the judgment, the court held that the intent and purpose of § 2151.413(A) was for the CPSU to have had actual custody of a child for at least six months when it filed its motion for permanent custody because the requirement was a safeguard that allowed parents to rectify the problems before the finality of permanent custody, as parental termination was the family law equivalent of the death penalty in a criminal case.

OUTCOME: The court affirmed the court of appeals judgment, which reversed the trial court's judgment granting permanent custody of the child to the CPSU. The court remanded the cause.

CORE TERMS: custody, temporary, children services, legislative intent, succeeding, Ohio Laws Part, waiting period, right to raise, parental rights, pari materia, accomplished, permanently, supervision, protective, preceding, liberally, ambiguous, elapsed, odd, cure

LexisNexis(R) Headnotes

Family Law > Child Custody > General Overview

Family Law > Delinquency & Dependency > Dependency Proceedings

Family Law > Family Protection & Welfare > Children > General Overview

[HN1] Ohio Rev. Code Ann. § 2151.413(A) requires that a children services agency seeking permanent custody of a child must have had temporary custody of the child for at least six months immediately preceding the filing of a motion for permanent custody.

Family Law > Child Custody > General Overview

Family Law > Delinquency & Dependency > Dependency Proceedings

Family Law > Family Protection & Welfare > Children > General Overview

[HN2] Ohio Rev. Code Ann. § 2151.413(A) states that a children services agency that has been granted temporary custody of a child may make a motion for permanent custody if a period of at least six months has elapsed since the order of temporary custody was issued. 142 Ohio Laws, Part I, 237.

Family Law > Parental Duties & Rights > Termination of Rights > General Overview

Governments > Legislation > Interpretation

[HN3] Given the seriousness of permanently divesting a parent of the right to raise a child, the procedural requirements of Ohio Rev. Code Ann. § 2151.413(A) should be strictly construed.

Constitutional Law > Substantive Due Process > Privacy > General Overview

Family Law > Child Custody > General Overview

Family Law > Parental Duties & Rights > Termination of Rights > General Overview

[HN4] The right to raise a child is an "essential" and "basic" civil right. Furthermore, a parent's right to the custody of his or her child has been deemed "paramount." Permanent 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.

Governments > Legislation > Interpretation

Governments > Local Governments > Fire Departments

[HN5] In construing a statute, a court's primary concern is legislative intent. In determining legislative intent, the court first looks to the language in the statute and the purpose to be accomplished.

Family Law > Child Custody > Procedures

Family Law > Delinquency & Dependency > Dependency Proceedings

Family Law > Parental Duties & Rights > Termination of Rights > General Overview

[HN6] The six-month waiting requirement of Ohio Rev. Code Ann. § 2151.413(A) is a procedural safeguard imposed before the finality of permanent custody. Therefore, a children services agency should not be able to bypass the six-month temporary custody requirement before seeking permanent custody.

Governments > Legislation > Interpretation

[HN7] Statutes concerning the same subject matter must be construed in pari materia.

Family Law > Child Custody > Procedures

Family Law > Delinquency & Dependency > Dependency Proceedings

Family Law > Family Protection & Welfare > Children > General Overview

[HN8] Ohio Rev. Code Ann. § 2151.414(A) states that upon the filing of a motion pursuant to Ohio Rev. Code Ann. § 2151.413 for permanent custody of a child by a public children services agency or private child placing agency that has temporary custody of the child, the court shall schedule a hearing. 142 Ohio Laws, Part I, 238.

Family Law > Delinquency & Dependency > Dependency Proceedings

Family Law > Family Protection & Welfare > Children > General Overview

[HN9] Ohio Rev. Code Ann. § 2151.414(A), when read in pari materia with Ohio Rev. Code Ann. § 2151.413(A), indicates that the legislature intended that a children services agency have current temporary custody when moving for permanent custody under the latter statute. The use of the words "has custody" in Ohio Rev. Code Ann. § 2151.414(A) anticipates that the child is currently in the agency's temporary custody.

HEADNOTES

Juvenile law -- Former R.C. 2151.413(A), construed.

SYLLABUS

Former R.C. 2151.413(A) required that a children services agency seeking permanent custody of a child must have had temporary custody of the child for at least six months immediately preceding the filing of the motion for permanent custody. 142 Ohio Laws, Part I, 237.

COUNSEL: Robert A. Fry, Hancock County Prosecuting Attorney, and Jonathan P. Starn, Assistant Prosecuting Attorney, for appellant.

Brimley & Kostyo and John C. Filkins, for appellee.

JUDGES: MOYER, C.J., RESNICK and PFEIFER, JJ., concur. DOUGLAS, COOK and LUNDBERG STRATTON, JJ., dissent.

OPINION BY: FRANCIS E. SWEENEY, SR.

OPINION

[*47] [**682] FRANCIS E. SWEENEY, SR., J. This case concerns the interpretation [***4] of the six-month waiting period imposed by former R.C. 2151.413(A) on a children services agency seeking permanent custody of a child. Based on the intent of the legislation, we hold that former [HN1] R.C. 2151.413(A) required that a children services agency seeking permanent custody of a child must have had temporary custody of the child for at least six months immediately preceding the filing of the motion for permanent custody. Therefore, we affirm the judgment of the court of appeals.

[*48] Former [HN2] R.C. 2151.413(A) stated that a children services agency that has been granted temporary custody of a child may make a motion for permanent custody "if a period of at least six months has elapsed since the order of temporary custody was issued." 142 Ohio Laws, Part I, 237. In finding for the CPSU, the trial court held that even

though the CPSU had not had current custody of Richard for a continuous period of six months when the motion for permanent custody was filed, the fact that the CPSU had been granted temporary custody at one point more than six months earlier was sufficient to meet the six-month requirement. However, we believe that [HN3] given the seriousness of permanently divesting a parent of [***5] the right to raise a child, the procedural requirements of former R.C. 2151.413(A) should be strictly construed.

It is well recognized that [HN4] the right to raise a child is an "essential" and "basic" civil right. *In re Murray* (1990), 52 Ohio St. 3d 155, 157, 556 N.E.2d 1169, 1171, quoting *Stanley v. Illinois* (1972), 405 U.S. 645, 651, 92 S. Ct. 1208, 1212, 31 L. Ed. 2d 551, 558. Furthermore, a parent's right to the custody of his or her child has been deemed "paramount." *In re Perales* (1977), 52 Ohio St. 2d 89, 97, 6 Ohio Op. 3d 293, 297, 369 N.E.2d 1047, 1051-1052.

Permanent termination of parental [**683] rights has been described as "the family law equivalent of the death penalty in a criminal case." *In re Smith* (1991), 77 Ohio App. 3d 1, 16, 601 N.E.2d 45, 54. Therefore, parents "must be afforded every procedural and substantive protection the law allows." *Id.* With this in mind, we turn to the construction of former R.C. 2151.413(A).

[HN5] In construing a statute, a court's primary concern is legislative intent. *State ex rel. Solomon v. Police & Firemen's Disability & Pension Fund Bd. of Trustees* (1995), 72 Ohio St. 3d 62, 65, 647 N.E.2d 486, 488. "In determining legislative [***6] intent, the court first looks to the language in the statute and the purpose to be accomplished." *State v. S.R.* (1992), 63 Ohio St. 3d 590, 594-595, 589 N.E.2d 1319, 1323. In the instant case, the logical purpose for the six-month delay imposed upon a children services agency is to give parents an adequate opportunity to rectify the problems which initially forced the child into temporary custody. The procedures of agency interference are generally graduated in nature, often starting with protective supervision of the child at home, then removal and temporary custody, and ultimately permanent custody if warranted. See R.C. 2151.353. [HN6] The six-month waiting requirement of former R.C. 2151.413(A) was a procedural safeguard imposed before the finality of permanent custody. Therefore, an agency should not be able to bypass the six-month temporary custody requirement before seeking permanent custody.

Furthermore, [HN7] statutes concerning the same subject matter must be construed *in pari materia*. *United Tel. Co. v. Limbach* (1994), 71 Ohio St. 3d 369, 372, 643 N.E.2d 1129, 1131. In the present case, the language of former R.C. 2151.414(A) [*49] reinforces our holding that the intent of the legislature [***7] was to require a children services agency to have current custody for six months before seeking permanent custody. Former [HN8] R.C. 2151.414(A) stated that "upon the filing of a motion pursuant to section 2151.413 of the Revised Code for permanent custody of a child by a public children services agency or private child placing agency that *has* temporary custody of the child, the court shall schedule a hearing." (Emphasis added.) 142 Ohio Laws, Part I, 238.

Former [HN9] R.C. 2151.414(A), when read *in pari materia* with former 2151.413(A), would indicate that the legislature intended that the children services agency have current temporary custody when moving for permanent custody under the latter statute. *In re Miller* (1995), 101 Ohio App. 3d 199, 655 N.E.2d 252. The use of the words "has custody" in former R.C. 2151.414(A) anticipated that the child was currently in the agency's temporary custody.

The procedural mandates set forth by the legislature in former R.C. 2151.413(A) allowed parents a final opportunity to redeem past indiscretions and conform to the requirements for ultimate reunification with their children. A children services agency should not be allowed to deprive parents [***8] of this opportunity. Based on the purpose and intent of the legislation, and given the gravity of permanently terminating parental rights, we conclude that the CPSU was required to have had current custody of Richard for at least six months at the time of its motion for permanent custody on December 2, 1994. Since the CPSU failed to comply with this requirement, the trial court had no authority to grant the motion for permanent custody. Therefore, we affirm the judgment of the court of appeals.

Judgment affirmed.

MOYER, C.J., RESNICK and PFEIFER, JJ., concur.

DOUGLAS, COOK and LUNDBERG STRATTON, JJ., dissent.

DISSENT BY: COOK

DISSENT

COOK, J., dissenting. Because I would find that the statutes here do not require that Richard Hayes be committed to foster care for a second six-month stint in order for CPSU to have standing to file for permanent custody, I respectfully dissent.

Like the majority, I focus on the legislative intent in interpreting former R.C. 2151.413, but I reach a contrary conclusion. R.C. 2151.01(A) states:

[**684] "The sections of Chapter 2151. of the Revised Code * * * shall be liberally interpreted and construed so as to * * * :

" * * * provide for the care, protection, [***9] and mental and physical development of children * * * ."

[*50] With this direction from the General Assembly, we must liberally construe the statutes in favor of the interests of the child. The majority's concentration on the parents' interests is, therefore, at cross-purposes with the stated intent of the General Assembly.

I also differ with the majority's reading of the statutes at issue. Former R.C. 2151.413(A) required only that "six months have elapsed," a meaning imparted plainly by the text of that section. The statute, therefore, is not ambiguous. Thus, the court has no reason to resort to R.C. 2151.414 for an enlarged meaning. The language employed by the General Assembly to establish a waiting period could have explicitly required that the six months of temporary custody immediately precede the filing for permanent custody. It does not.

As textual support for its holding, the majority relies solely on an *implication* supplied by a modifying phrase in the succeeding code section, former R.C. 2151.414(A). The choice of the word "has" in the phrase "agency that has temporary custody," says the majority, justifies adding the requirement of having *current* temporary custody [***10] to former R.C. 2151.413.

Former R.C. 2151.414 outlined procedures for hearing a request under former R.C. 2151.413. It would be odd for one section of the Revised Code that established filing criteria to draw its *substantive meaning* from a succeeding section. It would be even more peculiar if that succeeding section is concerned with *procedures* for hearing a request under the preceding section. And oddest of all would be that all this is accomplished not explicitly, but rather by implication. The Ohio Revised Code is not so odd.

Even if one were to agree that former R.C. 2151.413(A) is ambiguous, reference to former R.C. 2151.414 is unavailing because the phrase "that has temporary custody" as used there simply delimits *which agency*.

I conclude, therefore, that the six-month delay requirement, meant to give parents the opportunity to cure a situation requiring agency intervention, should not be extended where, as here, a parent's failure to cure becomes apparent following the child's return to the parental home under protective supervision. The statutory language does not explicitly provide such an extension, and, consequently, the statutorily mandated construction [***11] favoring the child's welfare and earliest possible eligibility for adoption should prevail.

DOUGLAS and LUNDBERG STRATTON, JJ., concur in the foregoing dissenting opinion.

54 of 54 DOCUMENTS

IN RE M., NEGLECTED CHILDREN

Nos. 261485, 267737

COURT OF COMMON PLEAS OF CUYAHOGA COUNTY, JUVENILE COURT
DIVISION, STATE OF OHIO

65 Ohio Misc. 7; 416 N.E.2d 669; 1979 Ohio Misc. LEXIS 88; 18 Ohio Op. 3d 283

August 14, 1979, Decided

DISPOSITION: [**1] *Judgment accordingly.*

CORE TERMS: custody, psychological, mother's home, foster parents, caseworker, visitation, placement, disturbed, psychologist, clinician's, foster, twins, foster homes, emotional, siblings, neglect, fault, love, natural parent, terminated, terminate, staff, parental care, recommendation, neglected, affection, parental, habits, temporary, county welfare department

HEADNOTES

Juvenile Court -- Neglected Children -- Termination of social agency's custody -- Reunification of family -- Psychological parent theory -- Applicability.

SYLLABUS

1. Where children are adjudged neglected under R. C. 2151.03 and committed to the temporary custody of a social agency, the agency should plan for the rehabilitation and reunification of the children with their family and the court should insist that the agency make a conscientious effort to bring the plan to fruition before considering the alternative of adoptive placement.
2. Where there are visitations and an ongoing relationship between children in foster home placement and their mother, the likelihood that the foster parents will become the "psychological parents" of these children is quite negligible.
3. Children of a family have a right to the companionship of their siblings. The role of the state should be to do everything that can be done to keep the children of a family together so that they may enjoy the advantages of mutual companionship, love and protection.

COUNSEL: *Mr. Charles Cohen*, for County Welfare Dept., Social Services.

Mr. George L. Nyerges, for mother.

[**2] *Ms. Margaret Terry*, guardian ad litem for the children.

JUDGES: WHITLATCH, J.

OPINION BY: WHITLATCH

OPINION

[*670] This matter comes before the court on the motion of the Cuyahoga County Welfare Department - Social Services, hereinafter referred to as the agency, to terminate its custody of the children herein and to return the children to the custody of their mother. The court's experience in this case demonstrates the need for a comprehensive plan de-

signed to rehabilitate and reunify the family when children are removed from their home and committed to the temporary custody of a social agency. Our experience has further demonstrated the correlative necessity of the court's insistence that a conscientious effort be made by the social agency to bring the plan to fruition before considering placing the children for adoption. The courtroom litigation of the issues involved in these cases took place many months ago. Our ruling on the motion now before us represents the successful culmination of the plan to rehabilitate and reunify the family. While it was a motion of the mother to return the two youngest children, Judy and Willard, to her care and a counter motion [**3] of the county welfare department for permanent custody of these two children for the purpose of adoption that last brought this matter before the court, it is essential to the understanding of this matter to briefly review not only the case of Judy and Willard but also the case of their three siblings, Robert, Julia and Eugena.

Judy M. hereinafter referred to as the mother, is the mother of five children: Robert, born 10-30-64, and Julia, born 1-22-67, are the children of her deceased husband; Eugena, born 8-2-68, and twins, Willard and Judy, born 11-16-70, were fathered by a Mr. W. with whom the mother cohabited for several years and whose existing valid marriage to another woman prevented the consummation of a common-law marriage between him and the mother.

Robert, Julia and Eugena were adjudged neglected children by this court on 3-27-70 in cause No. 261485, and the infant twins, Willard and Judy, were adjudged neglected children in cause No. 267737 on 12-18-70; both actions were brought under R. C. 2151.03. All five children were committed to the temporary custody of the agency.

In brief, the neglect in both actions was occasioned by repeated, brutal, physical assaults on [**4] the mother by Mr. W. in the presence of the children. Efforts to break up this pathological relationship and establish the mother and the children in a household separate from Mr. W. were unavailing, necessitating the placement of the children in foster homes.

It is noteworthy that the mother did not physically neglect the children or abuse them in any way. The children were kept clean, adequately fed and clothed while in her care. The mother's housekeeping standards have always been quite satisfactory. Had it not been for the repeated beatings of the mother by Mr. W., causing great emotional trauma to the children, and in one instance resulting in the mother being placed temporarily in a psychiatric hospital, it is unlikely that the children would have been removed from her custody. While the mother experienced a very deprived childhood and was at one time placed in the Columbus State School for the Retarded, the court psychologist found that her I.Q. was 85 when adjusted for lack of education.

[*671] Several hearings were had in 1973 and 1974 on motions of the mother to have the children returned to her care. Mr. W. had been imprisoned in the house of correction [**5] but escaped therefrom and there was some evidence that he and the mother had resumed their relationship. In June of 1974 the court became convinced that the mother was no longer consorting with Mr. W. and ordered Robert, the oldest boy, returned to the home. At the request of the court, a psychologist at Beechbrook, a residential treatment center for disturbed children, where Eugena was in placement, undertook the assignment of improving the relationship between Julia and Eugena and their mother. Prior to this the agency had favored these children remaining with their foster parents. The psychologist's therapy sessions with the mother, Julia and Eugena, resulted in the return of the children to the mother's home.

As we considered the motions in relation to the twins, Willard and Judy, (the agency's for permanent custody and the mother's to terminate the agency's custody) we, of course, took into account the experience of the three children who had been returned to the mother's home. Robert had been there for almost three years, Julia for eighteen months and Eugena for fourteen months. All three children were reported as doing remarkably well at home, in school and in the community. [**6] Their school records were outstanding: Robert and Julia received practically all A's with corresponding high marks in "personal and social growth." Eugena, who was formerly so disturbed as to necessitate her placement in a treatment facility at a considerable cost to the county was enrolled in a learning disability class in the Cleveland public school system where she showed vast improvement. The comment of her teacher is worth noting: "Gena has matured and cooperated since school began. She seems to be a *much happier child* and it is reflected in her progress in her academic work." (Emphasis added.)

Under the general policy of the agency, the successful return of the three eldest children to the mother's home would have prompted the agency to work toward the early return to her home of the children remaining in placement. However, in this case the agency made no movement to return the twins, Willard and Judy, to the mother's care. Whereupon counsel for the mother filed the motion to terminate the custody by the agency of Willard and Judy and the agency countered by filing the motion for the permanent custody of the children. The mother naturally asserted that [**7] by her exemplary care of the three eldest children she had demonstrated that she was well able to care for the twins. The agency contended that while the mother could adequately care for three of her children, she could not cope with the five

of them. The agency conceded that the three older children were receiving good care in their mother's home and were presenting no problems, but contended that these children had been with the mother in their early years and therefore recognized and accepted her in the maternal role. The agency claimed that Judy and Willard, who had been in foster home placement since they were a month old, would not be able to accept the mother in her natural role and that the children would undergo severe emotional trauma in any attempt to transfer them from the foster home to the mother's home.

It was the contention of the agency and the guardian ad litem that the foster parents had become the "psychological parents" of Willard and Judy. The agency supported its contention with the expert testimony of caseworkers, a psychologist and a psychiatrist. The term "psychological parent" has gained considerable currency in the social work community since the [**8] publication in 1973 of the book *Beyond the Best Interests of the Child*, by Goldstein, Freud and Solnit (McMillan Publishing Company). The socio-psychological theory of the book is summarized in *Montgomery Co. Dept. of Soc. Services v. Sanders* (1978), 38 Md. App. 406, 412, 381 A. 2d 1154, as follows:

"Under the 'psychological parenthood' principle, separation from the natural parent for a sufficient length of time saps the bond of love and affection between child [**672] and parent while simultaneously forging a strong psychological link which joins the child to a surrogate parent. Under those given circumstances, the surrogate parent becomes the 'psychological parent,' the one to whom the child turns for security, love, and a sense of emotional well-being. After the shift of allegiance by the child to the 'psychological parent' is completed, a return to the biological parent would, theoretically, result in severe emotional trauma, detrimental to the child's best interests."

This book does not present a new concept to this court, on several occasions we have resolved custody matters involving "psychological parents." In our opinion, psychological parenthood [**9] comes about when the child is with the same foster parents to the complete or almost complete exclusion of the natural parent or parents in the early years of childhood. However, the presence of and visitations by the natural parent create a discontinuity in the close attachment of the child and the foster parent which prevent the psychological parent and child relationship from developing. As long as the natural parents are maintaining a relationship with the child, the foster parents do not think of themselves as the child's parents. Even though they are fond of the child, psychologically they do not allow themselves to believe that the foster child is theirs. This must be particularly true of foster parents such as Judy's and Willard's who have had other foster children in their care from whom they have been later separated. The visitations by the parent, likewise, prevents the child from forging a strong psychological bond to the foster parents.

In the instant case the mother had visited with the children ever since their birth and had done so in spite of visitation arrangements which left much to be desired. Willard and Judy were in a foster home in Madison, Ohio, and [**10] transporting the children to and from Cleveland for the visits presented great problems for agency staff, frequently resulting in cancellation and postponement of visitations. For example, a Christmas visit was cancelled after the mother and the three children at home had made great preparations by way of a Christmas tree and gifts. Recognizing that there is a paucity of foster homes the court does not fault the agency for having placed the children some sixty miles from the mother's home. However, we believe that the logistical and staff problems created by a distant placement are not valid reasons for denying the mother regular and frequent visitations with her children. The agency was required to find the staff and means of transportation to enable it to carry out its responsibilities.

Prior to court's specific instructions for bi-monthly visits in the mother's home, the visitations had been at the agency's office. All visits both in the office and in the home had been under the personal surveillance of the agency's caseworker. There appeared to be no good reason for supervising the visits and it seemed to the court that the very presence of the caseworker stifled [**11] the development of a normal parent and child relationship. The agency caseworker reported that Judy and Willard disliked visiting with the mother and were usually very disturbed by the visits. Interestingly enough, we had these same reports from the agency as to the visits of Julia and Eugena before they were returned to the mother. The court was inclined to believe that it was the infrequency of the visits and the fact that the mother was uncomfortable in the caseworker's presence that militated against satisfactory visitations.

Everything considered, it appeared that the agency had decided that Judy and Willard were to be placed for adoption long before it filed its motion for permanent custody. It was the agency's plan to place Judy and Willard for adoption with their foster parents. From the agency's reports these were estimable people who had given the children good parental care. However, in addition to our conviction that given the proper visitation arrangements these children could be integrated into their own family, there was a significant consideration which weighed heavily against adoption by the foster parents. The foster [**673] mother had obtained information [**12] to the effect that the natural mother was "severely disturbed" and that one child, Eugena, was brain damaged and had emotional problems. While the mother

has intellectual limitations, she is not severely disturbed and Eugena, probably a learning disabled child, was neither disturbed nor brain damaged and was thriving in her mother's care. The court agrees with the clinical psychologist, who examined Judy at University Hospital, who concluded that the foster mother's misinformation as to Judy's family lowered her expectations for Judy or created the expectation that Judy would in some way be disturbed or deviant. Such expectations would not augur well for a successful parent and child relationship.

A cogent reason for rejecting any plan for adoptive placement for Judy and Willard was that this would entail the separation of these children from their siblings, probably forever. Judy and Willard and the three children in the mother's home have a right to the companionship of each other. A child should grow up as a part of its natural family and the role of the state should be to do everything that can be done to support the family and hold it together. Reddick: Sibling [**13] Rights in Legal Decisions Affecting Children, 25 Juvenile Justice, No. 3, November 1974. Children of a family should be kept together "so that they may grow up together and enjoy the advantages of mutual companionship, love and protection." *Brashear v. Brashear* (Idaho 1951), 228 P. 2d 243. Children should not be separated from each other except for a most compelling cause. *Arons v. Arons*, (Fla. 1957), 94 So. 2d 849; 27B Corpus Juris Secundum, Section 308. In *Howard v. Howard* (1948), 307 Ky. 452, 458, 211 S.W. 2d 412, we find the following: "[C]hildren of the same parentage should live together as members of the same family and not be separated whereby their natural affection for each other becomes dimmed and sometimes entirely fades away, thereby losing the benefits of constant association as nature intended."

The court does not lightly brush aside the recommendation of psychologists and psychiatrists. However, we are much aware of the dependence of these clinicians upon the reports of the social workers assigned to the case by the agency which is one of the adversaries in this custody dispute. Further, as we said in *In re Larry and Scott H.* [**14] (1963), 92 Ohio Law Abs. 436, 442, 192 N.E. 2d 683:

"The distinction between the role of the judge and the clinician must not be blurred. It is the clinician's job to make findings and recommendations; it is the judge's job to make the decision after careful consideration of the clinical reports and the other evidence in the case."

The basis for the neglect complaint as to Willard and Judy was that they lacked proper parental care because of the "faults and habits" of the mother, primarily her pathological relationship with Mr. W. These faults and habits no longer existed and certainly the fact that *these* particular "faults and habits" once existed did not render the mother incapable of giving the children proper parental care. *In re Hock* (1947), 55 Ohio Law Abs. 73. As is said *In re Burkhart* (1968), 15 Ohio Misc. 170, 174, 239 N.E. 2d 772, where a child has been removed from the temporary care of its parents because of neglect or inability to discharge legal responsibility the child should be returned to parental custody if the parents and their circumstances change sufficiently to warrant the same.

A conclusion that the mother was not capable of caring [**15] for Willard and Judy would have required the court to disregard the excellent care she was giving Robert, Julia and Eugena and her persistence in continuing her maternal relationship with Willard and Judy. Such a conclusion would be contrary to common sense and devoid of humanity. A succinct statement of the state's concern regarding the protection of parental rights is contained in *Williams v. Williams* (1975), 44 Ohio St. 2d 28, 29:

"In our society, the parent-child relationship is special, invoking strong feelings of [**674] love and affection. Therefore, the possible severance of that bond * * * must be guarded by procedures which give effect to the rights of * * * parents. * * *"

In light of the foregoing the court was in disagreement with the caseworkers, the clinicians employed by the agency and the guardian ad litem for the children, who argued that it would be in the best interest of Judy and Willard that the mother's parental rights be terminated so that Judy and Willard could be placed for adoption. Neither did we agree with counsel for the mother that the agency's custody should be terminated and the children returned forthwith to the mother. Accordingly, [**16] we denied both the mother's motion to terminate the custody of the agency and the agency's motion for permanent custody. At our suggestion, the foster home caseworker, who so strongly favored adoption by the foster parents, withdrew from the case and Willard and Judy were assigned to the caseworker in charge of the three children in the mother's home. We ordered that the children visit in the mother's home at least every two weeks for several hours at a time, that these visits not be under the surveillance of the caseworker and that arrangements be made after several such visits for Judy and Willard to have overnight visits with their mother and their siblings. These visitation arrangements were successfully carried out. Our purpose of reintegrating Judy and Willard into the mother's family was accomplished and Willard and Judy were placed in the mother's home within a few months. Al-

though all the children were now in the physical custody of the mother, they remained in the legal custody of the agency with the agency providing the supervision and supportive services.

Judy and Willard have now been in their mother's home for 18 months. The agency's social worker in [**17] support of the motion for the termination of the agency's custody of all five children and their return to the legal custody of the mother reported as follows:

"The children maintain good attendance records at school and all of them are doing well scholastically. Despite the difficulties involved in raising five children, Mrs. M. has demonstrated her ability to successfully care for these children. Her housekeeping standards are very good. She has also shown good ability to successfully manage on a limited income of ADC and Social Security. The mother is cooperative with the schools and makes appropriate contact with the school staff as needed. The children seem to have a good relationship with each other. Robert is particularly helpful to the mother. He sets a good example of behavior for the younger children to follow. The mother has demonstrated good ability to care for her children since they have returned to her home. She has provided appropriate physical care for the children and the family relationships appear to be good. She has been able to use casework support appropriately and is providing a stable home for her children.

"I recommend that custody of Robert, [**18] Julia, Eugena, Willard, and Judy M. be terminated to their mother with whom they reside."

We are pleased to accept the recommendation of the caseworker who has rendered such valuable service to this family. That we arrived at this happy ending is not attributable to the unusual perspicacity of the court. Actually, the mother's care of the three eldest children made the outcome of this case easily predictable. While the "psychological parent theory" is not without merit, it had no application to the case *sub judice*. The too ready acceptance by the agency's caseworkers and clinicians of the proposition that the foster parents had become the "psychological parents" of Willard and Judy deterred the agency from providing the positive program of help and services which was instituted upon the order of the court and which brought about the reunification of the family.

It is ordered by the court that the custody of the Cuyahoga County Welfare Department - Social Services of Robert, Julia, Eugena, Willard and Judy M. be terminated and that the aforesaid children be committed to the legal custody of their mother.

Judgment accordingly.

1 of 1 DOCUMENT

IN RE: EDWARD WILKINSON

C.A., CASE No. 15175

COURT OF APPEALS OF OHIO, SECOND APPELLATE DISTRICT,
MONTGOMERY COUNTY

1996 Ohio App. LEXIS 1091

March 8, 1996, Rendered

NOTICE:

[*1] THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION.

PRIOR HISTORY: T.C. CASE NO. JC 93 3238.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant agency challenged a judgment of the trial court (Ohio), which denied the agency's motion for permanent custody of appellee parent's minor child and continued its orders for the child's temporary custody with the agency to allow it to complete its investigation of the child's relatives as candidates for permanent placement and custody.

OVERVIEW: The agency requested an order pursuant to Ohio Rev. Code Ann. § 2151.415(A)(1) permanently terminating the parental rights of the parents. On appeal, the agency argued that it met its statutory burden of presenting clear and convincing evidence that permanent custody was in the best interest of the child and thus, the trial court erred in denying permanent custody. The agency also contended that the trial court erred in granting two extensions of temporary custody on its own motion without the clear and convincing evidence required by Ohio Rev. Code Ann. § 2151.415(D)(1). In dismissing the appeal, the court held that the trial court's order was no different from any other temporary order that continued the status quo until the claim for relief could be determined. The court found that such orders necessarily decided legal issues, but they were not final, appealable orders. The court determined that a trial court might err in failing to comply with a findings requirement attached to a statute pertaining to a temporary order, but that error did not make the order final and appealable or deprive the court of the power to enter it.

OUTCOME: The court dismissed the appeal.

CORE TERMS: custody, final order, assignments of error, substantial right, final judgments, temporary, convincing evidence, minor child, special proceeding, appealable orders, interlocutory

LexisNexis(R) Headnotes

Civil Procedure > Judgments > Relief From Judgment > Motions for New Trials

Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

[HN1] The jurisdiction of an appellate court on review is limited to final judgments and orders. Ohio Const. art. IV, § 3(B)(2). "Final Orders" are defined by Ohio Rev. Code Ann. § 2505.02 as an order that affects a substantial right in an action which in effect determines the action and prevents a judgment, an order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment, or an order that vacates or sets aside a

judgment or grants a new trial is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial.

Civil Procedure > Judgments > Relief From Judgment > General Overview
Evidence > Procedural Considerations > Burdens of Proof > Clear & Convincing Proof
Family Law > Family Protection & Welfare > Children > General Overview

[HN2] Ohio. Rev. Code Ann. § 2151 authorizes the juvenile court to transfer custody of a minor child from the biological parents to other, suitable persons for certain causes, which must be shown by clear and convincing evidence. The proceeding is not one recognized at common law or in equity. Therefore, it is a "special proceeding" for purposes of Ohio. Rev. Code Ann. § 2505.02. An order made in the proceeding is a final order so long as it affects a substantial right. Whether an order affects a substantial right is for purposes of § 2505.02 is determined not only by the nature of the right concerned but also by how it is affected by the order. If the ultimate relief requested in the action is yet to be determined and the facts needed to analyze the issues presented by the order will be unchanged by the ultimate disposition of the underlying action, there is an effective mode of relief after final judgment. Then, the order is an interlocutory one in the progress of the case, which cannot be made the foundation of an independent proceeding in error, but is properly reviewed on error promulgated to the final judgment.

Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule
Criminal Law & Procedure > Appeals > Reviewability > General Overview
Family Law > Family Protection & Welfare > Children > General Overview

[HN3] The requirement imposed by Ohio. Rev. Code Ann. § 2151.415(d)(1) that the court must issue findings of fact in support of a temporary order extending custody does not make an order issued without such findings a final order. An initial order temporarily committing a child to the custody of an agency upon a finding of dependency or neglect is a final order. However, a court's order is a temporary order where it continues the status quo until the claim for relief can be determined. Such orders necessarily decide legal issues, but they are not final, appealable orders. They are, instead, interlocutory orders entered in aid of the court's exercise of its jurisdiction, and are within the inherent power of the court to issue. The court may err in failing to comply with a findings requirement attached to a statute pertaining to such an order, but that error does not make the order final and appealable or deprive the court of the power to enter it. More importantly, any such error is prosecutable upon the final determination of the claim for relief unless that determination renders the error moot.

COUNSEL: Mathias H. Heck, Jr., Pros. Attorney, Deborah A. Millum, Asst. Pros. Attorney, Juvenile Division, 3304 N. Main Street, Cottage 1, Dayton, Ohio 45405, Attorney for Appellant.

Robert N. Berger, 111 W. First Street, Suite 518, Dayton, Ohio 45402, Attorney for Appellee Lisa Wilkinson.

Douglas Herdman, 333 W. First Street, Dayton, Ohio 45402, Attorney for Appellee Anderson Walls.

JUDGES: GRADY, J., WOLFF, J., and FAIN, J., concur.

OPINION BY: GRADY

OPINION

OPINION

GRADY, J.

This is an appeal brought by Montgomery County Children's Services from an order of the trial court denying the agency's motion for permanent custody of a minor child and continuing its orders for the child's temporary custody with the agency to allow it to complete its investigation of the child's relatives as candidates for permanent placement and custody. The Appellees are Lisa Wilkinson, the child's mother, and Anderson Walls, his father.

Appellant Children's Services presents three assignments of error, which state:

FIRST ASSIGNMENT OF ERROR

THE [*2] AGENCY MET ITS STATUTORY BURDEN OF PRESENTING CLEAR AND CONVINCING EVIDENCE THAT PERMANENT CUSTODY IS IN THE BEST INTEREST OF EDWARD WILKINSON AND THUS, THE COURT ERRED IN DENYING PERMANENT CUSTODY.

SECOND ASSIGNMENT OF ERROR

THE COURT ERRED IN DENYING THE AGENCY'S MOTION FOR PERMANENT CUSTODY IN ORDER TO HAVE THE AGENCY REINVESTIGATE A NON-RELATIVE WHO DID NOT FILE A MOTION REQUESTING LEGAL CUSTODY PRIOR TO THE DISPOSITIONAL HEARING.

THIRD ASSIGNMENT OF ERROR

THE COURT ERRED IN GRANTING TWO EXTENSIONS OF TEMPORARY CUSTODY ON ITS OWN MOTION WITHOUT THE CLEAR AND CONVINCING EVIDENCE REQUIRED BY OHIO REVISED CODE 2151.415(D)(1).

[HN1] The jurisdiction of this court on review is limited to final judgments and orders. Section 3(B)(2), Article IV, Ohio Constitution. *General Acc. Ins. Co. v. Insurance Co. of North America* (1989) 44 Ohio St. 3d 17, 540 N.E.2d 266.

"Final Orders" are defined by R.C. 2505.02:

An order that affects a substantial right in an action which in effect determines the action and prevents a judgment, an order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment, or an order [*3] that vacates or sets aside a judgment or grants a new trial is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial.

This proceeding was brought pursuant to R.C. Chp. 2151, [HN2] which authorizes the juvenile court to transfer custody of a minor child from the biological parents to other, suitable persons for certain causes, which must be shown by clear and convincing evidence. The proceeding is not one recognized at common law or in equity. Therefore, it is a "special proceeding" for purposes of R.C. 2505.02. *Polikoff v. Adam* (1993), 67 Ohio St. 3d 100, 616 N.E.2d 213. An order made in the proceeding is a final order so long as it affects a "substantial right."

Whether an order "affects" a substantial right is for purposes of R.C. 2505.02 is determined not only by the nature of the right concerned but also by how it is affected by the order. If the ultimate relief requested in the action is yet to be determined and the facts needed to analyze the issues presented by the order will be unchanged by the ultimate disposition of the underlying action, there is an effective mode of relief after final judgment. Then, the order is "an interlocutory [*4] one in the progress of the case, which (can) not be made the foundation of an independent proceeding in error, but (is) properly reviewed on error promulgated to the final judgment." *Id.*, at 105, quoting *Snell v. Cincinnati Street Ry. Co.* (1899), 60 Ohio St. 256, at 272, 54 N.E. 270.

Here, Appellant Children's Services has requested an order pursuant to R.C. 2151.415(A)(1) permanently terminating the parental rights of the Appellees. If that relief is granted, the Appellant may, but is unlikely to, challenge the sufficiency of the evidence before the trial court. If that relief is denied, or if Children's Services objects to the person to whom custody is otherwise awarded, the sufficiency of the evidence before the trial court is subject to challenge. Therefore, the trial court's order is properly reviewable on error prosecuted to final judgment, and the order is not a "final order" for purposes of R.C. 2505.02 because it does not affect a substantial right.

With respect to the third assignment of error in particular, the requirement imposed by R.C. 2151.415(D)(1) [HN3] that the court must issue findings of fact in support of a temporary order extending custody in this fashion does [*5] not make an order issued without such findings a final order. An initial order temporarily committing a child to the custody of an agency upon a finding of dependency or neglect is a final order. *In re Murray* (1990), 52 Ohio St. 3d 155, 556 N.E.2d 1169. However, the court's order in this instance is no different from any other "temporary order" that continues the status quo until the claim for relief can be determined. Such orders necessarily decide legal issues, but they are not final, appealable orders. They are, instead, interlocutory orders entered in aid of the court's exercise of its jurisdiction, and are within the inherent power of the court to issue. The court may err in failing to comply with a findings requirement attached to a statute pertaining to such an order, but that error does not make the order final and appealable or deprive the court of the power to enter it. More importantly, any such error is prosecutable upon the final determination of the claim for relief unless that determination renders the error moot.

Because the order from which this appeal is taken is not a final, appealable order, this appeal must be Dismissed.
WOLFF, J. and FAIN. [*6] J., concur.

1 of 2 DOCUMENTS

MATY, ADMINISTRATRIX, v. GRASELLI CHEMICAL CO.

No. 378

SUPREME COURT OF THE UNITED STATES

303 U.S. 197; 58 S. Ct. 507; 82 L. Ed. 745; 1938 U.S. LEXIS 290

February 3, 1938, Argued
February 14, 1938, Decided**PRIOR HISTORY:** CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

CERTIORARI, 302 U.S. 663, to review the reversal of a judgment for the defendant, the present respondent, in an action for personal injuries begun in a New Jersey state court and removed to the federal district court. Upon the death of the plaintiff, the present petitioner was substituted, as administratrix, by the court below.

DISPOSITION: 89 F.2d 456, reversed.

CASE SUMMARY:

PROCEDURAL POSTURE: Petitioner administratrix sought review of a judgment of the Circuit Court of Appeals for the Third Circuit, which affirmed a decision of the district court holding that the amendment to the complaint set out a new cause of action and was barred by the New Jersey statute of limitations. The administratrix had sued respondent employer for personal injuries.

OVERVIEW: The employee was injured while working in the employer's chemical plant. He sued the employer. More than two years after the date of his injuries, he amended his complaint. The amendment broadened the description of the place of employment where the injuries were sustained. The case was removed from state court to federal court based on diversity of citizenship, and judgment was entered for the employer. The court of appeals affirmed, holding the statute of limitations barred the amended complaint because it set out a new cause of action. The administratrix was substituted as petitioner. On appeal, the court reversed and remanded to the court of appeals. The amendment did not change the cause of action. The original action was brought for injuries sustained by inhaling harmful substances while the employee worked for the employer. The employer's responsibility was the same whether the harmful gases were inhaled in one building or another. The employee could have only one recovery for the single injury alleged as a result of a breach of the employer's duty. The court of appeals erred in holding that the New Jersey statute of limitations barred the amended complaint.

OUTCOME: The court reversed the court of appeals' judgment holding that the statute of limitations barred amendment to the complaint. The court remanded to the court of appeals for further proceedings.

CORE TERMS: cause of action, statute of limitations, plant, silicate, gases, place of employment, phosphate, inhaling, harmful, furnace, safe

LexisNexis(R) Headnotes**Governments > Legislation > Statutes of Limitations > Time Limitations**

[HN1] N. J. Comp. St. 1910, p. 3164, § 3 provides in part: All actions hereafter accruing for injuries to persons caused by the wrongful act, neglect or default of any corporation or corporations within the state, shall be commenced and instituted within two years next after the cause of such action shall have accrued and not after.

*Civil Procedure > Pleading & Practice > Pleadings > Amended Pleadings > General Overview
Governments > Legislation > Statutes of Limitations > Time Limitations*

[HN2] Amendments in causes where the statute of limitations has run will not, as a rule, be held to state a new cause of action if the facts alleged show, substantially, the same wrong with respect to the same transaction, or if it is the same matter more fully and differently laid, or if the gist of the action, or the subject of the controversy remains the same; and this is true although the alleged incidents of the transaction, may be different. Technical rules will not be applied in determining whether the cause of action stated in the original and amended pleadings are identical, since, in the strict sense, almost any amendment may be said to change the original cause of action.

LAWYERS' EDITION HEADNOTES:

LIMITATION OF ACTIONS, §231

amendment of complaint as changing cause of action. --

Headnote:

An amendment of a complaint in an employee's action against his employer for personal injuries alleged to have been occasioned by the inhalation of gases or injurious substances and to have been proximately caused by the employer's failure to protect plaintiff from unnecessary dangers and to provide him a reasonably safe place in which to work, which adds to an allegation that he was injured in a certain department of the employer's plant, a further allegation that he was also employed in another department located in a separate building, does not set out a new cause of action, and may, therefore, be made after expiration of the limitation period.

SYLLABUS

In an action for personal injuries, the plaintiff alleged his employment as a worker in a specified department of defendant's plant and that while so employed he suffered the injuries through inhaling gases etc. attributable to defendant's negligence. An amendment of the complaint broadened the description of the place of employment where the injuries were sustained so as to include another department located in another building of the same plant. *Held* that the amendment did not introduce a new cause of action within the meaning of the New Jersey statute of limitations. P. 199.

COUNSEL: Mr. Thomas F. Gain, with whom Messrs. Charles L. Guerin, Mario Turtur, and Francis Shunk Brown were on the brief, for petitioner.

Mr. Louis Rudner, with whom Mr. Carl E. Geuther was on the brief, for respondent.

JUDGES: Hughes, McReynolds, Brandeis, Butler, Stone, Roberts, Black, Reed, Cardozo

OPINION BY: BLACK

OPINION

[*197] [**508] [***746] MR. JUSTICE BLACK delivered the opinion of the Court.

Petitioner (plaintiff) filed a complaint alleging that he was injured [***747] while employed in the silicate department of respondent's (defendant's) chemical plant. Later, and more than two years after the date of his injuries, he amended his complaint. The only effect of the amendment [*198] was to broaden the description of the place of employment where the injuries were sustained so as to include the phosphate department located in the same plant but in a different building 500 feet removed from the silicate department.

The sole question is: Did the New Jersey statute of limitations of two years bar the amendment because it set out a new cause of action?

The cause, originally brought in the New Jersey State Court, was removed, because of diversity of citizenship, to the District Court for New Jersey, where a verdict for plaintiff was set aside and judgment entered for defendant. The Court of Appeals affirmed, holding that the amendment to the complaint set out a new cause of action and was barred by the New Jersey statute of limitations. ¹

1 89 F.2d 456. While the cause was pending in the Court of Appeals, the plaintiff died and his wife, the present plaintiff, was substituted as Administratrix. Both are referred to as petitioner (plaintiff).

The pertinent part of the New Jersey statute of limitations reads: ²

23 [HN1] N. J. Comp. St. 1910, p. 3164, § 3; P. L. 1896, p. 119.

"... all actions hereafter accruing for injuries to persons caused by the wrongful act, neglect or default of any . . . corporation or corporations within this State, *shall be commenced and instituted within two years next after the cause of such action shall have accrued and not after.*"

The original complaint alleged:

"1. The plaintiff was in the employ of the defendant in the month of *November, 1933, and for some time prior thereto* at defendant's plant in Grasselli, County of Union and State of New Jersey.

"2. The plaintiff was employed by the defendant as furnace man, operator and general worker in the Silicate Department of defendant's plant."

[*199] The complaint further alleged that plaintiff was injured while so employed by inhaling gases or injurious substances proximately caused by respondent's failure to protect plaintiff from unnecessary dangers and to provide plaintiff a reasonably safe place in which to work.

The amendment -- added more than two years after the injuries were sustained -- caused Paragraph 2 of the complaint to read as follows:

"2. The plaintiff was employed by the defendant as furnace man, operator and general worker in the Silicate Department of defendant's plant *and was also employed in other Departments of the defendant's plant where he performed his duties as he was directed to do during* [****509**] *his employment in the Phosphate Department and Dorr department.*" (New matter represented by italics.)

This amendment did not change plaintiff's cause of action. The original action was brought for injuries sustained by inhaling harmful substances while the plaintiff was in the defendant's employ previous to and including November 1933. The essentials of this cause of action were employment; injury by or from harmful gases or substances while engaged in the employment; and proof that the injuries resulted from the negligent failure of defendant to protect plaintiff from unnecessary dangers and to provide plaintiff with a reasonably safe place in which to work. The responsibility of respondent was the same whether the harmful gases or substances were inhaled in the silicate department, the phosphate department, the Dorr department or any other department where plaintiff was performing his duties under his employment. It is not reasonably possible to say that petitioner's right of recovery under the original complaint and under the amended complaint were two separate and distinct causes [*****748**] of action. Petitioner can have only one recovery for the one single injury alleged as a result of a breach of one continuing duty under one continuous employment.

[*200] The New Jersey Court of Errors and Appeals very clearly declared that State's rule applying to the operation of its statute of limitations, in 1935, as follows:

[HN2] ". . . amendments in causes where the statute of limitations has run, . . . 'will not, as a rule, be held to state a new cause of action if the facts alleged show, substantially, the same wrong with respect to the same transaction, or if it is the same matter more fully and differently laid, or if the gist of the action, or the subject of the controversy remains the same; and this is true although . . . the alleged incidents of the transaction, may be different. Technical rules will not be applied in determining whether the cause of action stated in the original and amended pleadings are identical, since, in the strict sense, almost any amendment may be said to change the original cause of action.'" ³

³ *Magliaro v. Modern Homes, Inc.*, 115 N. J. L. 151, 156-157; 178 A. 733, 736; *O'Shaughnessy v. Bayonne News Co.*, 154 A. 13; 9 N. J. Misc. 345, 347; and see, *New York Central & H. R. R. Co. v. Kinney*, 260 U.S. 340; and *United States v. Memphis Cotton Oil Co.*, 288 U.S. 62.

Under this rule laid down by the New Jersey Court, as to New Jersey's statute of limitations, the amended complaint here substantially alleged the same wrong as the original complaint; relied upon the identical matter *more fully and differently laid*; and the essential elements of the action and the controversy remained the same between the parties after as before the amendment.

Pleadings are intended to serve as a means of arriving at fair and just settlements of controversies between litigants. They should not raise barriers which prevent the achievement of that end. The original complaint in this cause and the amended complaint were not based upon different causes of action. They referred to the same kind of employment, the same general place of employment, [*201] the same injury and the same negligence. Proper pleading is important, but its importance consists in its effectiveness as a means to accomplish the end of a just judgment. The effect of the amendment here was to facilitate a fair trial of the existing issues between plaintiff and defendant. The New Jersey statute of limitations did not bar the amended cause of action. The court below was in error. Since the judgment of the Court of Appeals was based only on a consideration and improper application of the statute of limitations, the cause is reversed and remanded to the Court of Appeals for further proceedings in harmony with these views.

Reversed.

MR. JUSTICE CARDOZO took no part in the consideration or decision of this case.

1 of 1 DOCUMENT

M. L. B., PETITIONER v. S. L. J., INDIVIDUALLY AND AS NEXT FRIEND OF THE MINOR CHILDREN, S. L. J. AND M. L. J., ET UX.

No. 95-853.

SUPREME COURT OF THE UNITED STATES

519 U.S. 102; 117 S. Ct. 555; 136 L. Ed. 2d 473; 1996 U.S. LEXIS 7647; 65 U.S.L.W. 4035; 96 Cal. Daily Op. Service 9032; 96 Daily Journal DAR 14946; 10 Fla. L. Weekly Fed. S 221

October 7, 1996, Argued
December 16, 1996, Decided

PRIOR HISTORY: ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI.

DISPOSITION: Reversed and remanded.

CASE SUMMARY:

PROCEDURAL POSTURE: Petitioner mother appealed from a decision of the Mississippi Supreme Court dismissing her appeal of a trial court decision permanently terminating her parental rights owing to her failure to pay record transcription costs due to her poverty.

OVERVIEW: After petitioner's parental rights to her minor children were terminated, she sought to appeal, but since she lacked funds to pay for record preparation required by Miss. Code Ann. §§ 19-51-3 and 19-51-29 as a predicate to appeal, her appeal was dismissed. The court then granted certiorari and reversed, reasoning that: (a) an indigent's right to a transcript at state expense for purposes of appeal, while absolute in criminal cases, applied rarely in civil cases; (b) the right did apply in civil cases, pursuant to the Due Process and Equal Protection Clauses of U.S. Const. amend. XIV, when the interest involved is sufficiently strong; and (c) parents' interest in their relationship with their children was sufficiently strong as to require provision of a free transcript for indigents. The court cautioned that a verbatim transcript was not essential and that it was the complete termination of parental rights was critical factor.

OUTCOME: The judgment was reversed. The Fourteenth Amendment did not permit a state to condition the taking of an appeal from the termination of parental rights on the indigent parents' ability to pay record transcription costs.

CORE TERMS: indigent, termination, parental, equal protection, parental rights, decree, civil cases, imprisonment, classification, parental termination, paternity, marriage, state action, ability to pay, criminal convictions, custody, petty, judicial processes, convincing, plurality, forma pauperis, free transcripts, parent-child, invidious, disparate, divorce, urge, fine, line of cases, fundamental interest

LexisNexis(R) Headnotes

Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > General Overview
Constitutional Law > Equal Protection > Scope of Protection
Family Law > Parental Duties & Rights > Termination of Rights > General Overview

[HN1] A state may not, consistent with the Due Process and Equal Protection Clauses of U.S. Const. amend. XIV, condition appeals from trial court decrees terminating parental rights on the affected parent's ability to pay record preparation fees. Just as a state may not block an indigent petty offender's access to an appeal afforded others, so may it not deny a parent, because of her poverty, appellate review of the sufficiency of the evidence on which the trial court found her unfit to remain a parent.

*Constitutional Law > Substantive Due Process > Scope of Protection
Criminal Law & Procedure > Counsel > Costs & Attorney Fees*

[HN2] Although the Federal Constitution guarantees no right to appellate review, once a state affords that right, the state may not bolt the door to equal justice.

*Constitutional Law > Equal Protection > Poverty
Criminal Law & Procedure > Appeals > General Overview
Legal Ethics > Prosecutorial Conduct*

[HN3] The right to a free transcript if one is indigent is not limited to cases in which the party faces incarceration. The invidiousness of the discrimination that exists when criminal procedures are made available only to those who can pay is not erased by any differences in the sentences that may be imposed. Petty offenses can entail serious collateral consequences, and there is a flat prohibition against making access to appellate processes from even a state's most inferior courts depend upon a convicted defendant's ability to pay courts costs. An impecunious party, whether found guilty of a felony or conduct only quasi criminal in nature, cannot be denied a record of sufficient completeness to permit proper appellate consideration of his claims.

*Civil Procedure > Appeals > Records on Appeal
Constitutional Law > Equal Protection > Poverty
Governments > Courts > Court Personnel*

[HN4] A state need not provide a full trial transcript to an indigent party pursuing an appeal. A state need not purchase a stenographer's transcript in every case where an indigent party cannot buy it; a state supreme court may find other means of affording adequate and effective appellate review to indigent parties. Alternative methods of reporting trial proceedings are permissible if they place before the appellate court an equivalent report of the events at trial from which the appellant's contentions arise. Moreover, an indigent party is entitled only to those parts of the trial record that are germane to consideration of the appeal. A record of sufficient completeness does not translate automatically into a complete verbatim transcript.

*Civil Procedure > Appeals > Records on Appeal
Constitutional Law > Equal Protection > Poverty
Family Law > Paternity & Surrogacy > General Overview*

[HN5] In a narrow category of civil cases - such as marriage dissolution and paternity suits - a state must provide access to its judicial processes without regard to a party's ability to pay court fees.

*Constitutional Law > Equal Protection > Poverty
Governments > Courts > Court Records*

[HN6] The constitutional requirement to waive court fees in civil cases is the exception, not the general rule.

*Civil Procedure > Appeals > Costs & Attorney Fees
Constitutional Law > Equal Protection > Level of Review
Constitutional Law > Equal Protection > Scope of Protection*

[HN7] Absent a fundamental interest or classification attracting heightened scrutiny, the applicable U.S. Const. amend. XIV equal protection standard for state rules requiring payment of costs as a prerequisite to appellate review is that of rational justification.

*Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Association
Constitutional Law > Substantive Due Process > Privacy > General Overview*

[HN8] Choices about marriage, family life, and the upbringing of children are among associational rights ranked as of basic importance in society - rights sheltered by U.S. Const. amend. XIV against a state's unwarranted usurpation, disregard, or disrespect.

Evidence > Procedural Considerations > Burdens of Proof > General Overview
Family Law > Parental Duties & Rights > Termination of Rights > General Overview

[HN9] A clear and convincing proof standard is constitutionally required in parental termination proceedings.

Constitutional Law > Substantive Due Process > Privacy > Personal Decisions
Family Law > Parental Duties & Rights > Termination of Rights > General Overview

[HN10] The interest of parents in their relationship with their children is sufficiently fundamental to come within the finite class of liberty interests protected by U.S. Const. amend. XIV.

Constitutional Law > Equal Protection > Poverty
Governments > Courts > Court Records

[HN11] The principle of fair access by indigents to the judicial process reflects both equal protection and due process concerns. Due process and equal protection principles converge. The equal protection concern relates to the legitimacy of fencing out would-be appellants based solely on their inability to pay core costs. The due process concern homes in on the essential fairness of the state-ordered proceedings anterior to adverse state action.

DECISION: Mississippi's conditioning of natural mother's right to appeal from civil decision terminating her parental rights on her ability to prepay record preparation fees held inconsistent with Fourteenth Amendment's due process and equal protection clauses.

SUMMARY: After two minor children's natural parents were divorced, the children were placed in the father's custody and the father remarried. The father and his second wife filed in Chancery Court in Mississippi a civil suit seeking to terminate the natural mother's parental rights, and to gain approval for adoption of the children by the second wife. The chancellor--in a decree that (1) recited a state statute's language authorizing termination of parental rights on the basis of a substantial erosion of the relationship between the parent and child which was caused at least in part by the parent's serious neglect, abuse, prolonged and unreasonable absence, or unreasonable failure to visit or communicate with the child; and (2) stated that the father and his second wife had met their burden of proof by clear and convincing evidence; but (3) did not describe the evidence or otherwise reveal precisely the reasons for the chancellor's decision--terminated all parental rights of the natural mother, approved the adoption, and ordered that the second wife be shown on the children's birth certificates as their mother. State statutory provisions granted civil litigants the right to appeal, but conditioned that right on prepayment of costs. The natural mother filed a timely appeal and, being unable to pay the required record preparation fees, sought leave to proceed in forma pauperis. The Supreme Court of Mississippi, expressing the view that the right to proceed in forma pauperis in civil cases existed at only the trial level, denied the application to proceed in forma pauperis, and the appeal was dismissed.

On certiorari, the United States Supreme Court reversed and remanded. In an opinion by Ginsburg, J., joined by Stevens, O'Connor, Souter, and Breyer, JJ., it was held that given that civil litigants had a general right to appeal from state court decisions in Mississippi, the state could not, consistent with the due process and equal protection clauses of the Federal Constitution's Fourteenth Amendment, condition on the natural mother's ability to prepay record preparation fees the natural mother's right to appeal from the chancellor's decision, because, among other factors, (1) parental status termination was irretrievably destructive of the most fundamental family relationship, (2) the risk of error was considerable, (3) only a transcript could reveal the sufficiency or insufficiency of the evidence to support the chancellor's decree, (4) appeals were few in such cases, and (5) in light of prior Supreme Court decisions, it would be anomalous to hold that a transcript need not be prepared for the mother.

Kennedy, J., concurring in the judgment, expressed the view that the Fourteenth Amendment's due process clause was a sufficient basis for the Supreme Court's holding, as the prior Supreme Court cases that were most in point were certain cases addressing procedures involving the rights and privileges inherent in family and personal relations, all of which cases rested exclusively on the due process clause.

Rehnquist, Ch. J., dissenting, expressed the view that the line of Supreme Court cases concerning the provision of free transcripts to indigents appealing from criminal convictions ought not to be extended to invalidate Mississippi's refusal to pay for the transcript required for the natural mother's appeal.

Thomas, J., joined by Scalia, J., and joined in pertinent part by Rehnquist, Ch. J., dissenting, expressed the view that (1) given the many procedural protections afforded the natural mother, due process had been accorded in the tribunal of first instance, and (2) the natural mother had not been deprived by the state of equal protection, as any adverse impact that the transcript requirement had on any person seeking to appeal arose from factors entirely unrelated to the state's action.

LAWYERS' EDITION HEADNOTES:

[**LEdHN1]

CONSTITUTIONAL LAW §493

termination of parental rights -- indigent's appeal -- record preparation fees -- due process -- equal protection --

Headnote:[1A][1B][1C][1D][1E]

A state in which civil litigants have a general statutory right to appeal from state court decisions may not, consistent with the due process and equal protection clauses of the Federal Constitution's Fourteenth Amendment, condition on a natural mother's ability to prepay record preparation fees the mother's right to appeal from a state court's civil order terminating the mother's parental rights with respect to her minor children, because (1) parental status termination is irretrievably destructive of the most fundamental family relationship; (2) the risk of error, the state's experience shows, is considerable; (3) given that the order simply recites state statutory language authorizing parental rights termination, describes no evidence, and otherwise details no reason for finding the natural mother clearly and convincingly unfit to be a parent, only a transcript can reveal the sufficiency or insufficiency of the evidence to support the order; (4) in the tightly circumscribed category of parental-status-termination cases, appeals are few and are not likely to impose an undue financial burden on the state; (5) given that the United States Supreme Court has recognized a right to a transcript needed to appeal a misdemeanor conviction even when trial counsel may be flatly denied, it would be anomalous to hold that a transcript need not be prepared for the mother, who, as a prior Supreme Court decision instructs, would have state-paid counsel designated for her if her defense were sufficiently complex; (6) the mother, like a defendant resisting criminal conviction, seeks to be spared from the state's devastatingly adverse action, rather than from circumstances existing apart from state action; (7) the prescription at issue applies to all indigents and does not reach anyone outside that class; and (8) the label "civil" should not entice the Supreme Court to leave undisturbed the state courts' disposition of the case, as, in contrast to matters modifiable at the parties' will or based on changed circumstances, termination adjudications involve the authority of the state to destroy permanently all legal recognition of the parental relationship. (Rehnquist, Ch. J., and Thomas and Scalia, JJ., dissented from this holding.)

[**LEdHN2]

CONSTITUTIONAL LAW §509

indigent petty offender -- appeal --

Headnote:[2]

With respect to the due process and equal protection clauses of the Federal Constitution's Fourteenth Amendment, a state may not block an indigent petty offender's access to an appeal afforded others.

[**LEdHN3]

CRIMINAL LAW §46.5

indigent defendant -- counsel --

Headnote:[3]

A state must provide trial counsel for an indigent defendant charged with a felony, but that right does not extend to nonfelony trials if no term of imprisonment is actually imposed.

[**LEdHN4]

CRIMINAL LAW §46.5

poor defendants -- counsel --

Headnote:[4]

A state's obligation to provide appellate counsel to poor criminal defendants faced with incarceration applies to appeals of right.

[***LEdHN5]

CONSTITUTIONAL LAW §493

termination of parental rights -- appeal -- due process -- equal protection --

Headnote:[5A][5B]

With respect to a natural mother's assertion that a state in which civil litigants have a general statutory right to appeal from state court decisions may not, consistent with the due process and equal protection clauses of the Federal Constitution's Fourteenth Amendment, condition on the mother's ability to prepay record preparation fees the mother's right to appeal from a state court's civil order terminating the mother's parental rights with respect to her minor children, the mother's case demands the close consideration that the United States Supreme Court has long required when a family association so undeniably important is at stake, as the mother's case involves the state's authority to sever permanently a parent-child bond, where--although the termination proceeding was initiated by private parties as a prelude to an adoption petition, rather than by a state agency--the challenged state action remains essentially the same, in that the mother resists the imposition of an official decree extinguishing, as no power other than the state can, the mother's parent-child relationships.

[***LEdHN6]

CONSTITUTIONAL LAW §774

due process -- appeal --

Headnote:[6]

Under the Federal Constitution's Fourteenth Amendment, due process does not independently require that a state provide a right to appeal from a state judicial decision.

[***LEdHN7]

CONSTITUTIONAL LAW §509

criminal appeal -- indigent's equal access --

Headnote:[7]

Under the Federal Constitution, in states providing criminal appeals, an indigent's equal access right--concerning access to appeal through a transcript of relevant trial proceedings--holds for petty offenses as well as for felonies.

[***LEdHN8]

CONSTITUTIONAL LAW §778.5

due process -- counsel --

Headnote:[8]

When deprivation of parental status is at stake, provision of counsel at state expense is sometimes part of the process that is due under the Federal Constitution's Fourteenth Amendment.

[***LEdHN9]

CONSTITUTIONAL LAW §488

due process -- equal protection -- state fees --

Headnote:[9]

With respect to the due process and equal protection clauses of the Federal Constitution's Fourteenth Amendment, a state's need for revenue to offset costs, in the mine run of cases, satisfies the general rule that fee requirements ordinarily are examined for only rationality; states are not forced by the Constitution to adjust all tolls to account for disparity in material circumstances.

[***LEdHN10]

CONSTITUTIONAL LAW §484.2

due process -- equal protection -- elections --

Headnote:[10]

With respect to the due process and equal protection clauses of the Federal Constitution's Fourteenth Amendment, the basic right to participate in political processes as voters and candidates cannot be limited to those who can pay for a license.

[***LEdHN11]

CONSTITUTIONAL LAW §500

due process -- equal protection -- criminal cases -- fees --

Headnote:[11]

With respect to the due process and equal protection clauses of the Federal Constitution's Fourteenth Amendment, access to judicial processes in cases criminal or quasi-criminal in nature may not turn on ability to pay fees.

SYLLABUS

In a decree forever terminating petitioner M. L. B.'s parental rights to her two minor children, a Mississippi Chancery Court recited a segment of the governing Mississippi statute and stated, without elaboration, that respondents, the children's natural father and his second wife, had met their burden of proof by "clear and convincing evidence." The Chancery Court, however, neither described the evidence nor otherwise revealed precisely why M. L. B. was decreed a stranger to her children. M. L. B. filed a timely appeal from the termination decree, but Mississippi law conditioned her right to appeal on prepayment of record preparation fees estimated at \$ 2,352.36. Lacking funds to pay the fees, M. L. B. sought leave to appeal *in forma pauperis*. The Supreme Court of Mississippi denied her application on the ground that, under its precedent, there is no right to proceed *in forma pauperis* in civil appeals. Urging that the size of her pocketbook should not be dispositive when "an interest far more precious than any property right" is at stake, *Santosky v. Kramer*, 455 U.S. 745, 758-759, 71 L. Ed. 2d 599, 102 S. Ct. 1388, M. L. B. contends in this Court that a State may not, consistent with the Due Process and Equal Protection Clauses of the Fourteenth Amendment, condition appeals from trial court decrees terminating parental rights on the affected parent's ability to pay record preparation fees.

Held: Just as a State may not block an indigent petty offender's access to an appeal afforded others, see *Mayer v. Chicago*, 404 U.S. 189, 195-196, 30 L. Ed. 2d 372, 92 S. Ct. 410, so Mississippi may not deny M. L. B., because of her poverty, appellate review of the sufficiency of the evidence on which the trial court based its parental termination decree. Pp. 110-128.

(a) The foundation case in the relevant line of decisions is *Griffin v. Illinois*, 351 U.S. 12, 100 L. Ed. 891, 76 S. Ct. 585, in which the Court struck down an Illinois rule that effectively conditioned thoroughgoing appeals from criminal convictions on the defendant's procurement of a transcript of trial proceedings. The Illinois rule challenged in *Griffin* deprived most defendants lacking the means to pay for a transcript of any access to appellate review. Although the Federal Constitution guarantees no right to appellate review, *id.*, at 18 (plurality opinion), once a State affords that right, *Griffin* held, the State may not "bolt the door to equal justice," *id.*, at 24 (Frankfurter, J., concurring in judgment). The *Griffin* plurality drew support for its decision from the Due Process and Equal Protection Clauses, *id.*, at 13, 18, while Justice Frankfurter emphasized and explained the decision's equal protection underpinning, *id.*, at 23. Of prime relevance to the question presented by M. L. B., *Griffin's* principle has not been confined to cases in which imprisonment is at stake, but extends to appeals from convictions of petty offenses, involving conduct "quasi criminal" in nature. *Mayer*, 404 U.S. at 196, 197. In contrast, an indigent defendant's right to counsel at state expense does not extend to nonfelony trials if no

term of imprisonment is actually imposed. *Scott v. Illinois*, 440 U.S. 367, 373-374. Pp. 110-113, 59 L. Ed. 2d 383, 99 S. Ct. 1158.

(b) This Court has also recognized a narrow category of civil cases in which the State must provide access to its judicial processes without regard to a party's ability to pay court fees. See, e. g., *Boddie v. Connecticut*, 401 U.S. 371, 374, 28 L. Ed. 2d 113, 91 S. Ct. 780 (divorce proceedings). Making clear, however, that a constitutional requirement to waive court fees in civil cases is the exception, not the general rule, the Court has refused to extend *Griffin* to the broad array of civil cases. See *United States v. Kras*, 409 U.S. 434, 445, 34 L. Ed. 2d 626, 93 S. Ct. 631; *Ortwein v. Schwab*, 410 U.S. 656, 661, 35 L. Ed. 2d 572, 93 S. Ct. 1172 (*per curiam*). But the Court has consistently set apart from the mine run of civil cases those involving state controls or intrusions on family relationships. In that domain, to guard against undue official intrusion, the Court has examined closely and contextually the importance of the governmental interest advanced in defense of the intrusion. Pp. 113-116.

(c) M. L. B.'s case, involving the State's authority to sever permanently a parent-child bond, demands the close consideration the Court has long required when a family association "of basic importance in our society" is at stake. *Boddie*, 401 U.S. at 376. The Court approaches M. L. B.'s petition mindful of the gravity of the sanction imposed on her and in light of two prior decisions most immediately in point: *Lassiter v. Department of Social Servs. of Durham Cty.*, 452 U.S. 18, 68 L. Ed. 2d 640, 101 S. Ct. 2153 (appointment of counsel for indigent defendants in parental status termination proceedings is not routinely required by the Constitution, but should be determined on a case-by-case basis), and *Santosky v. Kramer*, 455 U.S. 745, 71 L. Ed. 2d 599, 102 S. Ct. 1388 ("clear and convincing" proof standard is constitutionally required in parental termination proceedings). Although both *Lassiter* and *Santosky* yielded divided opinions, the Court was unanimously of the view that "the interest of parents in their relationship with their children is sufficiently fundamental to come within the finite class of liberty interests protected by the Fourteenth Amendment," *Santosky*, 455 U.S. at 774 (REHNQUIST, J., dissenting), and that "few consequences of judicial action are so grave as the severance of natural family ties," 455 U.S. at 787. Pp. 116-119.

(d) Guided by *Lassiter*, *Santosky*, and other decisions acknowledging the primacy of the parent-child relationship, the Court agrees with M. L. B. that *Mayer* points to the disposition proper in this case: Her parental termination appeal must be treated as the Court has treated petty offense appeals, and Mississippi may not withhold the transcript she needs to gain review of the order ending her parental status. The Court's decisions concerning access to judicial processes, commencing with *Griffin* and running through *Mayer*, reflect both equal protection and due process concerns. See *Ross v. Moffitt*, 417 U.S. 600, 608-609, 41 L. Ed. 2d 341, 94 S. Ct. 2437. In these cases, "due process and equal protection principles converge." *Bearden v. Georgia*, 461 U.S. 660, 665, 76 L. Ed. 2d 221, 103 S. Ct. 2064. A "precise rationale" has not been composed, *Ross*, 417 U.S. at 608, because cases of this order "cannot be resolved by resort to easy slogans or pigeonhole analysis," *Bearden*, 461 U.S. at 666. Nevertheless, "most decisions in this area," the Court has recognized, "rest on an equal protection framework," 461 U.S. at 665, as M. L. B.'s plea heavily does, for due process does not independently require that the State provide a right to appeal. Placing this case within the framework established by the Court's past decisions in this area, the Court inspects the character and intensity of the individual interest at stake, on the one hand, and the State's justification for its exaction, on the other. See 461 U.S. at 666-667.

As in the case of the indigent petty offender charged in *Mayer*, the stakes for M. L. B. are large. Parental status termination is "irretrievably destructive" of the most fundamental family relationship. *Santosky*, 455 U.S. at 753. And the risk of error, Mississippi's experience shows, is considerable. Mississippi has, consistent with *Santosky*, adopted a "clear and convincing proof" standard for parental status termination cases, but the Chancellor's order in this case simply recites statutory language; it describes no evidence, and otherwise details no reasons for finding M. L. B. "clearly and convincingly" unfit to be a parent. Only a transcript can reveal the sufficiency, or insufficiency, of the evidence to support that stern judgment. Mississippi's countervailing interest in offsetting the costs of its court system is unimpressive when measured against the stakes for M. L. B. The record discloses that, in the tightly circumscribed category of parental status termination cases, appeals are few, and not likely to impose an undue burden on the State. Moreover, it would be anomalous to recognize a right to a transcript needed to appeal a misdemeanor conviction--though trial counsel may be flatly denied such a defendant--but hold, at the same time, that a transcript need not be prepared for M. L. B.--though were her defense sufficiently complex, state-paid counsel, as *Lassiter* instructs, would be designated for her. While the Court does not question the general rule, stated in *Ortwein*, 410 U.S. at 660, that fee requirements ordinarily are examined only for rationality, the Court's cases solidly establish two exceptions to that rule. The basic right to participate in political processes as voters and candidates cannot be limited to those who can pay for a license. See, e. g., *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 16 L. Ed. 2d 169, 86 S. Ct. 1079. Nor may access to judicial processes in cases criminal or "quasi criminal" in nature, *Mayer*, 404 U.S. at 196, turn on ability to pay. The Court places decrees forever

terminating parental rights in the category of cases in which the State may not "bolt the door to equal justice." *Griffin*, 351 U.S. at 24 (Frankfurter, J., concurring in judgment). Pp. 119-124.

(e) Contrary to respondents' contention, cases in which the Court has held that government need not provide funds so that people can exercise even fundamental rights, see, e. g., *Lyng v. Automobile Workers*, 485 U.S. 360, 363, n. 2, 370-374, 99 L. Ed. 2d 380, 108 S. Ct. 1184, are inapposite here. Complainants in those cases sought state aid to subsidize their privately initiated action or to alleviate the consequences of differences in economic circumstances that existed apart from state action. M. L. B.'s complaint is of a different order. She is endeavoring to defend against the State's destruction of her family bonds, and to resist the brand associated with a parental unfitness adjudication. Like a defendant resisting criminal conviction, she seeks to be spared from the State's devastatingly adverse action. That is the very reason this Court has paired her case with *Mayer*, not with *Ortwein* or *Kras*. Also rejected is respondents' suggestion that *Washington v. Davis*, 426 U.S. 229, 242, 48 L. Ed. 2d 597, 96 S. Ct. 2040, effectively overruled the *Griffin* line of cases in 1976 by rejecting the notion "that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another." That this Court has not so conceived the meaning and effect of *Washington v. Davis* is demonstrated by *Bearden*, 461 U.S. at 664-665, in which the Court adhered in 1983 to "*Griffin's* principle of 'equal justice.'" The Court recognized in *Griffin* that "a law nondiscriminatory on its face may be grossly discriminatory in operation," 351 U.S. at 17, n. 11, and explained in *Williams v. Illinois*, 399 U.S. 235, 242, 26 L. Ed. 2d 586, 90 S. Ct. 2018, that an Illinois statute it found unconstitutional in that case "in operative effect exposed only indigents to the risk of imprisonment beyond the statutory maximum." Like the sanction in *Williams*, the Mississippi prescription here at issue is not merely disproportionate in impact, but wholly contingent on one's ability to pay, thereby "visit[ing] different consequences on two categories of persons." *Ibid*. A failure rigidly to restrict *Griffin* to cases typed "criminal" will not result in the opening of judicial floodgates, as respondents urge. This Court has repeatedly distinguished parental status termination decrees from mine run civil actions on the basis of the unique deprivation termination decrees work: permanent destruction of all legal recognition of the parental relationship. *Lassiter* and *Santosky* have not served as precedent in other areas, and the Court is satisfied that the label "civil" should not entice it to leave undisturbed the Mississippi courts' disposition of this case. Cf. *In re Gault*, 387 U.S. 1, 50. Pp. 124-128, 18 L. Ed. 2d 527, 87 S. Ct. 1428.

(f) Thus, Mississippi may not withhold from M. L. B. "a 'record of sufficient completeness' to permit proper [appellate] consideration of [her] claims." *Mayer*, 404 U.S. at 198. P. 128.

COUNSEL: Robert B. McDuff argued the cause for petitioner. With him on the briefs were Danny Lampley and Steven R. Shapiro.

Rickey T. Moore, Special Assistant Attorney General of Mississippi, argued the cause for respondents. With him on the brief was Mike Moore, Attorney General.*

* *Martha Matthews* filed a brief for the National Center for Youth Law et al as *amici curiae*.

JUDGES: GINSBURG, J., delivered the opinion of the Court, in which STEVENS, O'CONNOR, SOUTER, and BREYER, JJ., joined. KENNEDY, J., filed an opinion concurring in the judgment, post, p. 128. REHNQUIST, C. J., filed a dissenting opinion, post, p. 129. THOMAS, J., filed a dissenting opinion, in which SCALIA, J., joined, and in which REHNQUIST, C. J., joined, except as to Part II, post, p. 129.

OPINION BY: GINSBURG

OPINION

[*106] [**559] [***481] JUSTICE GINSBURG delivered the opinion of the Court.

By order of a Mississippi Chancery Court, petitioner M. L. B.'s parental rights to her two minor children were forever terminated. M. L. B. sought to appeal from the termination decree, but Mississippi required that she pay in advance record preparation fees estimated at \$ 2,352.36. Because M. L. B. lacked funds to pay the fees, her appeal was dismissed.

[***LEdHR1A] [1A] [***LEdHR2] [2]Urging that the size of her pocketbook should not be dispositive when "an interest far more precious than any property right" is at stake, *Santosky v. Kramer*, 455 U.S. 745, 758-759, 71 L. Ed. 2d 599, 102 S. Ct. 1388 (1982), [*107] M. L. B. tenders this question, which we agreed to hear and decide: [HN1] May

a State, consistent with the Due Process and Equal Protection Clauses of the Fourteenth Amendment, condition appeals from trial court decrees terminating parental rights on the affected parent's ability to pay record preparation fees? We hold that, just as a State may not block an indigent petty offender's access to an appeal afforded others, see *Mayer v. Chicago*, 404 U.S. 189, 195-196, 30 L. Ed. 2d 372, 92 S. Ct. 410 (1971), so Mississippi may not deny M. L. B., because of her poverty, appellate review of the sufficiency of the evidence on which the trial court found her unfit to remain a parent.

[***482] I

Petitioner M. L. B. and respondent S. L. J. are, respectively, the biological mother and father of two children, a boy born in April 1985, and a girl born in February 1987. In June 1992, after a marriage that endured nearly eight years, M. L. B. and S. L. J. were divorced. The children remained in their father's custody, as M. L. B. and S. L. J. had agreed at the time of the divorce.

S. L. J. married respondent J. P. J. in September 1992. In November of the following year, S. L. J. and J. P. J. filed suit in Chancery Court in Mississippi, seeking to terminate the parental rights of M. L. B. and to gain court approval for adoption of the children by their stepmother, J. P. J. The complaint alleged that M. L. B. had not maintained reasonable visitation and was in arrears on child support payments. M. L. B. counterclaimed, seeking primary custody of both children and contending that S. L. J. had not permitted her reasonable visitation, despite a provision in the divorce decree that he do so.

After taking evidence on August 18, November 2, and December 12, 1994, the Chancellor, in a decree filed December 14, 1994, terminated all parental rights of the natural mother, approved the adoption, and ordered that J. P. J., the adopting parent, be shown as the mother of the children on [*108] their birth certificates. Twice reciting a segment of the governing Mississippi statute, Miss. Code Ann. § 93-15-103(3)(e) (1994), the Chancellor declared that there had been a "substantial erosion of the relationship between the natural mother, [M. L. B.], and the minor children," which had been caused "at least in part by [M. L. B.'s] serious neglect, abuse, prolonged and unreasonable absence or unreasonable failure to visit or communicate with her minor children." App. to Pet. for Cert. 9, 10.¹

1 Mississippi Code Ann. § 93-15-103(3) (1994) sets forth several grounds for termination of parental rights, including, in subsection (3)(e), "when there is [a] substantial erosion of the relationship between the parent and child which was caused at least in part by the parent's serious neglect, abuse, prolonged and unreasonable absence, unreasonable failure to visit or communicate, or prolonged imprisonment."

M. L. B. notes that, "in repeating the catch-all language of [the statute], the Chancellor said that [she] was guilty of 'serious . . . abuse.'" Reply Brief 6, n. 1. "However," M. L. B. adds, "there was no allegation of abuse in the complaint in this case or at any other stage of the proceedings." *Ibid.*

The Chancellor stated, without elaboration, that the natural father and his second wife [**560] had met their burden of proof by "clear and convincing evidence." App. to Pet. for Cert., *Id.* at 10. Nothing in the Chancellor's order describes the evidence, however, or otherwise reveals precisely why M. L. B. was decreed, forevermore, a stranger to her children.

In January 1995, M. L. B. filed a timely appeal and paid the \$ 100 filing fee. The Clerk of the Chancery Court, several days later, estimated the costs for preparing and transmitting the record: \$ 1,900 for the transcript (950 pages at \$ 2 per page); \$ 438 for other documents in the record (219 pages at \$ 2 per page); \$ 4.36 for binders; and \$ 10 for mailing. *Id.*, at 15.

Mississippi grants civil litigants a right to appeal, but conditions that right on prepayment of costs. Miss. Code Ann. §§ 11-51-3, 11-51-29 (Supp. 1996). Relevant portions of a transcript must be ordered, and its preparation costs advanced [*109] by the appellant, [***483] if the appellant "intends to urge on appeal," as M. L. B. did, "that a finding or conclusion is unsupported by the evidence or is contrary to the evidence." Miss. Rule of App. Proc. 10(b)(2) (1995); see also Miss. Code Ann. § 11-51-29 (Supp. 1996).

Unable to pay \$ 2,352.36, M. L. B. sought leave to appeal *in forma pauperis*. The Supreme Court of Mississippi denied her application in August 1995. Under its precedent, the court said, "the right to proceed in forma pauperis in civil cases exists only at the trial level." App. to Pet. for Cert. 3.²

2 In fact, Mississippi, by statute, provides for coverage of transcript fees and other costs for indigents in civil commitment appeals. Miss. Code Ann. § 41-21-83 (Supp. 1996) (record on appeal shall include transcript of commitment hearing); Miss. Code Ann. § 41-21-85 (1972) (all costs of hearing or appeal shall be borne by state board of mental health when patient is indigent).

M. L. B. had urged in Chancery Court and in the Supreme Court of Mississippi, and now urges in this Court, that

"where the State's judicial processes are invoked to secure so severe an alteration of a litigant's fundamental rights--the termination of the parental relationship with one's natural child--basic notions of fairness [and] of equal protection under the law, . . . guaranteed by [the Mississippi and Federal Constitutions], require that a person be afforded the right of appellate review though one is unable to pay the costs of such review in advance." App. to Pet. for Cert., *Id.* at 18.³

3 On the efficacy of appellate review in parental status termination cases, M. L. B. notes that of the eight reported appellate challenges to Mississippi trial court termination orders from 1980 through May 1996, three were reversed by the Mississippi Supreme Court for failure to meet the "clear and convincing" proof standard. Brief for Petitioner 20; see also Reply Brief 6 ("In civil cases generally, the Mississippi Court of Appeals reversed or vacated nearly 39% of the trial court decisions it reviewed in 1995 and the Mississippi Supreme Court reversed or vacated nearly 37%. *Supreme Court of Mississippi, 1995 Annual Report*, pp. 22, 41.").

[*110] II

Courts have confronted, in diverse settings, the "age-old problem" of "providing equal justice for poor and rich, weak and powerful alike." *Griffin v. Illinois*, 351 U.S. 12, 16, 100 L. Ed. 891, 76 S. Ct. 585 (1956). Concerning access to appeal in general, and transcripts needed to pursue appeals in particular, *Griffin* is the foundation case.

Griffin involved an Illinois rule that effectively conditioned thoroughgoing appeals from criminal convictions on the defendant's procurement of a transcript of trial proceedings. See 351 U.S. at 13-14, and nn. 2, 3 (noting, *inter alia*, that "mandatory record," which an indigent defendant could obtain free of charge, did not afford the defendant an opportunity to seek review of trial errors). Indigent defendants, other than those sentenced to death, were not excepted from the rule, so in most cases, defendants without means to pay for a transcript had no access to appellate review at all. [HN2] Although the Federal Constitution guarantees no right to appellate review, *id.*, at 18, once a State affords that right, *Griffin* held, the State may not "bolt the door to equal justice," *id.*, at 24 (Frankfurter, J., concurring in judgment).

[**561] The plurality in *Griffin* recognized "the importance of appellate review [***484] to a correct adjudication of guilt or innocence." *Id.*, at 18. "To deny adequate review to the poor," the plurality observed, "means that many of them may lose their life, liberty or property because of unjust convictions which appellate courts would set aside." *Id.*, at 19. Judging the Illinois rule inconsonant with the Fourteenth Amendment, the *Griffin* plurality drew support from the Due Process and Equal Protection Clauses. *Id.*, at 13, 18.

Justice Frankfurter, concurring in the judgment in *Griffin*, emphasized and explained the decision's equal protection underpinning:

"Of course a State need not equalize economic conditions. . . . But when a State deems it wise and just that [*111] convictions be susceptible to review by an appellate court, it cannot by force of its exactions draw a line which precludes convicted indigent persons, forsooth erroneously convicted, from securing such a review. . . ." *Id.*, at 23.

See also *Ross v. Moffitt*, 417 U.S. 600, 607, 41 L. Ed. 2d 341, 94 S. Ct. 2437 (1974) (*Griffin* and succeeding decisions "stand for the proposition that a State cannot arbitrarily cut off appeal rights for indigents while leaving open avenues of appeal for more affluent persons."). Summarizing the *Griffin* line of decisions regarding an indigent defendant's access to appellate review of a conviction,⁴ we said in *Rinaldi v. Yeager*, 384 U.S. 305, 310, 16 L. Ed. 2d 577, 86 S. Ct. 1497 (1966): "This Court has never held that the States are required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts."

4 See, e. g., *Williams v. Oklahoma City*, 395 U.S. 458, 458-459, 23 L. Ed. 2d 440, 89 S. Ct. 1818 (1969) (*per curiam*) (transcript needed to perfect appeal must be furnished at state expense to indigent defendant sentenced to 90 days in jail and a \$ 50 fine for drunk driving); *Long v. District Court of Iowa, Lee Cty.*, 385 U.S. 192, 192-194, 17 L. Ed. 2d 290, 87 S. Ct. 362 (1966) (*per curiam*) (transcript must be furnished at state expense to enable indigent state habeas corpus petitioner to appeal denial of relief); *Smith v. Bennett*, 365 U.S. 708, 708-709, 6 L. Ed.

2d 39, 81 S. Ct. 895 (1961) (filing fee to process state habeas corpus application must be waived for indigent prisoner); *Burns v. Ohio*, 360 U.S. 252, 253, 257-258, 3 L. Ed. 2d 1209, 79 S. Ct. 1164 (1959) (filing fee for motion for leave to appeal from judgment of intermediate appellate court to State Supreme Court must be waived when defendant is indigent).

Of prime relevance to the question presented by M. L. B.'s petition, *Griffin's* principle has not been confined to cases in which imprisonment is at stake. The key case is *Mayer v. Chicago*, 404 U.S. 189, 30 L. Ed. 2d 372, 92 S. Ct. 410 (1971). *Mayer* involved an indigent defendant convicted on nonfelony charges of violating two city ordinances. Fined \$ 250 for each offense, the defendant petitioned for a transcript to support his appeal. He alleged prosecutorial misconduct and insufficient evidence to convict. The State provided free transcripts for indigent appellants [*112] in felony cases only. We declined to limit *Griffin* [HN3] to cases in which the defendant faced incarceration. "The invidiousness of the discrimination that exists when criminal procedures are made available only to those who can pay," the Court said in *Mayer*, "is not erased by any differences in the sentences that may be imposed." 404 U.S. at 197. [***485] Petty offenses could entail serious collateral consequences, the *Mayer* Court noted. *Ibid.* The *Griffin* principle, *Mayer* underscored, "is a flat prohibition," 404 U.S. at 196, against "making access to appellate processes from even [the State's] most inferior courts depend upon the [convicted] defendant's ability to pay," *id.*, at 197. An impecunious party, the Court ruled, whether found guilty of a felony or conduct only "quasi criminal in nature," *id.*, at 196, "cannot be denied a record of sufficient completeness to permit proper [appellate] consideration of his claims," *id.*, at 198 (internal quotation marks omitted).⁵

⁵ *Griffin* did not impose an inflexible requirement that [HN4] a State provide a full trial transcript to an indigent defendant pursuing an appeal. See *Griffin v. Illinois*, 351 U.S. 12, 20, 100 L. Ed. 891, 76 S. Ct. 585 (1956) (State need not purchase a stenographer's transcript in every case where an indigent defendant cannot buy it; State "Supreme Court may find other means of affording adequate and effective appellate review to indigent defendants."). In *Draper v. Washington*, 372 U.S. 487, 9 L. Ed. 2d 899, 83 S. Ct. 774 (1963), we invalidated a state rule that tied an indigent defendant's ability to obtain a transcript at public expense to the trial judge's finding that the defendant's appeal was not frivolous. 372 U.S. at 498-500. We emphasized, however, that the *Griffin* requirement is not rigid. "Alternative methods of reporting trial proceedings," we observed, "are permissible if they place before the appellate court an equivalent report of the events at trial from which the appellant's contentions arise." 372 U.S. at 495. Moreover, we held, an indigent defendant is entitled only to those parts of the trial record that are "germane to consideration of the appeal." *Ibid.*; see also *Mayer v. Chicago*, 404 U.S. 189, 194, 30 L. Ed. 2d 372, 92 S. Ct. 410 (1971) ("A record of sufficient completeness does not translate automatically into a complete verbatim transcript." (internal quotation marks omitted)).

[**562] [***LEdHR3] [3] [***LEdHR4] [4] In contrast to the "flat prohibition" of "bolted doors" that the *Griffin* line of cases securely established, the right to [*113] counsel at state expense, as delineated in our decisions, is less encompassing. A State must provide trial counsel for an indigent defendant charged with a felony, *Gideon v. Wainwright*, 372 U.S. 335, 339, 9 L. Ed. 2d 799, 83 S. Ct. 792 (1963), but that right does not extend to nonfelony trials if no term of imprisonment is actually imposed, *Scott v. Illinois*, 440 U.S. 367, 373-374, 59 L. Ed. 2d 383, 99 S. Ct. 1158 (1979). A State's obligation to provide appellate counsel to poor defendants faced with incarceration applies to appeals of right. *Douglas v. California*, 372 U.S. 353, 357, 9 L. Ed. 2d 811, 83 S. Ct. 814 (1963). In *Ross v. Moffitt*, however, we held that neither the Due Process Clause nor the Equal Protection Clause requires a State to provide counsel at state expense to an indigent prisoner pursuing a discretionary appeal in the state system or petitioning for review in this Court. 417 U.S. at 610, 612, 616-618.

III

We have also recognized [HN5] a narrow category of civil cases in which the State must provide access to its judicial processes without regard to a party's ability to pay court fees. In *Boddie v. Connecticut*, 401 U.S. 371, 28 L. Ed. 2d 113, 91 S. Ct. 780 (1971), we held that the State could not deny a divorce to a married couple based on their inability to pay approximately \$ 60 in court costs. Crucial to our decision in *Boddie* was the fundamental interest at stake. "Given the basic position of the marriage relationship in this society's hierarchy of values and the concomitant state monopolization [***486] of the means for legally dissolving this relationship," we said, due process "prohibits a State from denying, solely because of inability to pay, access to its courts to individuals who seek judicial dissolution of their marriages." *Id.*, at 374; see also *Little v. Streater*, 452 U.S. 1, 13-17, 68 L. Ed. 2d 627, 101 S. Ct. 2202 (1981) (State must pay for blood grouping tests sought by an indigent defendant to enable him to contest a paternity suit).

Soon after *Boddie*, in *Lindsey v. Normet*, 405 U.S. 56, 31 L. Ed. 2d 36, 92 S. Ct. 862 (1972), the Court confronted a double-bond requirement imposed by Oregon law only on tenants seeking to appeal adverse [*114] decisions in eviction actions. We referred first to precedent recognizing that, "if a full and fair trial on the merits is provided, the Due

Process Clause of the Fourteenth Amendment does not require a State to provide appellate review." 405 U.S. at 77. We next stated, however, that "when an appeal is afforded, . . . it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause." *Ibid.* Oregon's double-bond requirement failed equal protection measurement, we concluded, because it raised a substantial barrier to appeal for a particular class of litigants--tenants facing eviction--a barrier "faced by no other civil litigant in Oregon." 405 U.S. at 79. The Court pointed out in *Lindsey* that the classification there at issue disadvantaged nonindigent as well as indigent appellants, *ibid.*; the *Lindsey* decision, therefore, does not guide our inquiry here.

[**563] The following year, in *United States v. Kras*, 409 U.S. 434, 34 L. Ed. 2d 626, 93 S. Ct. 631 (1973), the Court clarified that [HN6] a constitutional requirement to waive court fees in civil cases is the exception, not the general rule. *Kras* concerned fees, totaling \$ 50, required to secure a discharge in bankruptcy. *Id.*, at 436. The Court recalled in *Kras* that "on many occasions we have recognized the fundamental importance . . . under our Constitution" of "the associational interests that surround the establishment and dissolution of the [marital] relationship." *Id.*, at 444.⁶ But bankruptcy discharge entails no "fundamental [*115] interest," we said. 409 U.S. at 445. Although "obtaining [a] desired new start in life [is] important," that interest, the Court explained, "does not rise to the same constitutional level" as the interest in establishing or dissolving a marriage. [***487] *Ibid.*⁷ Nor is resort to court the sole path to securing debt forgiveness, we stressed; in contrast, termination of a marriage, we reiterated, requires access to the State's judicial machinery. 409 U.S. at 445-446; see *Boddie*, 401 U.S. at 376.

6 As examples, the Court listed: *Eisenstadt v. Baird*, 405 U.S. 438, 453, 31 L. Ed. 2d 349, 92 S. Ct. 1029 (1972) (right to be free from government interference in deciding whether to bear or beget a child is "fundamental," and may not be burdened based upon marital status); *Loving v. Virginia*, 388 U.S. 1, 12, 18 L. Ed. 2d 1010, 87 S. Ct. 1817 (1967) ("Marriage is a 'basic civil right,'" and cannot be denied based on a racial classification. (citations omitted)); *Griswold v. Connecticut*, 381 U.S. 479, 485-486, 14 L. Ed. 2d 510, 85 S. Ct. 1678 (1965) (marital relationship "is an association that promotes a way of life, . . . a harmony in living, . . . a bilateral loyalty," and the use of contraception within marriage is protected against government intrusion); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541, 86 L. Ed. 1655, 62 S. Ct. 1110 (1942) (Because the power to sterilize affects "a basic liberty[.]" . . . strict scrutiny of the classification which a State makes in a sterilization law is essential.); *Meyer v. Nebraska*, 262 U.S. 390, 399, 67 L. Ed. 1042, 43 S. Ct. 625 (1923) (recognizing liberty interest in raising children). See *Kras*, 409 U.S. at 444.

7 The Court ranked the prescription in *Kras* with economic and social welfare legislation generally, and cited among examples: *Jefferson v. Hackney*, 406 U.S. 535, 546, 32 L. Ed. 2d 285, 92 S. Ct. 1724 (1972) (Texas scheme for allocating limited welfare benefits is a rational legislative "effort to tackle the problems of the poor and the needy."); *Richardson v. Belcher*, 404 U.S. 78, 30 L. Ed. 2d 231, 92 S. Ct. 254 (1971) (federal statute mandating reductions in Social Security benefits to reflect workers' compensation payments is social welfare regulation that survives rational basis review); *Dandridge v. Williams*, 397 U.S. 471, 483, 487, 25 L. Ed. 2d 491, 90 S. Ct. 1153 (1970) (Maryland "maximum grant regulation" limiting family welfare benefits is economic, social welfare regulation that is "rationally based and free from invidious discrimination."); *Flemming v. Nestor*, 363 U.S. 603, 606, 611, 4 L. Ed. 2d 1435, 80 S. Ct. 1367 (1960) (The right to receive benefits under the Social Security Act is not "an accrued property right," but Congress may not take away benefits arbitrarily.). See *Kras*, 409 U.S. at 445-446.

In *Ortwein v. Schwab*, 410 U.S. 656, 35 L. Ed. 2d 572, 93 S. Ct. 1172 (1973) (*per curiam*), the Court adhered to the line drawn in *Kras*. The appellants in *Ortwein* sought court review of agency determinations reducing their welfare benefits. Alleging poverty, they challenged, as applied to them, an Oregon statute requiring appellants in civil cases to pay a \$ 25 fee. We summarily affirmed the Oregon Supreme Court's judgment rejecting appellants' challenge. As in *Kras*, the Court saw no "'fundamental interest . . . gained or lost depending on the availability' of the relief sought by [the complainants]." 410 U.S. at 659 (quoting *Kras*, 409 U.S. at 445). [HN7] Absent a fundamental interest or classification attracting heightened scrutiny, we said, the applicable equal protection standard [*116] "is that of rational justification," a requirement we found satisfied by Oregon's need for revenue to offset the expenses of its court system. 410 U.S. at 660. We expressly rejected the *Ortwein* appellants' argument that a fee waiver was required for all civil appeals simply because the State chose to permit *in forma pauperis* filings in special classes of civil appeals, including appeals from terminations of parental rights. *Id.*, at 661.

In sum, as *Ortwein* underscored, this Court has not extended *Griffin* to the broad array of civil cases. But tellingly, the Court has consistently set apart from the mine run [**564] of cases those involving state controls or intrusions on family relationships. In that domain, to guard against undue official intrusion, the Court has examined closely and contextually the importance of the governmental interest advanced in defense of the intrusion. Cf. *Moore v. East Cleveland*, 431 U.S. 494, 52 L. Ed. 2d 531, 97 S. Ct. 1932 (1977).

[**LEdHR5A] [5A] [HN8] Choices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as "of basic importance in our society," *Boddie*, 401 U.S. at 376, rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect. See, for example, *Turner v. Safley*, 482 U.S. 78, 96 L. Ed. 2d 64, 107 S. Ct. 2254 (1987), [**488] *Zablocki v. Redhail*, 434 U.S. 374, 54 L. Ed. 2d 618, 98 S. Ct. 673 (1978), and *Loving v. Virginia*, 388 U.S. 1, 18 L. Ed. 2d 1010, 87 S. Ct. 1817 (1967) (marriage); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 86 L. Ed. 1655, 62 S. Ct. 1110 (1942) (procreation); *Pierce v. Society of Sisters*, 268 U.S. 510, 69 L. Ed. 1070, 45 S. Ct. 571 (1925), and *Meyer v. Nebraska*, 262 U.S. 390, 67 L. Ed. 1042, 43 S. Ct. 625 (1923) (raising children). M. L. B.'s case, involving the State's authority to sever permanently a parent-child bond,⁸ demands the close consideration [**117] the Court has long required when a family association so undeniably important is at stake. We approach M. L. B.'s petition mindful of the gravity of the sanction imposed on her and in light of two prior decisions most immediately in point: *Lassiter v. Department of Social Servs. of Durham Cty.*, 452 U.S. 18, 68 L. Ed. 2d 640, 101 S. Ct. 2153 (1981), and *Santosky v. Kramer*, 455 U.S. 745, 71 L. Ed. 2d 599, 102 S. Ct. 1388 (1982).

8 [**LEdHR5B] [5B]

Although the termination proceeding in this case was initiated by private parties as a prelude to an adoption petition, rather than by a state agency, the challenged state action remains essentially the same: M. L. B. resists the imposition of an official decree extinguishing, as no power other than the State can, her parent-child relationships.

Lassiter concerned the appointment of counsel for indigent persons seeking to defend against the State's termination of their parental status. The Court held that appointed counsel was not routinely required to assure a fair adjudication; instead, a case-by-case determination of the need for counsel would suffice, an assessment to be made "in the first instance by the trial court, subject . . . to appellate review." 452 U.S. at 32.

For probation-revocation hearings where loss of conditional liberty is at issue, the *Lassiter* Court observed, our precedent is not doctrinaire; due process is provided, we have held, when the decision whether counsel should be appointed is made on a case-by-case basis. See *Gagnon v. Scarpelli*, 411 U.S. 778, 790, 36 L. Ed. 2d 656, 93 S. Ct. 1756 (1973). In criminal prosecutions that do not lead to the defendant's incarceration, however, our precedent recognizes no right to appointed counsel. See *Scott v. Illinois*, 440 U.S. at 373-374. Parental termination cases, the *Lassiter* Court concluded, are most appropriately ranked with probation-revocation hearings: While the Court declined to recognize an automatic right to appointed counsel, it said that an appointment would be due when warranted by the character and difficulty of the case. See *Lassiter*, 452 U.S. at 31-32.⁹

⁹ The Court noted, among other considerations, that petitions to terminate parental rights may charge criminal activity and that "parents so accused may need legal counsel to guide them in understanding the problems such petitions may create." *Lassiter*, 452 U.S. at 27, n. 3.

Significant to the disposition of M. L. B.'s case, the *Lassiter* Court considered it "plain . . . that a parent's desire for [**118] and right to 'the companionship, care, custody, and management of his or her children' is an important interest, one that "undeniably warrants deference and, absent a powerful countervailing interest, protection." 452 U.S. at 27 (quoting *Stanley v. Illinois*, 405 U.S. 645, 651, 31 L. Ed. 2d 551, 92 S. Ct. 1208 (1972)). The object of the proceeding is "not simply to infringe [**565] upon [the parent's] [**489] interest," the Court recognized, "but to end it"; thus, a decision against the parent "work[s] a unique kind of deprivation." *Lassiter*, 452 U.S. at 27. For that reason, "[a] parent's interest in the accuracy and justice of the decision . . . is . . . a commanding one." *Ibid.*; see also 452 U.S. at 39 (Blackmun, J., dissenting) ("A termination of parental rights is both total and irrevocable. Unlike other custody proceedings, it leaves the parent with no right to visit or communicate with the child" (footnote omitted)).

Santosky held that [HN9] a "clear and convincing" proof standard is constitutionally required in parental termination proceedings. 455 U.S. at 769-770.¹⁰ In so ruling, the Court again emphasized that a termination decree is "final and irrevocable." 455 U.S. at 759 (emphasis in original). "Few forms of state action," the Court said, "are both so severe and so irreversible." *Ibid.* ¹¹ As in *Lassiter*, the Court characterized the parent's interest as "commanding," indeed, [**119] "far more precious than any property right." 455 U.S. at 758-759.

10 Earlier, in *Addington v. Texas*, 441 U.S. 418, 431-432, 60 L. Ed. 2d 323, 99 S. Ct. 1804 (1979), the Court concluded that the Fourteenth Amendment requires a "clear and convincing" standard of proof in civil commitment proceedings.

11 In *Rivera v. Minnich*, 483 U.S. 574, 97 L. Ed. 2d 473, 107 S. Ct. 3001 (1987), the Court declined to extend *Santosky* to paternity proceedings. The Court distinguished the State's imposition of the legal obligations attending a biological relationship between parent and child from the State's termination of a fully existing parent-child relationship. See *Rivera*, 483 U.S. at 579-582. In drawing this distinction, the Court found it enlightening that state legislatures had similarly separated the two proceedings: Most jurisdictions applied a "preponderance of the evidence" standard in paternity cases, while 38 jurisdictions, at the time *Santosky* was decided, required a higher standard of proof in proceedings to terminate parental rights. See *Rivera*, 483 U.S. at 578-579 (citing *Santosky*, 455 U.S. at 749-750).

Although both *Lassiter* and *Santosky* yielded divided opinions, the Court was unanimously of the view that [HN10] "the interest of parents in their relationship with their children is sufficiently fundamental to come within the finite class of liberty interests protected by the Fourteenth Amendment." 455 U.S. at 774 (REHNQUIST, J., dissenting). It was also the Court's unanimous view that "few consequences of judicial action are so grave as the severance of natural family ties." 455 U.S. at 787.

V

Guided by this Court's precedent on an indigent's access to judicial processes in criminal and civil cases, and on proceedings to terminate parental status, we turn to the classification question this case presents: Does the Fourteenth Amendment require Mississippi to accord M. L. B. access to an appeal--available but for her inability to advance required costs--before she is forever branded unfit for affiliation with her children? Respondents urge us to classify M. L. B.'s case with the generality of civil cases, in which indigent persons have no constitutional right to proceed *in forma pauperis*. See *supra*, 519 U.S. at 114-116. M. L. B., on the other hand, maintains that the accusatory state action [***490] she is trying to fend off¹² is barely distinguishable from criminal condemnation in view of the magnitude and permanence of the loss she faces. Cf. *In re Gault*, 387 U.S. 1, 50, 55, 18 L. Ed. 2d 527, 87 S. Ct. 1428 (1967) (resisting "feeble enticement of the 'civil' label-of-convenience," and holding that Fifth Amendment's safeguard against self-incrimination applies in juvenile proceedings). See also *Santosky*, 455 U.S. at 756, 760 (recognizing stigmatic effect of parental status termination decree: "It entails a judicial determination that [a parent is] unfit to raise [her] own children."). For the purpose at hand, M. L. B. [*120] asks us to treat her parental termination appeal as we have treated petty offense appeals; she urges us to adhere to the reasoning in *Mayer v. Chicago*, 404 U.S. 189, 30 L. Ed. 2d 372, 92 S. Ct. 410 (1971), see [**566] *supra*, 519 U.S. at 111-112, and rule that Mississippi may not withhold the transcript M. L. B. needs to gain review of the order ending her parental status. Guided by *Lassiter* and *Santosky*, and other decisions acknowledging the primacy of the parent-child relationship, e. g., *Stanley v. Illinois*, 405 U.S. at 651; *Meyer v. Nebraska*, 262 U.S. at 399, we agree that the *Mayer* decision points to the disposition proper in this case.

12 See *supra*, 519 U.S. at 116, n. 8.

[**LEdHR1B] [1B] [**LEdHR6] [6] We observe first that the Court's decisions concerning [HN11] access to judicial processes, commencing with *Griffin* and running through *Mayer*, reflect both equal protection and due process concerns. See *Ross v. Moffitt*, 417 U.S. at 608-609. As we said in *Bearden v. Georgia*, 461 U.S. 660, 665, 76 L. Ed. 2d 221, 103 S. Ct. 2064 (1983), in the Court's *Griffin*-line cases, "due process and equal protection principles converge." The equal protection concern relates to the legitimacy of fencing out would-be appellants based solely on their inability to pay core costs. See *Griffin*, 351 U.S. at 23 (Frankfurter, J., concurring in judgment) (cited *supra*, 519 U.S. at 110-111). The due process concern homes in on the essential fairness of the state-ordered proceedings anterior to adverse state action. See *Ross*, 417 U.S. at 609. A "precise rationale" has not been composed, 417 U.S. at 608, because cases of this order "cannot be resolved by resort to easy slogans or pigeonhole analysis," *Bearden*, 461 U.S. at 666. Nevertheless, "most decisions in this area," we have recognized, "rest on an equal protection framework," *id.*, at 665, as M. L. B.'s plea heavily does, for, as we earlier observed, see *supra*, 519 U.S. at 110, due process does not independently require that the State provide a right to appeal. We place this case within the framework established by our past decisions in this area. In line with those decisions, we inspect the character and intensity of the individual interest at stake, on the one hand, and the State's [*121] justification for its exaction, on the other. See *Bearden*, 461 U.S. at 666-667.

[**LEdHR1C] [1C] We now focus on *Mayer* and the considerations linking that decision to M. L. B.'s case. *Mayer*, [***491] described *supra*, 519 U.S. at 111-112, applied *Griffin* to a petty offender, fined a total of \$ 500, who sought

to appeal from the trial court's judgment. See *Mayer*, 404 U.S. at 190. An "impecunious medical student," 404 U.S. at 197, the defendant in *Mayer* could not pay for a transcript. We held that the State must afford him a record complete enough to allow fair appellate consideration of his claims. The defendant in *Mayer* faced no term of confinement, but the conviction, we observed, could affect his professional prospects and, possibly, even bar him from the practice of medicine. *Ibid.* The State's pocketbook interest in advance payment for a transcript, we concluded, was unimpressive when measured against the stakes for the defendant. *Ibid.*

Similarly here, the stakes for petitioner M. L. B.--forced dissolution of her parental rights--are large, "more substantial than mere loss of money." *Santosky*, 455 U.S. at 756 (quoting *Addington v. Texas*, 441 U.S. 418, 424, 60 L. Ed. 2d 323, 99 S. Ct. 1804 (1979)). In contrast to loss of custody, which does not sever the parent-child bond, parental status termination is "irretrievably destructive" of the most fundamental family relationship. *Santosky*, 455 U.S. at 753. And the risk of error, Mississippi's experience shows, is considerable. See *supra*, 519 U.S. at 109, n. 3.

Consistent with *Santosky*, Mississippi has, by statute, adopted a "clear and convincing proof" standard for parental status termination cases. Miss. Code Ann. § 93-15-109 (Supp. 1996). Nevertheless, the Chancellor's termination order in this case simply recites statutory language; it describes no evidence, and otherwise details no reasons for finding M. L. B. "clearly and convincingly" unfit to be a parent. See *supra*, 519 U.S. at 107-108. Only a transcript can reveal to judicial minds other than the Chancellor's the sufficiency, [*122] or insufficiency, of the evidence to support his stern judgment.

The countervailing government interest, as in *Mayer*, is financial. Mississippi urges, as [**567] the justification for its appeal cost prepayment requirement, the State's legitimate interest in offsetting the costs of its court system. Brief for Respondents 4, 8, n. 1, 27-30. But in the tightly circumscribed category of parental status termination cases, cf. *supra*, 519 U.S. at 118, n. 11, appeals are few, and not likely to impose an undue burden on the State. See Brief for Petitioner 20, 25 (observing that only 16 reported appeals in Mississippi from 1980 until 1996 referred to the State's termination statute, and only 12 of those decisions addressed the merits of the grant or denial of parental rights); cf. Brief for Respondents 28 (of 63,765 civil actions filed in Mississippi Chancery Courts in 1995, 194 involved termination of parental rights; of cases decided on appeal in Mississippi in 1995 (including Court of Appeals and Supreme Court cases), 492 were first appeals of criminal convictions, 67 involved domestic relations, 16 involved child custody). Mississippi's experience with criminal appeals is noteworthy in this regard. In 1995, the Mississippi Court of Appeals disposed of 298 first appeals from criminal convictions, Sup. Ct. of Miss. Ann. Rep. 42 (1995); of those appeals, only seven were appeals from misdemeanor convictions, *ibid.*, notwithstanding our holding in *Mayer* requiring [***492] *in forma pauperis* transcript access in petty offense prosecutions.¹³

13 Many States provide for *in forma pauperis* appeals, including transcripts, in civil cases generally. See, e. g., Alaska Rule App. Proc. 209(a)(3) (1996); Conn. Rule App. Proc. 4017 (1996); D. C. Code Ann. § 15-712 (1995); Idaho Code § 31-3220(5) (1996); Ill. Comp. Stat., ch. 735, § 5/5-105.5(b) (Supp. 1996); Ky. Rev. Stat. Ann. § 453.190 (Baldwin 1991); La. Code Civ. Proc. Ann., Art. 5185 (West Supp. 1996); Me. Rule Civ. Proc. 91(f) (1996); Minn. Stat. § 563.01, subd. 7 (1994); Mo. Rev. Stat. § 512.150 (1994); Neb. Rev. Stat. § 25-2306 (1995); Nev. Rev. Stat. § 12.015.2 (1995); N. M. Stat. Ann. § 39-3-12 (1991); N. Y. Civ. Prac. Law § 1102(b) (McKinney 1976); Ore. Rev. Stat. § 21.605(3)(a) (1991); Pa. Rule Jud. Admin. 5000.2(h) (1996); Tex. Rule App. Proc. 53(j)(1) (1996); Vt. Rule App. Proc. 10(b)(4) (1996); Wash. Rule App. Proc. 15.4(d) (1996); W. Va. Code § 59-2-1(a) (Supp. 1996); *State ex rel. Girouard v. Circuit Court for Jackson County*, 155 Wis. 2d 148, 454 N.W.2d 792 (1990).

Several States deal discretely with *in forma pauperis* appeals, including transcripts, in parental status termination cases. See, e. g., *In re Appeal in Pima County v. Howard*, 112 Ariz. 170, 540 P.2d 642 (1975); Cal. Family Code Ann. § 7895(c) (West 1994); Colo. Rev. Stat. § 19-3-609 (Supp. 1996); *Nix v. Department of Human Resources*, 236 Ga. 794, 225 S.E.2d 306 (1976); *In re Chambers*, 261 Iowa 31, 152 N.W.2d 818 (1967); Kan. Stat. Ann. § 38-1593 (1986); *In re Karren*, 280 Minn. 377, 159 N.W.2d 402 (1968); Mich. Rule P. Ct. 5.974(H)(3) (1996); *In re Dotson*, 72 N.J. 112, 367 A.2d 1160 (1976); *State ex rel. Heller v. Miller*, 61 Ohio St. 2d 6, 399 N.E.2d 66 (1980); *Ex parte Cauthen*, 291 S.C. 465, 354 S.E.2d 381 (1987).

[**LEdHR1D] [1D] [***LEdHR7] [7] [***LEdHR8] [8] [*123] In States providing criminal appeals, as we earlier recounted, an indigent's access to appeal, through a transcript of relevant trial proceedings, is secure under our precedent. See *supra*, 519 U.S. at 110-112. That equal access right holds for petty offenses as well as for felonies. But counsel at state expense, we have held, is a constitutional requirement, even in the first instance, only when the defendant faces time in confinement. See *supra*, at 113. When deprivation of parental status is at stake, however, counsel is sometimes part of the process that is due. See *Lassiter*, 452 U.S. at 31-32. It would be anomalous to recognize a right to a transcript needed to appeal a misdemeanor conviction--though trial counsel may be flatly denied--but hold, at the

same time, that a transcript need not be prepared for M. L. B.--though were her defense sufficiently complex, state-paid counsel, as *Lassiter* instructs, would be designated for her.

[**LEdHR9] [9]In aligning M. L. B.'s case and *Mayer*--parental status termination decrees and criminal convictions that carry no jail time--for appeal access purposes, we do not question the general rule, stated in *Ortwein*, that fee requirements ordinarily are examined only for rationality. See *supra*, 519 U.S. at 115-116. The State's need for revenue to offset costs, in the mine run of cases, satisfies the rationality requirement, see *Ortwein*, 410 U.S. at 660; States are not forced by the Constitution to adjust all tolls to account for "disparity in material [*124] circumstances." *Griffin*, 351 U.S. at 23 (Frankfurter, J., concurring in judgment). [**568]

[**LEdHR10] [10] [**LEdHR11] [11]But our cases solidly establish two exceptions to that general rule. The basic right to participate in political processes as voters and candidates cannot be limited to those who can pay for a license.¹⁴ Nor may access to judicial processes in cases criminal or "quasi criminal in nature," *Mayer*, 404 U.S. at 196 (citation and [**493] internal quotation marks omitted), turn on ability to pay. In accord with the substance and sense of our decisions in *Lassiter* and *Santosky*, see *supra*, 519 U.S. at 117-120, we place decrees forever terminating parental rights in the category of cases in which the State may not "bolt the door to equal justice," *Griffin*, 351 U.S. at 24 (Frankfurter, J., concurring in judgment); see *supra*, at 110.

14 The pathmarking voting and ballot access decisions are *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 664, 666, 16 L. Ed. 2d 169, 86 S. Ct. 1079 (1966) (invalidating, as a denial of equal protection, an annual \$ 1.50 poll tax imposed by Virginia on all residents over 21); *Bullock v. Carter*, 405 U.S. 134, 135, 145, 149, 31 L. Ed. 2d 92, 92 S. Ct. 849 (1972) (invalidating Texas scheme under which candidates for local office had to pay fees as high as \$ 8,900 to get on the ballot); *Lubin v. Panish*, 415 U.S. 709, 710, 718, 39 L. Ed. 2d 702, 94 S. Ct. 1315 (1974) (invalidating California statute requiring payment of a ballot-access fee fixed at a percentage of the salary for the office sought).

Notably, the Court in *Harper* recognized that "a State may exact fees from citizens for many different kinds of licenses." 383 U.S. at 668. For example, the State "can demand from all an equal fee for a driver's license." *Ibid*. But voting cannot hinge on ability to pay, the Court explained, for it is a "fundamental political right . . . preservative of all rights." 383 U.S. at 667 (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370, 30 L. Ed. 220, 6 S. Ct. 1064 (1886)). *Bullock* rejected as justifications for excluding impecunious persons, the State's concern about unwieldy ballots and its interest in financing elections. 405 U.S. at 144-149. *Lubin* reaffirmed that a State may not require from an indigent candidate "fees he cannot pay." 415 U.S. at 718.

VI

In numerous cases, respondents point out, the Court has held that government "need not provide funds so that people [*125] can exercise even fundamental rights." Brief for Respondents 12; see, e. g., *Lyng v. Automobile Workers*, 485 U.S. 360, 363, 370-374, 99 L. Ed. 2d 380, 108 S. Ct. 1184 (1988) (rejecting equal protection attack on amendment to Food Stamp Act providing that no household could become eligible for benefits while a household member was on strike); *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 543-544, 550-551, 76 L. Ed. 2d 129, 103 S. Ct. 1997 (1983) (rejecting nonprofit organization's claims of free speech and equal protection rights to receive tax deductible contributions to support its lobbying activity); *Harris v. McRae*, 448 U.S. 297, 321-326, 65 L. Ed. 2d 784, 100 S. Ct. 2671 (1980) (Medicaid funding need not be provided for women seeking medically necessary abortions). A decision for M. L. B., respondents contend, would dishonor our cases recognizing that the Constitution "generally confer[s] no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual." *DeShaney v. Winnebago County Dept. of Social Servs.*, 489 U.S. 189, 196, 103 L. Ed. 2d 249, 109 S. Ct. 998 (1989).

[**LEdHR1E] [1E]Complainants in the cases on which respondents rely sought state aid to subsidize their privately initiated action or to alleviate the consequences of differences in economic circumstances that existed apart from state action. M. L. B.'s complaint is of a different order. She is endeavoring to defend against the State's destruction of her family bonds, and to resist the brand associated with a parental unfitness adjudication. Like a defendant resisting criminal conviction, she seeks to be spared from the State's devastatingly adverse action. That is the very reason we have paired her case with *Mayer*, not with *Ortwein* or *Kras*, discussed *supra*, at 114-116.

[**494] Respondents also suggest that *Washington v. Davis*, 426 U.S. 229, 48 L. Ed. 2d 597, 96 S. Ct. 2040 (1976), is instructive because it rejects the notion "that a law, neutral on its face and serving ends otherwise [*126] within the power of government to pursue, is invalid [**569] under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another," *id.*, at 242. "This must be all the more true," respondents urge, "with respect to an allegedly disparate impact on a class [here, the poor] that, unlike race, is not suspect." Brief for Respondents 31.

Washington v. Davis, however, does not have the sweeping effect respondents attribute to it. That case involved a verbal skill test administered to prospective Government employees. "[A] far greater proportion of blacks--four times as many--failed the test than did whites." 426 U.S. at 237. But the successful test takers included members of both races, as did the unsuccessful examinees. Disproportionate impact, standing alone, the Court held, was insufficient to prove unconstitutional racial discrimination. Were it otherwise, a host of laws would be called into question, "a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white." *Id.*, at 248.

To comprehend the difference between the case at hand and cases controlled by *Washington v. Davis*,¹⁵ one need look no further than this Court's opinion in *Williams v. Illinois*, 399 U.S. 235, 26 L. Ed. 2d 586, 90 S. Ct. 2018 (1970). *Williams* held unconstitutional an Illinois law under which an indigent offender could be continued in confinement beyond the maximum prison term specified by statute if his indigency prevented him from satisfying the monetary portion of the sentence. The Court described that law as "nondiscriminatory on its face," and recalled that the law found incompatible with the Constitution in *Griffin* had been so characterized. 399 U.S. at 242 (quoting *Griffin*, 351 U.S. at 17, n. 11); see *Griffin*, 351 U.S. at 17, n. 11 [*127] ("[A] law nondiscriminatory on its face may be grossly discriminatory in its operation."). But the *Williams* Court went on to explain that "the Illinois statute in operative effect exposes *only indigents* to the risk of imprisonment beyond the statutory maximum." 399 U.S. at 242 (emphasis added). Sanctions of the *Williams* genre, like the Mississippi prescription here at issue, are not merely *disproportionate* in impact. Rather, they are wholly contingent on one's ability to pay, and thus "visit different consequences on two categories of persons," *ibid.*; they apply to all indigents and do not reach anyone outside that class.

¹⁵ See *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 60 L. Ed. 2d 870, 99 S. Ct. 2282 (1979); *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 50 L. Ed. 2d 450, 97 S. Ct. 555 (1977).

In sum, under respondents' reading of *Washington v. Davis*, our overruling of the *Griffin* line of cases would be two decades overdue. It suffices to point out that this Court has not so conceived the meaning and effect of our 1976 "disproportionate [***495] impact" precedent. See *Bearden v. Georgia*, 461 U.S. at 664-665 (adhering in 1983 to "*Griffin's* principle of 'equal justice'").¹⁶

¹⁶ Six of the seven Justices in the majority in *Washington v. Davis*, 426 U.S. 229, 48 L. Ed. 2d 597, 96 S. Ct. 2040 (1976), had two Terms before *Davis* read our decisions in *Griffin* and related cases to hold that "the State cannot adopt procedures which leave an indigent defendant 'entirely cut off from any appeal at all,' by virtue of his indigency, or extend to such indigent defendants merely a 'meaningless ritual' while others in better economic circumstances have a 'meaningful appeal.'" *Ross v. Moffitt*, 417 U.S. 600, 612, 41 L. Ed. 2d 341, 94 S. Ct. 2437 (1974) (opinion of the Court by REHNQUIST, J.) (citations omitted).

Respondents and the dissenters urge that we will open floodgates if we do not rigidly restrict *Griffin* to cases typed "criminal." See *post*, at 141-144 (THOMAS, J., dissenting); Brief for Respondents 27-28. But we have repeatedly noticed what sets parental status termination decrees apart from mine run civil actions, even from other domestic relations matters such as divorce, paternity, and child custody. See *supra*, 519 U.S. at 117-120, and n. 11. To recapitulate, termination decrees "work a unique kind of deprivation." *Lassiter*, 452 U.S. at 27. In contrast to matters modifiable at [*128] the parties' [**570] will or based on changed circumstances, termination adjudications involve the awesome authority of the State "to destroy permanently all legal recognition of the parental relationship." *Rivera*, 483 U.S. at 580. Our *Lassiter* and *Santosky* decisions, recognizing that parental termination decrees are among the most severe forms of state action, *Santosky*, 455 U.S. at 759, have not served as precedent in other areas. See *supra*, 519 U.S. at 118, n. 11. We are therefore satisfied that the label "civil" should not entice us to leave undisturbed the Mississippi courts' disposition of this case. Cf. *In re Gault*, 387 U.S. at 50.

* * *

For the reasons stated, we hold that Mississippi may not withhold from M. L. B. "a 'record of sufficient completeness' to permit proper [appellate] consideration of [her] claims." *Mayer*, 404 U.S. at 198. Accordingly, we reverse the judgment of the Supreme Court of Mississippi and remand the case for further proceedings not inconsistent with this opinion.

It is so ordered.

CONCUR BY: KENNEDY

CONCUR

JUSTICE KENNEDY, concurring in the judgment.

The Court gives a most careful and comprehensive recitation of the precedents from *Griffin v. Illinois*, 351 U.S. 12, 100 L. Ed. 891, 76 S. Ct. 585 (1956), through *Mayer v. Chicago*, 404 U.S. 189, 30 L. Ed. 2d 372, 92 S. Ct. 410 (1971), and beyond, a line of decisions which invokes both equal protection and due process principles. The duality, as the Court notes, stems from *Griffin* itself, which produced no opinion for the Court and invoked strands of both constitutional doctrines.

In my view the cases most on point, and the ones which persuade me we must reverse the judgment now reviewed, are the decisions addressing [***496] procedures involving the rights and privileges inherent in family and personal relations. [*129] These are *Boddie v. Connecticut*, 401 U.S. 371, 28 L. Ed. 2d 113, 91 S. Ct. 780 (1971); *Lassiter v. Department of Social Servs. of Durham Cty.*, 452 U.S. 18, 68 L. Ed. 2d 640, 101 S. Ct. 2153 (1981); and *Santosky v. Kramer*, 455 U.S. 745, 71 L. Ed. 2d 599, 102 S. Ct. 1388 (1982), all cases resting exclusively upon the Due Process Clause. Here, due process is quite a sufficient basis for our holding.

I acknowledge the authorities do not hold that an appeal is required, even in a criminal case; but given the existing appellate structure in Mississippi, the realities of the litigation process, and the fundamental interests at stake in this particular proceeding, the State may not erect a bar in the form of transcript and filing costs beyond this petitioner's means. The Court well describes the fundamental interests the petitioner has in ensuring that the order which terminated all her parental ties was based upon a fair assessment of the facts and the law. See *Mathews v. Eldridge*, 424 U.S. 319, 335, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976). With these observations, I concur in the judgment.

DISSENT BY: REHNQUIST; THOMAS

DISSENT

CHIEF JUSTICE REHNQUIST, dissenting.

I join all but Part II of JUSTICE THOMAS' dissenting opinion. For the reasons stated in that opinion, I would not extend the *Griffin-Mayer* line of cases to invalidate Mississippi's refusal to pay for petitioner's transcript on appeal in this case.

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, and with whom THE CHIEF JUSTICE joins except as to Part II, dissenting.

Today the majority holds that the Fourteenth Amendment requires Mississippi to afford petitioner a free transcript because her civil case involves a "fundamental" right. The majority seeks to limit the reach of its holding to the type of case we confront here, one involving the termination of parental rights. I do not think, however, that the new-found constitutional right to free transcripts in civil appeals can be [*130] effectively restricted to this case. The inevitable consequence will be greater demands on the States to provide free assistance to would-be appellants in all manner of civil cases involving interests that cannot, based on the test established by the majority, be distinguished [**571] from the admittedly important interest at issue here. The cases on which the majority relies, primarily cases requiring appellate assistance for indigent criminal defendants, were questionable when decided, and have, in my view, been undermined since. Even accepting those cases, however, I am of the view that the majority takes them too far. I therefore dissent.

I

Petitioner requests relief under both the Due Process and Equal Protection Clauses, though she does not specify how either Clause affords it. The majority accedes to petitioner's request. But, carrying forward the ambiguity in the cases on which it relies, the majority does not specify the source of the relief it grants. Those decisions are said to "reflect both equal protection and due process concerns." *Ante*, at 120. And, while we are told [***497] that "cases of this order 'cannot be resolved by resort to easy slogans or pigeonhole analysis,'" *ibid.* (quoting *Bearden v. Georgia*, 461 U.S. 660, 666, 76 L. Ed. 2d 221, 103 S. Ct. 2064 (1983)), the majority nonetheless acknowledges that "most decisions in this area . . . rest on an equal protection framework," *ante*, at 120 (quoting *Bearden, supra*, at 665). It then purports to "place this case within the framework established by our past decisions in this area." *Ante*, at 120. It is not clear to me whether the

majority disavows *any* due process support for its holding. (Despite the murky disclaimer, the majority discusses numerous cases that squarely relied on due process considerations.) I therefore analyze petitioner's claim under both the Due Process and Equal Protection Clauses. If neither Clause affords petitioner the right to a free, civil-appeal transcript, I assume that no amalgam of the two does.

[*131] A

We have indicated on several occasions in this century that the interest of parents in maintaining their relationships with their children is "an important interest that 'undeniably warrants deference and, absent a powerful countervailing interest, protection.'" *Lassiter v. Department of Social Servs. of Durham Cty.*, 452 U.S. 18, 27, 68 L. Ed. 2d 640, 101 S. Ct. 2153 (1981) (quoting *Stanley v. Illinois*, 405 U.S. 645, 651, 31 L. Ed. 2d 551, 92 S. Ct. 1208 (1972)). Assuming that petitioner's interest may not be impinged without due process of law, I do not think that the Due Process Clause requires the result the majority reaches.

Petitioner's largest obstacle to a due process appeal *gratis* is our oft-affirmed view that due process does not oblige States to provide for any appeal, even from a criminal conviction. See, e.g., *Griffin v. Illinois*, 351 U.S. 12, 18, 100 L. Ed. 891, 76 S. Ct. 585 (1956) (plurality opinion) (noting that "a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all" (citation omitted)); *McKane v. Durston*, 153 U.S. 684, 687, 38 L. Ed. 867, 14 S. Ct. 913 (1894) ("A review by an appellate court of the final judgment in a criminal case, however grave the offence of which the accused is convicted, was not at common law and is not now a necessary element of due process of law. It is wholly within the discretion of the State to allow or not to allow such a review. A citation of authorities upon the point is unnecessary"). To be sure, we have indicated, beginning with *Griffin v. Illinois*, that where an appeal is provided, States may be prohibited from erecting barriers to those unable to pay. As I described last Term in my concurring opinion in *Lewis v. Casey*, 518 U.S. 343, 368-373, 135 L. Ed. 2d 606, 116 S. Ct. 2174 (1996), however, I believe that these cases are best understood as grounded in equal protection analysis, and thus make no inroads on our longstanding rule that States that accord due process in a hearing-level tribunal need not provide further review.

The majority reaffirms that due process does not require an appeal. *Ante*, at 110, 120. Indeed, as I noted above, it [*132] is not clear that the majority relies on the Due Process Clause at all. The majority does discuss, however, one case in which the Court stated its holding in terms of due process: *Boddie v. Connecticut*, 401 U.S. 371, 28 L. Ed. 2d 113, 91 S. Ct. 780 [***498] (1971). In *Boddie*, the Court [**572] held violative of due process a Connecticut statute that exacted fees averaging \$ 60 from persons seeking marital dissolution. Citing the importance of the interest in ending a marriage, and the State's monopoly over the mechanisms to accomplish it, we explained that, "at a minimum" and "absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." *Id.*, at 377. *Boddie* has little to do with this case. It, "of course, was not concerned with post-hearing review." *Ortwein v. Schwab*, 410 U.S. 656, 659, 35 L. Ed. 2d 572, 93 S. Ct. 1172 (1973). Rather, the concern in *Boddie* was that indigent persons were deprived of "fundamental rights" with no hearing whatsoever. Petitioner, in contrast, received not merely a hearing, but in fact enjoyed procedural protections above and beyond what our parental termination cases have required. She received both notice and a hearing before a neutral, legally trained decisionmaker. She was represented by counsel--even though due process does not in every case require the appointment of counsel. See *Lassiter*, *supra*, at 24. Through her attorney, petitioner was able to confront the evidence and witnesses against her. And, in accordance with *Santosky v. Kramer*, 455 U.S. 745, 769, 71 L. Ed. 2d 599, 102 S. Ct. 1388 (1982), the Chancery Court was required to find that petitioner's parental unfitness was proved by clear and convincing evidence. Indeed, petitioner points to no hearing-level process to which she was entitled that she did not receive.

Given the many procedural protections afforded petitioner, I have little difficulty concluding that "due process has . . . been accorded in the tribunal of first instance." *Ohio ex rel. Bryant v. Akron Metropolitan Park Dist.*, 281 U.S. 74, 80, 74 L. Ed. 710, 50 S. Ct. 228 (1930). [*133] Due process has never compelled an appeal where, as here, its rigors are satisfied by an adequate hearing. Those cases in which the Court has required States to alleviate financial obstacles to process beyond a hearing--though sometimes couched in due process terms--have been based on the equal protection proposition that if the State chooses to provide for appellate review, it "can no more discriminate on account of poverty than on account of religion, race, or color." *Lewis v. Casey*, *supra*, at 371 (THOMAS, J., concurring) (quoting *Griffin v. Illinois*, *supra*, at 17 (plurality opinion)) (footnote omitted). There seems, then, no place in the Due Process Clause--certainly as an original matter, and even as construed by this Court--for the constitutional "right" crafted by the majority today. I turn now to the other possible source: The Equal Protection Clause.

B

As I stated last Term in *Lewis v. Casey*, I do not think that the equal protection theory underlying the *Griffin* line of cases remains viable. See 518 U.S. at 373-378. There, I expressed serious reservations as to the continuing vitality of *Bounds v. Smith*, 430 U.S. 817, 52 L. Ed. 2d 72, 97 S. Ct. 1491 (1977) (requiring prison authorities to provide prisoners with adequate law libraries or legal assistance). As it did in *Bounds*, the Court [***499] today not only adopts the equal protection theory of *Griffin v. Illinois*--which was dubious *ab initio* and which has been undermined since--but extends it. Thus, much of what I said in *Lewis v. Casey* bears repeating here.

In *Griffin*, the State of Illinois required all criminal appellants whose claims on appeal required review of a trial transcript to obtain it themselves. The plurality thought that this "discriminate[d] against some convicted defendants on account of their poverty," 351 U.S. at 18 (plurality opinion). Justice Harlan, in dissent, perceived a troubling shift in this Court's equal protection jurisprudence. The Court, he noted, did not "dispute either the necessity for a bill of exceptions [*134] or the reasonableness of the general requirement that the trial transcript, if used in its preparation, be paid for by the appealing party." 351 U.S. at 35. But, because requiring each would-be appellant to bear the costs of appeal hit the poor harder, the majority divined "an invidious classification between the 'rich' and the 'poor.'" *Ibid.* Disputing this [**573] early manifestation of the "disparate impact" theory of equal protection, Justice Harlan argued:

"No economic burden attendant upon the exercise of a privilege bears equally upon all, and in other circumstances the resulting differentiation is not treated as an invidious classification by the State, even though discrimination against 'indigents' by name would be unconstitutional." *Ibid.*

Justice Harlan offered the example of a state university that conditions an education on the payment of tuition. If charging tuition did not create a discriminatory classification, then, Justice Harlan wondered, how did any other reasonable exaction by a State for a service it provides? "The resulting classification would be invidious in all cases, and an invidious classification offends equal protection regardless of the seriousness of the consequences." *Ibid.* (emphasis deleted). The issue in *Griffin* was not whether Illinois had made a reasonable classification, but whether the State acted reasonably in failing to remove disabilities that existed wholly independently of state action. To Justice Harlan this was not an inquiry typically posed under the Equal Protection Clause.

In *Douglas v. California*, 372 U.S. 353, 9 L. Ed. 2d 811, 83 S. Ct. 814 (1963), Justice Harlan again confronted what Justice Clark termed the Court's "fetish for indigency," *id.*, at 359 (dissenting opinion). Regarding a law limiting the appointment of appellate counsel for indigents, Justice Harlan pointed out that "laws such as these do not deny equal protection to the less fortunate for one essential reason: the Equal Protection Clause does not impose on the States 'an affirmative duty to lift the handicaps [*135] flowing from differences in economic circumstances.'" *Id.*, at 362 (dissenting opinion) (footnote omitted).

Justice Harlan's views were accepted by the Court in *Washington v. Davis*, 426 U.S. 229, 48 L. Ed. 2d 597, 96 S. Ct. 2040 (1976), in which "we rejected a disparate impact theory of the Equal Protection Clause altogether." *Lewis v. Casey, supra*, at 375 (concurring opinion). We spurned the claim that "a law, neutral on its face and serving ends otherwise within [***500] the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another." 426 U.S. at 242. Absent proof of discriminatory purpose, official action did not violate the Fourteenth Amendment "solely because it has a racially disparate impact." *Id.*, at 239 (emphasis in original). Harkening back to Justice Harlan's dissents in *Griffin* and *Douglas*, we recognized that

"[a] rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white." 426 U.S. at 248 (footnote omitted).

The lesson of *Davis* is that the Equal Protection Clause shields only against purposeful discrimination: A disparate impact, even upon members of a racial minority, the classification of which we have been most suspect, does not violate equal protection. The Clause is not a panacea for perceived social or economic inequity; it seeks to "guarantee equal laws, not equal results." *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 273, 60 L. Ed. 2d 870, 99 S. Ct. 2282 (1979).

Since *Davis*, we have regularly required more of an equal protection claimant than a showing that state action has a [*136] harsher effect on him or her than on others. See, e.g., *Harris v. McRae*, 448 U.S. 297, 324, n. 26, 65 L. Ed. 2d 784, 100 S. Ct. 2671 (1980) ("The equal protection component of the Fifth Amendment prohibits only purposeful discrimination, and when a facially neutral federal statute is challenged on equal protection grounds, it is incumbent upon the challenger to prove that Congress selected or reaffirmed a particular course of action at least in part because of, not

merely in spite of, its adverse effects upon an identifiable group" (internal quotation marks and citations [**574] omitted)); see also *Lewis v. Casey*, 518 U.S. at 375 (concurring opinion) (citing cases). Our frequent pronouncements that the Fourteenth Amendment is not violated by disparate impact have spanned challenges to statutes alleged to affect disproportionately members of one race, *Washington v. Davis*, *supra*; members of one sex, *Personnel Administrator v. Feeney*, *supra*; and poor persons seeking to exercise protected rights, *Harris v. McRae*, *supra*; *Maher v. Roe*, 432 U.S. 464, 470-471, 53 L. Ed. 2d 484, 97 S. Ct. 2376 (1977).

The majority attempts to avoid what I regard as the irresistible force of the *Davis* line of cases, but I am unconvinced by the effort. The majority states that persons in cases like those cited above "sought state aid to subsidize their privately initiated action or to alleviate the consequences of differences in economic circumstances that existed apart from state action." *Ante*, at 125. Petitioner, in apparent contrast, "is endeavoring to defend against the State's destruction of her family bonds, and to resist the brand associated with a parental unfitness adjudication." *Ibid.* [***501] She, "like a defendant resisting criminal conviction, . . . seeks to be spared from the State's devastatingly adverse action." *Ibid.* But, also like a defendant resisting criminal conviction, petitioner is not constitutionally entitled to post-trial process. See *ante*, at 110, 120. She defended against the "destruction of her family bonds" in the Chancery Court hearing at which she was accorded all the process this Court has required of the States in parental termination cases. She now desires "state aid to subsidize [her] privately initiated" [*137] appeal--an appeal that neither petitioner nor the majority claims Mississippi is required to provide--to overturn the determination that resulted from that hearing. I see no principled difference between a facially neutral rule that serves in some cases to prevent persons from availing themselves of state employment, or a state-funded education, or a state-funded abortion--each of which the State may, but is not required to, provide--and a facially neutral rule that prevents a person from taking an appeal that is available only because the State chooses to provide it.

Nor does *Williams v. Illinois*, 399 U.S. 235, 26 L. Ed. 2d 586, 90 S. Ct. 2018 (1970), a case decided six years earlier, operate to limit *Washington v. Davis*. *Williams* was yet another manifestation of the "equalizing" notion of equal protection that this Court began to question in *Davis*. See *Williams*, 399 U.S. at 260 (Harlan, J., concurring in result). To the extent its reasoning survives *Davis*, I think that *Williams* is distinguishable. Petitioner *Williams* was incarcerated beyond the maximum statutory sentence because he was unable to pay the fine imposed as part of his sentence. We found the law that permitted prisoners to avoid extrastatutory imprisonment only by paying their fines to violate the Equal Protection Clause. Even though it was "nondiscriminatory on its face," the law "work[ed] an invidious discrimination" as to *Williams* and all other indigents because they could not afford to pay their fines. 399 U.S. at 242. The majority concludes that the sanctions involved in *Williams* are analogous to "the Mississippi prescription here at issue," in that both do not have merely a disparate impact, "they apply to all indigents and do not reach anyone outside that class." *Ante*, at 127. Even assuming that *Williams*' imprisonment gave rise to an equal protection violation, however, M. L. B.'s circumstances are not comparable. M. L. B.'s parental rights were terminated--the analog to *Williams*' extended imprisonment--because the Chancery Court found, after a hearing, that she was unfit to remain her children's mother, not because she was indigent. Her indigency only prevented her from taking [*138] advantage of procedures above and beyond those required by the Constitution--in the same way that indigency frequently prevents persons from availing themselves of a variety of state services. ¹

¹ Similarly, *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 16 L. Ed. 2d 169, 86 S. Ct. 1079 (1966), struck down a poll tax that directly restricted the exercise of a right found in that case to be fundamental--the right to vote in state elections. The fee that M. L. B. is unable to pay does not prevent the exercise of a fundamental right directly: The fundamental interest identified by the majority is not the right to a civil appeal, it is rather the right to maintain the parental relationship.

[**575] The *Griffin* line of cases ascribed to--one might say announced--an equalizing notion of the Equal Protection Clause that would, I think, have startled the Fourteenth Amendment's Framers. In those cases, the Court did not find, nor did it seek, any purposeful discrimination on the part of the state defendants. That their statutes had disproportionate effect on poor persons was sufficient for us to find a constitutional violation. In *Davis*, among other cases, we began to recognize the potential mischief of a disparate impact theory writ large, and endeavored to contain it. In this case, I would continue that enterprise. Mississippi's requirement of prepaid transcripts in civil appeals seeking to contest the sufficiency of the evidence adduced at trial is facially neutral; it creates no classification. The transcript rule reasonably obliges would-be appellants to bear the costs of availing themselves of a service that the State chooses, but is not constitutionally required, to provide. ² Any adverse [*139] impact that the transcript requirement has on any person seeking to appeal arises not out of the State's action, but out of factors entirely unrelated to it.

2 Petitioner suggests that Mississippi's \$ 2 per page charge exceeds the actual cost of transcription. See Reply Brief for Petitioner 8. She stops short of asserting that the charge is unreasonable or irrational. While not conclusive, I note that Mississippi's transcript charge falls comfortably within the range of charges throughout the Nation. See, e.g., Ariz. Rev. Stat. Ann. § 12-224(B) (1992) (\$ 2.50/page); Idaho Code § 1-1105(2) (1990) (\$ 2/page); Mass. Gen. Laws § 221:88 (1994) (\$ 3/page); Mo. Rev. Stat. § 485.100 (1994) (\$ 1.50/page); N. M. Stat. Ann. § 34-6-20(C) (1996) (\$ 1.65/page); R. I. Gen. Laws § 8-5-5 (Supp. 1995) (family court transcripts, \$ 3/page); S. C. App. Ct. Rule 508 (\$ 2/page).

II

If this case squarely presented the question, I would be inclined to vote to overrule *Griffin* and its progeny. Even were I convinced that the cases on which the majority today relies ought to be retained, I could not agree with the majority's extension of them.

The interest at stake in this case differs in several important respects from that at issue in cases such as *Griffin*. Petitioner's interest in maintaining a relationship with her children is the subject of a civil, not criminal, action. While certain civil suits may tend at the margin toward criminal cases, and criminal cases may likewise drift toward civil suits, the basic distinction between the two finds root in the Constitution and has largely retained its vitality in our jurisprudence. In dissent in *Boddie v. Connecticut*, Justice Black stated that "in *Griffin* the Court studiously and carefully refrained from saying one word or one sentence suggesting that the rule there announced to control rights of criminal defendants would control in the quite different field of civil cases." 401 U.S. at 390. The Constitution provides for a series of protections of the unadorned liberty interest at stake in criminal proceedings. These express protections include the Fifth Amendment's guarantee of grand jury indictment, and protection against double jeopardy and self-incrimination; the Sixth Amendment's guarantees of a speedy and public jury trial, of the ability to confront witnesses, and of compulsory process and assistance of counsel; and the Eighth Amendment's protections against excessive bail and fines, and against cruel and unusual punishment. This Court has given content to these textual protections, and has identified others contained [***503] in the Due Process Clause. These protections are not available to the typical [*140] civil litigant. Even where the interest in a civil suit has been labeled "fundamental," as with the interest in parental termination suits, the protections extended pale by comparison. A party whose parental rights are subject to termination is entitled to appointed counsel, but only in certain circumstances. See *Lassiter*, 452 U.S. at 31-32. His or her rights cannot be terminated unless the evidence meets a standard higher than the preponderance standard applied in the typical civil suit, but the standard is still lower than that required before a guilty verdict. See *Santosky v. Kramer*, 455 U.S. at 769-770. [**576]

That said, it is true enough that civil and criminal cases do not always stand in bold relief to one another. *Mayer v. Chicago*, 404 U.S. 189, 30 L. Ed. 2d 372, 92 S. Ct. 410 (1971), marks a particularly discomfiting point along the border between the civil and criminal areas. Based on *Griffin*, the Court determined there that an indigent defendant had a constitutional right to a free transcript in aid of appealing his conviction for violating city ordinances, which resulted in a \$ 500 fine and no imprisonment. In *Scott v. Illinois*, 440 U.S. 367, 59 L. Ed. 2d 383, 99 S. Ct. 1158 (1979), we concluded that an indigent defendant charged with a crime that was not punishable by imprisonment was not entitled to appointed counsel. And yet, in *Lassiter*, *supra*, we held that, in some cases, due process required provision of assistance of counsel before the termination of parental rights. The assertion that civil litigants have no right to the free transcripts that all criminal defendants enjoy is difficult to sustain in the face of our holding that some civil litigants are entitled to the assistance of counsel to which some criminal defendants are not. It is at this unsettled (and unsettling) place that the majority lays the foundation of its holding. See *ante*, at 120-124. The majority's solution to the "anomaly" that a misdemeanor receives a free transcript but no trial counsel, while a parental-rights terminnee receives (sometimes) trial counsel, but no transcript, works an extension of *Mayer*. I [*141] would answer the conundrum differently: Even if the *Griffin* line were sound, *Mayer* was an unjustified extension that should be limited to its facts, if not overruled.

Unlike in *Scott* and *Lassiter*, the Court gave short shrift in *Mayer* to the distinction, as old as our Constitution, between crimes punishable by imprisonment and crimes punishable merely by fines. See *Lassiter*, *supra*, 452 U.S. at 26-27; *Scott*, *supra*, at 373. Even though specific text-based constitutional protections have been withheld in cases not involving the prospect of imprisonment, the Court found the difference of no moment in *Mayer*. The Court reasoned that "the invidiousness of the discrimination that exists when criminal procedures are made available only to those who can pay is not erased by any differences in the sentences that may be imposed." 404 U.S. at 197. We reap today what we sowed then. If requiring payment for procedures (e.g., appeals) that are not themselves required is invidious discrimination no matter what sentence results, it is difficult to imagine why it is not invidious discrimination no matter [***504] what

results and no matter whether the procedures involve a criminal or civil case. See *supra*, 519 U.S. at 135. To me this points up the difficulty underlying the entire *Griffin* line. Taking the *Griffin* line as a given, however, and in the absence of any obvious limiting principle, I would restrict it to the criminal appeals to which its authors, see *Boddie v. Connecticut*, 401 U.S. at 389 (Black, J., dissenting), sought to limit it.

The distinction between criminal and civil cases--if blurred at the margins--has persisted throughout the law. The distinction that the majority seeks to draw between the case we confront today and the other civil cases that we will surely face tomorrow is far more ephemeral. If all that is required to trigger the right to a free appellate transcript is that the interest at stake appear to us to be as fundamental as the interest of a convicted misdemeanant, several kinds of civil suits involving interests that seem fundamental [*142] enough leap to mind. Will the Court, for example, now extend the right to a free transcript to an indigent seeking to appeal the outcome of a paternity suit? ³ To those [**577] who wish to appeal custody determinations? ⁴ How about persons against whom divorce decrees are entered? ⁵ Civil suits that arise out of challenges to zoning ordinances with an impact on families? ⁶ Why not foreclosure actions--or at least foreclosure [*143] [***505] actions seeking to oust persons from their homes of many years? ⁷

3 In *Little v. Streater*, 452 U.S. 1, 68 L. Ed. 2d 627, 101 S. Ct. 2202 (1981), we held that the Due Process Clause required the States to provide a free blood grouping test to an indigent defendant in a paternity action. The Court observed that "apart from the putative father's pecuniary interest in avoiding a substantial support obligation and liberty interest threatened by the possible sanctions for noncompliance, at issue is the creation of a parent-child relationship. This Court frequently has stressed the importance of familial bonds, whether or not legitimized by marriage, and accorded them constitutional protection. Just as the termination of such bonds demands procedural fairness, so too does their imposition." *Id.*, at 13 (citations omitted). *Little's* description of the interest at stake in a paternity suit seems to place it on par with the interest here.

Justice Blackmun, dissenting in *Lassiter v. Department of Social Servs. of Durham Cty.*, 452 U.S. 18, 58, 68 L. Ed. 2d 640, 101 S. Ct. 2153 (1981), recognized as much: "I deem it not a little ironic that the Court on this very day grants, on due process grounds, an indigent putative father's claim for state-paid blood grouping tests in the interest of according him a meaningful opportunity to disprove his paternity, *Little v. Streater*, [*supra*,] but in the present case rejects, on due process grounds, an indigent mother's claim for state-paid legal assistance when the State seeks to take her own child away from her in a termination proceeding." (Emphasis deleted.)

As the majority indicates, *ante*, at 118, n. 11, we have distinguished--in my view unpersuasively--between the requirements of due process in paternity suits and in termination suits. See *Rivera v. Minnich*, 483 U.S. 574, 97 L. Ed. 2d 473, 107 S. Ct. 3001 (1987). Whether we will distinguish between paternity appellants and misdemeanor appellants remains to be seen.

4 See, e.g., *Zakrzewski v. Fox*, 87 F.3d 1011, 1013-1014 (CA8 1996) (father's "fundamental" "liberty interest in the care, custody and management of his son has been substantially reduced by the terms of the divorce decree and Nebraska law").

5 In *Boddie v. Connecticut*, 401 U.S. 371, 28 L. Ed. 2d 113, 91 S. Ct. 780 (1971), we referred to a divorce as the "adjustment of a fundamental human relationship." 401 U.S. at 382-383.

6 See, e.g., *Moore v. East Cleveland*, 431 U.S. 494, 52 L. Ed. 2d 531, 97 S. Ct. 1932 (1977).

7 Cf. *Lindsey v. Normet*, 405 U.S. 56, 89-90, 31 L. Ed. 2d 36, 92 S. Ct. 862 (1972) (Douglas, J., dissenting in part) ("Where the right is so fundamental as the tenant's claim to his home, the requirements of due process should be more embracing").

The majority seeks to provide assurances that its holding will not extend beyond parental termination suits. The holdings of *Santosky* and *Lassiter*--both of which involved parental termination--have not, we are told, been applied to other areas of law. *Ante*, at 128. This is not comforting. Both *Santosky* and *Lassiter* are cases that determined the requirements of due process (not equal protection) in the parental rights termination area. As the Court has said countless times, the requirements of due process vary considerably with the interest involved and the action to which it is subject. It is little wonder, then, that the specific due process requirements for one sort of action are not readily transferable to others. I have my doubts that today's opinion will be so confined. In the first place, it is not clear whether it is an equal protection or a due process opinion. Moreover, the principle on which it appears to rest hardly seems capable of stemming the tide. Petitioner is permitted a free appellate transcript because the interest that underlies her civil claim compares favorably to the interest of the misdemeanant facing a \$ 500 fine and unknown professional difficulties in *Mayer v. Illinois*. Under the rule announced today, I do not see how a civil litigant could constitutionally be denied a free transcript in any case that involves an interest that is arguably as important as the interest in *Mayer* (which would appear to include all the types of cases that I mention above, and perhaps many others). ⁸ What is more, it must be remembered that *Griffin* did not merely invent [*144] the free transcript right for criminal appellants; it was also the launching pad for the discovery of a host of other rights. See, e.g., *Bounds*, 430 U.S. at 822 (right to prison law libraries or legal assistance); *Doug-*

las, 372 U.S. at 356 (right to free appellate counsel). I fear that the growth of *Griffin* in the criminal area may be mirrored in the civil area.

8 Accordingly, Mississippi will no doubt find little solace in the fact that, as the majority notes, of 63,765 civil actions filed in Mississippi Chancery Court in 1995, 194 were parental termination cases. *Anne*, at 122. Mississippi pointed out in its brief that of these civil actions, "39,475 were domestic relations cases," "1027 involved custody or visitation, and 6080 were paternity cases." Brief for Respondents 28.

In brushing aside the distinction between criminal and civil cases--the distinction that has constrained *Griffin* for 40 years--the Court has eliminated the last meaningful limit [**578] on the free-floating right to appellate assistance. From *Mayer*, an unfortunate outlier in the *Griffin* line, has sprung the *M. L. B.* line, and I have no confidence that the majority's assurances that the line starts and ends with this case will hold true.

III

As the majority points out, many States already provide for *in forma pauperis* civil appeals, with some making special allowances for parental termination cases. I do not dispute the wisdom or charity of these heretofore voluntary allocations of the various States' scarce resources. I agree that, for many--if not most--parents, the termination of their [***506] right to raise their children would be an exaction more dear than any other. It seems perfectly reasonable for States to choose to provide extraconstitutional procedures to ensure that any such termination is undertaken with care. I do not agree, however, that a State that has taken the step, not required by the Constitution, of permitting appeals from termination decisions somehow violates the Constitution when it charges reasonable fees of all would-be appellants. I respectfully dissent.

REFERENCES

3 of 3 DOCUMENTS

WALTER C. MOORE, APPELLANT VS. PHIL PRICE, DIRECTOR, APPELLEE

No. E 94-231

COURT OF APPEALS OF ARKANSAS

52 Ark. App. 10; 914 S.W.2d 318; 1996 Ark. App. LEXIS 27

January 31, 1996, Opinion Delivered
January 31, 1996, filed

PRIOR HISTORY: [***1] AN APPEAL FROM THE ARKANSAS EMPLOYMENT SECURITY DEPARTMENT, NO. 94-BR-1125. Board of Review.

DISPOSITION: AFFIRMED

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant claimant sought review of a decision from the Arkansas Employment Security Department Board of Review, which found that the claimant was disqualified from receiving unemployment compensation benefits.

OVERVIEW: The claimant sought unemployment compensation benefits. The Agency found that the claimant left his job voluntarily and was disqualified from receiving benefits. The claimant sought review. The Board denied benefits on the further ground that the claimant was fired for misconduct. The claimant sought review and contended that it was a denial of due process for the Board to deny benefits on a different ground than the agency denial. The court affirmed. It found that because the claimant's hearing notice contained a reference to discharge, there was no denial of due process because the claimant was alerted that discharge for misconduct was at issue.

OUTCOME: The court affirmed the Board's finding and held that the claimant was not denied due process when the Board found that he was disqualified from receiving unemployment compensation benefits.

CORE TERMS: quit, misconduct, tribunal, discharged, good cause, connected, claimant, notice, unemployment benefits, denied benefits, pro se, disqualified, referee, unemployment compensation, contested issues, substantial rights, majority opinion, rules of procedure, quit work, present case, fundamentally unfair, direct appeal, computer printout, civil cases, administrative agency, en banc, fundamentally, cross-examine, unemployment, injection

JUDGES: JUDITH ROGERS, Judge. Mayfield and Robbins, JJ., and Bullion, S.J., dissent.

OPINION BY: JUDITH ROGERS

OPINION

[*11] [**319] EN BANC

JUDITH ROGERS, Judge

This is an appeal from a decision of the Board of Review disqualifying appellant from receiving unemployment compensation benefits. The Board held that appellant was discharged for misconduct connected with the work. This appeal comes to us without benefit of briefs being filed by either party. We affirm.

Both the Agency and Appeal Tribunal in this case denied benefits based on a finding that appellant had voluntarily quit his job without good cause connected with the work pursuant to Ark. Code Ann. § 11-10-513(a)(1) (1987). The Board also denied benefits, but modified the appeals referee's decision by finding that the appellant had been discharged for misconduct pursuant to Ark. Code Ann. § 11-10-514(a)(1) (1987). In *Linscott v. Director*, 9 Ark. App. 103, 653 S.W.2d 150 (1983), the Agency and Appeal Tribunal determined that the appellant was disqualified for the receipt of benefits for misconduct connected with the work. The Board of [***2] Review, however, denied benefits on the ground that appellant had voluntarily quit his job without good cause connected with the work. We agreed with the argument presented in the appeal and held that it was a denial of due process for the Board to disqualify a claimant on a different ground than that contained in the hearing notice. Consequently, we reversed and remanded for further proceedings.

Here, as in *Linscott*, the Board denied benefits on a ground different from that of the Agency and Appeal Tribunal. However, the decision in *Linscott* does not compel reversal of this case. Fundamental to the decision in *Linscott* was the appellant's claim that the issue to be litigated was confined to the charge of misconduct, and his assertion that he and his legal representative had only prepared and presented evidence pertinent to that one issue. Under those circumstances, we determined that the injection of the voluntary quit issue for the first time in the Board's decision effectively deprived the appellant of notice and the opportunity to defend and be heard on the alternative ground raised by the Board. By contrast, the record in this case demonstrates that the Board's finding [***3] that appellant was discharged for misconduct was within the framework of contested issues. The hearing notice plainly states that the "primary issue(s) involved [*12] are: Whether the claimant voluntarily left, was discharged or suspended from last work and whether the circumstances of the separation entitle the claimant to unemployment benefits within the meaning of Ark. Code Ann. 11-10-513 and/or 514." Indeed the appeals referee framed the issues as such in her opening remarks. Furthermore, it was the appellant's position that he had been discharged as reflected by his testimony: "I was laid off. I did not quit." In sum, the record, without any doubt, reflects that the issues before the Board were whether appellant was entitled to benefits, or whether he was disqualified for either voluntarily quitting without good cause or for being discharged for misconduct. On this record, it cannot plausibly be argued that the Board exceeded the parameters of the defined issues. This case simply does not present a situation where the Board disqualified a claim for benefits on a ground unanticipated by the claimant. Therefore, we hold that appellant was not denied due process.

[**320] After a careful and thorough [***4] review of the record, we find no error in the Board's decision and further conclude that it is supported by substantial evidence.

Affirmed.

Mayfield and Robbins, JJ., and Bullion, S.J., dissent.

DISSENT BY: BRUCE T. BULLION; MELVIN MAYFIELD

DISSENT

DISSENTING OPINION

MELVIN MAYFIELD, Judge

I respectfully dissent from the majority opinion in this case. In the first place, I think the decision of the Board of Review was reached under circumstances that were fundamentally unfair. And in the second place, I think that in pro se appeals to this court from the Board of Review it is our duty to see that the Board complies with the rules of procedure and decides the cases in keeping with [***5] the law and the evidence.

The first reason for my dissent is based on the failure of the majority opinion to apply the law in *Linscott v. Director*, 9 Ark. App. 103, 653 S.W.2d 150 (1983), to the present case. In *Linscott* the appellant's claim for unemployment benefits was denied by the agency on the basis that he had been discharged for misconduct in connection with his work. His disqualification was affirmed upon appeal to the Appeal Tribunal. However, on appeal to the Board of Review, the Board denied benefits on the [*13] basis that he had voluntarily quit his job without good cause connected with the work. On appeal to this court, we held:

Here, the injection of the voluntary quit issue for the first time in the board's decision effectively denied appellant proper notice of the disputed issue, the opportunity to subpoena witnesses on his behalf, to confront and cross-examine adverse witnesses, and to present rebuttal evidence on the voluntary quit issue. In short, appellant was denied the minimum requirements of due process of law

9 Ark. App. at 105-06, 653 S.W.2d at 151 (citations omitted).

Linscott was a unanimous decision of this court, sitting [***6] en banc. The decision was later cited by a Missouri Court of Appeals, along with cases in other states, to support that court's holding that "many other courts" have found that this situation violates due process. See *Wilson v. Labor and Industrial Relations Commission*, 693 S.W.2d 328, 330 (Mo. App. 1985). Moreover, one of the Oregon cases cited in *Linscott* has been cited again by that court as authority for holding that an appeal to an Appeals Board must be remanded where the Board decided the case on an issue presented for the first time in the appeal to the Board. See *Cascade Corporation v. Employment Division*, 104 Ore. App. 238, 800 P.2d 305 (Or. App. 1990). And the Vermont case cited in *Linscott* has been relied upon for another similar decision in that state. See *Call v. Department of Employment Security*, 138 Vt. 52, 411 A.2d 1336 (1980).

However, the majority opinion in the present case seeks to distinguish this case from *Linscott* and the rule followed in the above cited cases, on the basis that "the record in this case demonstrates that the Board's finding that appellant was discharged for misconduct was within the framework of contested issues." I must, [***7] with due respect, vigorously disagree.

The record in this case shows that on February 8, 1994, the appellant filed a "Claimant's Statement Concerning Discharge" in which he stated that he had received a letter discharging him from work and was told his discharge would be considered a voluntary quit. On February 18, 1994, the employer wrote a letter to the Employment Security Division stating that appellant [*14] "voluntarily quit without attributable [**321] cause to the employer," and the "Employer Response" dated February 21, 1994, to the agency request for additional information states that the appellant "quit."

The agency cited Ark. Code Ann. § 11-10-513(a)(2) (1987), under which one who voluntarily leaves work is disqualified for benefits until he has 30 days covered employment, and denied appellant benefits on the basis that he left work without good cause connected with the work. Appellant appealed to the Appeal Tribunal and the Appeal Tribunal held that "the determination of the Agency denying the claimant benefits under Ark. Code Ann. § 11-10-513 is affirmed."

The appellant then appealed to the Board of Review, and the Board's opinion cited a different section of the Employment Security [***8] Law - Ark. Code Ann. § 11 10-514 (a) (1995 Supp.) - and held that the appellant was disqualified "for misconduct" under that section and could not receive benefits "for a period of eight (8) weeks, of unemployment . . ." I think it is clear that the Board was wrong in using section 11-10-514 to find appellant guilty of misconduct when he had only been charged with having voluntarily left work without good cause under section 11-10-513.

At the hearing on appellant's claim, the referee said that "the Agency determined this to be a voluntary quit," and Robert Gant, who appeared in behalf of the employer, testified they considered that appellant "voluntarily quit." Gant testified further that Ron Arney verbally offered appellant light duty work on August 20 and appellant refused.

Appellant testified that he did not quit; that he was "laid off"; and that "they told me that I quit July 15th, which was incorrect." Appellant said that he had injured his knee, but he did not remember being offered "light duty"; that Arney told him that "he would get back" with him; and the "next thing I know, I got a letter stating that I had voluntarily quit." He testified further that he never told anyone [***9] he quit; that "all of a sudden" he no longer had a job; and that he wanted to know why he was "terminated."

Under these circumstances, I do not believe the misconduct [*15] issue was "within the framework of contested issues." The employer continuously claimed that the appellant had voluntarily quit. The agency held that the appellant had voluntarily quit. The issue that was contested before the referee was whether the appellant had voluntarily quit. And the referee affirmed the agency finding that the appellant had voluntarily quit. Therefore, I believe that the only issue before the Board of Review was whether the appellant had voluntarily quit. When the Board departed from that issue and found that the appellant had been discharged for misconduct, that determination was made on an issue which was not before the agency, the Appeal Tribunal, or the Board.

It is true that Ark. Code Ann. § 11-10-525(a)(2) (1987) provides:

Upon review on its own motion or upon appeal, and on the basis of evidence previously submitted in the case, or upon the basis of such additional evidence as it may direct to be taken, the board may affirm, modify, or reverse the findings and conclusions of the appeal [***10] tribunal or may remand the case.

The above provisions were quoted in *Brown Jordan v. Dukes*, 269 Ark. 581, 600 S.W.2d 21 (Ark. App. 1980) (at that time the provisions were Ark. Stat. Ann. § 81-1107(d)(3) (Repl. 1976)), and the court said, "we interpret 'previously submitted' to mean submitted in some previous hearing at which either party would have an opportunity to question or support." 269 Ark. at 583, 600 S.W.2d at 23. Because the "additional evidence" in that case had not been "previously submitted" the court reversed the decision of the board and "remanded for the taking of further evidence." We amplified the "additional evidence" point in *Jones v. Director*, 8 Ark. App. 234, 650 S.W.2d 601 (1983), when we said, "We think that phrase means additional evidence directed to be taken at some hearing, conducted by the board or someone designated by the board, at which witnesses could appear and opportunity for cross-examination could be afforded." 8 Ark. App. at 236, 650 S.W.2d at 603. The action of the Board in allowing or refusing to allow additional evidence to be taken is discretionary, and we have affirmed the Board where it [**322] remanded the case to the Appeal Tribunal [***11] for the taking of additional [*16] evidence, *Edwards v. Stiles*, 23 Ark. App. 96, 743 S.W.2d 12 (1988), and where it refused to remand for that purpose, *Arkansas Game & Fish Commission v. Director*, 36 Ark. App. 243, 821 S.W.2d 69 (1992). The controlling issue, however, in the decision to remand for the taking of additional evidence is stated in *Maybelline Co. v. Stiles*, 10 Ark. App. 169, 174, 661 S.W.2d 462, 465 (1983), as whether "each side has notice of and a fair opportunity to rebut the evidence of the other party."

So, in the case at bar, the issue is the right to a fair hearing before the Board of Review. The Appeal Tribunal found that appellant voluntarily quit work without good cause, but on appeal the Board found that he was discharged for misconduct. There was no way for him to know that the Board was even going to consider the misconduct issue. The specific question involved is whether it was fundamentally fair for the Board to consider the misconduct issue without notice to appellant and opportunity to produce evidence on that issue.

It is therefore important to note that the petition for review in this court was filed on September 19, 1994. Although it was filed [***12] on a form designed for appeal to the Board of Review, it was filed within 20 days after it was mailed on August 31, 1994, and qualified as a timely petition for appeal to this court. There is a question on the form asking if the appellant has additional evidence to present, and it was checked by appellant. This certainly indicates that after he received the Board's decision mailed to him on August 31, 1994, the appellant wanted to present additional evidence on the misconduct issue. As we did in *Linscott*, and as other courts have done in similar situations, I think we should remand this case to the Board of Review with directions that it either decide the single issue of whether the appellant voluntarily quit work without good cause in connection with that work, or that the Board remand to the Appeal Tribunal for it to allow the parties an opportunity to introduce additional evidence and cross-examine witnesses on the discharge-for-misconduct issue. This will enable the Board to apply the law set out in Ark. Code Ann. § 11-10-525(a)(2) (1987) in a way that is fundamentally fair to all parties.

I also want to comment upon a point that was mentioned in our discussion in conference [***13] on this case. That point concerns [*17] our duty and responsibility in unemployment compensation cases appealed pro se to the Arkansas Court of Appeals. Before this court was established and started to function in July of 1979, these cases were appealed to the circuit court and then to the Arkansas Supreme Court. Section 2 of Act 252, enacted by the Arkansas General Assembly in 1979, codified as Ark. Code Ann. § 11-10-529 (1987), provided for appeals from the Board of Review to be made directly to the Arkansas Court of Appeals, and the Emergency Clause of that Act stated that "the present system of judicial review has not been adequate to insure the prompt and final determination of the issues involved in such matters and, as a result, there has been undue delay to the prejudice of the State and the parties involved." A computer printout reveals that almost 200 such published cases have been appealed to the Court of Appeals in the almost 16 years since this court was established. From 1935 to 1979, a total of almost 45 years prior to the establishment of this court, a computer printout reveals less than 100 such cases were appealed from circuit court to the Arkansas Supreme Court. Therefore, [***14] it would seem that the direct appeal to this court has also provided a more accessible method for the review of the decisions of the Board of Review.

From the beginning of the operation of this court we have recognized that most of the appeals from the Board of Review were pro se, and we have treated these appeals in a somewhat different manner. For example, in *Hunter v. Daniels*, 2 Ark. App. 94, 616 S.W.2d 763 (1981), we said:

We first consider the Board's Rule 9 argument. While it is true that Hunter's brief did not meet the requirements of that rule, we hold that it was not required to do so. Our Rule 7(a) requires the filing of briefs in all civil cases. We have not heretofore treated petitions for review from the decisions of the Board of Review as cases in which briefs are required. It is rare [**323] when appellants in unemployment benefit cases are represented by counsel. It is even rarer when we are furnished anything other than a transcript of the proceedings on appeal. We have not treated unemployment benefit cases the same as other civil cases under our

Appellate Rules. Accordingly, we hold that appellant is not required to [*18] abstract the record under Rules 7 or 9 of this [***15] court since this appeal involves an unemployment benefit case.

2 Ark. App. 94 at 96, 616 S.W.2d 763 at 765.

In *Smith v. Everett*, 6 Ark. App. 337, 642 S.W.2d 320 (1982), a pro se case, we stated in a supplemental opinion on denial of rehearing as follows:

In Employment Security cases, the Board of Review, appeal tribunals and special examiners are not bound by common law, statutory rules of evidence or by technical rules of procedure, but any hearing or appeal before such hearing officers must be conducted in a manner to ascertain the substantial rights of the parties. Ark. Stat. Ann. § 81-1107(d)(4) (Repl. 1976) [now Ark. Code Ann. § 11-10-526(a)(1) (1987)]. Here, the appellee urges us to adopt a rule which would impose a duty on the parties to formally interpose objections in order to preserve a record for an appeal to this Court. If we required the parties to formally object or proffer evidence to preserve a record for appeal purposes, we would be imposing a duty contrary to that envisioned by the Arkansas General Assembly when it enacted § 81-1107(d)(4). We believe it would be fundamentally unfair to adopt such a rule in this type case. Parties in Employment Security cases [***16] are rarely represented by attorneys, and the records on review often reflect clear errors that affect the substantial rights of the parties. The appeal tribunals and the Board of Review are mandated by law to conduct hearings and appeals in a manner to ascertain the substantial rights of the parties. If they fail to do so, we have a correlative duty to remand these cases to require it to be done.

6 Ark. App. at 339A-339B, 642 S.W.2d at 322.

In summary, I do not think that the legislature provided for this court to have direct appeals from the Board of Review in order for us to simply summarily affirm the Board's decision. I think we are supposed to give these cases a close inspection whether or not the parties are represented by attorneys. My view in this regard was ably expressed in a dissent written by now Justice David Newbern when he was a judge on the Court [*19] of Appeals:

It is apparently easy for an administrative agency to slip, unintentionally, into a high-handed and complicated procedure in administering the "governmental largess." Over ten years ago, Charles Reich made the point, with some erudition, that we must treat this form of wealth distribution as affecting [***17] and effecting property rights. Reich, *The New Property*, 73 *Yale L.J.* 733 (1964). We are hearing ESD appeals mostly in cases where citizens can afford to appeal pro se only. Lest the citizenry lose faith in the substance of the system and the procedures we use to administer it, we can ill afford to confront them with a government dominated by forms and mysterious rituals and then tell them they lose because they did not know how to play the game or should not have taken us at our word.

In 1937 Chief Justice Charles Evans Hughes said:

The maintenance of proper standards on the part of administrative agencies in the performance of their quasi-judicial functions is of the highest importance and in no way cripples or embarrasses the exercise of their appropriate authority. On the contrary, it is in their manifest interest. For, as we said at the outset, if these multiplying agencies deemed to be necessary in our complex society are to serve the purposes for which they are created and endowed with vast powers they must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play. [*Morgan v. United States*, 304 U.S. [***18] 1, 58 S. Ct. 999, 82 L. Ed. 1129, 58 S. Ct. 773 (1937)].

Forty two years would seem enough to have learned this small lesson. . . .

[**324] *Teegarden V. Director*, 267 Ark. 893, 899, 591 S.W.2d 675, 678 (Ark. App. 1979).

I would reverse the decision of the Board of Review and remand this case for further proceedings in keeping with this dissent, and I regret that the appellant, who is without the benefit [*20] of legal counsel, will probably not know that he can file a petition asking that the Arkansas Supreme Court review the decision reached by the three to three vote of the judges who participated in this case. BRUCE T. BULLION, Special Judge

I agree with Judge Mayfield and Judge Robbins and vote to reverse and remand this case to the Board of Review so it may arrange for a hearing upon the question of work-related misconduct. I remain neutral of opinion on that portion of Judge Mayfield's written dissent regarding the intention of the General Assembly concerning our review in unemployment compensation appeals. I would reverse and remand this case to the Board of Review.

Robbins, J., joins in this opinion. BRUCE T. BULLION, Special Judge

I agree with Judge Mayfield [***19] and Judge Robbins and vote to reverse and remand this case to the Board of Review so it may arrange for a hearing upon the question of work-related misconduct. I remain neutral of opinion on that

portion of Judge Mayfield's written dissent regarding the intention of the General Assembly concerning our review in unemployment compensation appeals. I would reverse and remand this case to the Board of Review.

Robbins, J., joins in this opinion.

1 of 2 DOCUMENTS

PATTON, APPELLANT, v. DIEMER, APPELLEE

No. 86-1867

Supreme Court of Ohio

35 Ohio St. 3d 68; 518 N.E.2d 941; 1988 Ohio LEXIS 117

February 3, 1988, Decided

PRIOR HISTORY: [*1]**

APPEAL from the Court of Appeals for Cuyahoga County.

Plaintiff-appellant, Richard F. Patton, is an attorney engaged in the practice of law in the state of Ohio. On February 4, 1977, appellant obtained a final decree of divorce on behalf of defendant-appellee, Julie Ann Diemer, from her former husband, Thomas E. Diemer. From July 30, 1977 through December 5, 1984, appellant provided 494 3/4 hours of post-decree legal services to appellee. During the course of his post-decree representation of appellee, appellant sought from Thomas Diemer an award of attorney fees. On December 5, 1984, a hearing was held before a referee appointed by the Cuyahoga County Court of Common Pleas upon the application for attorney fees. Prior to the hearing, appellee signed a cognovit note for the attorney fees due, payable to appellant in the amount of \$ 50,448.60. The note contained a warrant of attorney to confess judgment which allowed execution thereon without prior notice to the debtor.

On March 6, 1985, appellant instituted the present action on the cognovit note in the Cuyahoga County Court of Common Pleas. Judgment was entered thereon at that time in the amount of \$ 51,609.61. Appellee [***2] received notice of this judgment on March 15, 1985. No appeal therefrom was pursued. On May 30, 1985, appellant filed a partial satisfaction in the sum of \$ 20,375.75 -- leaving a balance due of \$ 31,233.86.

1 Inasmuch as the amount in controversy exceeded the jurisdictional limits of the Cleveland Municipal Court, an action brought therein would have been the proper subject of a motion to dismiss pursuant to Civ. R. 12(B)(1) irrespective of the nature of the transaction producing the debt represented by the note. See R.C. 1901.17 and 2323.13(A).

On February 27, 1986, appellee filed what was captioned as an Amended Motion for Relief from Judgment, pursuant to Civ. R. 60(B). This motion was opposed by appellant. On April 22, 1986, the court of common pleas granted the motion. Upon appeal, the court of appeals affirmed the judgment of the common pleas court.

The cause is now before this court pursuant to the allowance of a motion to certify the record.

DISPOSITION: *Judgment affirmed.*

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant attorney challenged the judgment of the Court of Appeals for Cuyahoga County (Ohio), which affirmed a judgment granting appellee client's motion for relief from a judgment for attorney fees. The judgment was obtained upon a note that contained a warrant of attorney to confess judgment.

OVERVIEW: After an attorney obtained a final decree of divorce on behalf of his client, he sought to obtain an award of attorney fees from the client's former husband. Prior to a hearing on the fees, the client signed a cognovit note for attorney fees due. The note contained a warrant of attorney to confess judgment and the trial court entered judgment on the warrant. After the attorney's award was partially satisfied, the client filed a motion for relief from judgment. The court affirmed the lower courts judgments. The court held that Ohio Rev. Code Ann. § 2323.13(B) precluded the use of

a warrant of attorney to confess judgment where the underlying action involved a consumer transaction. The court found that a consumer transaction under Ohio Rev. Code Ann. § 2323.13(F)(2) encompassed the attorney-client relationship because legal representation was a service to an individual for purposes that were primarily personal. The court concluded that because the warrant of attorney was void ab initio, the trial court lacked jurisdiction to render judgment upon the warrant. Thus, it was within the power of the trial court to vacate the judgment upon the warrant and restate the cause for trial.

OUTCOME: The court affirmed the grant of the client's motion to be relieved from a judgment on attorney fees.

CORE TERMS: consumer, warrant of attorney, attorney-client, confess judgment, inherent power, jurisdiction to render, common pleas, household, vacate, void judgments, confession of judgment, educational, confession, intangible, municipal, territory, confessed, franchise, invalid, patients, vacated, resides, lease

LexisNexis(R) Headnotes

Civil Procedure > Pretrial Judgments > Judgment by Confession

[HN1] Ohio Rev. Code Ann. § 2323.13(A) authorizes the use of a warrant of attorney to confess judgment.

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > Pretrial Judgments > Judgment by Confession

Governments > Courts > Justice Courts

[HN2] See Ohio Rev. Code Ann. § 2323.13(A).

Civil Procedure > Pretrial Judgments > Judgment by Confession

Commercial Law (UCC) > Sales (Article 2) > Subject Matter > General Overview

[HN3] Ohio Rev. Code Ann. § 2323.13(E) specifically precludes the use of a warrant of attorney to confess judgment where the underlying action involves a consumer transaction.

Civil Procedure > Pretrial Judgments > Judgment by Confession

Commercial Law (UCC) > Sales (Article 2) > Subject Matter > General Overview

[HN4] See Ohio Rev. Code Ann. § 2323.13(E).

Commercial Law (UCC) > Sales (Article 2) > Subject Matter > General Overview

[HN5] See Ohio Rev. Code Ann. § 2323.13(E)(2).

Commercial Law (UCC) > Sales (Article 2) > Subject Matter > General Overview

Legal Ethics > Client Relations > Confidentiality of Information

[HN6] The definition of "consumer transaction" contained within Ohio Rev. Code Ann. § 2323.13 clearly encompasses the attorney-client relationship. Legal representation is undoubtedly a service to an individual for purposes that are primarily personal, family, educational, or household.

Antitrust & Trade Law > Consumer Protection > General Overview

Commercial Law (UCC) > Sales (Article 2) > Subject Matter > General Overview

Legal Ethics > Client Relations > Confidentiality of Information

[HN7] See Ohio Rev. Code Ann. § 1345.01(A).

Commercial Law (UCC) > Sales (Article 2) > Subject Matter > General Overview

Governments > Legislation > Interpretation

Legal Ethics > Client Relations > Confidentiality of Information

[HN8] Ohio Rev. Code Ann. § 1345.01(A), by its terms, applies only to §§ 1345.01 to 1345.13. Section 1345.01(A) specifically excludes the attorney-client relationship, whereas no such exclusion is present in Ohio Rev. Code Ann. § 2323.13. Clearly, if the Ohio General Assembly had intended to exempt the attorney-client relationship from the definition of "consumer transaction" contained in § 2323.13(E)(2), it could have employed language of similar import to that utilized in Ohio Rev. Code Ann. § 1345.01(A). Inasmuch as the legislature chose not to include such an exception it

must be presumed that none was intended. Under such circumstances a appellate court is not disposed to supply an exception where none exists by statute.

Civil Procedure > Pretrial Judgments > Judgment by Confession
Commercial Law (UCC) > Sales (Article 2) > Subject Matter > General Overview
Criminal Law & Procedure > Preliminary Proceedings > Entry of Pleas > General Overview

[HN9] A warrant of attorney to confess judgment that has as its basis a consumer transaction is rendered wholly invalid by operation of Ohio Rev. Code Ann. § 2323.13(E). More significantly, a common pleas court lacks jurisdiction to render judgment upon a warrant of attorney pursuant to Ohio Rev. Code Ann. § 2323.13 where the relationship giving rise to the claim for relief involves a consumer transaction.

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview
Civil Procedure > Judgments > Relief From Judgment > Void Judgments

[HN10] A judgment rendered by a court lacking subject matter jurisdiction is void ab initio. Consequently, the authority to vacate a void judgment is not derived from Ohio R. Civ. P. 60(B), but rather constitutes an inherent power possessed by Ohio courts.

HEADNOTES

*Attorneys at law -- Consumer transactions -- Attorney-client relationship is "consumer transaction" -- Judgment may not be rendered upon warrant of attorney, when -- R.C. 2323.13 -- Courts have inherent [***3] power to vacate void judgments.*

SYLLABUS

1. The attorney-client relationship is a "consumer transaction" within the meaning of R.C. 2323.13.
2. A common pleas court lacks jurisdiction to render judgment upon a warrant of attorney pursuant to R.C. 2323.13 where the relationship giving rise to the claim for relief involves a consumer transaction.
3. A judgment rendered by a court lacking subject matter jurisdiction is void *ab initio*.
4. The authority to vacate a void judgment is not derived from Civ. R. 60(B) but rather constitutes an inherent power possessed by Ohio courts. (*Lincoln Tavern v. Snader* [1956], 165 Ohio St. 61, 59 O.O. 74, 133 N.E. 2d 606, paragraph one of the syllabus, and *Westmoreland v. Valley Homes Corp.* [1975], 42 Ohio St. 2d 291, 294, 71 O.O. 2d 262, 264, 328 N.E. 2d 406, 409, approved and followed.)

COUNSEL: *Deborah Purcell Goshien*, for appellant.

Mary Ann S. Johaneck, for appellee.

JUDGES: SWEENEY, J. MOYER, C.J., LOCHER, HOLMES, DOUGLAS, WRIGHT and H. BROWN, JJ., concur.

OPINION BY: SWEENEY

OPINION

[*69] [**942] The instant appeal involves the interpretation of R.C. 2323.13 and its relationship to a confession of judgment obtained as a result of an action for attorney fees. [***4] [HN1] R.C. 2323.13(A) authorizes the use of a warrant of attorney to confess judgment. It provides:

[**943] [HN2] "An attorney who confesses judgment in a case, at the time of making such confession, must produce the warrant of attorney for making it to the court before which he makes the confession. Notwithstanding any agreement to the contrary, if the maker or any of several makers resides within the territorial jurisdiction of a municipal court established under section 1901.01 of the Revised Code, or signed the warrant of attorney authorizing confession of judgment in such territory, judgment on such warrant of attorney shall be confessed in a municipal court having jurisdiction in such territory, provided the court has jurisdiction over the subject matter; otherwise, judgment may be confessed in any court in the county where the maker or any of several makers resides or signed the warrant of attorney. The original or a copy of the warrant shall be filed with the clerk."

[HN3] R.C. 2323.13(E) specifically precludes the use of a warrant of attorney to confess judgment where the underlying action involves a consumer transaction. It provides in relevant part:

[HN4] "A warrant of attorney to confess judgment [***5] contained in any instrument executed on or after January 1, 1974, arising out of a consumer loan or consumer transaction, is invalid and the court shall have no jurisdiction to render a judgment based upon such a warrant. An action founded upon an instrument arising out of a consumer loan or a consumer transaction as defined in this section is commenced by the filing of a complaint as in any ordinary civil action." (Emphasis added.)

R.C. 2323.13(E)(2) defines the term "consumer transaction." It provides:

[HN5] "As used in this section:

"* * *

"* * * (2) 'Consumer transaction' means a sale, lease, assignment, award by chance, or other transfer of an item of goods, a service, franchise, or an intangible, to an individual for purposes that are primarily personal, family, educational, or household." (Emphasis added.)

[HN6] The definition of "consumer transaction" contained within R.C. 2323.13 clearly encompasses the attorney-client relationship. Legal representation is undoubtedly a "service * * * to an individual for purposes that are primarily personal, family, educational, or household." Consequently, the attorney-client [*70] relationship is a "consumer transaction" as [***6] defined by R.C. 2323.13.

Appellant maintains that the attorney-client relationship is specifically exempted from the definition of consumer transaction by virtue of R.C. 1345.01(A). It provides in relevant part:

[HN7] "As used in sections 1345.01 to 1345.13 of the Revised Code:

"(A) 'Consumer transaction' means a sale, lease, assignment, award by chance, or other transfer of an item of goods, a service, franchise, or an intangible, except those transactions between persons, defined in sections 4905.03 and 5725.01 of the Revised Code, and their customers, those between attorneys, physicians, or dentists and their clients or patients, or those between veterinarians and their patients that pertain to medical treatment but not ancillary services, to an individual for purposes that are primarily personal, family, or household, or solicitation to supply any of these things." (Emphasis added.)

This argument fails for two reasons. As an initial matter, [HN8] R.C. 1345.01(A), by its terms, applies only to "sections 1345.01 to 1345.13 of the Revised Code." Secondly, R.C. 1345.01(A) specifically excludes the attorney-client relationship, whereas no such exclusion is present [***7] in R.C. 2323.13. Clearly, if the General Assembly had intended to exempt the attorney-client relationship from the definition of "[c]onsumer transaction" contained in R.C. 2323.13(E)(2), it could have employed language of similar import to that utilized in R.C. 1345.01(A). Inasmuch as the legislature chose not to include such an exception it must be presumed that none was intended. Under such circumstances this court is not disposed to supply an exception where none exists by statute.

[**944] [HN9] A warrant of attorney to confess judgment which has as its basis a consumer transaction is rendered wholly invalid by operation of R.C. 2323.13 (E). More significantly, a common pleas court lacks jurisdiction to render judgment upon a warrant of attorney pursuant to R.C. 2323.13 where the relationship giving rise to the claim for relief involves a consumer transaction.

It is therefore apparent that the common pleas court lacked jurisdiction to render the March 6, 1985 judgment. Nevertheless, appellant maintains that the common pleas court erred when it vacated the March 6, 1985 judgment on April 22, 1986. Appellant contends that the vacation of the March 6, 1985 judgment was erroneous because [***8] appellee failed to demonstrate any of the grounds for relief from judgment prescribed by Civ. R. 60(B). However, [HN10] a judgment rendered by a court lacking subject matter jurisdiction is void *ab initio*. Consequently, the authority to vacate a void judgment is not derived from Civ. R. 60(B), but rather constitutes an inherent power possessed by Ohio courts. See Staff Notes to Civ. R. 60(B); *Lincoln Tavern, Inc. v. Snader* (1956); 165 Ohio St. 61, 59 O.O. 74, 133 N.E. 2d 606, paragraph one of the syllabus; *Westmoreland v. Valley Homes Corp.* (1975), 42 Ohio St. 2d 291, 294, 71 O.O. 2d 262, 264, 328 N.E. 2d 406, 409.

It was neither incumbent upon appellee to establish a basis for relief under Civ. R. 60(B) nor was it necessary for the common pleas court to derive its authority therefrom. Rather, the "judgment" sought to be vacated constituted a nulli-

ty. It was therefore within the inherent power of the trial court to vacate the March 6, 1985 judgment and to reinstate the cause for trial.

[*71] Accordingly, the judgment of the court of appeals is [***9] affirmed.

Judgment affirmed.

1 of 4 DOCUMENTS

PRATTS, APPELLANT, v. HURLEY, APPELLEE.

Nos. 2003-0392 and 2003-0560

SUPREME COURT OF OHIO

102 Ohio St. 3d 81; 2004 Ohio 1980; 806 N.E.2d 992; 2004 Ohio LEXIS 1017

December 3, 2003, Submitted

May 5, 2004, Decided

PRIOR HISTORY: APPEAL from the Court of Appeals for Ross County, No. 02CA2674, 2003 Ohio 864. Pratts v. Hurley, 2003 Ohio 864, 2003 Ohio App. LEXIS 818 (Ohio Ct. App., Ross County, Feb. 12, 2003)

DISPOSITION: Judgment affirmed; certified question answered in the negative.

CASE SUMMARY:

PROCEDURAL POSTURE: The Court of Appeals for Ross County (Ohio) dismissed petitioner inmate's request for a writ of habeas corpus in which he challenged the subject-matter jurisdiction of the trial sentencing judge. The inmate appealed.

OVERVIEW: The inmate challenged the judgment entered. At issue was whether the inmate had a right to convene a three-judge panel, as required by Ohio Rev. Code Ann. § 2945.06, deprived the court of subject-matter jurisdiction in a capital case when a defendant waived the right to trial by jury, so as to render the trial court's judgment void ab initio and subject to collateral attack in habeas corpus. The answer to the question was no. Although § 2945.06 mandated the use of a three-judge panel when a defendant was charged with a death-penalty offense and waived the right to a jury, the failure to convene such a panel did not divest a court of subject-matter jurisdiction so that a judgment rendered by a single judge was void ab initio. Instead, it constituted an error in the court's exercise of jurisdiction over a collateral case, for which there was an adequate remedy at law by way of direct appeal. Thus, defendant was not entitled to habeas corpus relief.

OUTCOME: The judgment was affirmed.

CORE TERMS: subject-matter, habeas corpus, direct appeal, common pleas, waived, convene, exercise of jurisdiction, death-penalty, aggravated, void ab initio, subject to collateral attack, jury trial, jurisdictional, noncapital, murder, res judicata, specification, sentence, remedied, void, particular case, written waiver, criminal conviction, sentencing, punishable, subject matter, collateral attack, capital case, capital offense, right to trial

LexisNexis(R) Headnotes

Commercial Law (UCC) > Sales (Article 2) > Remedies > General Overview

Criminal Law & Procedure > Habeas Corpus > Cognizable Issues > General Overview

Criminal Law & Procedure > Habeas Corpus > Procedure > Filing of Petition > Jurisdiction

[HN1] A writ of habeas corpus is an extraordinary remedy available where there is an unlawful restraint of a person's liberty and no adequate remedy at law. Habeas corpus will lie when a judgment is void due to lack of jurisdiction. However, it is not the proper remedy for reviewing errors by a court that properly had subject-matter jurisdiction.

Civil Procedure > Judgments > Relief From Judgment > Void Judgments

Criminal Law & Procedure > Sentencing > Appeals > General Overview

Criminal Law & Procedure > Habeas Corpus > Procedure > Filing of Petition > Jurisdiction

[HN2] There is a distinction between a court that lacks subject-matter jurisdiction over a case and a court that improperly exercises that subject-matter jurisdiction once conferred upon it. The failure of the trial court to convene a three-judge panel, as required by Ohio Rev. Code Ann. § 2945.06, does not constitute a lack of subject-matter jurisdiction that renders the court's judgment void ab initio and subject to collateral attack in habeas corpus.

Criminal Law & Procedure > Jurisdiction & Venue > Jurisdiction

[HN3] "Jurisdiction" means the courts' statutory or constitutional power to adjudicate the case. The term encompasses jurisdiction over the subject matter and over the person.

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Criminal Law & Procedure > Jurisdiction & Venue > Jurisdiction

Governments > Courts > Authority to Adjudicate

[HN4] 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. It is a condition precedent to the court's ability to hear the case. If a court acts without jurisdiction, then any proclamation by that court is void. The term "jurisdiction" is also used when referring to a court's exercise of its jurisdiction over a particular case. This category of jurisdiction encompasses the trial court's authority to determine a specific case within that class of cases that is within its subject matter jurisdiction. It is only when the trial court lacks subject matter jurisdiction that its judgment is void; lack of jurisdiction over the particular case merely renders the judgment voidable. Once a tribunal has jurisdiction over both the subject matter of an action and the parties to it, the right to hear and determine is perfect; and the decision of every question thereafter arising is but the exercise of the jurisdiction thus conferred.

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Criminal Law & Procedure > Jurisdiction & Venue > Jurisdiction

[HN5] The court of common pleas has original jurisdiction over crimes and offenses committed by an adult, with certain exceptions. Ohio Rev. Code Ann. § 2931.03; Ohio Const. art. IV, § 4(B).

Criminal Law & Procedure > Criminal Offenses > Homicide > Murder > Aggravated Murder > Penalties

Criminal Law & Procedure > Juries & Jurors > Waiver of Jury Trial > Right of Waiver

Evidence > Procedural Considerations > Judicial Intervention in Trials > Interrogation of Witnesses

[HN6] Ohio Rev. Code Ann. § 2945.06 authorizes a judge of the court in which the case is pending to hear and decide a criminal case where a defendant has waived the right to a jury trial. The statute makes special provisions for a defendant charged with an offense punishable with death who has waived a jury trial. In such cases, defendant shall be tried by a court to be composed of three judges. For example, if the accused pleads guilty of aggravated murder, a court composed of three judges shall examine the witnesses, determine whether the accused is guilty of aggravated murder or any other offense, and pronounce sentence accordingly. Courts must strictly comply with these procedures.

Criminal Law & Procedure > Jurisdiction & Venue > Jurisdiction

[HN7] Where it is apparent from the allegations that the matter alleged is within the class of cases in which a particular court has been empowered to act, jurisdiction is present. Any subsequent error in the proceedings is only error in the exercise of jurisdiction, as distinguished from the want of jurisdiction in the first instance.

Criminal Law & Procedure > Jurisdiction & Venue > Jurisdiction

Criminal Law & Procedure > Appeals > Procedures > Notice of Appeal

Criminal Law & Procedure > Appeals > Remands & Remittiturs

[HN8] Absent strict compliance with the requirements of Ohio Rev. Code Ann. § 2945.05, a trial court lacks jurisdiction to try a defendant without a jury. Yet, the failure to comply with § 2945.05 may be remedied only in a direct appeal from a criminal conviction.

HEADNOTES

Criminal procedure -- Trial -- Failure of court to convene a three-judge panel, as required by R.C. 2945.06, does not constitute a lack of subject-matter jurisdiction that renders the trial court's judgment void ab initio and subject to colla-

teral attack in habeas corpus. The failure constitutes an error in the court's exercise of jurisdiction that must be raised on direct appeal.

SYLLABUS

[*4912] *994 [*3352] *81 SYLLABUS OF THE COURT

The failure of a court to convene a three-judge panel, as required by R.C. 2945.06, does not constitute a lack of subject-matter jurisdiction that renders the trial court's judgment void ab initio and subject to collateral attack in habeas corpus. It constitutes an error in the court's exercise of jurisdiction that must be raised on direct appeal.

COUNSEL: Reinhart Law Office and Harry R. Reinhart, for appellant.

Jim Petro, Attorney General, Douglas R. Cole, State Solicitor, Stephen P. Carney, Senior Deputy Solicitor, Diane Richards Brey, Deputy Solicitor, and Diane Mallory, Assistant Attorney General, for appellee.

JUDGES: LUNDBERG STRATTON, J. MOYER, C.J., RESNICK, F.E. SWEENEY, PFEIFER, O'CONNOR and O'DONNELL, JJ., concur.

OPINION BY: LUNDBERG STRATTON

OPINION

LUNDBERG STRATTON, J.

[**P1] We are asked to decide whether the failure of a court to convene a three-judge panel, as required by R.C. 2945.06, deprives the court of subject-matter jurisdiction in a capital case when a defendant [***995] has waived the right to trial by jury, so as to render the trial court's judgment void ab initio and subject to collateral attack in habeas corpus.

[**P2] Appellant, Ruben Pratts, appeals from the dismissal of his petition for a writ of habeas corpus in which he challenged the subject-matter jurisdiction of the single judge who sentenced him in the Summit County Court of Common Pleas. In 1989, Pratts pleaded guilty to aggravated murder with death-penalty and firearm specifications and aggravated burglary with a firearm specification. The state had agreed not to seek the death penalty in exchange for the plea of [*82] guilty. At the sentencing hearing, appellant waived his right to a jury trial and agreed to submit his plea to a single judge in lieu of a three-judge panel. The judge accepted his plea and sentenced him to life in prison with parole eligibility after 20 full years for the charge of aggravated murder. Appellant did not file a direct appeal.

[**P3] In 2001, appellant petitioned the Summit County Court of Common Pleas for a writ of habeas corpus. He claimed that the trial court lacked jurisdiction to accept his plea to a capital offense because R.C. 2945.06 requires a three-judge panel if an accused is charged with an offense punishable by death and has waived a jury trial. The Summit County Common Pleas Court denied the writ as barred by res judicata because the appellant had not raised the issue at trial or in a direct appeal. *State v. Pratts* (Nov. 30, 2001), Summit C.P. No. CR 1988 12 1771. Pratts did not appeal from this decision.

[**P4] In April, appellant filed another petition for a writ of habeas corpus, this time in the Ross County Court of Common Pleas. The court dismissed the petition on June 25, 2002, finding that his claim was not cognizable in habeas corpus and was barred by res judicata.¹ The court of appeals affirmed. The court held that the sentencing of appellant by a single judge constituted an error in the exercise of jurisdiction under R.C. 2945.06 that was not subject to collateral attack and that the claim was also barred by res judicata.

¹ Appellant filed a third petition for a writ of habeas corpus as an original action in the Ross County Court of Appeals. The court dismissed the action as barred by res judicata because of the previously filed petition in the Ross County Court of Common Pleas. *Pratts v. Hurley* (Aug. 27, 2002), Ross App. No. 02CA2675.

[**P5] The court of appeals subsequently determined that its decision was in conflict with *State v. Brock* (1996), 110 Ohio App. 3d 656, 675 N.E.2d 18, and *State v. Noggle*, Crawford App. No. 3-99-08, 1999 Ohio 816, 1999 WL 446440, on the following rule of law:

[**P6] "When a defendant charged with an offense punishable by death waives his or her right to trial by jury and elects to be tried by the court, does the failure of the court to convene a three-judge panel, as required by R.C. 2945.06, constitute a lack of subject-matter jurisdiction rendering the trial court's judgment void ab initio and subject to collateral attack in habeas corpus; or is the error one in the exercise of jurisdiction, which is waived if not raised on direct appeal, thereby foreclosing collateral attack in habeas corpus and/or making the defense of res judicata available to defend against the collateral attack?"

[**P7] This cause is now before this court upon our determination that a conflict exists (case No. 2003-0560), and pursuant to the acceptance of a discretionary appeal (case No. 2003-0392).

[**P8] [*83] Appellant seeks [HN1] a writ of habeas corpus, which is an extraordinary remedy available where there is an unlawful [***996] restraint of a person's liberty and no adequate remedy at law. *Agee v. Russell* (2001), 92 Ohio St.3d 540, 544, 2001 Ohio 1279, 751 N.E.2d 1043; *State ex rel. Larkins v. Baker* (1995), 73 Ohio St.3d 658, 659, 1995 Ohio 144, 653 N.E.2d 701. Habeas corpus will lie when a judgment is void due to lack of jurisdiction. *Pegan v. Cramer* (1996), 76 Ohio St.3d 97, 99, 1996 Ohio 419, 666 N.E.2d 1091. However, it is not the proper remedy for reviewing errors by a court that properly had subject-matter jurisdiction. *Blackburn v. Jago* (1988), 39 Ohio St.3d 139, 529 N.E.2d 929.

[**P9] In this case, appellant argues that his conviction and the sentencing order are void because the single judge who entertained his plea of guilty and sentenced him violated R.C. 2945.06 and, therefore, lacked subject-matter jurisdiction. He claims that he is entitled to relief in habeas corpus and immediate release from prison.

[**P10] We disagree. [HN2] There is a distinction between a court that lacks subject-matter jurisdiction over a case and a court that improperly exercises that subject-matter jurisdiction once conferred upon it. Therefore, for the reasons that follow, we hold that the failure of the trial court to convene a three-judge panel, as required by R.C. 2945.06, does not constitute a lack of subject-matter jurisdiction that renders the court's judgment void ab initio and subject to collateral attack in habeas corpus.

[**P11] [HN3] "Jurisdiction" means "the courts' statutory or constitutional power to adjudicate the case." (Emphasis omitted.) *Steel Co. v. Citizens for a Better Environment* (1998), 523 U.S. 83, 89, 118 S. Ct. 1003, 140 L. Ed. 2d 210; *Morrison v. Steiner* (1972), 32 Ohio St.2d 86, 87, 61 Ohio Op. 2d 335, 290 N.E.2d 841, paragraph one of the syllabus. The term encompasses jurisdiction over the subject matter and over the person. *State v. Parker*, 95 Ohio St.3d 524, 2002 Ohio 2833, 769 N.E.2d 846, P22 (Cook, J., dissenting). [HN4] 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. *United States v. Cotton* (2002), 535 U.S. 625, 630, 122 S. Ct. 1781, 152 L. Ed. 2d 860; *State ex rel. Tubbs Jones v. Suster* (1998), 84 Ohio St.3d 70, 75, 1998 Ohio 275, 701 N.E.2d 1002. It is a "condition precedent to the court's ability to hear the case. If a court acts without jurisdiction, then any proclamation by that court is void." Id.; *Patton v. Diemer* (1988), 35 Ohio St.3d 68, 518 N.E.2d 941, paragraph three of the syllabus.

[**P12] The term "jurisdiction" is also used when referring to a court's exercise of its jurisdiction over a particular case. See *State v. Parker*, 95 Ohio St.3d 524, 2002 Ohio 2833, 769 N.E.2d 846, P20 (Cook, J., dissenting); *State v. Swiger* (1998), 125 Ohio App. 3d 456, 462, 708 N.E.2d 1033. "The third category of jurisdiction [i.e., jurisdiction over the particular case] encompasses the trial court's authority to [*84] determine a specific case within that class of cases that is within its subject matter jurisdiction. It is only when the trial court lacks subject matter jurisdiction that its judgment is void; lack of jurisdiction over the particular case merely renders the judgment voidable." *Parker* at P22 (Cook, J., dissenting), quoting *Swiger*, 125 Ohio App.3d at 462, 708 N.E.2d 1033. "Once a tribunal has jurisdiction over both the subject matter of an action and the parties to it, * * * the right to hear and determine is perfect; and the decision of every question thereafter arising is but the exercise of the jurisdiction thus conferred * * *." *State ex rel. Pizza v. Rayford* (1992), 62 Ohio St.3d 382, 384, 582 N.E.2d 992, quoting *Sheldon's Lessee v. Newton* (1854), 3 Ohio St. 494, 499.

[**P13] [HN5] [***997] The court of common pleas has original jurisdiction over crimes and offenses committed by an adult, with certain exceptions irrelevant here. R.C. 2931.03. See, also, Section 4(B), Article IV, Ohio Constitution. Appellant does not dispute that his case was properly filed in common pleas court. However, he contends that the

different statutory procedures for death penalty cases create a unique form of jurisdiction in the common pleas courts that must be followed in order for the trial court to acquire subject-matter jurisdiction in those cases.

[**P14] The applicable statute in this case is R.C. 2945.06, [HN6] which authorizes a judge of the court in which the case is pending to hear and decide a criminal case where a defendant has waived the right to a jury trial. The statute makes special provisions for the defendant charged with "an offense punishable with death" who has waived a jury trial. In such cases, the defendant "shall be tried by a court to be composed of three judges * * *. * * * If the accused pleads guilty of aggravated murder, a court composed of three judges shall examine the witnesses, determine whether the accused is guilty of aggravated murder or any other offense, and pronounce sentence accordingly." Courts must strictly comply with these procedures. See *State v. Pless* (1996), 74 Ohio St.3d 333, 1996 Ohio 102, 658 N.E.2d 766 (holding that the written waiver requirements of R.C. 2945.05 must be strictly observed).

[**P15] In support of his argument, appellant cites *State v. Parker*. He contends that *Parker* established a bright-line rule that the three-judge panel is a jurisdictional matter that cannot be waived.

[**P16] Vincent Parker pleaded guilty to certain charges, including a capital offense, in exchange for the state's agreement not to seek the death penalty. However, the indictment was never amended to delete the death-penalty specification. Parker waived his right to a jury trial and his right to a three-judge panel, and a single trial judge presided over his guilty pleas and pronounced his sentence.

[**P17] Parker filed a direct appeal in which he claimed that the sole judge lacked jurisdiction to accept his plea because of the presence of the death-penalty [*85] specification. The court of appeals agreed and vacated his sentence, remanding to the trial court for further proceedings.

[**P18] In *Parker*, we affirmed, holding that "[a] defendant charged with a crime punishable by death who has waived his right to trial by jury must, pursuant to R.C. 2945.06 and Crim.R. 11(C)(3), have his case heard and decided by a three-judge panel even if the state agrees that it will not seek the death penalty." *Id.* at syllabus. *Parker* reasoned that when the death penalty is a sentencing option, a defendant may not waive the three-judge requirement in R.C. 2945.06 and Crim.R. 11(C)(3) because Ohio courts are required to strictly adhere to statutory procedures in capital cases. *Id.* at P10; see, also, *Pless*, 74 Ohio St.3d 333, 1996 Ohio 102, 658 N.E.2d 766, paragraph one of the syllabus. *Parker* called the three-judge requirement a "jurisdictional matter that cannot be waived." *Parker* at P12, 769 N.E.2d 846, citing *State v. Filiaggi* (1999), 86 Ohio St.3d 230, 239, 1999 Ohio 99, 714 N.E.2d 867.

[**P19] *State v. Filiaggi* also involved the three-judge panel in a capital case. In *Filiaggi*, the defendant was charged with a capital offense and other, noncapital charges. After he waived his right to be tried by a jury, a three-judge panel entered the verdict on the capital charge, but a single judge entered the verdict on the remaining charges.

[**P20] [***998] *Filiaggi* held that the sole judge lacked authority to enter a verdict on the noncapital charges because R.C. 2945.06 makes no provision for separating capital charges from noncapital charges. *Id.* at 238-240, 714 N.E.2d 867. R.C. 2945.06 mandates the three-judge panel for any offense in a case where there are death-penalty specifications pending, including the noncapital offenses. Therefore, *Filiaggi* concluded that the three-judge panel was "jurisdictional" and could not be waived. *Id.* at 239, 714 N.E.2d 867. The court reversed the verdicts on the noncapital offenses only and remanded them for the three-judge panel to consider.

[**P21] The references in *Filiaggi* and *Parker* to the jurisdictional nature of the three-judge panel have been misinterpreted. Neither stands for the proposition that a court lacks *subject-matter* jurisdiction in a death penalty case if it fails to convene the three-judge panel upon a defendant's waiver of a jury. Each case was properly commenced in the common pleas court. In each case, the trial court erred by failing to convene the mandatory three-judge panel. The resulting judgments were voidable, not void, and properly challenged on direct appeal. For this reason, we were able to remand both *Filiaggi* and *Parker* for the court below to correct the *error in the exercise of* jurisdiction. Had the trial court lacked subject-matter jurisdiction over the death-penalty case, there could have been no remand. For in the absence of subject-matter jurisdiction, a court lacks [*86] the authority to do anything but announce its lack of jurisdiction and dismiss. *Steel Co.*, 523 U.S. at 94, 118 S. Ct. 1003, 140 L. Ed. 2d 210.

[**P22] We explained in *Filiaggi* that [HN7] " 'where it is apparent from the allegations that the matter alleged is within the class of cases in which a particular court has been empowered to act, jurisdiction is present. Any subsequent error in the proceedings is only error in the 'exercise of jurisdiction,' as distinguished from the want of jurisdiction in the first instance.' " *Filiaggi*, 86 Ohio St.3d at 240, 714 N.E.2d 867, quoting *In re Waite* (1991), 188 Mich. App. 189, 200, 468 N.W.2d 912. Therefore, jurisdiction had properly vested in the common pleas court. However, by failing to convene the three-judge panel as to all charges, the court had erred in its exercise of jurisdiction over the noncapital

charges. *Filiaggi* directed that "upon remand, the trial panel is required to proceed from the point at which the error occurred." *Filiaggi*, 86 Ohio St.3d at 240, 714 N.E.2d 867.

[**P23] *Parker* also involved a remand that would have been improper and impossible had the trial court patently and unambiguously lacked subject-matter jurisdiction. Instead, in *Parker*, we affirmed the appellate court's decision to remand for a three-judge panel to correct the *error in the exercise of its jurisdiction* and resentence Parker.

[**P24] Although R.C. 2945.06 mandates the use of a three-judge panel when a defendant is charged with a death-penalty offense and waives the right to a jury, the failure to convene such a panel does not divest a court of subject-matter jurisdiction so that a judgment rendered by a single judge is void ab initio. Instead, it constitutes an error in the court's exercise of jurisdiction over a particular case, for which there is an adequate remedy at law by way of direct appeal.

[**P25] The misunderstanding over the jurisdictional aspect of R.C. 2945.06 may be traced to *State v. Pless*, 74 Ohio St.3d 333, 1996 Ohio 102, 658 N.E.2d 766. *Pless* was a death-penalty case that involved the defendant's written waiver of the right to trial by jury under R.C. 2945.05. Although the defendant appeared in court and voluntarily [***999] signed a written waiver, it was not filed and did not become a part of the record.

[**P26] *Pless*, like *Filiaggi* and *Parker*, was a direct appeal. In *Pless*, we reversed the judgment of the court of appeals, vacated the judgment of the three-judge panel, and *remanded* for a new trial. Because the requirements for jury waiver in R.C. 2945.05 are clear and unambiguous, the court held that [HN8] "absent strict compliance with the requirements of R.C. 2945.05, a trial court lacks jurisdiction to try a defendant without a jury." *Id.* at paragraph one of the syllabus. Yet *Pless* clarified, "The failure to comply with R.C. 2945.05 may be remedied only in a direct appeal from a criminal conviction." *Id.* at paragraph [*87] two of the syllabus. Therefore, implicit in our remand ruling was the basic premise that the common pleas court had subject-matter jurisdiction over the criminal charges at issue. Because *Pless* involved a remand to the trial court, it was not about the lack of subject-matter jurisdiction but instead involved error in the court's exercise of its jurisdiction.

[**P27] The results in *Filiaggi*, *Parker*, and *Pless* are in contrast to those in which the defendant seeks the extraordinary remedy of habeas corpus. Similar to the facts in *Pless*, in *State ex rel. Larkins v. Baker* (1995), 73 Ohio St.3d 658, 1995 Ohio 144, 653 N.E.2d 701, the defendant signed a written waiver of a jury trial but it was not filed and made a part of the court's record. Larkins sought a writ of habeas corpus challenging the trial court's jurisdiction to conduct his bench trial. We held that habeas relief was not warranted when the trial court failed to strictly comply with R.C. 2945.05. Instead, the trial court erred by not filing the executed waiver but it did not affect the court's authority to proceed with a bench trial. The failure to file was neither a jurisdictional defect nor an error for which no adequate remedy at law existed. *Larkins*, 73 Ohio St.3d at 660, 653 N.E.2d 701.

[**P28] In *State ex rel. Collins v. Leonard* (1997), 80 Ohio St.3d 477, 1997 Ohio 282, 687 N.E.2d 443, the defendant filed a petition for a writ of habeas corpus, claiming that the trial court lacked jurisdiction to convict him of aggravated murder because the court had failed to comply with R.C. 2945.06's requirement that a three-judge panel examine the witnesses when a capital defendant pleads guilty. We denied relief and held that "an alleged violation of R.C. 2945.06 is not a proper subject for habeas corpus relief and may be remedied only in a direct appeal from a criminal conviction." *Id.* at 478, 687 N.E.2d 443.

[**P29] Similarly, in *Kirklin v. Enlow* (2000), 89 Ohio St.3d 455, 2000 Ohio 217, 732 N.E.2d 982, the defendant filed a complaint for a writ of prohibition to compel the trial court to vacate his convictions and sentence for aggravated murder and other offenses for failing to convene a three-judge panel to try his case. He argued that the trial court lacked jurisdiction to convict and sentence him. We held that the extraordinary remedy of prohibition would not lie for an alleged violation of R.C. 2945.06. It may be remedied only by way of direct appeal from a criminal conviction.

[**P30] Nevertheless, in *State ex rel. Jackson v. Dallman* (1994), 70 Ohio St.3d 261, 1994 Ohio 235, 638 N.E.2d 563, this court did grant habeas relief, finding that the court of common pleas lacked jurisdiction to try the defendant because his written jury waiver was not in the record as required by R.C. 2945.05. Although this result appears to be contrary to our holding today, *Dallman* included an explicit warning that granting the writ and discharging the defendant from prison "does not preclude the common pleas court from trying [the defendant] again on the [*88] robbery charge." *Id.* at 263, 638 N.E.2d 563. Had the common [***1000] pleas court lacked subject-matter jurisdiction over the defendant's case, a retrial would not have been possible. Furthermore, *Larkins* distinguished *Dallman* on its facts and limited the holding of *Dallman* to the extent that it was contrary to *Larkins*. *Larkins* at 661, 653 N.E.2d 701.

[**P31] Our analysis today is consistent with the reasoning by the court below. The appellate court noted that, according to *State v. Pless*, failure to comply with jury-waiver requirements in a death-penalty case "may be remedied only in a direct appeal from a criminal conviction." *Pless*, 74 Ohio St.3d 333, 1996 Ohio 102, 658 N.E.2d 766, paragraph two of the syllabus. The court of appeals concluded, "This resolution strongly suggests that the failure to strictly comply with the statute results in an improper exercise of jurisdiction, not lack of subject-matter jurisdiction." The court further noted that *Filiaggi* also "expressly indicates that the type of error involved is the improper exercise of jurisdiction, which, by definition, is subject only to direct appeal and not collateral attack."

[**P32] We concur with the conclusion of the appellate court that *Parker*, *Filiaggi*, and *Pless* stand for the following principles: " 1) the statutes require strict compliance, 2) that failure to strictly comply is error in the exercise of jurisdiction, 3) that strict compliance may not be voluntarily waived and is always reversible error on direct appeal, but 4) after direct appeal, any error is, in effect, waived and cannot be remedied through collateral attack."

[**P33] Jurisdiction has been described as "a word of many, too many, meanings." *United States v. Vanness* (C.A.D.C. 1996), 318 U.S. App. D.C. 95, 85 F.3d 661, 663, fn. 2. The term is used in various contexts and often is not properly clarified. This has resulted in misinterpretation and confusion.

[**P34] Subject-matter jurisdiction is a court's power over a type of case. It is determined as a matter of law and, once conferred, it remains. Here, the common pleas court had subject-matter jurisdiction over the defendant's criminal case. R.C. 2945.06 establishes procedural requirements that a court must follow in order to properly exercise its subject-matter jurisdiction. Failure to convene the three-judge panel may result in reversible error; however, it does not divest the court of its subject-matter jurisdiction.

[**P35] In conclusion, the common pleas court in this case, in the exercise of its jurisdiction over appellant's case, erred when it failed to follow the procedural mandates of R.C. 2945.06 and convene a three-judge panel. Upon entry of judgment, Pratts had a remedy at law in the form of a direct appeal. He is not entitled to habeas corpus relief.

[**P36] Therefore, our answer to the certified question is no. The failure of the court to convene a three-judge panel, as required by R.C. 2945.06, does not constitute a lack of subject-matter jurisdiction that renders the trial court's [*89] judgment void ab initio and subject to collateral attack in habeas corpus. It constitutes an error in the court's exercise of jurisdiction that must be raised on direct appeal. We affirm the judgment of the court of appeals.

Judgment affirmed.

MOYER, C.J., RESNICK, F.E. SWEENEY, PFEIFER, O'CONNOR and O'DONNELL, JJ., concur.

1 of 4 DOCUMENTS

SANTOSKY ET AL. v. KRAMER, COMMISSIONER, ULSTER COUNTY DEPARTMENT OF SOCIAL SERVICES, ET AL.

No. 80-5889

SUPREME COURT OF THE UNITED STATES

455 U.S. 745; 102 S. Ct. 1388; 71 L. Ed. 2d 599; 1982 U.S. LEXIS 89; 50 U.S.L.W. 4333

November 10, 1981, Argued
March 24, 1982, Decided**PRIOR HISTORY:** CERTIORARI TO THE APPELLATE DIVISION, SUPREME COURT OF NEW YORK, THIRD JUDICIAL DEPARTMENT.**DISPOSITION:** 75 App. Div. 2d 910, 427 N. Y. S. 2d 319, vacated and remanded.**CASE SUMMARY:**

PROCEDURAL POSTURE: The court granted certiorari on a decision from the Appellate Division, Supreme Court of New York, Third Judicial Department, which affirmed the permanent termination of petitioners' parental rights and rejected petitioners' assertion that the preponderance of the evidence standard in N.Y. Fam. Ct. Act § 622 was unconstitutional.

OVERVIEW: After incidents reflecting parental neglect, respondent removed petitioners' biological children from petitioners' home. Petitioners' parental rights were later terminated. The court of appeals rejected petitioners' argument that the "fair preponderance of the evidence" standard in N.Y. Fam. Ct. Act § 622 was unconstitutional. The court held that before a state could sever completely and irrevocably the rights of parents in their natural child, due process required that the state support its allegations by at least clear and convincing evidence. The court found that the "fair preponderance of the evidence" standard was inconsistent with due process because the private interest in parental rights affected was substantial and the countervailing governmental interest favoring the preponderance standard was comparatively slight. The court held that a clear and convincing evidence standard adequately conveyed to the factfinder the level of subjective certainty about his factual conclusions necessary to satisfy due process, and that determination of the precise burden equal to or greater than that standard was a matter of state law properly left to state legislatures and state courts.

OUTCOME: The court found that a clear and convincing standard was necessary to protect petitioners' due process rights, and vacated and remanded so that a hearing could be conducted under a constitutionally proper standard.

CORE TERMS: standard of proof, termination, parental rights, natural parents, factfinding, neglect, custody, termination proceeding, foster, removal, risk of error, parental, terminate, temporary', factfinder, fair preponderance, clear and convincing evidence, neglected, fundamental fairness, private interests, convincing, dispositional hearing, termination of parental rights, termination proceedings, procedural protections, permanently, Soc Serv Law, parents' rights, preponderance standard, evidence standard

LexisNexis(R) Headnotes

***Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection
Family Law > Parental Duties & Rights > Termination of Rights > General Overview***

[HN1] Before a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegations by at least clear and convincing evidence.

***Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > General Overview
Constitutional Law > Substantive Due Process > Privacy > Personal Decisions***

Family Law > Parental Duties & Rights > Termination of Rights > General Overview

[HN2] It is not disputed that state intervention to terminate the relationship between a parent and a child must be accomplished by procedures meeting the requisites of the Due Process Clause. The absence of dispute reflected the Court's historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment.

Family Law > Child Custody > General Overview

Family Law > Parental Duties & Rights > Duties > Care & Control of Children

Family Law > Parental Duties & Rights > Termination of Rights > General Overview

[HN3] The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.

Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection

[HN4] The minimum requirements of procedural due process being a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action.

Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection

[HN5] Retrospective case-by-case review cannot preserve fundamental fairness when a class of proceedings is governed by a constitutionally defective evidentiary standard.

Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection

Family Law > Parental Duties & Rights > Termination of Rights > General Overview

[HN6] In parental rights termination proceedings, the private interest affected is commanding; the risk of error from using a preponderance standard is substantial; and the countervailing governmental interest favoring that standard is comparatively slight. The use of a "fair preponderance of the evidence" standard in such proceedings is inconsistent with due process.

Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection

[HN7] 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. Whether the loss threatened by a particular type of proceeding is sufficiently grave to warrant more than average certainty on the part of the factfinder turns on both the nature of the private interest threatened and the permanency of the threatened loss.

Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection

Family Law > Parental Duties & Rights > Termination of Rights > General Overview

[HN8] Two state interests are at stake in parental rights termination proceedings -- a *parens patriae* interest in preserving and promoting the welfare of the child and a fiscal and administrative interest in reducing the cost and burden of such proceedings. A standard of proof more strict than preponderance of the evidence is consistent with both interests.

Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection

Family Law > Parental Duties & Rights > Termination of Rights > General Overview

[HN9] At a parental rights termination proceeding, a near-equal allocation of risk between the parents and the State is constitutionally intolerable.

*Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection
Evidence > Procedural Considerations > Burdens of Proof > Clear & Convincing Proof
Family Law > Parental Duties & Rights > Termination of Rights > General Overview*

[HN10] In parental rights cases, a "clear and convincing evidence" standard of proof adequately conveys to the fact-finder the level of subjective certainty about his factual conclusions necessary to satisfy due process.

DECISION: Application of at least "clear and convincing evidence" standard of proof to state's parental rights termination proceeding, held required by Fourteenth Amendment due process clause.

SUMMARY: In an action brought in the Ulster County, New York, Family Court to terminate the rights of certain natural parents in their three children, the parents challenged the constitutionality of a provision of a New York statute under which the state may terminate the rights of parents in their natural child upon a finding that the child is "permanently neglected," when such a finding is supported by a fair preponderance of the evidence. The Family Court rejected the challenge, weighed the evidence under the "fair preponderance of the evidence" standard, found permanent neglect, and ultimately ruled that the best interests of the children required permanent termination of the parents' custody. The Appellate Division of the New York Supreme Court affirmed, holding application of the preponderance of the evidence standard proper and constitutional (75 App Div 2d 910, 427 NYS2d 319), and the New York Court of Appeals dismissed the parents' appeal to that court.

On certiorari, the United States Supreme Court vacated and remanded. In an opinion by Blackmun, J., joined by Brennan, Marshall, Powell and Stevens, JJ., it was held that (1) process is constitutionally due a natural parent at a state's parental rights termination proceeding, and (2) the "fair preponderance of the evidence" standard prescribed by the state statute violated the due process clause of the Fourteenth Amendment, due process requiring proof by clear and convincing evidence in such a proceeding.

Rehnquist, J., joined by Burger, Ch. J., and White and O'Connor, JJ., dissenting, expressed the view that the "fair preponderance of the evidence" standard prescribed by the New York statute must be considered in the context of New York's overall scheme of procedures relating to the termination of parental rights on the basis of permanent neglect, that such standard, when considered in that context, did not violate the due process clause of the Fourteenth Amendment, and that the majority decision, by holding the statutory standard unconstitutional without evaluation of the overall effect of New York's scheme of procedures for terminating parental rights, invited further federal court intrusion into every facet of state family law.

LAWYERS' EDITION HEADNOTES:

[***LEdHN1]

LAW §830.7

due process -- severance of parental rights -- requirement of clear and convincing evidence --

Headnote:[1A][1B][1C]

Before a state may sever completely and irrevocably the rights of parents in their natural child, due process requires that the state support its allegations by at least clear and convincing evidence; therefore a state statute violates the due process clause of the Fourteenth Amendment insofar as it authorizes termination, over parental objection, of the rights of parents in their natural child upon a finding that the child is "permanently neglected," when that finding is supported by a "fair preponderance of the evidence." (Rehnquist, J., Burger, Ch. J., White, J., and O'Connor, J., dissented from this holding.)

[***LEdHN2]

LAW §778.5

due process -- parental rights termination proceeding -- liberty interest --

Headnote:[2A][2B][2C]

Under the Fourteenth Amendment, process is constitutionally due a natural parent at a state's parental rights termination proceeding, such a proceeding interfering with a fundamental liberty interest of natural parents in the care, custody, and management of their child, such interest not evaporating simply because the parents have not been model parents or have lost temporary custody of their child to the state, and the fact that important liberty interests of the child and its foster parents may also be affected by a permanent neglect proceeding not justifying denial to the natural parents of constitutionally adequate procedures; a state cannot refuse to provide natural parents adequate procedural safeguards in a parental rights termination proceeding on the grounds that the family unit already has broken down.

[***LEdHN3]

LAW §746

due process -- minimum procedural requirements --

Headnote:[3]

The minimum requirements of procedural due process are not diminished by the fact that a state may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action, such requirements being a matter of federal law.

[***LEdHN4]

LAW §829

due process -- standard of proof --

Headnote:[4]

Standards of proof, like other procedural due process rules, are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases, not the rare exceptions; the standard of proof necessarily must be calibrated in advance, the litigants and the factfinder requiring knowledge at the outset of a given proceeding how the risk of error will be allocated, and retrospective case-by-case review being unable to preserve fundamental fairness when a class of proceedings is governed by a constitutionally defective evidentiary standard.

[***LEdHN5]

LAW §830.7

due process -- parental rights termination proceedings -- standard of proof --

Headnote:[5]

Determination of the precise burden equal to or greater than the "clear and convincing evidence" standard of proof, which is to be applied in a state's parental rights termination proceedings, is a matter of state law properly left to state legislatures and to state courts.

SYLLABUS

Under New York law, the State may terminate, over parental objection, the rights of parents in their natural child upon a finding that the child is "permanently neglected." The New York Family Court Act (§ 622) requires that only a "fair preponderance of the evidence" support that finding. Neglect proceedings were brought in Family Court to terminate petitioners' rights as natural parents in their three children. Rejecting petitioners' challenge to the constitutionality of § 622's "fair preponderance of the evidence" standard, the Family Court weighed the evidence under that standard and found permanent neglect. After a subsequent dispositional hearing, the Family Court ruled that the best interests of the children required permanent termination of petitioners' custody. The Appellate Division of the New York Supreme Court affirmed, and the New York Court of Appeals dismissed petitioners' appeal to that court.

Held:

1. Process is constitutionally due a natural parent at a state-initiated parental rights termination proceeding. Pp. 752-757.

(a) The fundamental liberty interest of natural parents in the care, custody, and management of their child is protected by the Fourteenth 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. Pp. 752-754.

(b) The nature of the process due in parental rights termination proceedings turns on a balancing of three factors: the private interests affected by the proceedings; the risk of error created by the State's chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure. *Mathews v. Eldridge*, 424 U.S. 319, 335. In any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the public and private interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants. The minimum standard is a question of federal law which this Court may resolve. Retrospective case-by-case review cannot preserve fundamental fairness when a class of proceedings is governed by a constitutionally defective evidentiary standard. Pp. 754-757.

2. The "fair preponderance of the evidence" standard prescribed by § 622 violates the Due Process Clause of the Fourteenth Amendment. Pp. 758-768.

(a) The balance of private interests affected weighs heavily against use of such a standard in parental rights termination proceedings, since the private interest affected is commanding and the threatened loss is permanent. Once affirmed on appeal, a New York decision terminating parental rights is *final* and irrevocable. Pp. 758-761.

(b) A preponderance standard does not fairly allocate the risk of an erroneous factfinding between the State and the natural parents. In parental rights termination proceedings, which bear many of the indicia of a criminal trial, numerous factors combine to magnify the risk of erroneous factfinding. Coupled with the preponderance standard, these factors create a significant prospect of erroneous termination of parental rights. A standard of proof that allocates the risk of error nearly equally between an erroneous failure to terminate, which leaves the child in an uneasy status quo, and an erroneous termination, which unnecessarily destroys the natural family, does not reflect properly the relative severity of these two outcomes. Pp. 761-766.

(c) A standard of proof more strict than preponderance of the evidence is consistent with the two state interests at stake in parental rights termination proceedings -- a *parens patriae* interest in preserving and promoting the child's welfare and a fiscal and administrative interest in reducing the cost and burden of such proceedings. Pp. 766-768.

3. Before a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegations by at least clear and convincing evidence. A "clear and convincing evidence" standard adequately conveys to the factfinder the level of subjective certainty about his factual conclusions necessary to satisfy due process. Determination of the precise burden equal to or greater than that standard is a matter of state law properly left to state legislatures and state courts. Pp. 768-770.

COUNSEL: Martin Guggenheim argued the cause for petitioners. With him on the briefs was Alan N. Sussman.

Steven Domenic Scavuzzo argued the cause pro hac vice for respondents. With him on the brief was H. Randall Bixler. Wilfrid E. Marrin and Frederick J. Magovern filed a brief for respondents Balogh et al. *

* Briefs of amici curiae urging reversal were filed by Marcia Robinson Lowry, Steven R. Shapiro, and Margaret Hayman for the American Civil Liberties Union Children's Rights Project et al.; and by Louise Gruner Gans, Catherine P. Mitchell, Norman Siegel, Gary Connor, and Daniel Greenberg for Community Action for Legal Services, Inc., et al.

Briefs of amici curiae urging affirmance were filed by Robert Abrams, Attorney General, Shirley Adelson Siegel, Solicitor General, and Lawrence J. Logan and Robert J. Schack, Assistant Attorneys General, for the State of New York; and by Dave Frohnmayer, Attorney General, William F. Gary, Solicitor General, and Jan Peter Londahl, Assistant Attorney General, for the State of Oregon.

JUDGES: BLACKMUN, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, POWELL, and STEVENS, JJ., joined. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., and WHITE and O'CONNOR, JJ., joined, post, p. 770.

OPINION BY: BLACKMUN

OPINION

[*747] [***602] [**1391] JUSTICE BLACKMUN delivered the opinion of the Court.

[***LEdHR1A] [1A] Under New York law, the State may terminate, over parental [***603] objection, the rights of parents in their natural child upon a finding that the child is "permanently neglected." N. Y. Soc. Serv. Law §§ 384-b.4.(d), 384-b.7.(a) (McKinney Supp. 1981-1982) (Soc. Serv. Law). The New York Family Court Act § 622 (McKinney 1975 and Supp. 1981-1982) (Fam. Ct. Act) requires that only a "fair preponderance of the evidence" support that finding. Thus, in New York, the factual certainty required to extinguish the parent-child relationship is no greater than that necessary to award money damages in an ordinary civil action.

Today we hold that the Due Process Clause of the Fourteenth Amendment demands more than this. [HN1] Before a State may sever completely and irrevocably the rights of parents in [*748] their natural child, due process requires that the State support its [**1392] allegations by at least clear and convincing evidence.

I

A

New York authorizes its officials to remove a child temporarily from his or her home if the child appears "neglected," within the meaning of Art. 10 of the Family Court Act. See §§ 1012(f), 1021-1029. Once removed, a child under the age of 18 customarily is placed "in the care of an authorized agency," Soc. Serv. Law § 384-b.7.(a), usually a state institution or a foster home. At that point, "the state's first obligation is to help the family with services to . . . reunite it . . ." § 384-b.1.(a)(iii). But if convinced that "positive, nurturing parent-child relationships no longer exist," § 384-b.1.(b), the State may initiate "permanent neglect" proceedings to free the child for adoption.

The State bifurcates its permanent neglect proceeding into "factfinding" and "dispositional" hearings. Fam. Ct. Act §§ 622, 623. At the factfinding stage, the State must prove that the child has been "permanently neglected," as defined by Fam. Ct. Act §§ 614.1.(a)-(d) and Soc. Serv. Law § 384-b.7.(a). See Fam. Ct. Act § 622. The Family Court judge then determines at a subsequent dispositional hearing what placement would serve the child's best interests. §§ 623, 631.

At the factfinding hearing, the State must establish, among other things, that for more than a year after the child entered state custody, the agency "made diligent efforts to encourage and strengthen the parental relationship." Fam. Ct. Act §§ 614.1.(c), 611. The State must further prove that during that same period, the child's natural parents failed "substantially and continuously or repeatedly to maintain contact with or plan for the future of the child although physically and financially able to do so." § 614.1.(d). Should the State support its allegations by "a fair preponderance of the evidence," § 622, the child may be declared permanently neglected. [*749] § 611. That declaration empowers the Family Court judge to terminate permanently the natural parents' rights in the child. §§ 631(c), 634. Termination denies the natural parents physical custody, as well as the rights ever to visit, communicate with, or regain custody of the child.¹

¹ At oral argument, counsel for petitioners asserted that, in New York, natural parents have no means of restoring terminated parental rights. Tr. of Oral Arg. 9. Counsel for respondents, citing Fam. Ct. Act § 1061, answered that parents may petition the Family Court to vacate or set aside an earlier order on narrow grounds, such as newly discovered evidence or fraud. Tr. of Oral Arg. 26. Counsel for respondents conceded, however, that this statutory provision has never been invoked to set aside a permanent neglect finding. *Id.*, at 27.

New [***604] York's permanent neglect statute provides natural parents with certain procedural protections.² But New York permits its officials to establish "permanent neglect" with less proof than most States require. Thirty-five States, the District of Columbia, and the Virgin Islands currently specify a higher standard of proof, in parental rights termination proceedings, than a "fair preponderance of the evidence."³ [**1393] The only analogous federal statute of which we are aware [*750] permits termination of parental rights solely upon "evidence beyond a reasonable doubt." Indian Child Welfare Act of 1978, Pub. L. 95-608, § 102(f), 92 Stat. 3072, 25 U. S. C. § 1912(f) (1976 ed., Supp. IV). The question here is whether [*751] New York's "fair preponderance of the evidence" standard is constitutionally sufficient.

2 Most notably, natural parents have a statutory right to the assistance of counsel and of court-appointed counsel if they are indigent. Fam. Ct. Act § 262.(a)(iii).

3 Fifteen States, by statute, have required "clear and convincing evidence" or its equivalent. See Alaska Stat. Ann. § 47.10.080(c)(3) (1980); Cal. Civ. Code Ann. § 232(a)(7) (West Supp. 1982); Ga. Code §§ 24A-2201(c), 24A-3201 (1979); Iowa Code § 600A.8 (1981) ("clear and convincing proof"); Me. Rev. Stat. Ann., Tit. 22, § 4055.1.B.(2) (Supp. 1981-1982); Mich. Comp. Laws § 722.25 (Supp. 1981-1982); Mo. Rev. Stat. § 211.447.2(2) (Supp. 1981) ("clear, cogent and convincing evidence"); N. M. Stat. Ann. § 40-7-4.J. (Supp. 1981); N. C. Gen. Stat. § 7A-289.30(e) (1981) ("clear, cogent, and convincing evidence"); Ohio Rev. Code Ann. §§ 2151.35, 2151.414(B) (Page Supp. 1982); R. I. Gen. Laws § 15-7-7(d) (Supp. 1980); Tenn. Code Ann. § 37-246(d) (Supp. 1981); Va. Code § 16.1-283.B (Supp. 1981); W. Va. Code § 49-6-2(c) (1980) ("clear and convincing proof"); Wis. Stat. § 48.31(1) (Supp. 1981-1982).

Fifteen States, the District of Columbia, and the Virgin Islands, by court decision, have required "clear and convincing evidence" or its equivalent. See *Dale County Dept. of Pensions & Security v. Robles*, 368 So. 2d 39, 42 (Ala. Civ. App. 1979); *Harper v. Caskin*, 265 Ark. 558, 560-561, 580 S. W. 2d 176, 178 (1979); *In re J. S. R.*, 374 A. 2d 860, 864 (D. C. 1977); *Torres v. Van Eepoel*, 98 So. 2d 735, 737 (Fla. 1957); *In re Kerns*, 225 Kan. 746, 753, 594 P. 2d 187, 193 (1979); *In re Rosenbloom*, 266 N. W. 2d 888, 889 (Minn. 1978) ("clear and convincing proof"); *In re J. L. B.*, 182 Mont. 100, 116-117, 594 P. 2d 1127, 1136 (1979); *In re Souza*, 204 Neb. 503, 510, 283 N. W. 2d 48, 52 (1979); *J. v. M.*, 157 N. J. Super. 478, 489, 385 A. 2d 240, 246 (App. Div. 1978); *In re J. A.*, 283 N. W. 2d 83, 92 (N. D. 1979); *In re Darren Todd H.*, 615 P. 2d 287, 289 (Okla. 1980); *In re William L.*, 477 Pa. 322, 332, 383 A. 2d 1228, 1233, cert. denied *sub nom. Lehman v. Lyncoming County Children's Services*, 439 U.S. 880 (1978); *In re G. M.*, 596 S. W. 2d 846, 847 (Tex. 1980); *In re Pitts*, 535 P. 2d 1244, 1248 (Utah 1975); *In re Maria*, 15 V. I. 368, 384 (1978); *In re Seago*, 82 Wash. 2d 736, 739, 513 P. 2d 831, 833 (1973) ("clear, cogent, and convincing evidence"); *In re X.*, 607 P. 2d 911, 919 (Wyo. 1980) ("clear and unequivocal").

South Dakota's Supreme Court has required a "clear preponderance" of the evidence in a dependency proceeding. See *In re B. E.*, 287 N. W. 2d 91, 96 (1979). Two States, New Hampshire and Louisiana, have barred parental rights terminations unless the key allegations have been proved beyond a reasonable doubt. See *State v. Robert H.*, 118 N. H. 713, 716, 393 A. 2d 1387, 1389 (1978); La. Rev. Stat. Ann. § 13:1603.A (West Supp. 1982). Two States, Illinois and New York, have required clear and convincing evidence, but only in certain types of parental rights termination proceedings. See Ill. Rev. Stat., ch. 37, paras. 705-9(2), (3) (1979), amended by Act of Sept. 11, 1981, 1982 Ill. Laws, P. A. 82-437 (generally requiring a preponderance of the evidence, but requiring clear and convincing evidence to terminate the rights of minor parents and mentally ill or mentally deficient parents); N. Y. Soc. Serv. Law §§ 384-b.3(g), 384-b.4(c), and 384-b.4(e) (Supp. 1981-1982) (requiring "clear and convincing proof" before parental rights may be terminated for reasons of mental illness and mental retardation or severe and repeated child abuse).

So far as we are aware, only two federal courts have addressed the issue. Each has held that allegations supporting parental rights termination must be proved by clear and convincing evidence. *Sims v. State Dept. of Public Welfare*, 438 F.Supp. 1179, 1194 (SD Tex. 1977), *rev'd on other grounds sub nom. Moore v. Sims*, 442 U.S. 415 (1979); *Alsager v. District Court of Polk County*, 406 F.Supp. 10, 25 (SD Iowa 1975), *aff'd on other grounds*, 545 F.2d 1137 (CA8 1976).

B

[**605] Petitioners John Santosky II and Annie Santosky are the natural parents of Tina and John III. In November 1973, after incidents reflecting parental neglect, respondent Kramer, Commissioner of the Ulster County Department of Social Services, initiated a neglect proceeding under Fam. Ct. Act § 1022 and removed Tina from her natural home. About 10 months later, he removed John III and placed him with foster parents. On the day John was taken, Annie Santosky gave birth to a third child, Jed. When Jed was only three days old, respondent transferred him to a foster home on the ground that immediate removal was necessary to avoid imminent danger to his life or health.

In October 1978, respondent petitioned the Ulster County Family Court to terminate petitioners' parental rights in the three children. ⁴ Petitioners challenged the constitutionality of the "fair preponderance of the evidence" standard specified in Fam. Ct. Act § 622. The Family Court Judge rejected this constitutional challenge, App. 29-30, and weighed the evidence under the statutory standard. While acknowledging that the Santoskys had maintained contact with their children, the judge found those visits "at best superficial and devoid of any [**1394] real emotional content." *Id.*, at 21. After [**752] deciding that the agency had made "diligent efforts" to encourage and strengthen the parental relationship, *id.*, at 30, he concluded that the Santoskys were incapable, even with public assistance, of planning for the future of their children. *Id.*, at 33-37. The judge later held a dispositional hearing and ruled that the best interests of the three children required permanent termination of the Santoskys' custody. ⁵ *Id.*, at 39.

⁴ Respondent had made an earlier and unsuccessful termination effort in September 1976. After a factfinding hearing, the Family Court Judge dismissed respondent's petition for failure to prove an essential element of Fam. Ct. Act § 614.1.(d). See *In re Santosky*, 89 Misc. 2d 730, 393 N. Y. S. 2d 486 (1977). The New York Supreme Court, Appellate Division, affirmed, finding that "the record as a whole" revealed that petitioners had "substantially planned for the future of the children." *In re John W.*, 63 App. Div. 2d 750, 751, 404 N. Y. S. 2d 717, 719 (1978).

5 Since respondent Kramer took custody of Tina, John III, and Jed, the Santoskys have had two other children, James and Jeremy. The State has taken no action to remove these younger children. At oral argument, counsel for respondents replied affirmatively when asked whether he was asserting that petitioners were "unfit to handle the three older ones but not unfit to handle the two younger ones." Tr. of Oral Arg. 24.

Petitioners appealed, again contesting the constitutionality of § 622's standard of proof.⁶ The New York Supreme Court, Appellate Division, affirmed, holding application of the preponderance-of-the-evidence standard "proper and constitutional." *In re John AA*, 75 App. Div. 2d 910, 427 N. Y. S. 2d 319, 320 (1980). That standard, the court reasoned, "recognizes and seeks to balance rights possessed by the child . . . with those of the natural parents . . ." *Ibid*.

6 Petitioners initially had sought review in the New York Court of Appeals. That court *sua sponte* transferred the appeal to the Appellate Division, Third Department, stating that a direct appeal did not lie because "questions other than the constitutional validity of a statutory provision are involved." App. 50.

The New York Court of Appeals [***606] then dismissed petitioners' appeal to that court "upon the ground that no substantial constitutional question is directly involved." App. 55. We granted certiorari to consider petitioners' constitutional claim. 450 U.S. 993 (1981).

II

[***LEdHR2A] [2A] Last Term, in *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981), this Court, by a 5-4 vote, held that the [*753] Fourteenth Amendment's Due Process Clause does not require the appointment of counsel for indigent parents in every parental status termination proceeding. The case casts light, however, on the two central questions here -- whether process is constitutionally due a natural parent at a State's parental rights termination proceeding, and, if so, what process is due.

In *Lassiter*, [HN2] it was "not disputed that state intervention to terminate the relationship between [a parent] and [the] child must be accomplished by procedures meeting the requisites of the Due Process Clause." *Id.*, at 37 (first dissenting opinion); see *id.*, at 24-32 (opinion of the Court); *id.*, at 59-60 (STEVENS, J., dissenting). See also *Little v. Streater*, 452 U.S. 1, 13 (1981). The absence of dispute reflected this Court's historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment. *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978); *Smith v. Organization of Foster Families*, 431 U.S. 816, 845 (1977); *Moore v. East Cleveland*, 431 U.S. 494, 499 (1977) (plurality opinion); *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 639-640 (1974); *Stanley v. Illinois*, 405 U.S. 645, 651-652 (1972); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-535 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

[***LEdHR2B] [2B] [HN3] The fundamental liberty interest of natural parents in the care, custody, and [***1395] management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs. When the State moves to [*754] destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.⁷

[***LEdHR2C] [2C]

7 We therefore reject respondent Kramer's claim that a parental rights termination proceeding does not interfere with a fundamental liberty interest. See Brief for Respondent Kramer 11-18; Tr. of Oral Arg. 38. The fact that important liberty interests of the child and its foster parents may also be affected by a permanent neglect proceeding does not justify denying the *natural parents* constitutionally adequate procedures. Nor can the State refuse to provide natural parents adequate procedural safeguards on the ground that the family unit already has broken down; that is the very issue the permanent neglect proceeding is meant to decide.

In [***607] *Lassiter*, the Court and three dissenters agreed that the nature of the process due in parental rights termination proceedings turns on a balancing of the "three distinct factors" specified in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976): the private interests affected by the proceeding; the risk of error created by the State's chosen proce-

dure; and the countervailing governmental interest supporting use of the challenged procedure. See 452 U.S., at 27-31; *id.*, at 37-48 (first dissenting opinion). But see *id.*, at 59-60 (STEVENS, J., dissenting). While the respective *Lassiter* opinions disputed whether those factors should be weighed against a presumption disfavoring appointed counsel for one not threatened with loss of physical liberty, compare 452 U.S., at 31-32, with *id.*, at 41, and n. 8 (first dissenting opinion), that concern is irrelevant here. Unlike the Court's right-to-counsel rulings, its decisions concerning constitutional burdens of proof have not turned on any presumption favoring any particular standard. To the contrary, the Court has engaged in a straightforward consideration of the factors identified in *Eldridge* to determine whether a particular standard of proof in a particular proceeding satisfies due process.

In *Addington v. Texas*, 441 U.S. 418 (1979), the Court, by a unanimous vote of the participating Justices, declared: "The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to [*755] 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.'" *Id.*, at 423, quoting *In re Winship*, 397 U.S. 358, 370 (1970) (Harlan, J., concurring). *Addington* teaches that, in any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants.

Thus, while private parties may be interested intensely in a civil dispute over money damages, application of a "fair preponderance of the evidence" standard indicates both society's "minimal concern with the outcome," and a conclusion that the litigants should "share the risk of error in roughly equal fashion." 441 U.S., at 423. When the State brings a criminal action to deny a defendant liberty or life, however, "the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as [*1396] nearly as possible the likelihood of an erroneous judgment." *Ibid.* The stringency of the "beyond a reasonable doubt" standard bespeaks [*608] the "weight and gravity" of the private interest affected, *id.*, at 427, society's interest in avoiding erroneous convictions, and a judgment that those interests together require that "society [impose] almost the entire risk of error upon itself." *Id.*, at 424. See also *In re Winship*, 397 U.S., at 372 (Harlan, J., concurring).

[***LEdHR3] [3] [HN4] The "minimum requirements [of procedural due process] being a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action." *Vitek v. Jones*, 445 U.S. 480, 491 (1980). See also *Logan v. Zimmerman Brush Co.*, *ante*, at 432. Moreover, the degree of proof required in a particular type of proceeding "is the kind of question which has [*756] traditionally been left to the judiciary to resolve." *Woodby v. INS*, 385 U.S. 276, 284 (1966). * "In cases involving individual rights, whether criminal or civil, [the] standard of proof [at a minimum] reflects the value society places on individual liberty." *Addington v. Texas*, 441 U.S., at 425, quoting *Tippett v. Maryland*, 436 F.2d 1153, 1166 (CA4 1971) (opinion concurring in part and dissenting in part), cert. *dism'd sub nom. Murel v. Baltimore City Criminal Court*, 407 U.S. 355 (1972).

⁸ The dissent charges, *post*, at 772, n. 2, that "this Court simply has no role in establishing the standards of proof that States must follow in the various judicial proceedings they afford to their citizens." As the dissent properly concedes, however, the Court must examine a State's chosen standard to determine whether it satisfies "the constitutional minimum of 'fundamental fairness.'" *Ibid.* See, e. g., *Addington v. Texas*, 441 U.S. 418, 427, 433 (1979) (unanimous decision of participating Justices) (Fourteenth Amendment requires at least clear and convincing evidence in a civil proceeding brought under state law to commit an individual involuntarily for an indefinite period to a state mental hospital); *In re Winship*, 397 U.S. 358, 364 (1970) (Due Process Clause of the Fourteenth Amendment protects the accused in state proceeding against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged).

This Court has mandated an intermediate standard of proof -- "clear and convincing evidence" -- when the individual interests at stake in a state proceeding are both "particularly important" and "more substantial than mere loss of money." *Addington v. Texas*, 441 U.S., at 424. Notwithstanding "the state's 'civil labels and good intentions,'" *id.*, at 427, quoting *In re Winship*, 397 U.S., at 365-366, the Court has deemed this level of certainty necessary to preserve fundamental fairness in a variety of government-initiated proceedings that threaten the individual involved with "a significant deprivation of liberty" or "stigma." 441 U.S., at 425, 426. See, e. g., *Addington v. Texas*, *supra* (civil commitment); *Woodby v. INS*, 385 U.S., at 285 (deportation); *Chaunt v. United States*, 364 U.S. 350, 353 [*609] (1960) (denaturalization); [*757] *Schneiderman v. United States*, 320 U.S. 118, 125, 159 (1943) (denaturalization).

[**LEdHR4] [4]In *Lassiter*, to be sure, the Court held that fundamental fairness may be maintained in parental rights termination proceedings even when some procedures are mandated only on a case-by-case basis, rather than through rules of general application. 452 U.S., at 31-32 (natural parent's right to court-appointed counsel should be determined by the trial court, subject to appellate review). But this Court never has approved case-by-case determination of the proper *standard of proof* for a given proceeding. Standards of proof, like other "procedural due process [**1397] rules[,] are shaped by the risk of error inherent in the truth-finding process as applied to the *generality of cases*, not the rare exceptions." *Mathews v. Eldridge*, 424 U.S., at 344 (emphasis added). Since the litigants and the factfinder must know at the outset of a given proceeding how the risk of error will be allocated, the standard of proof necessarily must be calibrated in advance. [HN5] Retrospective case-by-case review cannot preserve fundamental fairness when a class of proceedings is governed by a constitutionally defective evidentiary standard.⁹

9 For this reason, we reject the suggestions of respondents and the dissent that the constitutionality of New York's statutory procedures must be evaluated as a "package." See Tr. of Oral Arg. 25, 36, 38. Indeed, we would rewrite our precedents were we to excuse a constitutionally defective standard of proof based on an amorphous assessment of the "cumulative effect" of state procedures. In the criminal context, for example, the Court has never assumed that "strict substantive standards or special procedures compensate for a lower burden of proof. . . ." *Post*, at 773. See *In re Winship*, 397 U.S., at 368. Nor has the Court treated appellate review as a curative for an inadequate burden of proof. See *Woodby v. INS*, 385 U.S. 276, 282 (1966) ("judicial review is generally limited to ascertaining whether the evidence relied upon by the trier of fact was of sufficient quality and substantiality to support the rationality of the judgment").

As the dissent points out, "the standard of proof is a crucial component of legal process, the primary function of which is 'to minimize the risk of erroneous decisions.'" *Post*, at 785, quoting *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 13 (1979). Notice, summons, right to counsel, rules of evidence, and evidentiary hearings are all procedures to place information *before* the factfinder. But only the standard of proof "[instructs] the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions" he draws from that information. *In re Winship*, 397 U.S., at 370 (Harlan, J., concurring). The statutory provision of right to counsel and multiple hearings before termination cannot suffice to protect a natural parent's fundamental liberty interests if the State is willing to tolerate undue uncertainty in the determination of the dispositive facts.

[*758] III

[**LEdHR1B] [1B] [HN6] In parental rights termination proceedings, the private interest affected is commanding; the risk of error from using a preponderance standard is substantial; and the countervailing governmental interest favoring that standard is comparatively slight. Evaluation of the three *Eldridge* factors compels the conclusion that use of a "fair preponderance of the evidence" standard in such proceedings is inconsistent with due process.

[**610] A

" [HN7] 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.'" *Goldberg v. Kelly*, 397 U.S. 254, 262-263 (1970), quoting *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring). Whether the loss threatened by a particular type of proceeding is sufficiently grave to warrant more than average certainty on the part of the factfinder turns on both the nature of the private interest threatened and the permanency of the threatened loss.

Lassiter declared it "plain beyond the need for multiple citation" that a natural parent's "desire for and right to 'the companionship, care, custody, and management of his or her children'" is an interest far more precious than any property [*759] right. 452 U.S., at 27, quoting *Stanley v. Illinois*, 405 U.S., at 651. When the State initiates a parental rights termination proceeding, it seeks not merely to infringe that fundamental liberty interest, but to end it. "If the State prevails, it will have worked a unique kind of deprivation. . . . A parent's interest in the accuracy and justice of the decision to terminate his or her parental status is, therefore, a commanding one." 452 U.S., at 27.

[**1398] In government-initiated proceedings to determine juvenile delinquency, *In re Winship, supra*; civil commitment, *Addington v. Texas, supra*; deportation, *Woodby v. INS, supra*; and denaturalization, *Chaunt v. United States, supra*, and *Schneiderman v. United States, supra*, this Court has identified losses of individual liberty sufficiently serious to warrant imposition of an elevated burden of proof. Yet juvenile delinquency adjudications, civil commitment, deportation, and denaturalization, at least to a degree, are all *reversible* official actions. Once affirmed on appeal, a New York decision terminating parental rights is *final* and irrevocable. See n. 1, *supra*. Few forms of state action are both so severe and so irreversible.

Thus, the first *Eldridge* factor -- the private interest affected -- weighs heavily against use of the preponderance standard at a state-initiated permanent neglect proceeding. We do not deny that the child and his foster parents are also deeply

interested in the outcome of that contest. But at the factfinding stage of the New York proceeding, the focus emphatically is not on them.

The factfinding does not purport -- and is not intended -- to balance the child's interest in a normal family home against the parents' interest in raising the child. Nor does it purport to determine whether the natural parents or the foster parents would provide the better home. Rather, the factfinding hearing pits the State directly against the parents. The State alleges that the natural parents are at fault. Fam. Ct. Act § 614.1(d). The questions disputed and decided are [*760] what the State did -- "made diligent efforts," § 614.1(c) -- and what the natural parents did not do -- "maintain contact with or plan for the future of the child." § 614.1(d). The State marshals an array of public resources to prove its case and disprove the parents' case. [***611] Victory by the State not only makes termination of parental rights possible; it entails a judicial determination that the parents are unfit to raise their own children.¹⁰

¹⁰ The Family Court Judge in the present case expressly refused to terminate petitioners' parental rights on a "non-statutory, no-fault basis." App. 22-29. Nor is it clear that the State constitutionally could terminate a parent's rights *without* showing parental unfitness. See *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) ("We have little doubt that the Due Process Clause would be offended [if] a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest," quoting *Smith v. Organization of Foster Families*, 431 U.S. 816, 862-863 (1977) (Stewart, J., concurring in judgment)).

At the factfinding, the State cannot presume that a child and his parents are adversaries. After the State has established parental unfitness at that initial proceeding, the court may assume at the *dispositional* stage that the interests of the child and the natural parents do diverge. See Fam. Ct. Act § 631 (judge shall make his order "solely on the basis of the best interests of the child," and thus has no obligation to consider the natural parents' rights in selecting dispositional alternatives). But until the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship.¹¹ Thus, [*761] at the factfinding, the interests of the child and his natural parents coincide to favor use of error-reducing procedures.

¹¹ For a child, the consequences of termination of his natural parents' rights may well be far-reaching. In Colorado, for example, it has been noted: "The child loses the right of support and maintenance, for which he may thereafter be dependent upon society; the right to inherit; and all other rights inherent in the legal parent-child relationship, not just for [a limited] period . . . , but forever." *In re K. S.*, 33 Colo. App. 72, 76, 515 P. 2d 130, 133 (1973).

Some losses cannot be measured. In this case, for example, Jed Santosky was removed from his natural parents' custody when he was only three days old; the judge's finding of permanent neglect effectively foreclosed the possibility that Jed would ever know his natural parents.

[**1399] However substantial the foster parents' interests may be, cf. *Smith v. Organization of Foster Families*, 431 U.S., at 845-847, they are not implicated directly in the factfinding stage of a state-initiated permanent neglect proceeding against the natural parents. If authorized, the foster parents may pit their interests directly against those of the natural parents by initiating their own permanent neglect proceeding. Fam. Ct. Act § 1055(d); Soc. Serv. Law §§ 384-6.3(b), 392.7(c). Alternatively, the foster parents can make their case for custody at the dispositional stage of a state-initiated proceeding, where the judge already has decided the issue of permanent neglect and is focusing on the placement that would serve the child's best interests. Fam. Ct. Act §§ 623, 631. For the foster parents, the State's failure to prove permanent neglect may prolong the delay and uncertainty until their foster child is freed for adoption. But for the natural parents, a finding of permanent neglect can cut off forever their rights in their child. Given this disparity of consequence, we have no difficulty finding that the balance of private interests strongly favors heightened procedural protections.

[***612] B

Under *Mathews v. Eldridge*, we next must consider both the risk of erroneous deprivation of private interests resulting from use of a "fair preponderance" standard and the likelihood that a higher evidentiary standard would reduce that risk. See 424 U.S., at 335. Since the factfinding phase of a permanent neglect proceeding is an adversary contest between the State and the natural parents, the relevant question is whether a preponderance standard fairly allocates the risk of an erroneous factfinding between these two parties.

[*762] In New York, the factfinding stage of a state-initiated permanent neglect proceeding bears many of the indicia of a criminal trial. Cf. *Lassiter v. Department of Social Services*, 452 U.S., at 42-44 (first dissenting opinion); *Meltzer*

v. C. Buck LeCraw & Co., 402 U.S. 954, 959 (1971) (Black, J., dissenting from denial of certiorari). See also dissenting opinion, *post*, at 777-779 (describing procedures employed at factfinding proceeding). The Commissioner of Social Services charges the parents with permanent neglect. They are served by summons. Fam. Ct. Act §§ 614, 616, 617. The factfinding hearing is conducted pursuant to formal rules of evidence. § 624. The State, the parents, and the child are all represented by counsel. §§ 249, 262. The State seeks to establish a series of historical facts about the intensity of its agency's efforts to reunite the family, the infrequency and insubstantiality of the parents' contacts with their child, and the parents' inability or unwillingness to formulate a plan for the child's future. The attorneys submit documentary evidence, and call witnesses who are subject to cross-examination. Based on all the evidence, the judge then determines whether the State has proved the statutory elements of permanent neglect by a fair preponderance of the evidence. § 622.

At such a proceeding, numerous factors combine to magnify the risk of erroneous factfinding. Permanent neglect proceedings employ imprecise substantive standards that leave determinations unusually open to the subjective values of the judge. See *Smith v. Organization of Foster Families*, 431 U.S., at 835, n. 36. In appraising the nature and quality of a complex series of encounters among the agency, the parents, and the child, the court possesses unusual discretion to underweigh probative facts that might favor the parent.¹² [*763] Because parents [**1400] subject to termination proceedings are often poor, uneducated, or members of minority [***613] groups, *id.*, at 833-835, such proceedings are often vulnerable to judgments based on cultural or class bias.

12 For example, a New York court appraising an agency's "diligent efforts" to provide the parents with social services can excuse efforts *not* made on the grounds that they would have been "detrimental to the best interests of the child." Fam. Ct. Act § 614.1.(c). In determining whether the parent "substantially and continuously or repeatedly" failed to "maintain contact with . . . the child," § 614.1.(d), the judge can discount actual visits or communications on the grounds that they were insubstantial or "overtly [demonstrated] a lack of affectionate and concerned parenthood." Soc. Serv. Law § 384-b.7.(b). When determining whether the parent planned for the child's future, the judge can reject as unrealistic plans based on overly optimistic estimates of physical or financial ability. § 384-b.7.(c). See also dissenting opinion, *post*, at 779-780, nn. 8 and 9.

The State's ability to assemble its case almost inevitably dwarfs the parents' ability to mount a defense. No predetermined limits restrict the sums an agency may spend in prosecuting a given termination proceeding. The State's attorney usually will be expert on the issues contested and the procedures employed at the factfinding hearing, and enjoys full access to all public records concerning the family. The State may call on experts in family relations, psychology, and medicine to bolster its case. Furthermore, the primary witnesses at the hearing will be the agency's own professional caseworkers whom the State has empowered both to investigate the family situation and to testify against the parents. Indeed, because the child is already in agency custody, the State even has the power to shape the historical events that form the basis for termination.¹³

13 In this case, for example, the parents claim that the State sought court orders denying them the right to visit their children, which would have prevented them from maintaining the contact required by Fam. Ct. Act. § 614.1.(d). See Brief for Petitioners 9. The parents further claim that the State cited their rejection of social services they found offensive or superfluous as proof of the agency's "diligent efforts" and their own "failure to plan" for the children's future. *Id.*, at 10-11.

We need not accept these statements as true to recognize that the State's unusual ability to structure the evidence increases the risk of an erroneous factfinding. Of course, the disparity between the litigants' resources will be vastly greater in States where there is no statutory right to court-appointed counsel. See *Lassiter v. Department of Social Services*, 452 U.S. 18, 34 (1981) (only 33 States and the District of Columbia provide that right by statute).

[*764] The disparity between the adversaries' litigation resources is matched by a striking asymmetry in their litigation options. Unlike criminal defendants, natural parents have no "double jeopardy" defense against repeated state termination efforts. If the State initially fails to win termination, as New York did here, see n. 4, *supra*, it always can try once again to cut off the parents' rights after gathering more or better evidence. Yet even when the parents have attained the level of fitness required by the State, they have no similar means by which they can forestall future termination efforts.

Coupled with a "fair preponderance of the evidence" standard, these factors create a significant prospect of erroneous termination. A standard of proof that by its very terms demands consideration of the quantity, rather than the quality, of the evidence may misdirect the factfinder in the marginal case. See *In re Winship*, 397 U.S., at 371, n. 3 (Harlan, J., concurring). Given the weight of the private interests at stake, the social cost of even occasional error is sizable.

Raising the standard of proof would have both practical and symbolic consequences. Cf. *Addington v. Texas*, 441 U.S., at 426. The Court has long considered the heightened standard of proof used in criminal prosecutions to be "a prime instrument for reducing the risk of convictions resting on factual error." *In re Winship*, 397 U.S., at 363.

[**614] An elevated standard of proof in a parental rights termination proceeding would alleviate "the possible risk that a factfinder might decide to [deprive] an individual based solely on a few isolated instances of unusual conduct [or] . . . idiosyncratic behavior." *Addington v. Texas*, 441 U.S., at 427. "Increasing the burden of proof is one way to [**1401] impress the factfinder with the importance [**765] of the decision and thereby perhaps to reduce the chances that inappropriate" terminations will be ordered. *Ibid*.

The Appellate Division approved New York's preponderance standard on the ground that it properly "balanced rights possessed by the child . . . with those of the natural parents. . . ." 75 App. Div. 2d, at 910, 427 N. Y. S. 2d, at 320. By so saying, the court suggested that a preponderance standard properly allocates the risk of error *between* the parents and the child.¹⁴ That view is fundamentally mistaken.

14 The dissent makes a similar claim. See *post*, at 786-791.

The court's theory assumes that termination of the natural parents' rights invariably will benefit the child.¹⁵ Yet we have noted above that the parents and the child share an interest in avoiding erroneous termination. Even accepting the court's assumption, we cannot agree with its conclusion that a preponderance standard fairly distributes the risk of error between parent and child. Use of that standard reflects the judgment that society is nearly neutral between erroneous termination of parental rights and erroneous failure to terminate those rights. Cf. *In re Winship*, 397 U.S., at 371 (Harlan, J., concurring). For the child, the likely consequence of an erroneous failure to terminate is preservation of [**766] an uneasy status quo.¹⁶ For the natural parents, however, [**615] the consequence of an erroneous termination is the unnecessary destruction of their natural family. A standard that allocates the risk of error nearly equally between those two outcomes does not reflect properly their relative severity.

15 This is a hazardous assumption at best. Even when a child's natural home is imperfect, permanent removal from that home will not necessarily improve his welfare. See, e. g., Wald, *State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards*, 27 *Stan. L. Rev.* 985, 993 (1975) ("In fact, under current practice, coercive intervention frequently results in placing a child in a more detrimental situation than he would be in without intervention").

Nor does termination of parental rights necessarily ensure adoption. See Brief for *Community Action for Legal Services, Inc., et al. as Amici Curiae* 22-23. Even when a child eventually finds an adoptive family, he may spend years moving between state institutions and "temporary" foster placements after his ties to his natural parents have been severed. See *Smith v. Organization of Foster Families*, 431 U.S., at 833-838 (describing the "limbo" of the New York foster care system).

16 When the termination proceeding occurs, the child is not living at his natural home. A child cannot be adjudicated "permanently neglected" until, "for a period of more than one year," he has been in "the care of an authorized agency." Soc. Serv. Law § 384-b.7.(a); Fam. Ct. Act § 614.1.(d). See also dissenting opinion, *post*, at 789-790.

Under New York law, a judge has ample discretion to ensure that, once removed from his natural parents on grounds of neglect, a child will not return to a hostile environment. In this case, when the State's initial termination effort failed for lack of proof, see n. 4, *supra*, the court simply issued orders under Fam. Ct. Act § 1055(b) extending the period of the child's foster home placement. See App. 19-20. See also Fam. Ct. Act § 632(b) (when State's permanent neglect petition is dismissed for insufficient evidence, judge retains jurisdiction to reconsider underlying orders of placement); § 633 (judge may suspend judgment at dispositional hearing for an additional year).

C

[HN8] Two state interests are at stake in parental rights termination proceedings -- a *parens patriae* interest in preserving and promoting the welfare of the child and a fiscal and administrative interest in reducing the cost and burden of such proceedings. A standard of proof more strict than preponderance of the evidence is consistent with both interests.

"Since the State has an urgent interest in the welfare of the child, it shares the parent's interest in an accurate and just decision" at the *factfinding* proceeding. *Lassiter v. Department of Social Services*, 452 U.S., at 27. As *parens patriae*, the State's goal is to provide the child with a permanent home. See Soc. Serv. Law § 384-b.1.(a)(i) (statement of legislative findings and intent). Yet while [**1402] there is still reason to believe that positive, nurturing parent-child relationships exist, the *parens patriae* interest favors preservation, not [**767] severance, of natural familial bonds.¹⁷

§ 384-b.1.(a)(ii). "[The] State registers no gain towards its declared goals when it separates children from the custody of fit parents." *Stanley v. Illinois*, 405 U.S., at 652.

17 Any *parens patriae* interest in terminating the natural parents' rights arises only at the dispositional phase, *after* the parents have been found unfit.

The State's interest in finding the child an alternative permanent home arises only "when it is *clear* that the natural parent cannot or will not provide a normal family home for the child." Soc. Serv. Law § 384-b.1.(a)(iv) (emphasis added). At the factfinding, that goal is served by procedures that promote an accurate determination of whether the natural parents can and will provide a normal home.

Unlike a constitutional requirement of hearings, see, e. g., *Mathews v. Eldridge*, 424 U.S., at 347, or court-appointed counsel, a stricter standard of proof would reduce factual error without imposing substantial fiscal burdens upon the State. As we have observed, 35 States already have adopted a higher standard by statute or court decision without apparent effect on the speed, form, or cost of their factfinding proceedings. See n. 3, *supra*.

Nor would an elevated standard of proof create any real administrative burdens for the State's factfinders. New York Family Court judges already are familiar with a higher evidentiary standard in other parental rights termination proceedings not involving permanent neglect. See Soc. Serv. Law §§ 384-b.3.(g), 384-b. 4.(c), and 384-b.4.(e) (requiring "clear and convincing proof" before parental rights may be terminated for reasons of mental illness and mental retardation or severe and repeated child abuse). New York [***616] also demands at least clear and convincing evidence in proceedings of far less moment than parental rights termination proceedings. See, e. g., N. Y. Veh. & Traf. Law § 227.1 (McKinney Supp. 1981) (requiring the State to prove traffic [*768] infractions by "clear and convincing evidence") and *In re Rosenthal v. Hartnett*, 36 N. Y. 2d 269, 326 N. E. 2d 811 (1975); see also *Ross v. Food Specialties, Inc.*, 6 N. Y. 2d 336, 341, 160 N. E. 2d 618, 620 (1959) (requiring "clear, positive and convincing evidence" for contract reformation). We cannot believe that it would burden the State unduly to require that its factfinders have the same factual certainty when terminating the parent-child relationship as they must have to suspend a driver's license.

IV

[**LEdHRIC] [1C]The logical conclusion of this balancing process is that the "fair preponderance of the evidence" standard prescribed by Fam. Ct. Act § 622 violates the Due Process Clause of the Fourteenth Amendment.¹⁸ The Court noted in *Addington*: "The individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state." 441 U.S., at 427. Thus, [HN9] at a parental rights termination proceeding, a near-equal allocation of risk between the parents and the State is constitutionally intolerable. The next question, then, is whether a "beyond a reasonable doubt" or a "clear and convincing" standard is constitutionally mandated.

18 The dissent's claim that today's decision "will inevitably lead to the federalization of family law," *post*, at 773, is, of course, vastly overstated. As the dissent properly notes, the Court's duty to "[refrain] from interfering with state answers to domestic relations questions" has never required "that the Court should blink at clear constitutional violations in state statutes." *Post*, at 771.

In *Addington*, the Court concluded that application of a reasonable-doubt standard is inappropriate in civil commitment proceedings for two reasons -- because of our hesitation to apply that unique standard [**1403] "too broadly or casually in non-criminal cases," *id.*, at 428, and because the psychiatric evidence ordinarily adduced at commitment proceedings is [*769] rarely susceptible to proof beyond a reasonable doubt. *Id.*, at 429-430, 432-433. To be sure, as has been noted above, in the Indian Child Welfare Act of 1978, Pub. L. 95-608, § 102(f), 92 Stat. 3072, 25 U. S. C. § 1912(f) (1976 ed., Supp. IV), Congress requires "evidence beyond a reasonable doubt" for termination of Indian parental rights, reasoning that "the removal of a child from the parents is a penalty as great [as], if not greater, than a criminal penalty . . ." H. R. Rep. No. 95-1386, p. 22 (1978). Congress did not consider, however, the evidentiary problems that would arise if proof beyond a reasonable doubt were required in all state-initiated parental rights termination hearings.

Like civil commitment hearings, termination proceedings often require the factfinder to evaluate medical and psychiatric testimony, and to decide issues difficult to prove to a level of absolute certainty, such as lack of parental motive, absence of [***617] affection between parent and child, and failure of parental foresight and progress. Cf. *Lassiter*

v. Department of Social Services, 452 U.S., at 30; *id.*, at 44-46 (first dissenting opinion) (describing issues raised in state termination proceedings). The substantive standards applied vary from State to State. Although Congress found a "beyond a reasonable doubt" standard proper in one type of parental rights termination case, another legislative body might well conclude that a reasonable-doubt standard would erect an unreasonable barrier to state efforts to free permanently neglected children for adoption.

[**LEdHRS] [5]A majority of the States have concluded that a "clear and convincing evidence" standard of proof strikes a fair balance between the rights of the natural parents and the State's legitimate concerns. See n. 3, *supra*. [HN10] We hold that such a standard adequately conveys to the factfinder the level of subjective certainty about his factual conclusions necessary to satisfy due process. We further hold that determination of the precise burden equal to or greater than that standard [*770] is a matter of state law properly left to state legislatures and state courts. Cf. *Addington v. Texas*, 441 U.S., at 433.

We, of course, express no view on the merits of petitioners' claims.¹⁹ At a hearing conducted under a constitutionally proper standard, they may or may not prevail. Without deciding the outcome under any of the standards we have approved, we vacate the judgment of the Appellate Division and remand the case for further proceedings not inconsistent with this opinion.

¹⁹ Unlike the dissent, we carefully refrain from accepting as the "facts of this case" findings that are not part of the record and that have been found only to be more likely true than not.

It is so ordered.

DISSENT BY: REHNQUIST

DISSENT

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE O'CONNOR join, dissenting.

I believe that few of us would care to live in a society where every aspect of life was regulated by a single source of law, whether that source be this Court or some other organ of our complex body politic. But today's decision certainly moves us in that direction. By parsing the New York scheme and holding one narrow provision unconstitutional, the majority invites further federal-court intrusion into every facet of state family law. If ever there were an area in which federal courts should heed the admonition of Justice Holmes that "a page of history is worth a volume of logic,"¹ it is in the area of domestic relations. This area has been left to the States from [*1404] time immemorial, and not without good reason.

¹ *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921).

Equally as troubling is the majority's due process analysis. The Fourteenth Amendment guarantees that a State will treat individuals with "fundamental fairness" whenever its actions infringe their protected liberty or property interests. By adoption of the procedures relevant to [**618] this case, New [*771] York has created an exhaustive program to assist parents in regaining the custody of their children and to protect parents from the unfair deprivation of their parental rights. And yet the majority's myopic scrutiny of the standard of proof blinds it to the very considerations and procedures which make the New York scheme "fundamentally fair."

I

State intervention in domestic relations has always been an unhappy but necessary feature of life in our organized society. For all of our experience in this area, we have found no fully satisfactory solutions to the painful problem of child abuse and neglect. We have found, however, that leaving the States free to experiment with various remedies has produced novel approaches and promising progress.

Throughout this experience the Court has scrupulously refrained from interfering with state answers to domestic relations questions. "Both theory and the precedents of this Court teach us solicitude for state interests, particularly in the

field of family and family-property arrangements." *United States v. Yazell*, 382 U.S. 341, 352 (1966). This is not to say that the Court should blink at clear constitutional violations in state statutes, but rather that in this area, of all areas, "substantial weight must be given to the good-faith judgments of the individuals [administering a program] . . . that the procedures they have provided assure fair consideration of the . . . claims of individuals." *Mathews v. Eldridge*, 424 U.S. 319, 349 (1976).

This case presents a classic occasion for such solicitude. As will be seen more fully in the next part, New York has enacted a comprehensive plan to *aid* marginal parents in regaining the custody of their child. The central purpose of the New York plan is to reunite divided families. Adoption of the preponderance-of-the-evidence standard represents New York's good-faith effort to balance the interest of parents [*772] against the legitimate interests of the child and the State. These earnest efforts by state officials should be given weight in the Court's application of due process principles. "Great constitutional provisions must be administered with caution. Some play must be allowed for the joints of the machine, and it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." *Missouri, K. & T. R. Co. v. May*, 194 U.S. 267, 270 (1904).²

² The majority asserts that "the degree of proof required in a particular type of proceeding is the kind of question which has traditionally been left to the judiciary to resolve." *Woodby v. INS*, 385 U.S. 276, 284 (1966). *Ante*, at 755-756. To the extent that the majority seeks, by this statement, to place upon the federal judiciary the primary responsibility for deciding the appropriate standard of proof in state matters, it arrogates to itself a responsibility wholly at odds with the allocation of authority in our federalist system and wholly unsupported by the prior decisions of this Court. In *Woodby v. INS*, 385 U.S. 276 (1966), the Court determined the proper standard of proof to be applied under a federal statute, and did so only after concluding that "Congress [had] not addressed itself to the question of what degree of proof [was] required in deportation proceedings." *Id.*, at 284. Beyond an examination for the constitutional minimum of "fundamental fairness" -- which clearly is satisfied by the New York procedures at issue in this case -- this Court simply has no role in establishing the standards of proof that States must follow in the various judicial proceedings they afford to their citizens.

The [***619] majority may believe that it is adopting a relatively unobtrusive means of ensuring that termination proceedings provide "due process of law." In fact, however, [**1405] fixing the standard of proof as a matter of federal constitutional law will only lead to further federal-court intervention in state schemes. By holding that due process requires proof by clear and convincing evidence the majority surely cannot mean that any state scheme passes constitutional muster so long as it applies that standard of proof. A state law permitting termination of parental rights upon a showing of neglect by clear and convincing evidence certainly would not be [*773] acceptable to the majority if it provided no procedures other than one 30-minute hearing. Similarly, the majority probably would balk at a state scheme that permitted termination of parental rights on a clear and convincing showing merely that such action would be in the best interests of the child. See *Smith v. Organization of Foster Families*, 431 U.S. 816, 862-863 (1977) (Stewart, J., concurring in judgment).

After fixing the standard of proof, therefore, the majority will be forced to evaluate other aspects of termination proceedings with reference to that point. Having in this case abandoned evaluation of the overall effect of a scheme, and with it the possibility of finding that strict substantive standards or special procedures compensate for a lower burden of proof, the majority's approach will inevitably lead to the federalization of family law. Such a trend will only thwart state searches for better solutions in an area where this Court should encourage state experimentation. "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). It should not do so in the absence of a clear constitutional violation. As will be seen in the next part, no clear constitutional violation has occurred in this case.

II

As the majority opinion notes, petitioners are the parents of five children, three of whom were removed from petitioners' care on or before August 22, 1974. During the next four and one-half years, those three children were in the custody of the State and in the care of foster homes or institutions, and the State was diligently engaged in efforts to prepare petitioners for the children's return. Those efforts were unsuccessful, [*774] however, and on April 10, 1979, the New York Family Court for Ulster County terminated petitioners' parental rights as to the three children removed in 1974 or earlier. This termination was preceded by a judicial finding that petitioners had failed to plan for the return and future of their children, a statutory [***620] category of permanent neglect. Petitioners now contend, and the Court today holds, that they were denied due process of law, not because of a general inadequacy of procedural protections, but

simply because the finding of permanent neglect was made on the basis of a preponderance of the evidence adduced at the termination hearing.

It is well settled that "[the] requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property." *Board of Regents v. Roth*, 408 U.S. 564, 569 (1972). In determining whether such liberty or property interests are implicated by a particular government action, "we must look not to the 'weight' but to the *nature* of the interest at stake." *Id.*, at 571 (emphasis in original). I do not disagree with the majority's conclusion that the interest of parents in their relationship with their children is sufficiently fundamental to come within the finite class of liberty interests protected by the Fourteenth Amendment. See *Smith v. Organization of Foster Families, supra*, at 862-863 (Stewart, J., concurring in judgment). "Once it is determined that due [**1406] process applies, [however,] the question remains what process is due." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). It is the majority's answer to this question with which I disagree.

A

Due process of law is a flexible constitutional principle. The requirements which it imposes upon governmental actions vary with the situations to which it applies. As the Court previously has recognized, "not all situations calling for [*775] procedural safeguards call for the same kind of procedure." *Morrissey v. Brewer, supra*, at 481. See also *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 12 (1979); *Mathews v. Eldridge*, 424 U.S., at 334; *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961). The adequacy of a scheme of procedural protections cannot, therefore, be determined merely by the application of general principles unrelated to the peculiarities of the case at hand.

Given this flexibility, it is obvious that a proper due process inquiry cannot be made by focusing upon one narrow provision of the challenged statutory scheme. Such a focus threatens to overlook factors which may introduce constitutionally adequate protections into a particular government action. Courts must examine *all* procedural protections offered by the State, and must assess the *cumulative* effect of such safeguards. As we have stated before, courts must consider "the fairness and reliability of the existing . . . procedures" before holding that the Constitution requires more. *Mathews v. Eldridge, supra*, at 343. Only through such a broad inquiry may courts determine whether a challenged governmental action satisfies the due process requirement of "fundamental fairness."³ In some instances, the [***621] Court has even looked to nonprocedural restraints on official action in determining whether the deprivation of a protected interest was effected without due process of law. *E. g., Ingraham v. Wright*, [*776] 430 U.S. 651 (1977). In this case, it is just such a broad look at the New York scheme which reveals its fundamental fairness.⁴

³ Although, as the majority states, we have held that the minimum requirements of procedural due process are a question of federal law, such a holding does not mean that the procedural protections afforded by a State will be inadequate under the Fourteenth Amendment. It means simply that the adequacy of the state-provided process is to be judged by constitutional standards -- standards which the majority itself equates to "fundamental fairness." *Ante*, at 754. I differ, therefore, not with the majority's statement that the requirements of due process present a federal question, but with its apparent assumption that the presence of "fundamental fairness" can be ascertained by an examination which completely disregards the plethora of protective procedures accorded parents by New York law.

⁴ The majority refuses to consider New York's procedure as a whole, stating that "[the] statutory provision of right to counsel and multiple hearings before termination cannot suffice to protect a natural parent's fundamental liberty interests if the State is willing to tolerate undue uncertainty in the determination of the dispositive facts." *Ante*, at 758, n. 9. Implicit in this statement is the conclusion that the risk of error may be reduced to constitutionally tolerable levels only by raising the standard of proof -- that other procedures can never eliminate "undue uncertainty" so long as the standard of proof remains too low. Aside from begging the question of whether the risks of error tolerated by the State in this case are "undue," see *infra*, at 785-791, this conclusion denies the flexibility that we have long recognized in the principle of due process; understates the error-reducing power of procedural protections such as the right to counsel, evidentiary hearings, rules of evidence, and appellate review; and establishes the standard of proof as the *sine qua non* of procedural due process.

The termination of parental rights on the basis of permanent neglect can occur under New York law only by order of the Family Court. N. Y. Soc. Serv. Law (SSL) § 384-b.3.(d) (McKinney Supp. 1981-1982). Before a petition for permanent termination can be filed in that court, however, several other events must first occur.

[**1407] The Family Court has jurisdiction only over those children who are in the care of an authorized agency. N. Y. Family Court Act (FCA) § 614.1.(b) (McKinney 1975 and Supp. 1981-1982). Therefore, the children who are the subject of a termination petition must previously have been removed from their parents' home on a temporary basis. Temporary removal of a child can occur in one of two ways. The parents may consent to the removal, FCA § 1021, or, as occurred in this case, the Family Court can order the removal pursuant to a finding that the child is abused or neglected.⁵ FCA §§ 1051, 1952.

⁵ An abused child is one who has been subjected to intentional physical injury "which causes or creates a substantial risk of death, or serious or protracted disfigurement, or protracted impairment of physical or emotional health or protracted loss or impairment of the function of any bodily organ." FCA § 1012(e)(i). Sexual offenses against a child are also covered by this category. A neglected child is one "whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his parent . . . to exercise a minimum degree of care in supplying the child with adequate food, clothing, shelter or education." FCA § 1012(f)(i)(A).

[*777] Court proceedings to order the temporary removal of a child are initiated by a petition alleging abuse or neglect, filed by a state-authorized child protection agency or by a person designated by the court. FCA §§ 1031, 1032. Unless the court finds that exigent circumstances require removal of the child before a petition may be filed and a hearing held, [***622] see FCA § 1022, the order of temporary removal results from a "dispositional hearing" conducted to determine the appropriate form of alternative care. FCA § 1045. See also FCA § 1055. This "dispositional hearing" can be held only after the court, at a separate "factfinding hearing," has found the child to be abused or neglected within the specific statutory definition of those terms. FCA §§ 1012, 1044, 1051.

Parents subjected to temporary removal proceedings are provided extensive procedural protections. A summons and copy of the temporary removal petition must be served upon the parents within two days of issuance by the court, FCA §§ 1035, 1036, and the parents may, at their own request, delay the commencement of the factfinding hearing for three days after service of the summons. FCA § 1048. ⁶ The factfinding hearing may not commence without a determination by the court that the parents are present at the hearing and have been served with the petition. FCA § 1041. At the hearing itself, "only competent, material and relevant evidence may be admitted," with some enumerated exceptions [**778] for particularly probative evidence. FCA § 1046(b)(ii). In addition, indigent parents are provided with an attorney to represent them at both the factfinding and dispositional hearings, as well as at all other proceedings related to temporary removal of their child. FCA § 262(a)(i).

⁶ The relatively short time between notice and commencement of hearing provided by § 1048 undoubtedly reflects the State's desire to protect the child. These proceedings are designed to permit prompt action by the court when the child is threatened with imminent and serious physical, mental, or emotional harm.

An order of temporary removal must be reviewed every 18 months by the Family Court. SSL § 392.2. Such review is conducted by hearing before the same judge who ordered the temporary removal, and a notice of the hearing, including a statement of the dispositional alternatives, must be given to the parents at least 20 days before the hearing is held. SSL § 392.4. As in the initial removal action, the parents must be parties to the proceedings, *ibid.*, and are entitled to court-appointed counsel if indigent. FCA § 262(a).

One or more years after a child has been removed temporarily from the parents' home, permanent termination proceedings may be commenced by the filing of a petition in the court which ordered the temporary removal. The petition must be filed by a state agency or by a foster parent authorized by the court, SSL § 384-b.3.(b), and must allege that the child has been [**1408] permanently neglected by the parents. SSL § 384-b.3.(d). ⁷ Notice of the petition and the dispositional proceedings must be served upon the parents at least 20 days before the commencement of the hearing, SSL § 384-b.3.(e), must inform them of the potential consequences of the hearing, *ibid.*, and must inform them "of their right to the assistance of counsel, including [their] right . . . to have counsel assigned by the court [if] they are financially unable to obtain counsel." *Ibid.* See also FCA § 262.

⁷ Permanent custody also may be awarded by the Family Court if both parents are deceased, the parents abandoned the child at least six months prior to the termination proceedings, or the parents are unable to provide proper and adequate care by reason of mental illness or mental retardation. SSL § 384-b.4.(c).

As [***623] in the initial removal proceedings, two hearings are held in consideration of the permanent termination petition. [*779] SSL § 384-b.3.(f). At the factfinding hearing, the court must determine, by a fair preponderance of the evidence, whether the child has been permanently neglected. SSL § 384-b.3.(g). "Only competent, material and relevant evidence may be admitted in a factfinding hearing." FCA § 624. The court may find permanent neglect if the child is in the care of an authorized agency or foster home and the parents have "failed for a period of more than one year . . . substantially and continuously or repeatedly to maintain contact with or plan for the future of the child, al-

though physically and financially able to do so." SSL § 384-b.7.(a).⁸ In addition, because the State considers its "first obligation" to be the reuniting of the child with its natural parents, SSL § 384-b.1.(iii), the court must also find that the supervising state agency has, without success, made "diligent efforts to encourage and strengthen the parental relationship." SSL § 384-b.7.(a) (emphasis added).⁹

⁸ As to maintaining contact with the child, New York law provides that "evidence of insubstantial or infrequent contacts by a parent with his or her child shall not, of itself, be sufficient as a matter of law to preclude a determination that such child is a permanently neglected child. A visit or communication by a parent with the child which is of such a character as to overtly demonstrate a lack of affectionate and concerned parenthood shall not be deemed a substantial contact." SSL § 384-b.7.(b).

Failure to plan for the future of the child means failure "to take such steps as may be necessary to provide an adequate, stable home and parental care for the child within a period of time which is reasonable under the financial circumstances available to the parent. The plan must be realistic and feasible, and good faith effort shall not, of itself, be determinative. In determining whether a parent has planned for the future of the child, the court may consider the failure of the parent to utilize medical, psychiatric, psychological and other social and rehabilitative services and material resources made available to such parent." SSL § 384-b.7.(c).

⁹ "Diligent efforts" are defined under New York law to "mean reasonable attempts by an authorized agency to assist, develop and encourage a meaningful relationship between the parent and child, including but not limited to:

"(1) consultation and cooperation with the parents in developing a plan for appropriate services to the child and his family;

"(2) making suitable arrangements for the parents to visit the child;

"(3) provision of services and other assistance to the parents so that problems preventing the discharge of the child from care may be resolved or ameliorated; and

"(4) informing the parents at appropriate intervals of the child's progress, development and health." SSL § 384-b.7.(f).

[*780] Following the factfinding hearing, a separate, dispositional hearing is held to determine what course of action would be in "the best interests of the child." FCA § 631. A finding of permanent neglect at the factfinding hearing, although necessary to a termination of parental rights, does not control the court's order at the dispositional hearing. The court may dismiss the petition, suspend judgment on the petition and retain jurisdiction for a period of one year in order to provide further opportunity for a reuniting of the family, or terminate the parents' right to the custody and care of the child. FCA §§ 631-634. The court must base its decision solely upon the record of "material and relevant evidence" introduced at the dispositional [**1409] hearing, FCA § 624; *In re "Female" M.*, 70 App. Div. 2d 812, 417 N. Y. S. 2d 482 (1979), and may not entertain any presumption that the best interests [***624] of the child "will be promoted by any particular disposition." FCA § 631.

As petitioners did in this case, parents may appeal any unfavorable decision to the Appellate Division of the New York Supreme Court. Thereafter, review may be sought in the New York Court of Appeals and, ultimately, in this Court if a federal question is properly presented.

As this description of New York's termination procedures demonstrates, the State seeks not only to protect the interests of parents in rearing their own children, but also to assist and encourage parents who have lost custody of their children to reassume their rightful role. Fully understood, the New York system is a comprehensive program to aid parents such as petitioners. Only as a last resort, when "diligent efforts" to reunite the family have failed, does New [*781] York authorize the termination of parental rights. The procedures for termination of those relationships which cannot be aided and which threaten permanent injury to the child, administered by a judge who has supervised the case from the first temporary removal through the final termination, cannot be viewed as fundamentally unfair. The facts of this case demonstrate the fairness of the system.

The three children to which this case relates were removed from petitioners' custody in 1973 and 1974, before petitioners' other two children were born. The removals were made pursuant to the procedures detailed above and in response to what can only be described as shockingly abusive treatment.¹⁰ At the temporary removal hearing held before the Family Court on September 30, 1974, petitioners were represented by counsel, and allowed the Ulster County Department of Social Services (Department) to take custody of the three children.

¹⁰ Tina Apel, the oldest of petitioners' five children, was removed from their custody by court order in November 1973 when she was two years old. Removal proceedings were commenced in response to complaints by neighbors and reports from a local hospital that Tina had suffered injuries in petitioners' home including a fractured left femur, treated with a homemade splint; bruises on the upper arms, forehead, flank, and spine; and abrasions of the upper leg. The following summer John Santosky III, petitioners' second oldest child, was also re-

moved from petitioners' custody. John, who was less than one year old at the time, was admitted to the hospital suffering malnutrition, bruises on the eye and forehead, cuts on the foot, blisters on the hand, and multiple pin pricks on the back. Exhibit to Brief for Respondent Kramer 1-5. Jed Santosky, the third oldest of petitioners' children, was removed from his parents' custody when only three days old as a result of the abusive treatment of the two older children.

Temporary removal of the children was continued at an evidentiary hearing held before the Family Court in December 1975, after which the court issued a written opinion concluding that petitioners were unable to resume their parental responsibilities due to personality disorders. Unsatisfied with the progress petitioners were making, the court also directed [*782] the Department to reduce to writing the plan which it had designed to solve the problems at petitioners' home and reunite the family.

A plan for providing petitioners with extensive counseling and training services was submitted to the court and approved in February 1976. Under the plan, petitioners received training by a mother's aide, a nutritional aide, and a public [***625] health nurse, and counseling at a family planning clinic. In addition, the plan provided psychiatric treatment and vocational training for the father, and counseling at a family service center for the mother. Brief for Respondent Kramer 1-7. Between early 1976 and the final termination decision in April 1979, the State spent more than \$ 15,000 in these efforts to rehabilitate petitioners as parents. App. 34.

Petitioners' response to the State's effort was marginal at best. They wholly disregarded some of the available services and participated only sporadically in the others. [**1410] As a result, and out of growing concern over the length of the children's stay in foster care, the Department petitioned in September 1976 for permanent termination of petitioners' parental rights so that the children could be adopted by other families. Although the Family Court recognized that petitioners' reaction to the State's efforts was generally "nonresponsive, even hostile," the fact that they were "at least superficially cooperative" led it to conclude that there was yet hope of further improvement and an eventual reuniting of the family. Exhibit to Brief for Respondent Kramer 618. Accordingly, the petition for permanent termination was dismissed.

Whatever progress petitioners were making prior to the 1976 termination hearing, they made little or no progress thereafter. In October 1978, the Department again filed a termination petition alleging that petitioners had completely failed to plan for the children's future despite the considerable efforts rendered in their behalf. This time, the Family Court agreed. The court found that petitioners had "failed in any meaningful way to take advantage of the many social [*783] and rehabilitative services that have not only been made available to them but have been diligently urged upon them." App. 35. In addition, the court found that the "infrequent" visits "between the parents and their children were at best superficial and devoid of any real emotional content." *Id.*, at 21. The court thus found "nothing in the situation which holds out any hope that [petitioners] may ever become financially self sufficient or emotionally mature enough to be independent of the services of social agencies. More than a reasonable amount of time has passed and still, in the words of the case workers, there has been no discernible forward movement. At some point in time, it must be said, 'enough is enough.'" *Id.*, at 36.

In accordance with the statutory requirements set forth above, the court found that petitioners' failure to plan for the future of their children, who were then seven, five, and four years old and had been out of petitioners' custody for at least four years, rose to the level of permanent neglect. At a subsequent dispositional hearing, the court terminated petitioners' parental rights, thereby freeing the three children for adoption.

As this account demonstrates, the State's extraordinary 4-year effort to reunite petitioners' family was not just unsuccessful, it was altogether rebuffed by parents unwilling to improve their circumstances sufficiently to permit a return of their children. At every step of this protracted process petitioners were accorded those procedures and protections [***626] which traditionally have been required by due process of law. Moreover, from the beginning to the end of this sad story all judicial determinations were made by one Family Court Judge. After four and one-half years of involvement with petitioners, more than seven complete hearings, and additional periodic supervision of the State's rehabilitative efforts, the judge no doubt was intimately familiar with this case and the prospects for petitioners' rehabilitation.

It is inconceivable to me that these procedures were "fundamentally unfair" to petitioners. Only by its obsessive [*784] focus on the standard of proof and its almost complete disregard of the facts of this case does the majority find otherwise. " As the discussion [**1411] above indicates, however, such a [*785] focus does not comport with the flexible standard of fundamental fairness embodied in the Due Process Clause of the Fourteenth Amendment.

11 The majority finds, without any reference to the facts of this case, that "numerous factors [in New York termination proceedings] combine to magnify the risk of erroneous factfinding." *Ante*, at 762. Among the factors identified by the majority are the "unusual discretion" of the Family Court judge "to underweigh probative facts that might favor the parent"; the often uneducated, minority status of the parents and their consequent "[vulnerability] to judgments based on cultural or class bias"; the "State's ability to assemble its case," which "dwarfs the parents' ability to mount a defense" by including an unlimited budget, expert attorneys, and "full access to all public records concerning the family"; and the fact that "natural parents have no 'double jeopardy' defense against repeated state" efforts, "with more or better evidence," to terminate parental rights "even when the parents have attained the level of fitness required by the State." *Ante*, at 762, 763, 764. In short, the majority characterizes the State as a wealthy and powerful bully bent on taking children away from defenseless parents. See *ante*, at 761-764. Such characterization finds no support in the record.

The intent of New York has been stated with eminent clarity: "the [State's] *first obligation* is to *help* the family with services to *prevent* its break-up or to *reunite* it if the child has already left home." SSL § 384-b.1.(a)(iii) (emphasis added). There is simply no basis in fact for believing, as the majority does, that the State does not mean what it says; indeed, the facts of this case demonstrate that New York has gone the extra mile in seeking to effectuate its declared purpose. See *supra*, at 781-785. More importantly, there should be no room in the jurisprudence of this Court for decisions based on unsupported, inaccurate assumptions.

A brief examination of the "factors" relied upon by the majority demonstrates its error. The "unusual" discretion of the Family Court judge to consider the "[affection] and [concern]" displayed by parents during visits with their children, *ante*, at 763, n. 12, is nothing more than discretion to consider reality; there is not one shred of evidence in this case suggesting that the determination of the Family Court was "based on cultural or class bias"; if parents lack the "ability to mount a defense," the State provides them with the full services of an attorney, FCA § 262, and they, like the State, have "full access to all *public* records concerning the family" (emphasis added); and the absence of "double jeopardy" protection simply recognizes the fact that family problems are often ongoing and may in the future warrant action that currently is unnecessary. In this case the Family Court dismissed the first termination petition because it desired to give petitioners "the benefit of the doubt," Exhibit to Brief for Respondent Kramer 620, and a second opportunity to raise themselves to "an acceptable minimal level of competency as parents." *Id.*, at 624. It was their complete failure to do so that prompted the second, successful termination petition. See *supra*, at 781-784 and this page.

B

In addition to the basic fairness of the process afforded petitioners, the standard of proof chosen by New York clearly reflects a constitutionally permissible balance of the interests at stake in this case. The standard of proof "represents an attempt to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." *In re Winship*, 397 U.S. 358, 370 (1970) (Harlan, J. concurring); *Addington v. Texas*, 441 U.S. 418, 423 (1979). In this respect, the standard of proof is a crucial component of legal process, the primary function of which is "to minimize the risk of erroneous decisions."¹² *Greenholtz v. Nebraska [*786] Penal Inmates*, 442 U.S., at 13. See also *Addington v. Texas*, *supra*, at 425; *Mathews v. Eldridge*, 424 U.S., at 344.

12 It is worth noting that the significance of the standard of proof in New York parental termination proceedings differs from the significance of the standard in other forms of litigation. In the usual adjudicatory setting, the factfinder has had little or no prior exposure to the facts of the case. His only knowledge of those facts comes from the evidence adduced at trial, and he renders his findings solely upon the basis of that evidence. Thus, normally, the standard of proof is a crucial factor in the final outcome of the case, for it is the scale upon which the factfinder weighs his knowledge and makes his decision.

Although the standard serves the same function in New York parental termination proceedings, additional assurances of accuracy are present in its application. As was adduced at oral argument, the practice in New York is to assign one judge to supervise a case from the initial temporary removal of the child to the final termination of parental rights. Therefore, as discussed above, the factfinder is intimately familiar with the case before the termination proceedings ever begin. Indeed, as in this case, he often will have been closely involved in protracted efforts to rehabilitate the parents. Even if a change in judges occurs, the Family Court retains jurisdiction of the case and the newly assigned judge may take judicial notice of all prior proceedings. Given this familiarity with the case, and the necessarily lengthy efforts which must precede a termination action in New York, decisions in termination cases are made by judges steeped in the background of the case and peculiarly able to judge the accuracy of evidence placed before them. This does not mean that the standard of proof in these cases can escape due process scrutiny, only that additional assurances of accuracy attend the application of the standard in New York termination proceedings.

[**1412] In determining the propriety of a particular standard of proof in a given case, however, it is not enough simply to say that we are trying to minimize the risk of error. Because errors in factfinding affect more than one interest, we try to minimize error as to those interests which we consider to be most important. As Justice Harlan explained in his well-known concurrence to *In re Winship*:

"In a lawsuit between two parties, a factual error can make a difference in one of two ways. First, it can result in a judgment in favor of the plaintiff when the true facts warrant a judgment for the defendant. The analogue in a criminal

case would be the conviction of an innocent man. On the other hand, an erroneous factual determination can result in a judgment for the defendant when the true facts justify a judgment in plaintiff's favor. The criminal analogue would be the acquittal of a guilty man.

The standard of proof influences the relative frequency of these two types of erroneous outcomes. If, for example, the standard of proof for a criminal trial were a preponderance [***628] of the evidence rather than proof [*787] beyond a reasonable doubt, there would be a smaller risk of factual errors that result in freeing guilty persons, but a far greater risk of factual errors that result in convicting the innocent. Because the standard of proof affects the comparative frequency of these two types of erroneous outcomes, the choice of the standard to be applied in a particular kind of litigation should, in a rational world, reflect an assessment of the comparative social disutility of each." 397 U.S., at 370-371.

When the standard of proof is understood as reflecting such an assessment, an examination of the interests at stake in a particular case becomes essential to determining the propriety of the specified standard of proof. Because proof by a preponderance of the evidence requires that "[the] litigants . . . share the risk of error in a roughly equal fashion," *Ad-dington v. Texas*, *supra*, at 423, it rationally should be applied only when the interests at stake are of roughly equal societal importance. The interests at stake in this case demonstrate that New York has selected a constitutionally permissible standard of proof.

On one side is the interest of parents in a continuation of the family unit and the raising of their own children. The importance of this interest cannot easily be overstated. Few consequences of judicial action are so grave as the severance of natural family ties. Even the convict committed to prison and thereby deprived of his physical liberty often retains the love and support of family members. "This Court's decisions have by now made plain beyond the need for multiple citation that a parent's desire for and right to 'the companionship, care, custody, and management of his or her children' is an important interest that 'undeniably warrants deference and, absent a powerful countervailing interest, protection.'" *Stanley v. Illinois*, 405 U.S. 645, 651." *Lassiter v. Department of Social Services*, 452 U.S. 18, 27 (1981). In creating the scheme at issue in this case, the New York Legislature [*788] was expressly aware of this right of parents "to bring up their own children." SSL § 384-b.1.(a)(ii).

On the other side of the termination proceeding are the often countervailing interests of the child.¹³ A [***629] stable, loving [*789] homelife [**1413] is essential to a child's physical, emotional, and spiritual well-being. It requires no citation of authority to assert that children who are abused in their youth generally face extraordinary problems developing into responsible, productive citizens. The same can be said of children who, though not physically or emotionally abused, are passed from one foster home to another with no constancy of love, trust, or discipline. If the Family Court makes an incorrect factual determination resulting in a failure to terminate a parent-child relationship which rightfully should be ended, the child involved must return either to an abusive home¹⁴ or to the often unstable world of foster care.¹⁵ The reality of these [*790] risks is magnified by the fact that the only families faced with termination [***630] actions are those which have voluntarily surrendered custody of their child to the State, or, as in this case, those from which the child has been removed by judicial action because of threatened irreparable injury through [**1414] abuse or neglect. Permanent neglect findings also occur only in families where the child has been in foster care for at least one year.

¹³ The majority dismisses the child's interest in the accuracy of determinations made at the factfinding hearing because "[the] factfinding does not purport . . . to balance the child's interest in a normal family home against the parents' interest in raising the child," but instead "pits the State directly against the parents." *Ante*, at 759. Only "[after] the State has established parental unfitness," the majority reasons, may the court "assume . . . that the interests of the child and the natural parents do diverge." *Ante*, at 760.

This reasoning misses the mark. The child has an interest in the outcome of the factfinding hearing independent of that of the parent. To be sure, "the child and his parents share a vital interest in preventing *erroneous* termination of their natural relationship." *Ibid.* (emphasis added). But the child's interest in a continuation of the family unit exists only to the extent that such a continuation would not be harmful to him. An error in the factfinding hearing that results in a failure to terminate a parent-child relationship which rightfully should be terminated may well detrimentally affect the child. See nn. 14, 15, *infra*.

The preponderance-of-the-evidence standard, which allocates the risk of error more or less evenly, is employed when the social disutility of error in either direction is roughly equal -- that is, when an incorrect finding of fault would produce consequences as undesirable as the consequences that would be produced by an incorrect finding of no fault. Only when the disutility of error in one direction discernibly outweighs the disutility of error in the other direction do we choose, by means of the standard of proof, to reduce the likelihood of the more onerous outcome. See *In re Winship*, 397 U.S. 358, 370-372 (1970) (Harlan, J., concurring).

New York's adoption of the preponderance-of-the-evidence standard reflects its conclusion that the undesirable consequence of an erroneous finding of parental unfitness -- the unwarranted termination of the family relationship -- is roughly equal to the undesirable consequence of

an erroneous finding of parental fitness -- the risk of permanent injury to the child either by return of the child to an abusive home or by the child's continued lack of a permanent home. See nn. 14, 15, *infra*. Such a conclusion is well within the province of state legislatures. It cannot be said that the New York procedures are unconstitutional simply because a majority of the Members of this Court disagree with the New York Legislature's weighing of the interests of the parents and the child in an error-free factfinding hearing.

14 The record in this case illustrates the problems that may arise when a child is returned to an abusive home. Eighteen months after Tina, petitioners' oldest child, was first removed from petitioner's home, she was returned to the home on a trial basis. Katherine Weiss, a supervisor in the Child Protective Unit of the Ulster County Child Welfare Department, later testified in Family Court that "[the] attempt to return Tina to her home just totally blew up." Exhibit to Brief for Respondent Kramer 135. When asked to explain what happened, Mrs. Weiss testified that "there were instances on the record in this court of Mr. Santosky's abuse of his wife, alleged abuse of the children and proven neglect of the children." *Ibid.* Tina again was removed from the home, this time along with John and Jed.

15 The New York Legislature recognized the potential harm to children of extended, nonpermanent foster care. It found "that many children who have been placed in foster care experience unnecessarily protracted stays in such care without being adopted or returned to their parents or other custodians. Such unnecessary stays may deprive these children of positive, nurturing family relationships and have deleterious effects on their development into responsible, productive citizens." SSL § 384-b.1.(b). Subsequent studies have proved this finding correct. One commentator recently wrote of "the lamentable conditions of many foster care placements" under the New York system even today. He noted: "Over fifty percent of the children in foster care have been in this 'temporary' status for more than two years; over thirty percent for more than five years. During this time, many children are placed in a sequence of ill-suited foster homes, denying them the consistent support and nurturing that they so desperately need." Besharov, *State Intervention To Protect Children: New York's Definition of "Child Abuse" and "Child Neglect,"* 26 N. Y. L. S. L. Rev. 723, 770-771 (1981) (footnotes omitted). In this case, petitioners' three children have been in foster care for more than four years, one child since he was only three days old. Failure to terminate petitioners' parental rights will only mean a continuation of this unsatisfactory situation.

In addition to the child's interest in a normal homelife, "the State has an urgent interest in the welfare of the child." *Lassiter v. Department of Social Services*, 452 U.S., at 27. ¹⁶ Few could doubt that the most valuable resource of a self-governing society is its population of children who will one day become adults and themselves assume the responsibility of self-governance. "A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies." *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944). Thus, "the whole community" has an interest "that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed . . . citizens." *Id.*, at 165. See also *Ginsberg v. New York*, 390 U.S. 629, 640-641 (1968).

16 The majority's conclusion that a state interest in the child's well-being arises only after a determination of parental unfitness suffers from the same error as its assertion that the child has no interest, separate from that of its parents, in the accuracy of the factfinding hearing. See n. 13, *supra*.

When, in the context of a permanent neglect termination proceeding, the interests of the child and the State in a stable, [*791] nurturing homelife are balanced against the interests of the parents in the rearing of their child, it cannot be said that either set of interests is so clearly paramount as to require that the risk of error be allocated to one side or the other. Accordingly, a State constitutionally may conclude that the risk of error should be borne in roughly equal fashion by use of the preponderance-of-the-evidence standard of proof. See *Addington v. Texas*, 441 U.S., at 423. This is precisely the balance which has been struck by the New York Legislature: "It is the intent of the legislature in enacting this section to provide procedures not only assuring that the rights of the natural parent are protected, but also, where positive, nurturing parent-child relationships no longer exist, furthering the best interests, needs, and rights of the child by terminating the parental rights and freeing the child for adoption." SSL § 384-b.1.(b).

III

For the reasons heretofore stated, I believe that the Court today errs in concluding that the New York standard of proof in parental-rights termination proceedings violates due process of law. The decision disregards New York's earnest efforts to *aid* parents in regaining the custody of their children and a host of procedural protections placed around parental rights and interests. The Court finds a constitutional violation only by a tunnel-vision application of due process principles that altogether [***631] loses sight of the unmistakable fairness of the New York procedure.

Even more worrisome, today's decision cavalierly rejects the considered judgment of the New York Legislature in an area traditionally entrusted to state care. The Court thereby begins, I fear, a trend of federal intervention in state family law matters which surely will stifle creative responses to vexing problems. Accordingly, I dissent.

REFERENCES

16A Am Jur 2d, Constitutional Law 568; 59 Am Jur 2d, Parent and Child 5

USCS, Constitution, 14th Amendment

US L Ed Digest, Constitutional Law 830.7

L Ed Index to Annos, Burden of Proof; Children and Minors; Due process of Law

ALR Quick Index, Parent and Child; Presumptions and Burden of Proof

Federal Quick Index, Burden of Proof; Child Abuse and Neglect; Children and Minors; Custody of Children

Annotation References:

Supreme Court's views as to concept of "liberty" under due process clauses of Fifth and Fourteenth Amendments. 47 L Ed 2d 975.

**THE STATE EX REL. OFFICE OF MONTGOMERY COUNTY PUBLIC DEFENDER
ET AL., APPELLANTS, v. SIROKI, CLERK, ET AL., APPELLEES.
[Cite as *State ex rel. Montgomery Cty. Pub. Defender v. Siroki*,
108 Ohio St.3d 207, 2006-Ohio-662.]**

Public records requests — Redaction of Social Security numbers.

(No. 2005-1142 — Submitted January 25, 2006 — Decided March 1, 2006.)

APPEAL from the Court of Appeals for Montgomery County, No. 20433.

Per Curiam.

{¶ 1} This is an appeal from a judgment denying a writ of mandamus to compel the immediate production of public records containing Social Security numbers.

{¶ 2} On March 26, 2004, appellants, the office of the Montgomery County Public Defender and Assistant Public Defender Janet R. Sorrell, filed a petition for a writ of mandamus in the Court of Appeals for Montgomery County to compel appellees, Susan M. Siroki, Clerk of Court for the Moraine Mayor's Court, the city of Moraine, and Moraine Mayor Robert Rosencrans, to make certain records available for inspection in accordance with the Public Records Act, R.C. 149.43. Appellants alleged that on March 23, 2004, Sorrell asked to inspect the mayor's court records of Rickey Person and Robert Cochran, who had been incarcerated and charged with criminal offenses by the city of Moraine. According to appellants, Siroki offered to provide copies of the requested records but refused to permit inspection of the records except by Person's and Cochran's attorney of record. Appellants further alleged that at other times within the previous four months, Sorrell had made similar requests to inspect other records of the clerk's office, and some of those requests had been denied. Appellants

further claimed that the refusal to permit inspection of records of the Moraine Mayor's Court constituted retaliation against the public defender's office.

{¶ 3} On April 21, 2004, Siroki mailed a letter to Sorrell advising her that she could inspect the public records for Person, Cochran, and any other individual who had a public record in the clerk's office. Siroki specified that public records would be made available in accordance with R.C. 149.43 and Moraine Codified Ordinances 127.02. Appellees then moved for summary judgment.

{¶ 4} On April 28, 2004, Sorrell went to the clerk's office and asked to inspect the files for Moses Kubander and Elizabeth Tabar, who had been incarcerated and brought before the mayor's court on April 26. Siroki refused to permit Sorrell to inspect the files until she had redacted the Social Security numbers from them, and, because of the size of the requested files, Siroki indicated that the files would not be ready for inspection until the next day. Sorrell later inspected Kubander's and Tabar's files.

{¶ 5} On May 12, 2004, Sorrell requested that the clerk's office permit her to inspect the file for Michael Allen Kraph, who had been incarcerated on a Moraine criminal charge. Siroki held up Kraph's ticket on one side of a plexiglass partition, with her thumb over the Social Security number on the ticket, while Sorrell viewed the document from the other side of the partition.

{¶ 6} On May 13, 2004, appellants filed a memorandum in opposition to appellees' motion for summary judgment. Appellants claimed that notwithstanding appellees' contentions to the contrary, Siroki was not complying with R.C. 149.43 and Moraine Codified Ordinances 127.02. Appellants asserted that records had not been promptly provided and that inspection rights had been limited.

{¶ 7} Shortly thereafter, appellants moved for summary judgment. Appellants claimed that Siroki could not delay disclosure of clerk's office files until she had redacted Social Security numbers.

{¶ 8} The parties filed depositions. In her deposition, Sorrell admitted that she did not then have any outstanding request for records from Siroki that had not been satisfied. Sorrell also conceded that she did not use or need Social Security numbers. Siroki testified that a separate, private file was kept by the prosecutor, which could not be viewed by the general public until the case had been terminated.

{¶ 9} On May 13, 2005, the court of appeals denied the requested writ of mandamus insofar as appellants claimed that they were entitled to inspect the requested records immediately without any redactions of Social Security numbers. The court of appeals reasoned:

{¶ 10} “[T]o the extent the requested documents contain social security numbers, [appellees] must have a reasonable amount of time to redact such information prior to disclosing the public documents. * * * [I]t is unreasonable for the Relators to expect [appellee] Siroki to respond to their request for public documents without a moment's delay. We do not believe that [appellants] have a clear legal right to such immediacy under R.C. [§] 149.43.”

{¶ 11} The court of appeals further observed in dicta that under Moraine Codified Ordinances 127.02(1)(C)(b)(i), appellees had a policy of producing public records for inspection within two working days of the request and that such a time frame “seems reasonable,” but that “to the extent [appellee] Siroki is capable of providing the requested documents to the Relators in less time, every reasonable effort should be made to do so.”

{¶ 12} In addition, the court of appeals granted the writ of mandamus relating to appellees' practice of keeping a separate, nonpublic prosecutor's file and ordered that all documents pertaining to cases in the mayor's court “must be

made available to the public, upon request, regardless of whether the case is currently pending or has been finally adjudicated.” The court of appeals also found Siroki’s practice of making requesters view documents through a plexiglass partition to be unacceptable.

{¶ 13} In their appeal as of right, appellants assert that the court of appeals erred in holding that Siroki could redact Social Security numbers before providing access to the clerk’s office files.

{¶ 14} For the following reasons, however, appellants’ claim lacks merit.

{¶ 15} Appellants could have raised, but did not raise, their claims concerning the alleged failure of appellees to provide them timely access to records in their complaint or move to amend their complaint to include that claim. *State ex rel. Taxpayers Coalition v. Lakewood* (1999), 86 Ohio St.3d 385, 391, 715 N.E.2d 179. In fact, appellants’ complaint was limited to seeking certain records that they later admitted they had been afforded the opportunity to inspect.

{¶ 16} Further, if the parties had expressly or impliedly consented to trial of this claim under Civ.R. 15(B), appellants’ request would have been comparable to one to compel appellees, including Siroki, to produce public records in the future without delay. Such claims have been found to be lacking in merit. See *State ex rel. Consumer News Servs., Inc. v. Worthington City Bd. of Edn.*, 97 Ohio St.3d 58, 2002-Ohio-5311, 776 N.E.2d 82, ¶ 51 (“We refuse, however, to grant the specific request by [relator] that respondents provide public records ‘without delay,’ because the statutory standard ‘promptly’ relates only to the right to inspection, and access to public records will ultimately be dependent upon the facts and circumstances of each request”); see, also, *State ex rel. Dispatch Printing Co. v. Johnson*, 106 Ohio St.3d 160, 2005-Ohio-4384, 833 N.E.2d 274, ¶ 44.

{¶ 17} Moreover, “R.C. 149.43(A) envisions an opportunity on the part of the public office to examine records prior to inspection in order to make

appropriate redactions of exempt materials.” *State ex rel. Warren Newspapers, Inc. v. Hutson* (1994), 70 Ohio St.3d 619, 623, 640 N.E.2d 174. One of the recognized exemptions is the constitutional right of privacy, which precludes disclosure of Social Security numbers. See *State ex rel. Beacon Journal Publishing Co. v. Akron* (1994), 70 Ohio St.3d 605, 610, 640 N.E.2d 164, quoting *Greidinger v. Davis* (C.A.4, 1993), 988 F.2d 1344, 1353-1354 (“ ‘armed with one’s SSN, an unscrupulous individual could obtain a person’s welfare benefits or Social Security benefits, order new checks at a new address on that person’s checking account, obtain credit cards, or even obtain the person’s paycheck. * * * Succinctly stated, the harm that can be inflicted from the disclosure of an SSN to an unscrupulous individual is alarming and potentially financially ruinous’ ”).

{¶ 18} We have specifically held that public-records custodians should redact Social Security numbers from otherwise public records before disclosing them under R.C. 149.43. See, e.g., *State ex rel. Highlander v. Rudduck*, 103 Ohio St.3d 370, 2004-Ohio-4952, 816 N.E.2d 213, ¶ 25 (“in accordance with Highlander’s request, Judge Rudduck should promptly make any appropriate redactions, e.g., Social Security numbers, before releasing the [court] records”); *State ex rel. Wadd v. Cleveland* (1998), 81 Ohio St.3d 50, 53, 689 N.E.2d 25 (“there is nothing to suggest that Wadd would not be entitled to public access of the preliminary, unnumbered accident reports following prompt redaction of exempt information such as Social Security numbers”); and 2004 Ohio Atty.Gen.Ops. No. 2004-045, paragraph two of the syllabus (“Because individuals possess a constitutionally protected privacy right in their social security numbers, such numbers when contained in a court’s criminal case files are not public records for purposes of R.C. 149.43”).

{¶ 19} Appellants claim that because they would be subject to ethical and disciplinary sanctions, as well as criminal punishment, if they ever misused Social Security numbers provided to them in a public-records request, there is no reason

to withhold those numbers before permitting appellants access to the records. In effect, appellants contend that their legitimate purpose in requesting the records overcomes any rationale to delay their ability to inspect them. Appellants' purpose, however, is irrelevant. See, e.g., *State ex rel. Wilson-Simmons v. Lake Cty. Sheriff's Dept.* (1998), 82 Ohio St.3d 37, 40, 693 N.E.2d 789. If the records were public, they would be subject to disclosure to all persons, not simply lawyers with good intentions or persons subject to additional civil penalties because of the nature of their profession.

{¶ 20} Additionally, appellants' reliance on a new affidavit attached to their merit brief in support of their appeal is misplaced. " '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.' " *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.

{¶ 21} Finally, permitting Siroki the opportunity to redact Social Security numbers before disclosing records does not contravene the purpose of the Public Records Act, which is "to expose government activity to public scrutiny." *State ex rel. WHIO-TV-7 v. Lowe* (1997), 77 Ohio St.3d 350, 355, 673 N.E.2d 1360. See, also, *State ex rel. Gannett Satellite Info. Network, Inc. v. Petro* (1997), 80 Ohio St.3d 261, 685 N.E.2d 1223. Revealing individuals' Social Security numbers that are contained in criminal records does not shed light on any government activity.

{¶ 22} Therefore, the court of appeals did not err in holding that Siroki could redact Social Security numbers before providing access to the clerk's office files.

{¶ 23} Appellants next contend that the court erred in holding that the two-day review period provided by the ordinance was reasonable. Codified Ordinances of Moraine 127.02(1)(C) provides:

{¶ 24} “Records created through the normal operation of the Mayor’s Court shall be processed through the Clerk of Court Office.

{¶ 25} “* * *

{¶ 26} “(b) Such records shall be promptly prepared and made available for inspection Monday through Friday, 8:00AM to 4:00PM. The length of time needed to prepare the record(s) will vary depending on the size of the request.

{¶ 27} “(i) The Clerk of Court shall, however, make every effort to produce the record(s) within (2) working days of the date the request is received.”

{¶ 28} Appellants waived any argument challenging the propriety of the ordinance because they failed to plead this claim in their petition or otherwise raise it in the court of appeals. See, e.g., *State ex rel. Scruggs v. Sadler*, 102 Ohio St.3d 160, 2004-Ohio-2054, 807 N.E.2d 357, ¶ 6. And, as the court of appeals emphasized, if Siroki is capable of providing the requested records in less than two days, she should do so pursuant to R.C. 149.43(B).

{¶ 29} Based on the foregoing, the court of appeals did not err in refusing to grant a writ of mandamus to compel the immediate production of records containing Social Security numbers. Accordingly, we affirm the judgment of the court of appeals.

Judgment affirmed.

MOYER, C.J., RESNICK, PFEIFER, LUNDBERG STRATTON, O’CONNOR, O’DONNELL and LANZINGER, JJ., concur.

Glen H. Dewar, Montgomery County Public Defender, and Timothy Young, Deputy Public Defender, for appellants.

SUPREME COURT OF OHIO

Bieser, Greer & Landis, L.L.P., David C. Greer, and Jennifer L. Stueve;
Surdyk, Dowd & Turner Co., L.P.A., and Robert J. Surdyk, for appellees.



Disparate Treatment of Pro Se Civil Litigants in Federal Court: A Justification for Resort to Inappropriate Self-Help?

by Sean L. Harrington *

Equality before the law, like universal suffrage, holds a privileged place in our political system, and to deny equality before the law delegitimizes that system. . . . when these rights are denied, the expectation that the affronted parties should continue to respect the political system . . . that they should continue to treat it as a legitimate political system—has no basis.

—David Luban, *Lawyers and Justice: An Ethical Study*, 251, 264-66 n.12 (Princeton Univ. Press, 1988)

INTRODUCTION

In 2003, Professor Chemerinsky reminded us that civil rights vindication in the United States is less achievable than a manned mission to Mars this decade:

To be sure, closing the courthouse doors is not a new technique for a conservative court to use to undermine rights. During the early years of the Burger Court, it did this by expanding the scope of abstention doctrines, and by increasing standing as a barrier to civil rights litigation. But the recent decisions are different in an important respect. The Burger Court cases were primarily about channeling civil rights litigation from federal to state court. The Rehnquist Court rulings of the last few years are about precluding all judicial forums.¹

While Chemerinsky's article contemplated evolving Supreme Court jurisprudence, this article endeavors to describe unwritten, yet systemic district and circuit court practices to preclude ordinary citizens —regardless of statutory jurisdictional eligibility — from prosecuting civil rights cases.² These practices defy the prevalent misconceptions that self-represented litigants have a meaningful and effective right of access to the civil law for redress of grievances and that self-represented litigants are litigious paranoiacs.³ I conclude that these practices constitute a violation of: the fundamental right of access to the court; the statutory right to self-representation in civil cases; and the statutory right of appeal. Consequently, unless there is a state court remedy for the redress of grievances, litigants may resolve that there is no other recourse than to resort to inappropriate self-help.

☞ Sidebar: Access to Justice for unrepresented persons in Colorado state courts much better?

FILING THE PRO SE CIVIL RIGHTS CASE: AN ACT OF FUTILITY (BY DESIGN)

Although this article does not concern prisoner *pro se* litigation, it is worth noting that, in *Lewis v. Casey*, the Supreme Court held that prisoners do not have "an abstract, freestanding right to a law library" and that an inmate cannot support a federal claim simply by showing that a prison law library is "subpar." 518 U.S. 343, 351 (1996). Rather, the inmate "must go one step further and demonstrate that the alleged shortcomings of the law library . . . hindered his efforts to pursue a legal claim." *Id.* As many commentators have noted, this "actual injury" requirement has created an impossible pleading paradox in that the ability to litigate a denial-of-access claim is evidence that the plaintiff has no-denial-of-access claim. For prisoners, filing such a claim is an exercise in futility.

For the remainder of *pro se* plaintiffs not subject to *Lewis* or to the provisions of the Prisoner Litigation Reform Act of 1995, the federal district and appellate courts have perfected a seven-step process to impose the same futility by systemically weeding out an entire class of cases, regardless of merit, whilst maintaining the appearance of accessibility:

- (1) The *pro se* party files a Complaint and pays the \$300 docket fee.
- (2) The Article III judge, upon receiving ECF notification of a *pro se* filed complaint, issues a template "General Order of Reference" to the workhorse of the policy, a magistrate judge.⁴
- (3) The magistrate judge, who is often a former state district court judge, will review the Complaint and arrive at a predetermined outcome by actively advocating for the defendants; contriving arguments for the defendants; creating or assuming facts not alleged; ignoring facts that were alleged; misstating facts that were alleged;⁵ or misrepresenting precedents and legal holdings that are not applicable or that do not exist.⁶ The magistrate will axiomatically recommend dismissal of all claims against all defendants. During this time, which may last up to a year, the magistrate will often suspend all discovery, depriving the plaintiffs of the evidence he may need to prove his claims.
- (4) The plaintiff may file objections to the magistrate's recommendations.

One bankruptcy judge from Texas used humor to deny a defendant's motion as incomprehensible. The judge compared the defendant and his motion "to Adam Sandler's title character in the movie 'Billy Madison,' after Billy Madison had responded to a question with answer that sounded superficially reasonable lacked any substance." Billy Madison, like the defendant in this case, was berated for his stupidity:

[W]hat you've just said is one of the most insanely idiotic things I've ever heard. At no point in your rambling, incoherent response was there anything that could be considered a rational thought. Everyone in this room is now dumber for having listened to it. I award you no points, and may God have mercy on your soul.

Judges are different from everyone else in a courtroom. They should decipher rambling, irrational incoherent thoughts. They should

Memorandum from God

To: You
From: God

Take counsel.

I hear your cry.

It passes through the darkness, filters through the clouds, mingles with starlight, and finds its way to my heart on the path of a sunbeam.

I have anguished over the cry of a hare choked in the noose of a snare, a sparrow tumbled from the nest of its mother, a child thrashing helplessly in a pond, and a son shedding his blood on a cross.

Know that I hear you, also. Be at peace. Be calm.

I bring thee relief for your sorrow for I know its cause ... and its cure.

You weep for all your childhood dreams that have vanished with the years.

You weep for all your self-esteem that has been corrupted by failure.

You weep for all your potential that has been bartered for security.

You weep for all your talent that has been wasted through misuse.

You look upon yourself with disgrace and you turn in terror from the image you see in the pool. Who is this mockery of humanity staring back at you with bloodless eyes of shame?

Where is the grace of your manner, the beauty of your figure, the quickness of your movement, the clarity of your mind, the brilliance of your tongue? Who stole your goods? Is the thief's identity known to you, as it is to me?

Once you placed your head in a pillow of grass in your father's field and looked up at a cathedral of clouds and knew that all the gold of Babylon would be yours in time.

Once you read from many books and wrote on many tablets, convinced beyond any doubt that all the wisdom of Solomon would be equaled and surpassed by you.

And the seasons would flow into years until lo, you would reign supreme in your own garden of Eden.

Dost thou remember who implanted those plans and dreams and seeds of hope within you?

You cannot.

You have no memory of that moment when first you emerged from your mother's womb and I placed my hand on your soft brow. And the secret I whispered in your small ear when I bestowed my blessings upon you?

Remember our secret?

You cannot.

The passing years have destroyed your recollection, for they have filled your mind with fear and doubt and anxiety and remorse and hate and there is no room for joyful memories where these beasts habitate.

Weep no more. I am with you ... and this moment is the dividing line of your life. All that has gone before is like unto no more than that time you slept within your mother's womb. What is past is dead. Let the dead bury the dead.

This day you return from the living dead.

This day, like unto Elijah with the widow's son, I stretch myself upon thee three times and you live again.

This day, like unto Elisha with the Shunammite's son, I put my mouth upon your mouth and my eyes upon your eyes and my hands upon your hands and your flesh is warm again.

This day, like unto Jesus at the tomb of Lazarus, I command you to come forth and you will walk from your cave of doom to begin a new life.

This is your birthday. This is your new date of birth. Your first life, like unto a play of the theatre, was only a rehearsal. This time the curtain is up. This time the world watches and waits to applaud. This time you will not fail.

Light your candles. Share your cake. Pour the wine. You have been reborn.

Like a butterfly from its chrysalis you will fly ... fly as high as you wish, and neither the wasps nor dragonflies nor

mantids of mankind shall obstruct your mission or your search for the true riches of life.

Feel my hand upon thy head.

Attend to my wisdom.

Let me share with you, again, the secret you heard at your birth and forgot.

You are my greatest miracle.

You are the greatest miracle in the world.

Those were the first words you ever heard. Then you cried. They all cry ...

You did not believe me then ... and nothing has happened in the intervening years to correct your disbelief. For how could you be a miracle when you consider yourself a failure at the most menial of tasks? How can you be a miracle when you have little confidence in dealing with the most trivial of responsibilities? How can you be a miracle when you are shackled by debt and lie awake in torment over whence will come tomorrow's bread?

Enough. The milk that is spilled is sour. Yet, how many prophets, how many wise men, how many poets, how many artists, how many composers, how many scientists, how many philosophers and messengers have I sent with word of your divinity, your potential for godliness, and the secrets of achievement? How did you treat them?

Still I love you and I am with you now, through these words, to fulfill the prophet who announced that the Lord shall set his hand again, the second time, to recover the remnant of his people.

I have set my hand again.

This is the second time.

You are my remnant.

It is of no avail to ask, haven't you known, haven't you heard, hasn't it been told to you from the beginning; haven't you understood from the foundations of the earth?

You have not known; you have not heard; you have not understood.

You have been told that you are a divinity in disguise, a god playing a fool.

You have been told that you a special piece of work, noble in reason, infinite in faculties, express and admirable in form and moving, like an angel in action, like a god in apprehension.

You have been told that you are the salt of the earth.

You were given the secret even of moving mountains, of performing the impossible.

You believed no one. You burned your map to happiness, you abandoned your claim to peace of mind, you snuffed out the candles that had been placed along your destined path of glory, and then you stumbled, lost and frightened, in the darkness of futility and self-pity, until you fell into a hell of your own creation.

Then you cried and beat your breast and cursed the luck that had befallen you. You refused to accept the consequences of your own petty thoughts and lazy deeds and you searched for a scapegoat on which to blame your failure. How quickly you found one.

You blamed me!

You cried that your handicaps, your mediocrity, your lack of opportunity, your failures ... were the will of God!

You were wrong!

Let us take inventory. Let us, first, call a roll of your handicaps. For how can I ask you to build a new life lest you have the tools?

Are you blind? Does the sun rise and fall without your witness?

No. You can see ... and the hundred million receptors I have placed in your eyes enable you to enjoy the magic of a leaf, a snowflake, a pond, an eagle, a child, a cloud, a star, a rose, a rainbow ... and the look of love. Count one blessing.

Are you deaf? Can a baby laugh or cry without your attention?

No. You can hear ... and the twenty-four thousand fibers I have built in each of your ears vibrate to the wind in the trees, the tides on the rocks, the majesty of an opera, a robin's plea, children at play ... and the words I love you. Count another blessing.

Are you mute? Do your lips move and bring forth only spittle?

No. You can speak ... as can no other of my creatures, and your words can calm the angry, uplift the despondent, goad the quitter, cheer the unhappy, warm the lonely, praise the worthy, encourage the defeated, teach the ignorant ... and say I love you. Count another blessing.

Are you paralyzed? Does your helpless form despoil the land?

No. You can move. You are not a tree condemned to a small plot while the wind and world abuses you. You can stretch and run and dance and work, for within you I have designed five hundred muscles, two hundred bones, and seven miles of nerve fiber all synchronized by me to do your bidding. Count another blessing.

Are you unloved and unloving? Does loneliness engulf you, night and day?

No. No more. For now you know love's secret, that to receive love it must be given with no thought of its return. To love for fulfillment, satisfaction, or pride is no love. Love is a gift on which no return is demanded. Now you know that to love unselfishly is its own reward. And even should love not be returned it is not lost, for love not reciprocated will flow back to you and soften and purify your heart. Count another blessing. Count twice.

Is your heart stricken? Does it leak and strain to maintain your life?

No. Your heart is strong. Touch your chest and feel its rhythm, pulsating, hour after hour, day and night, thirty-six million beats each year, year after year, asleep or awake, pumping your blood through more than sixty thousand miles of veins, arteries, and tubing ... pumping more than six hundred thousand gallons each year. Man has never created such a machine. Count another blessing.

Are you diseased of skin? Do people turn in horror when you approach?

No. Your skin is clear and a marvel of creation, needing only that you tend it with soap and oil and brush and care. In time all steels will tarnish and rust, but not your skin. Eventually the strongest of metals will wear, with use, but not that layer that I have constructed around you. Constantly it renews itself, old cells replaced by new, just as the old you is now replaced by the new. Count another blessing.

Are your lungs befouled? Does your breath of life struggle to enter your body?

No. Your portholes to life support you even in the vilest of environments of your own making, and they labor always to filter life-giving oxygen through six hundred million pockets of folded flesh while they rid your body of gaseous wastes. Count another blessing.

Is your blood poisoned? Is it diluted with water and pus?

No. Within your five quarts of blood are twenty-two trillion blood cells and within each cell are millions of molecules and within each molecule is an atom oscillating at more than ten million times each second. Each second, two million of your blood cells die to be replaced by two million more in a resurrection that has continued since your first birth. As it has always been inside, so now it is on your outside. Count another blessing.

Are you feeble of mind? Can you no longer think for yourself?

No. Your brain is the most complex structure in the universe. I know. Within its three pounds are thirteen billion nerve cells, more than three times as many cells as there are people on your earth. To help you file away every perception, every sound, every taste, every smell, every action you have experienced since the day of your birth, I have implanted, within your cells, more than one thousand billion billion protein molecules. Every incident in your life is there waiting only your recall. And, to assist your brain in the control of your body I have dispersed, throughout your form, four million pain-sensitive structures, five hundred thousand touch detectors, and more than two hundred thousand temperature detectors. No nation's gold is better protected than you. None of your ancient wonders are greater than you.

You are my finest creation.

Within you is enough atomic energy to destroy any of the world's great cities ... and rebuild it.

Are you poor? Is there no gold or silver in your purse?

No. You are rich! Together we have just counted your wealth. Study the list. Count them again. Tally your assets!

Why have you betrayed yourself? Why have you cried that all the blessings of humanity were removed from you? Why did you deceive yourself that you were powerless to change your life? Are you without talent, senses, abilities, pleasures, instincts, sensations, and pride? Are you without hope? Why do you cringe in the shadows, a giant defeated, awaiting only sympathetic transport into the welcome void and dampness of hell?

You have so much. Your blessings overflow your cup ... and you have been unmindful of them, like a child spoiled in luxury, since I have bestowed them upon you with generosity and regularity.

Answer me.

Answer yourself.

What rich man, old and sick, feeble and helpless, would not exchange all the gold in his vault for the blessings you have treated so lightly.

Know then the first secret to happiness and success - that you possess, even now, every blessing necessary to achieve great glory. They are your treasure, your tools with which to build, starting today, the foundation for a new and better life.

Therefore, I say unto you, count your blessings and know that you already are my greatest creation. This is the first law you must obey in order to perform the greatest miracle in the world, the return of your humanity from living death.

And be grateful for your lessons learned in poverty. For he is not poor who has little; only he that desires much ... and true security lies not in the things one has but in the things one can do without.

Where are the handicaps that produced your failure? They existed only in your mind.

Count your blessings.

And the second law is like unto the first. Proclaim your rarity.

You had condemned yourself to a potter's field, and there you lay, unable to forgive your own failure, destroying yourself with self-hate, self-incrimination, and revulsion at your crimes against yourself and others.

Are you not perplexed?

Do you not wonder why I am able to forgive your failures, your transgressions, your pitiful demeanor ... when you cannot forgive yourself?

I address you now, for three reasons. You need me. You are not one of a herd heading for destruction in a gray mass of mediocrity. And ... you are a great rarity.

Consider a painting by Rembrandt or a bronze by Degas or a violin by Stradivarius or a play by Shakespeare. They have great value for two reasons: their creators were masters and they are few in number. Yet there are more than one of each of these.

On that reasoning you are the most valuable treasure on the face of the earth, for you know who created you and there is only one of you.

Never, in all the seventy billion humans who have walked this planet since the beginning of time has there been anyone exactly like you.

Never, until the end of time, will there be another such as you.

You have shown no knowledge or appreciation of your uniqueness.

Yet, you are the rarest thing in the world.

From your father, in his moment of supreme love, flowed countless seeds of love, more than four hundred million in number. All of them, as they swam within your mother, gave up the ghost and died. All except one! You.

You alone persevered within the loving warmth of your mother's body, searching for your other half, a single cell from your mother so small that more than two million would be necessary to fill an acorn shell. Yet, despite impossible odds, in that vast ocean of darkness and disaster, you persevered, found that infinitesimal cell, joined with it, and began a new life. Your life.

You arrived, bringing with you, as does every child, the message that I was not yet discouraged of man. Two cells now united in a miracle. Two cells, each containing twenty-three chromosomes and within each chromosome hundreds of genes, which would govern every characteristic about you, from the color of your eyes to the charm of your manner, to the size of your brain.

With all the combinations at my command, beginning with that single sperm from your father's four hundred million, through the hundreds of genes in each of the chromosomes from your mother and father, I could have created three hundred thousand billion humans, each different from the other.

But who did I bring forth?

You! One of a kind. Rarest of the rare. A priceless treasure, possessed of qualities in mind and speech and movement and appearance and actions as no other who has ever lived, lives, or shall live.

Why have you valued yourself in pennies when you are worth a king's ransom?

Why did you listen to those who demeaned you ... and far worse, why did you believe them?

Take counsel. No longer hide your rarity in the dark. Bring it forth. Show the world. Strive not to walk as your brother walks, nor talk as your leader talks, nor labor as do the mediocre. Never do as another. Never imitate. For how do you know that you may not imitate evil; and he who imitates evil always goes beyond the example set, while he who imitates

what is good always falls short. Imitate no one. Be yourself. Show your rarity to the world and they will shower you with gold. This then is the second law.

Proclaim your rarity.

And now you have received two laws.

Count your blessings! Proclaim your rarity!

You have no handicaps. You are not mediocre.

You nod. You force a smile. You admit your self-deception.

What of your next complaint? Opportunity never seeks thee?

Take counsel and it shall come to pass, for now I give you the law of success in every venture. Many centuries ago this law was given to your forefathers from a mountain top. Some heeded the law and lo, their life was filled with the fruit of happiness, accomplishment, gold, and peace of mind. Most listened not, for they sought magic means, devious routes, or waited for the devil called luck to deliver to them the riches of life. They waited in vain ... just as you waited, and then they wept, blaming their lack of fortune.

The law is simple. Young or old, pauper or king, white or black, male or female ... all can use the secret to their advantage; for all the rules and speeches and scriptures of success and how to attain it, only one method has never failed ... whomsoever shall compel ye to go with him one mile ... go with him two.

This then is the third law ... the secret that will produce riches and acclaim beyond your dreams. Go another mile!

The only certain means of success is to render more and better service than is expected of you, no matter what your task may be. This is a habit followed by all successful people since the beginning of time. Therefore I saith the surest way to doom yourself to mediocrity is to perform only the work for which you are paid.

Think not ye are being cheated if you deliver more than the silver you receive. For there is a pendulum to all life and the sweat you deliver, if not rewarded today, will swing back tomorrow, tenfold. The mediocre never goes another mile, for why should he cheat himself, he thinks. But you are not mediocre. To go another mile is a privilege you must appropriate by your own initiative. You cannot, you must not avoid it. Neglect it, do only as little as the others, and the responsibility for your failure is yours alone.

You can no more render service without receiving just compensation than you can withhold the rendering of it without suffering the loss of reward. Cause and effect, means and ends, seed and fruit, these cannot be separated. The effect already blooms in the cause, the end pre-exists in the means, and the fruit is always in the seed.

Go another mile.

Concern yourself not, should you serve an ungrateful master. Serve him more.

And instead of him, let it be me who is in your debt, for then you will know that every minute, every stroke of extra service will be repaid. And worry not, should your reward not come soon. For the longer payment is withheld, the better for you ... and compound interest on compound interest is this law's greatest benefit.

You cannot command success, you can only deserve it ... and now you know the great secret necessary in order to merit its rare reward.

Go another mile!

Where is this field whence you cried there was no opportunity? Look! Look around thee. See, where only yesterday you wallowed on the refuse of self-pity, you now walk tall on a carpet of gold. Nothing has changed ... except you, but you are everything.

You are my greatest miracle.

You are the greatest miracle in the world.

And now the laws of happiness and success are three.

Count your blessings! Proclaim your rarity! Go another mile!

Be patient with your progress. To count your blessings with gratitude, to proclaim your rarity with pride, to go an extra mile and then another, these acts are not accomplished in the blinking of an eye. Yet, that which you acquire with most difficulty you retain the longest; as those who have earned a fortune are more careful of it than those by whom it was inherited.

And fear not as you enter your new life. Every noble acquisition is attended with its risks. He who fears to encounter the one must not expect to obtain the other. Now you know you are a miracle. And there is no fear in a miracle.

Be proud. You are not the momentary whim of a careless creator experimenting in the laboratory of life. You are not a slave of forces that you cannot comprehend. You are a free manifestation of no force but mine, of no love but mine. You

were made with a purpose.

Feel my hand. Hear my words.

You need me ... and I need you.

We have a world to rebuild ... and if it requireth a miracle what is that to us? We are both miracles and now we have each other.

Never have I lost faith in you since that day when I first spun you from a giant wave and tossed you helplessly on the sands. As you measure time that was more than five hundred million years ago. There were many models, many shapes, many sizes, before I reached perfection in you more than thirty thousand years ago. I have made no further effort to improve on you in all these years.

For how could one improve on a miracle? You were a marvel to behold and I was pleased. I gave you this world and dominion over it. Then, to enable you to reach your full potential I placed my hand upon you, once more, and endowed you with powers unknown to any other creature in the universe, even unto this day.

I gave you the power to think.
I gave you the power to love.
I gave you the power to will.
I gave you the power to laugh.
I gave you the power to imagine.
I gave you the power to create.
I gave you the power to plan.
I gave you the power to speak.
I gave you the power to pray.
I gave you the power to heal.

My pride in you knew no bounds. You were my ultimate creation, my greatest miracle. A complete living being. One who can adjust to any climate, any hardship, any challenge. One who can manage his own destiny without any interference from me. One who can translate a sensation or perception, not by instinct, but by thought and deliberation into whatever action is best for himself and all humanity.

Thus we come to the fourth law of success and happiness ... for I gave you one more power, a power so great that not even my angels possess it.

I gave you ... the power to choose.

With this gift I placed you even above my angels ... for angels are not free to choose sin. I gave you complete control over your destiny. I told you to determine, for yourself, your own nature in accordance with your own free will. Neither heavenly nor earthly in nature, you were free to fashion yourself in whatever form you preferred. You had the power to choose to degenerate into the lowest forms of life, but you also had the power, out of your soul's judgment, to be reborn into the higher forms, which are divine.

I have never withdrawn your great power, the power to choose.

What have you done with this tremendous force? Look at yourself. Think of the choices you have made in your life and recall, now, those bitter moments when you would fall to your knees if only you had the opportunity to choose again.

What is past is past ... and now you know the fourth great law of happiness and success ... Use wisely, your power of choice.

Choose to love ... rather than hate.
Choose to laugh ... rather than cry.
Choose to create ... rather than destroy.
Choose to persevere ... rather than quit.
Choose to praise ... rather than gossip.
Choose to heal ... rather than wound.
Choose to give ... rather than steal.
Choose to act ... rather than procrastinate.
Choose to grow ... rather than rot.
Choose to pray ... rather than curse.
Choose to live ... rather than die.

Now you know that your misfortunes were not my will, for all power was vested in you, and the accumulation of deeds and thoughts which placed you on the refuse of humanity were your doing, not mine. My gifts of power were too large for your small nature. Now you have grown tall and wise and the fruits of the land will be yours.

You are more than a human being, you are a human becoming.

You are capable of great wonders. Your potential is unlimited. Who else, among my creatures, has mastered fire? Who else, among my creatures, has conquered gravity, has pierced the heavens, has conquered disease and pestilence and drought?

Never demean yourself again!

Never settle for the crumbs of life!

Never hide your talents, from this day hence!

Remember the child who says, "when I am big boy." But what is that? For the big boy says, "when I grow up." And then the grown up, he says, "when I am wed." But to be wed, what is that, after all? The thought then changes to "when I retire." And then, retirement comes, and he looks back over it and somehow he has missed it all and it is gone.

Enjoy this day, today ... and tomorrow, tomorrow.

You have performed the greatest miracle in the world.

You have returned from a living death.

You will feel self-pity no more and each new day will be a challenge and a joy.

You have been born again ... but just as before, you can choose failure and despair or success and happiness. The choice is yours. The choice is exclusively yours. I can only watch, as before ... in pride ... or sorrow.

Remember, then, the four laws of happiness and success.

- Count your blessings.
- Proclaim your rarity.
- Go another mile.
- Use wisely your power of choice.

And one more, to fulfill the other four. Do all things with love ... love for yourself, love for all others, and love for me.

Wipe away your tears. Reach out, grasp my hand, and stand straight.

Let me cut the grave cloths that have bound you.

This day you have been notified.

YOU ARE THE GREATEST MIRACLE IN THE WORLD

From the book "The Greatest Miracle in the World" by Og Mandino

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2151.01 Liberal interpretation and construction.

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

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

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

Effective Date: 01-01-2002

2151.414 Hearing on motion requesting permanent custody.

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

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

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

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

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

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

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

the child's parents.

(b) The child is abandoned.

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

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

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

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

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

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

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

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

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

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

agency in another state;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(9) The parent has placed the child at substantial risk of harm two or more times due to alcohol or drug

abuse and has rejected treatment two or more times or refused to participate in further treatment two or more times after a case plan issued pursuant to section 2151.412 of the Revised Code requiring treatment of the parent was journalized as part of a dispositional order issued with respect to the child or an order was issued by any other court requiring treatment of the parent.

(10) The parent has abandoned the child.

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

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

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

(14) The parent for any reason is unwilling to provide food, clothing, shelter, and other basic necessities for the child or to prevent the child from suffering physical, emotional, or sexual abuse or physical, emotional, or mental neglect.

(15) The parent has committed abuse as described in section 2151.031 of the Revised Code against the child or caused or allowed the child to suffer neglect as described in section 2151.03 of the Revised Code, and the court determines that the seriousness, nature, or likelihood of recurrence of the abuse or neglect makes the child's placement with the child's parent a threat to the child's safety.

(16) Any other factor the court considers relevant.

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

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

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*** CURRENT THROUGH LEGISLATION PASSED BY THE 128TH OHIO GENERAL ASSEMBLY AND FILED
WITH THE SECRETARY OF STATE THROUGH JUNE 1, 2009 ***
*** ANNOTATIONS CURRENT THROUGH APRIL 1, 2009 ***
*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH JUNE 1, 2009 ***

TITLE 25. COURTS -- APPELLATE
CHAPTER 2505. PROCEDURE ON APPEAL

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ORC Ann. 2505.02 (2009)

§ 2505.02. Final order

(A) As used in this section:

(1) "Substantial right" means a right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect.

(2) "Special proceeding" means an action or proceeding that is specially created by statute and that prior to 1853 was not denoted as an action at law or a suit in equity.

(3) "Provisional remedy" means a proceeding ancillary to an action, including, but not limited to, a proceeding for a preliminary injunction, attachment, discovery of privileged matter, suppression of evidence, a prima-facie showing pursuant to section 2307.85 or 2307.86 of the Revised Code, a prima-facie showing pursuant to section 2307.92 of the Revised Code, or a finding made pursuant to division (A)(3) of section 2307.93 of the Revised Code.

(B) An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:

(1) An order that affects a substantial right in an action that in effect determines the action and prevents a judgment;

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

(3) An order that vacates or sets aside a judgment or grants a new trial;

(4) An order that grants or denies a provisional remedy and to which both of the following apply:

(a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.

(b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.

(5) An order that determines that an action may or may not be maintained as a class action;

(6) An order determining the constitutionality of any changes to the Revised Code made by Am. Sub. S.B. 281 of the 124th general assembly, including the amendment of sections 1751.67, 2117.06, 2305.11, 2305.15, 2305.234 [2305.23.4], 2317.02, 2317.54, 2323.56, 2711.21, 2711.22, 2711.23, 2711.24, 2743.02, 2743.43, 2919.16, 3923.63, 3923.64, 4705.15, and 5111.018 [5111.01.8], and the enactment of sections 2305.113 [2305.11.3], 2323.41, 2323.43,

ORC Ann. 2505.02

and 2323.55 of the Revised Code or any changes made by Sub. S.B. 80 of the 125th general assembly, including the amendment of sections 2125.02, 2305.10, 2305.131 [2305.13.1], 2315.18, 2315.19, and 2315.21 of the Revised Code.

(7) An order in an appropriation proceeding that may be appealed pursuant to division (B)(3) of section 163.09 of the Revised Code.

(C) When a court issues an order that vacates or sets aside a judgment or grants a new trial, the court, upon the request of either party, shall state in the order the grounds upon which the new trial is granted or the judgment vacated or set aside.

(D) This section applies to and governs any action, including an appeal, that is pending in any court on July 22, 1998, and all claims filed or actions commenced on or after July 22, 1998, notwithstanding any provision of any prior statute or rule of law of this state.

GC § 12223-2; 116 v 104; 117 v 615; 122 v 754; Bureau of Code Revision, 10-1-53; 141 v H 412 (Eff 3-17-87); 147 v H 394. Eff 7-22-98; 150 v H 342, § 1, eff. 9-1-04; 150 v H 292, § 1, eff. 9-2-04; 150 v S 187, § 1, eff. 9-13-04; 150 v H 516, § 1, eff. 12-30-04; 150 v S 80, § 1, eff. 4-7-05; 152 v S 7, § 1, eff. 10-10-07.

Section Notes

The provisions of § 3 of 152 v S 7 read as follows:

SECTION 3. The General Assembly finds that in order to adequately protect property rights and ensure that vital public improvements are completed in a timely manner, it is necessary to provide for prompt appeals from adverse judgments in appropriation actions. As a result, the General Assembly encourages the Supreme Court of Ohio to exercise its constitutional authority under Section 5 of Article IV, Ohio Constitution, to adopt a procedural rule requiring expedited appeals in appropriation actions.

The provisions of § 4 of 152 v S 7 read as follows:

SECTION 4. In accordance with *City of Norwood v. Horney* (2006), 110 Ohio St.3d 353, in which the Supreme Court held the right of property to be a fundamental right protected by the United States and Ohio Constitutions, the General Assembly finds that the exercise of the power of eminent domain at any level of government is a matter of statewide importance and hereby declares its intention that this act be construed to apply generally throughout the state.

The provisions of § 5 of 152 v S 7 read as follows:

SECTION 5. Sections 1 and 2 of this act do not apply to appropriation proceedings pending on the effective date of this act. This section is not intended to indicate that such appropriation proceedings do not have to comply with the constitutional requirements set forth in *City of Norwood v. Horney* (2006), 110 Ohio St.3d 353.

The provisions of § 6 of 152 v S 7 read as follows:

SECTION 6. Section 2505.02 of the Revised Code is presented in this act as a composite of the section as amended by both Am. Sub. H.B. 516 and Am. Sub. S.B. 80 of the 125th General Assembly. The General Assembly, applying the principle stated in division (B) of section 1.52 of the Revised Code that amendments are to be harmonized if reasonably capable of simultaneous operation, finds that the composite is the resulting version of the section in effect prior to the effective date of the section as presented in this act.

The provisions of § 6 of 151 v S 124 read as follows:

SECTION 6. It is the intent of the General Assembly in amending sections 101.23, 101.83, 101.84, 101.85, 101.86, 122.011, 122.40, 123.151, 149.56, 307.674, 340.02, 1501.04, 1502.04, 1502.05, 1502.11, 1502.12, 1506.30, 1506.34, 1506.35, 1517.02, 1517.23, 1518.01, 1518.03, 1551.35, 3358.10, 3375.61, 3375.62, 3383.01, 3383.02, 3383.03, 3383.04, 3383.05, 3383.06, 3383.07, 3383.08, 3383.09, 3746.09, 3746.35, 3747.02, 3748.01, 3748.02, 3748.04, 3748.05, 3748.16, 3929.482, 3929.85, 3931.01, 3955.05, 3960.06, 4117.01, 4121.442, 4167.09, 4167.25, 4167.27, 4731.143, 4741.03, 4755.481, 4981.03, 5123.35, and 5123.352 of the Revised Code in this act to confirm the amendments to those sections and the resulting versions of those sections that took effect on December 30, 2004, in accordance with Section 10 of Am. Sub. H.B. 516 of the 125th General Assembly. It also is the intent of the General Assem-

RULE 22. ENTRY OF JUDGMENT

(A) **Journalization.** This court will file the journal entry and opinion or any other dispositive entry with the clerk of this court for journalization as of the date of its release.

[Amended effective July 20, 2010.]

(B) **Form of Opinions.** Opinions of this court will not identify or make reference by proper name to the trial judge, magistrates, court officials, administrative personnel, or counsel for the parties involved in the proceedings below unless such reference is essential to clarify or explain the role of such person in the course of said proceedings.

[Adopted effective July 26, 2000.]

**RULE 23. FRIVOLOUS ACTIONS;
VEXATIOUS LITIGATORS; SANCTIONS**

(A) If the Eighth District Court of Appeals, sua sponte or on motion by a party, determines that an appeal, original action, or motion is frivolous or is prosecuted for delay, harassment, or any other improper purpose, it may impose on the person who signed the appeal, original action, or motion, a represented party, or both, appropriate sanctions. The sanctions may include an award to the opposing party of reasonable expenses, reasonable attorney fees, costs or double costs, or any other sanction the Eighth District Court of Appeals considers just. An appeal or original action shall be considered frivolous if it is not reasonably well-grounded in fact, or warranted by existing law, or by a good faith argument for the extension, modification, or reversal of existing law.

(B) If a party habitually, persistently, and without reasonable cause engages in frivolous conduct under division (A) of this rule, the Eighth District Court of Appeals may, sua sponte or on motion by a party, find the party to be a vexatious litigator. If the Eighth District Court of Appeals determines that a party is a vexatious litigator under this rule, the Court may impose filing restrictions on the party. The restrictions may include prohibiting the party from continuing or instituting legal proceedings in the Eighth District Court of Appeals without first obtaining leave, prohibiting the filing of actions in the Eighth District Court of Appeals without the filing fee or security for costs required by Loc.App.R. 3(A), or any other restriction the Eighth District Court of Appeals considers just.

[Adopted effective June 22, 2010.]

OHIO RULES OF JUVENILE PROCEDURE

Rule

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- 33 [Reserved]
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- 38 Voluntary surrender of custody
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RULE 2. Definitions

As used in these rules:

- (A) "Abused child" has the same meaning as in section 2151.031 of the Revised Code.
- (B) "Adjudicatory hearing" means a hearing to determine whether a child is a juvenile traffic offender, delinquent, unruly, abused, neglected, or dependent or otherwise within the jurisdiction of the court.
- (C) "Agreement for temporary custody" means a voluntary agreement that is authorized by section 5103.15 of the Revised Code and transfers the temporary custody of a child to a public children services agency or a private child placing agency.
- (D) "Child" has the same meaning as in sections 2151.011 and 2152.02 of the Revised Code.
- (E) "Chronic truant" has the same meaning as in section 2151.011 of the Revised Code.
- (F) "Complaint" means the legal document that sets forth the allegations that form the basis for juvenile court jurisdiction.
- (G) "Court proceeding" means all action taken by a court from the earlier of (1) the time a complaint is filed and (2) the time a person first appears before an officer of a juvenile court until the court relinquishes jurisdiction over such child.
- (H) "Custodian" means a person who has legal custody of a child or a public children's services agency or private child-placing agency that has permanent, temporary, or legal custody of a child.
- (I) "Delinquent child" has the same meaning as in section 2152.02 of the Revised Code.
- (J) "Dependent child" has the same meaning as in section 2151.04 of the Revised Code.
- (K) "Detention" means the temporary care of children in restricted facilities pending court adjudication or disposition.
- (L) "Detention hearing" means a hearing to determine whether a child shall be held in detention or shelter care prior to or pending execution of a final dispositional order.
- (M) "Dispositional hearing" means a hearing to determine what action shall be taken concerning a child who is within the jurisdiction of the court.

(N) "Guardian" means a person, association, or corporation that is granted authority by a probate court pursuant to Chapter 2111 of the Revised Code to exercise parental rights over a child to the extent provided in the court's order and subject to the residual parental rights of the child's parents.

(O) "Guardian ad litem" means a person appointed to protect the interests of a party in a juvenile court proceeding.

(P) "Habitual truant" has the same meaning as in section 2151.011 of the Revised Code.

(Q) "Hearing" means any portion of a juvenile court proceeding before the court, whether summary in nature or by examination of witnesses.

(R) "Indigent person" means a person who, at the time need is determined, is unable by reason of lack of property or income to provide for full payment of legal counsel and all other necessary expenses of representation.

(S) "Juvenile court" means a division of the court of common pleas, or a juvenile court separately and independently created, that has jurisdiction under Chapters 2151 and 2152 of the Revised Code.

(T) "Juvenile judge" means a judge of a court having jurisdiction under Chapters 2151 and 2152 of the Revised Code.

(U) "Juvenile traffic offender" has the same meaning as in section 2151.021 of the Revised Code.

(V) "Legal custody" means a legal status that vests in the custodian the right to have physical care and control of the child and to determine where and with whom the child shall live, and the right and duty to protect, train, and discipline the child and provide the child with food, shelter, education, and medical care, all subject to any residual parental rights, privileges, and responsibilities. An individual granted legal custody shall exercise the rights and responsibilities personally unless otherwise authorized by any section of the Revised Code or by the court.

(W) "Mental examination" means an examination by a psychiatrist or psychologist.

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

(Y) "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.

(Z) "Permanent custody" means a legal status that vests in a public children's services agency or a private child-placing agency, all parental rights, duties, and obligations, including the right to consent to adoption, and divests the natural parents or adoptive parents of any and all parental rights, privileges, and obligations, including all residual rights and obligations.

(AA) "Permanent surrender" means the act of the parents or, if a child has only one parent, of the parent of a child, by a voluntary agreement authorized by section 5103.15 of the Revised Code, to transfer the permanent custody of the child to a public children's services agency or a private child-placing agency.

(BB) "Person" includes an individual, association, corporation, or partnership and the state or any of its political subdivisions, departments, or agencies.

(CC) "Physical examination" means an examination by a physician.

(DD) "Planned permanent living arrangement" means an order of a juvenile court pursuant to which both of the following apply:

(1) The court gives legal custody of a child to a public children's services agency or a private child-placing agency without the termination of parental rights;

(2) The order permits the agency to make an appropriate placement of the child and to enter into a written planned permanent living arrangement agreement with a foster care provider or with another person or agency with whom the child is placed.

(EE) "Private child-placing agency" means any association, as defined in section 5103.02 of the Revised Code that is certified pursuant to sections 5103.03 to 5103.05 of the Revised Code to accept temporary, permanent, or legal custody of children and place the children for either foster care or adoption.

(FF) "Public children's services agency" means a children's services board or a county department of human services that has assumed the administration of the children's services function prescribed by Chapter 5153 of the Revised Code.

(GG) "Removal action" means a statutory action filed by the superintendent of a school district for the removal of a child in an out-of-county foster home placement.

(HH) "Residence or legal settlement" means a location as defined by section 2151.06 of the Revised Code.

(II) "Residual parental rights, privileges, and responsibilities" means those rights, privileges, and responsibilities remaining with the natural parent after the transfer of legal custody of the child, including but not limited to the privilege of reasonable visitation, consent to adoption, the privilege to determine the child's religious affiliation, and the responsibility for support.

(JJ) "Rule of court" means a rule promulgated by the Supreme Court or a rule concerning local practice adopted by another court that is not inconsistent with the rules promulgated by the Supreme Court and that is filed with the Supreme Court.

(KK) "Serious youthful offender" means a child eligible for sentencing as described in sections 2152.11 and 2152.13 of the Revised Code.

(LL) "Serious youthful offender proceedings" means proceedings after a probable cause determination that a child is eligible for sentencing as described in sections 2152.11 and 2152.13 of the Revised Code. Serious youthful offender proceedings cease to be serious youthful offender proceedings once a child has been determined by the trier of fact not to be a serious youthful offender or the juvenile judge has determined not to impose a serious youthful offender disposition on a child eligible for discretionary serious youthful offender sentencing.

(MM) "Shelter care" means the temporary care of children in physically unrestricted facilities, pending court adjudication or disposition.

(NN) "Social history" means the personal and family history of a child or any other party to a juvenile proceeding and may include the prior record of the person with the juvenile court or any other court.

(OO) "Temporary custody" means legal custody of a child who is removed from the child's home, which custody may be terminated at any time at the discretion of the court or, if the legal custody is granted in an agreement for temporary custody, by the person or persons who executed the agreement.

(PP) "Unruly child" has the same meaning as in section 2151.022 of the Revised Code.

(QQ) "Ward of court" means a child over whom the court assumes continuing jurisdiction.

[Effective: July 1, 1972; amended effective July 1, 1994; July 1, 1998; July 1, 2001; July 1, 2002.]

Staff Note (July 1, 2001 Amendment)

Juvenile Rule 2 Definitions

Several definitions in Rule 2 were amended to correct the language: Rules 2(F), (H), (W), (AA), (BB), (EE), and (FF).

Rule 2(D) was amended to reflect that the definition of "child" in the Revised Code had been placed into two new sections, i.e., R. C. 2151.011 and 2152.02.

Rules 2(E) and (P) were added to reflect the new categories of chronic truant [defined in Revised Code section 2151.011(B)(9)] and habitual truant [defined in Revised Code section 2151.011(B)(18)], added by Sub. Sen. Bill 181, which became effective September 4, 2000. Other rules that were amended

to reflect changes necessitated by the chronic and habitual truancy bill are Rule 10(A), Rule 15(B), Rule 27(A), Rule 29(F), and Rule 37.

Rules 2(I), (S) and (T) were amended to reflect the reorganization of the Revised Code made by Sub. Sen. Bill 179, effective January 1, 2002. The reorganization moved delinquency into a new chapter, Chapter 2152 of the Revised Code, thus necessitating that "juvenile court" and "juvenile judge" be redefined to include those having jurisdiction under Chapter 2152 as well as under Chapter 2151, and that "delinquent child" be amended to reflect it is now defined in section 2152.02.

Rule 2(KK) was added to reflect the new category of "serious youthful offender" created by Sub. Sen. Bill 179. Although the Revised Code does not define serious youthful offender specifically, sections 2152.11 and 2152.13 describe in detail the predicate offenses and other predicates to treatment as a serious youthful offender, as well as the types of dispositional sentencing available for each. Other rules that were amended to reflect changes necessitated by the serious youthful offender bill are Rule 7(A), Rule 22(D) and (E), Rule 27(A), and Rule 29(A), (C) and (F).

Rule 2(LL) defines "serious youthful offender proceedings." The new category of serious youthful offender created by Sub. Sen. Bill 179 contemplates imposition of an adult sentence in addition to a juvenile disposition upon conviction. Therefore, serious youthful offenders have statutory and constitutional rights commensurate with those of adults. Some proceedings in juvenile court needed to be altered to ensure adult substantive and procedural protections where appropriate. The amendment makes clear that juvenile protections and confidentiality apply both before a probable cause determination that a child may be subject to serious youthful offender disposition, and after a determination that the child shall not be given a serious youthful offender disposition.

Staff Note (July 1, 2002 Amendment)

Juvenile Rule 2 Definitions

The July 1, 2002, amendments substituted the language of "planned permanent living arrangement" for the former language of "long term foster care," to conform to the new legislative designation for these child-placing arrangements. Former division (W), "Long term foster care," was deleted, a new division (DD), "Planned permanent living arrangement," was added, and other divisions were relettered accordingly.

The amendments to Juv. R. 2 conform to section 2151.011 of the Revised Code. Juvenile Rules 10, 15, and 34 also were amended effective July 1, 2002 to reflect this change in terminology.

OHIO RULES OF JUVENILE PROCEDURE

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- 3 Waiver of rights
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Rule

- 41 [Reserved]
- 42 Consent to marry
- 43 Reference to Ohio Revised Code
- 44 Jurisdiction unaffected
- 45 Rules by juvenile courts; procedure not otherwise specified
- 46 Forms
- 47 Effective date
- 48 Title

RULE 4. Assistance of Counsel; Guardian Ad Litem

(A) Assistance of counsel. 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.

(B) Guardian ad litem; when appointed. The court shall appoint a guardian *ad litem* to protect the interests of a child or incompetent adult in a juvenile court proceeding when:

(1) The child has no parents, guardian, or legal custodian;

(2) The interests of the child and the interests of the parent may conflict;

(3) The parent is under eighteen years of age or appears to be mentally incompetent;

(4) The court believes that the parent of the child is not capable of representing the best interest of the child.

(5) Any proceeding involves allegations of abuse or neglect, voluntary surrender of permanent custody, or termination of parental rights as soon as possible after the commencement of such proceeding.

(6) There is an agreement for the voluntary surrender of temporary custody that is made in accordance with section 5103.15 of the Revised Code, and thereafter there is a request for extension of the voluntary agreement.

(7) The proceeding is a removal action.

(8) Appointment is otherwise necessary to meet the requirements of a fair hearing.

(C) Guardian ad litem as counsel.

(1) When the guardian ad litem is an attorney admitted to practice in this state, the guardian may also serve as counsel to the ward providing no conflict between the roles exist.

(2) If a person is serving as guardian ad litem and as attorney for a ward and either that person or the court finds a conflict between the responsibilities of the role of attorney and that of guardian ad litem, the court shall appoint another person as guardian ad litem for the ward.

(3) If a court appoints a person who is not an attorney admitted to practice in this state to be a guardian ad litem, the court may appoint an attorney admitted to practice in this state to serve as attorney for the guardian ad litem.

(D) Appearance of attorneys. An attorney shall enter appearance by filing a written notice with the court or by appearing personally at a court hearing and informing the court of said representation.

(E) Notice to guardian ad litem. The guardian ad litem shall be given notice of all proceedings in the same manner as notice is given to other parties to the action.

(F) Withdrawal of counsel or guardian ad litem. An attorney or guardian ad litem may withdraw only with the consent of the court upon good cause shown.

(G) Costs. The court may fix compensation for the services of appointed counsel and guardians ad litem, tax the same as part of the costs and assess them against the child, the child's parents, custodian, or other person in loco parentis of such child.

[Effective: July 1, 1972; amended effective July 1, 1976; July 1, 1994; July 1, 1995; July 1, 1998.]

RULE 1.0: TERMINOLOGY

As used in these rules:

(a) "Belief" or "believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

(b) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See division (f) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

(c) "Firm" or "law firm" denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship, or other association authorized to practice law; or lawyers employed in a private or public legal aid or public defender organization, a legal services organization, or the legal department of a corporation or other organization.

(d) "Fraud" or "fraudulent" denotes conduct that has an intent to deceive and is either of the following:

(1) an actual or implied misrepresentation of a material fact that is made either with knowledge of its falsity or with such utter disregard and recklessness about its falsity that knowledge may be inferred;

(2) a knowing concealment of a material fact where there is a duty to disclose the material fact.

(e) "Illegal" denotes criminal conduct or a violation of an applicable statute or administrative regulation.

(f) "Informed consent" denotes 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.

(g) "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

(h) "Partner" denotes a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.

(2) An appeal of a case contesting an election under section 3515.15 of the Revised Code shall be designated an appeal of right. The Supreme Court will render judgment after the parties are given an opportunity to brief the case on the merits in accordance with S.Ct. Prac. R. 6.1 through 6.8.

Effective Date: June 1, 1994

Amended Effective: April 1, 1996; April 1, 2000; June 1, 2000; July 1, 2004; August 1, 2004; January 1, 2008; January 1, 2010.

S.Ct. Prac. R. 2.2. Institution of Appeal from Court of Appeals.

(A) Perfection of appeal

- (1) (a) To perfect an appeal from a court of appeals to the Supreme Court, other than in a certified conflict case, which is addressed in S.Ct. Prac. R. 4.1, the appellant shall file a notice of appeal in the Supreme Court within forty-five days from the entry of the judgment being appealed. The date the court of appeals filed its judgment entry for journalization with its clerk, in accordance with App. R. 22, shall be considered the date of entry of the judgment being appealed. If the appeal is a claimed appeal of right or a discretionary appeal, the appellant shall also file a memorandum in support of jurisdiction, in accordance with S.Ct. Prac. R. 3.1, at the time the notice of appeal is filed.

(b) 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. The Clerk of the Supreme Court shall refuse to file a notice of appeal or a memorandum in support of jurisdiction that is received for filing after this time period has passed.
- (2) (a) If a party timely files a notice of appeal in the Supreme Court, any other party may file a notice of appeal or cross-appeal in the Supreme Court within the later of the time prescribed by division (A)(1) of this rule or ten days after the first notice of appeal was filed.

(b) A notice of appeal shall be designated and treated as a notice of cross-appeal if it is filed both:
 - (i) After the original notice of appeal was filed in the case;
 - (ii) By a party against whom the original notice of appeal was filed.
(c) If a notice of cross-appeal is filed, a combined memorandum both in response to appellant/cross-appellee's memorandum and in support of jurisdiction for the cross-appeal shall be filed by the deadline imposed in S.Ct. Prac. R. 3.4.

SECTION 3. DETERMINATION OF JURISDICTION ON CLAIMED APPEALS OF RIGHT AND DISCRETIONARY APPEALS

S.Ct. Prac. R. 3.1. Memorandum in Support of Jurisdiction.

[See Appendix B following these rules for a sample memorandum.]

- (A) In a claimed appeal of right or a discretionary appeal, the appellant shall file a memorandum in support of jurisdiction with the notice of appeal.
- (B) A memorandum in support of jurisdiction shall contain all of the following:
- (1) A table of contents, which shall include the propositions of law;
 - (2) A thorough explanation of why a substantial constitutional question is involved, why the case is of public or great general interest, or, in a felony case, why leave to appeal should be granted;
 - (3) A statement of the case and facts;
 - (4) A brief and concise argument in support of each proposition of law.
- (C) Except in postconviction death penalty cases, a memorandum shall not exceed fifteen numbered pages, exclusive of the table of contents and the certificate of service.
- (D) (1) A date-stamped copy of the court of appeals opinion and judgment entry being appealed shall be attached to the memorandum. For purposes of this rule, a date-stamped copy of the court of appeals judgment entry shall mean a copy bearing the file stamp of the clerk of the court of appeals and reflecting the date the court of appeals filed its judgment entry for journalization with its clerk under App. R. 22.
- (2) In postconviction death penalty cases, the appellant shall also attach the findings of fact and conclusions of law entered by the trial court.
- (3) The appellant may also attach any other judgment entries or opinions issued in the case, if relevant to the appeal. The memorandum shall not include any other attachments.
- (E) Except as otherwise provided in S.Ct. Prac. R. 2.2(A), if the appellant does not tender a memorandum in support of jurisdiction for timely filing along with the notice of appeal, the Clerk shall refuse to file the notice of appeal.

Effective Date: June 1, 1994