

ORIGINAL

IN THE SUPREME COURT OF OHIO

In the Matter of:

S.Y.; C.F.; and A.F.

\* Case No: **11-1846**

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\* On Appeal from The Court of Appeals  
\* for Tuscarawas County, Ohio,  
\* Fifth Appellate District,  
\* Case No. 2011 AP 04 0018

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MEMORANDUM IN SUPPORT OF JURISDICTION OF  
TUSCARAWAS COUNTY JOB & FAMILY SERVICES

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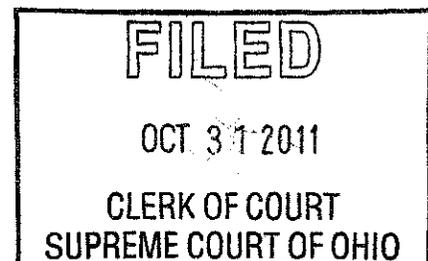
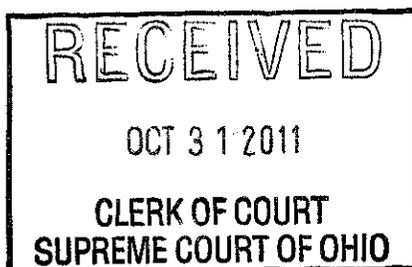
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Opinion of the fifth District Court of Appeals dated September 13, 2011

Judgment Entry of the Fifth District Court of Appeals denying Appellants  
Motion for Reconsideration

Judgment Entry of the fifth District Court of Appeals denying Appellants  
Motion for En Banc Consideration, dated October 5, 2011

**EXPLANATION OF WHY THIS CASE IS OF PUBLIC OR  
GREAT GENERAL INTEREST AND IMPORTANCE**

This case considers whether a public child welfare agency has standing to appeal the dispositional order of a juvenile court that removes a child from a specified relative who has had placement of a child and instead orders the agency to assume custody of the child. There are eighty-eight separate public child welfare agencies in Ohio. Each operates under a mandate to locate the least restrictive placement for children whenever possible. This affirmative obligation on the agency requires active attempts to locate and secure appropriate relative placement options. In this case, the agency found the same in a relative who already had placement of S.Y. and legally secured the same by filing of a grandparent affidavit pursuant to R.C. §3109.66. The agency, as it is empowered to do by R.C. §2151.353, requested that the Tuscarawas County Juvenile Court place S.Y. in the temporary custody of his maternal grandmother. The court required the agency to provide evidence on the issue of placement. The agency, all parties, including the Guardian ad Litem, and children agreed that this placement was in the best interest of S.Y. The trial court removed him from that placement by judgment entry issued some ninety days after the agency formally notified the court of his placement and requested a disposition placing him there.

The agency filed an appeal of this disposition with the Fifth District Court of Appeals. No party opposed this placement and, consequently, there was no real Appellee in this case. Without request from any party, the Court of Appeals dismissed the agency's appeal, asserting that it lacked standing to prosecute the same.

In holding that the agency lacks standing to file this appeal, the Court of Appeals creates a situation where the agency is vested with authority to request a particular disposition of the court but left with no remedy when the court denies this request. Further, the decision of the

court obligates the agency to a financial commitment of public funds and again provides the agency with no opportunity for appellate review of the same. While certainly the trial court is vested with authority to make decisions regarding placement, the trial court is not and should not be vested with final authority in that regard. The decision from the Court of Appeals suggests that the grandparents should have requested to be joined as parties and pursued appellate review on their own. This decision ignores the reality of the circumstances of the parties in these cases. Kin throughout Ohio are called upon to provide homes for children who are not safe in their own homes. These persons often struggle to maintain these children and themselves. To expect them to hire legal counsel and advocate for placement when the agency who placed the children there is empowered to do so will lead to fewer of these persons being willing to accept these placements.

Public child welfare agencies, like every other public entity in the state of Ohio, continue to struggle with budgetary cuts and limitations. The agency depends on appropriate relatives and others with a significant connection to children to care for them when they cannot be maintained in their homes. While not only best for children, it affects a significant cost savings on public agencies. The decision of the trial court below obligates the agency to foster care placement costs of \$24 a day. This does not include other financial obligations which would include unreimbursed medical costs and other incidental expenses.

The record in the case below contains overwhelming evidence that this placement was not only appropriate, but that the child was thriving with his grandmother. The trial court rejected the placement based upon its own historical involvement with the grandmother's children and a considerable amount of evidence not contained in the record. Because of those reasons, the agency sought appellate review of that decision. The holding of the court below

effectively closes off any review of decisions of the trial court made in response to requests of the agency, and it imposes a cost on the agency without affording it any meaningful ability to have that decision reviewed by another appellate court. The agency asks the Supreme Court to accept jurisdiction of this matter in order to clarify whether the agency has standing to appeal a decision that denies a request it is specifically empowered to make and imposes a financial obligation it did not request.

## STATEMENT OF THE CASE AND FACTS

The instant action concerns three children of T.Y. S.Y. is the oldest and is the child of T.Y. and S.G. He is three years old. C.F. and A.F. are the children of T.Y. and M.F. These children have remained in the custody of their father during the pendency of this action and are not the subject of the within appeal.

The instant action was initiated by the filing of a complaint by Tuscarawas County Job & Family Services on November 9, 2010, alleging that these children were Abused, Neglected, and Dependent. The basis for said filing occurred when A.F., who was only three months old at the time, was treated at Children's Hospital Medical Center in Akron for a skull fracture. Both he and C.F. were with T. Y. Her explanation of said injuries was not consistent with the observation of medical professionals. The children were placed with their father; however, the agency had concerns about his willingness to protect them from T.Y. Therefore, the agency initiated the instant action. At the time of the filing of the complaint, S.Y. was residing with his maternal grandmother, C.Y. C.Y. filed a Grandparent Affidavit with the Tuscarawas County Juvenile Court in August 2010 advising that S.Y. was residing with her. The face of the complaint filed on November 9, 2010, put the court and parties on notice that S.Y. was residing with C.Y. and, specifically, moved the court to grant her temporary custody. S.Y. did not reside with his mother during the time the events leading up to the filing of the instant complaint took place. He had resided with his grandmother since approximately April 2010, and since August 2010 pursuant to the document filed with juvenile court.

After the address which the agency was provided and was able to obtain for S.G., the father of S.Y. was not valid; the agency sought and was granted a continuance of the adjudicatory hearing. The same was continued until January 4, 2011. During that time, the

agency was made aware that there was a history with C.Y. and the juvenile court. Based upon this information, Cynthia McGuire and Attorney Jeff Kiggans from the agency contacted Juvenile Probation Officer David Garbrandt to inquire about the same. The information they received from Mr. Garbrandt did not cause them to believe that this placement was not in the best interest of S.Y. It was at the adjudicatory hearing that the court apparently realized that S.Y. was residing with his grandmother. After expressing anger toward agency personnel, Judge Linda A. Kate advised the agency that while she would not remove the child at that time, she would not accept any agreements regarding disposition and would expect that the agency be prepared to fully litigate the same. She also ordered agency personnel to review every part of the juvenile records of both T.Y. and her older brother and be prepared to report on them to the court and the next hearing. Based upon a concern that Attorney Kiggans would be required to testify in this matter, the undersigned substituted as counsel of record in advance of the dispositional hearing.

The dispositional hearing was begun on February 1, 2011. The agency presented one witness on that date due to some logistical concerns and the number of witnesses. The same concluded on February 23, 2011. The agency presented a number of witnesses to support its request that S.Y. remain in the care of his grandmother. No party or the Guardian ad Litem opposed the same. By judgment entry dated April 20, 2011, the juvenile court removed S.Y. from his grandmother's home and placed him in the temporary custody of the agency. From that decision, the agency timely appealed to the Fifth District Court of Appeals. That court, by judgment dated September 13, 2011, dismissed the appeal, holding that the agency did not have standing. The agency subsequently filed motions on September 21, 2011, for reconsideration

and en banc consideration. These were denied by judgment entries filed on October 5, 2011.  
From those decisions, the agency seeks discretionary review by the Supreme Court of Ohio.

## LAW AND ARGUMENT

Proposition of Law No. 1: Job & Family Services has standing to appeal a decision of a trial court that denies it requested disposition in a child protection action instituted pursuant to Chapter 2151 of the Ohio Revised Code.

To have appellate standing, a party must be "aggrieved by the final order appealed from."<sup>1</sup> The person or entity seeking to appeal also must have either been a party to the case below or sought to intervene.<sup>2</sup> The entry of an adjudication followed by a dispositional order in a civil abuse, neglect, and/or dependency action has been held to be a final appealable order.<sup>3</sup> Additionally, the decision of this court in *In re: Adams*<sup>4</sup> should not bar the agency's appeal herein. In *Adams*, a case which held that an order denying a motion for permanent custody was not a final appealable order, this court drew a careful distinction between permanent custody and an initial adjudication followed by a disposition. "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.'"<sup>5</sup>

There is no question that pursuant to Juv. R. 2(Y), Tuscarawas County Job & Family Services was a party to the action in the trial court. The agency also asserts that it has been

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<sup>1</sup> *State ex rel. Merrill v. Ohio Department of Natural Resources*, 2011-Ohio-4612 citing to *Ohio Contract Carriers Assn., Inc. v. Pub. Util. Comm.* (1942), 140 Ohio St. 160, 23 O.O. 369, 42 N.E.2d 758, syllabus; see also *In re Guardianship of Santrucek*, 120 Ohio St.3d 67, 2008-Ohio-4915, 896 N.E.2d 683, ¶ 5; *Willoughby Hills v. CC Bar's Sahara, Inc.* (1992), 64 Ohio St.3d 24, 26, 591 N.E.2d 1203. Cf. *Forney v. Apfel* (1998), 524 U.S. 266, 271, 118 S.Ct. 1984, 141 L.Ed.2d 269, quoting *United States v. Jose* (1996), 519 U.S. 54, 56, 117 S.Ct. 463, 136 L.Ed.2d 364 ("a party is 'aggrieved' [by] and ordinarily can appeal [from] a decision granting in part and denying in part the remedy requested")

<sup>2</sup> *Ohio Sav. Bank v. Ambrose* (1990), 56 Ohio St. 3d 53.

<sup>3</sup> *In re Murray*, 115 Ohio St.3d 86, 2006-Ohio-4840.

<sup>4</sup> 115 Ohio St. 3d 155, 2006-Ohio-4840

<sup>5</sup> *Id* at ¶38

prejudiced by the decision below. First, the agency has been directly impacted by this decision as it obligates the agency to a financial outlay. The agency, by virtue of the decision of the trial court to give it custody over its alternative request, has been obligated to a financial expense which is at a minimum of \$24 per day.<sup>6</sup> While the court has broad authority to grant the agency custody of children over whom it has jurisdiction in cases where the agency is not even a party, the rules provide the agency a mechanism to be formally notified of the same and participate in the proceeding where the court makes that determination.<sup>7</sup> This is entirely consistent with Appellant's argument herein that it has an enforceable interest in challenging the placement of children into its custody when it does specifically request the same.

The decision of the trial court below also places the agency in a position where it has a right and, in fact, an affirmative obligation to make certain requests of the juvenile court, but, consequently, no remedy when these requests are denied. This is the hallmark definition of standing set forth by this court. Job & Family Services has an affirmative obligation to seek out the least restrictive placement options for children by contacting specified relatives.<sup>8</sup> Furthermore, the agency is required to consider relatives who meet certain criteria for placement and to place children there as a less restrictive placement option.<sup>9</sup>

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<sup>6</sup> This amount reflects the minimum amount of foster care maintenance that the agency pays to foster parents who care for children. This is the amount being paid to the foster parents of S.Y. This does not include additional costs which include but are not limited to incidental costs and medical costs not covered by the Medicaid card required for S.Y.

<sup>7</sup> R.C. 2151.3510 requires the juvenile court to provide the agency with notice of its intent to place a child into its temporary custody in a delinquency or unruly child case. The Fifth District Court of Appeals, possibly recognizing the agency's interest in such a decision, has not dismissed an appeal of the failure of a juvenile court to comply with that mandate on grounds of standing. (See *In re Roberson*, 2004 -Ohio- 4996)

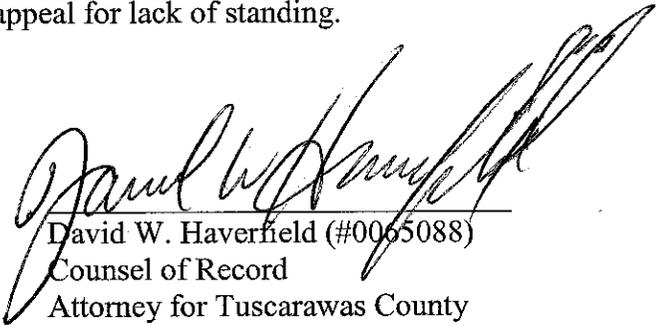
<sup>8</sup> O.A. C. §5101:2-39-01

<sup>9</sup> O.A.C. §5101:2-48-18.

The agency recognizes that the juvenile court is given discretion to make decisions regarding placement. But as the agency is directed to seek out and locate appropriate placements, this obligation is meaningless when the agency is left without any recourse to challenge a decision of a trial court. Because of this, the agency also has standing to challenge the decision of the trial court to reject the placement that it was obligated to find and evaluate. The agency recognizes that the grandmother here could have challenged this decision. However, under the facts and circumstances presented here, the fact that she did not should not defeat the agency's clearly articulated interest in doing so.

**CONCLUSION**

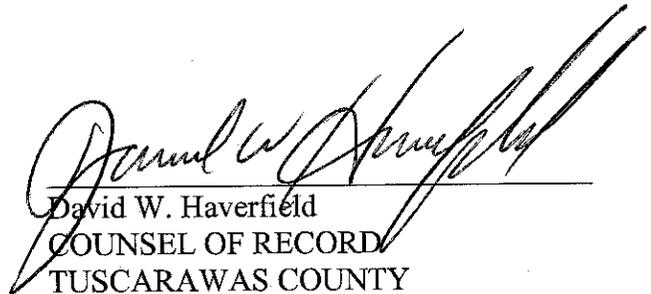
WHEREFORE, for the reasons set forth herein, Tuscarawas County Job & Family Services respectfully requests that the Supreme Court of Ohio grant review. The agency specifically requests the court to grant review and reverse the decision of the Tuscarawas County Court of Appeals which dismissed the agency's appeal for lack of standing.



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**PROOF OF SERVICE**

A copy of the foregoing was served upon Attorney John A. Gartrell (Counsel for Tanika York), 153 North Broadway, New Philadelphia, Ohio 44663; Attorney Seth W. Arkow (Counsel for Matthew Frame), 221 Front Avenue, SW, New Philadelphia, Ohio 44663; Attorney Sharon Buckley-Mirhaidari (Counsel for Children), 152 North Broadway, Suite 101, New Philadelphia, Ohio 44663; Attorney Karen Dummermuth (GAL), 349 East High Avenue, P.O. Box 494, New Philadelphia, Ohio 44663; by regular U.S. mail and/or delivered to courthouse mailboxes; this 26<sup>th</sup> day of October 2011.

  
David W. Haverfield  
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TUSCARAWAS COUNTY  
JOB & FAMILY SERVICES

**APPENDIX**

IN THE COURT OF APPEALS FOR TUSCARAWAS COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

2011 OCT -6 AM 9 08

IN THE MATTER OF:

S.Y., C.F., AND A.F.

Abused, Neglected and  
Dependent Children

FILED  
5th District Court of Appeals  
Tuscarawas Co. Ohio

OCT 05 2011

ROCKNE W. CLARKE  
Clerk of Courts

JUDGMENT ENTRY

CASE NO. 2011 AP 04 0018

This matter came before the Court upon appellant Tuscarawas County Job & Family Services motions for reconsideration pursuant to App.R. 26(A) filed September 21, 2011.

App. R. 26 does not provide specific guidelines to be used by an appellate court when determining whether a decision should be reconsidered or modified. In *Mathews v. Mathews* (1981), 5 Ohio App. 3d 140, 143, 450 N.E. 2d 278 218, the court stated: [t]he test generally applied in [A]pp. R. 26 (A) motions] is whether the motion for reconsideration calls to the attention of the court an obvious error in its decision or raises an issue for our consideration that was either not considered at all or was not fully considered by us when it should have been." See also, *State v. Owens* (1996), 112 Ohio App. 3d 334, 678 N.E. 2d 956; *Erie Insurance Exchange v. Colony Development Corp.* (2000), 136 Ohio App.3d 419, 736 N.E.2d 950.

A review of appellant's motion reveals that it has not demonstrated any obvious error or pointed out any issue that was not adequately addressed in the opinion.

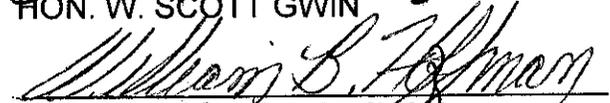
"An Application for Reconsideration is not designed for use in instances where the parties simply disagree with the conclusions reached and logic used by an appellate court. App. R. 26 provides a mechanism by which a party may prevent miscarriages of justice that could arise when an appellate court makes an obvious error or renders an unsupportable decision under the law." Id. Appellant has made no such demonstration in his application for reconsideration.

Upon a complete review of appellant's Application for Reconsideration, this court finds that the issues had been thoroughly considered by this court in the previous appeal. For these reasons, appellant's Application for Reconsideration is found not well taken.

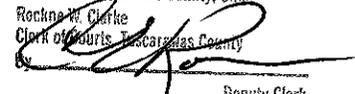
Appellant's Application for Reconsideration is therefore denied.

IT IS SO ORDERED.

  
HON. W. SCOTT GWIN

  
HON. WILLIAM B. HOFFMAN

  
HON. JOHN W. WISE

I the undersigned Clerk of Courts hereby testify this to be a true and correct copy of the original filed in the court of Appeals of Tuscarawas County, Ohio  
Rockne W. Clarke  
Clerk of Courts, Tuscarawas County  
  
Deputy Clerk

IN THE COURT OF APPEALS FOR TUSCARAWAS COUNTY, OHIO

2011 OCT -6 AM 9 08

FIFTH APPELLATE DISTRICT

IN THE MATTER OF:

S.Y., C.F., AND A.F.

Abused, Neglected and  
Dependent Children

**FILED**  
5th District Court of Appeals  
Tuscarawas Co., Ohio

OCT 05 2011

ROCKNE W. CLARKE  
Clerk of Courts

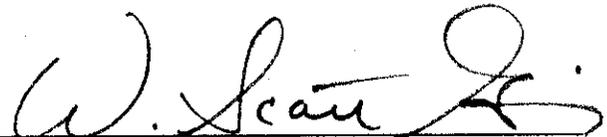
JUDGMENT ENTRY

CASE NO. 2011 AP 04 0018

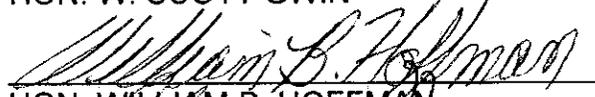
This matter comes before the Court upon a Motion for En Banc Consideration. The Court has reviewed the motion as well as the cases cited and denies the motion for en banc consideration as no majority in favor of granting the motion could be reached.

MOTION DENIED.

IT IS SO ORDERED.



HON. W. SCOTT GWIN



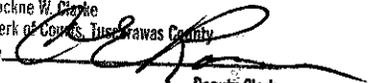
HON. WILLIAM B. HOFFMAN



HON. JOHN W. WISE

I the undersigned Clerk of Courts hereby testify this to be a true and correct copy of the original filed in the court of Appeals of Tuscarawas County, Ohio.

Rockne W. Clarke  
Clerk of Courts, Tuscarawas County

By   
Deputy Clerk

COURT OF APPEALS  
TUSCARAWAS COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

IN THE MATTER OF:  
S.Y., C.F., AND A.F.

JUDGES:

Hon. W. Scott Gwin, P.J.  
Hon. William B. Hoffman, J.  
Hon. John W. Wise, J.

Case No. 2011AP04 0018

OPINION

CHARACTER OF PROCEEDING:

Civil appeal from the Tuscarawas County  
Court of Common Pleas, Juvenile Division,  
Case No. 10JN00568

JUDGMENT:

Dismissed

DATE OF JUDGMENT ENTRY:

**FILED**  
5th District Court of Appeals  
Tuscarawas Co. Ohio

SEP 13 2011

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Gwin, P.J.

{¶1} Appellant Tuscarawas County Job & Family Services [(hereinafter "TCJFS")] appeals the April 20, 2011 judgment entry of the Tuscarawas County Court of Common Pleas, Juvenile Division, which removed S.Y. from his grandmother's home and placed him in the temporary custody of the agency.<sup>1</sup>

#### I. Procedural History

{¶2} The instant action concerns three children of Tanika York. S.Y. is the oldest and is the child of Tanika York and Shane Goins. He is three years old.<sup>2</sup>

{¶3} The instant action was initiated by the filing of a complaint by TCJFS on November 9, 2010, alleging that these children were Abused, Neglected, and Dependent. The basis for said filing occurred when A.F., who was only 3 months old at the time, was treated at Children's Hospital Medical Center in Akron for a skull fracture. Both he and C.F. were with Tanika York. Her explanation of said injuries was not consistent with the observation of medical professionals.

{¶4} At the time of the filing of the complaint, S.Y. was residing with his maternal grandmother, Carla York. He had been residing with his grandmother since April 2010. In August, 2010, Ms. York filed a Grandparent Power of Attorney with the Tuscarawas County Juvenile Court advising that S.Y. was residing with her.<sup>3</sup>

{¶5} By Judgment Entry filed January 5, 2011 all three children were adjudicated Dependent pursuant to RC 2151.04, Neglected pursuant to RC 2151.03

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<sup>1</sup> No appellee brief has been filed.

<sup>2</sup> C.F. and A.F. are the children of Tanika York and Matthew Frame. These children have remained in the custody of their father during the pendency of this action and are not the subject of the within appeal.

<sup>3</sup> R.C. 3109.74

and Abused pursuant to RC 2151.031. The court ordered S.Y. to remain in the custody of Ms. York pending the dispositional hearing.<sup>4</sup>

{16} The dispositional hearing was begun on February 1, 2011. TCJFS presented one witness on that date due to logistical concerns and the number of witnesses.

{17} The first witness called by TCJFS was Leslie Chase. Ms. Chase is employed by the Help Me Grow program as a Service Coordinator. She became involved with S.Y. after he was evaluated in June 2010 and recommended for services. All services were set up and accessed by Carla York. Ms. Chase testified that she had no concerns about the home of Ms. York or the care she was providing for S.Y. She went on to indicate that Carla was nurturing, caring, and committed to making sure that S.Y. received the services he needed, and she wished all the families she dealt with were as committed as Carla York. She further opined that she noted progress for S.Y. while placed in his grandmother's home.

{18} The dispositional hearing concluded on February 23, 2011. Shelly Clemence, a teacher at the Starlight School for the past sixteen years testified she has been S.Y.'s teacher since December 2010, which was the earliest time he was old enough to enroll. She noted no behavioral or attendance problems with S.Y., and he was doing well in her class and making gains. Ms. Clemence testified that she made regular visits to the home of Carla York, and she had no concerns with her care or follow through. She further provided information to the court that S.Y. suffered from a significant speech delay and was probably one year behind for his age.

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<sup>4</sup> A transcript of the adjudicatory hearing held January 4, 2011 was not filed and made a part of the record in this appeal.

{¶9} Barb Rice, a speech pathologist with a master's degree and over 30 years of experience, testified next. She had been providing speech therapy to S.Y. since April 2010. She testified that he had stabilized while at his grandmother's house, and that Carla York was appropriately involved in addressing this issue, including following through on suggestions she made. Ms. Rice further testified that the key to his success was stability and putting his needs first, and that he needed a consistent routine.

{¶10} David Garbrandt a Juvenile Probation Officer for the court testified that he was familiar with Carla York's children, having acted as the probation officer for T.J. York, the eldest child of Carla York. Mr. Garbrandt testified that his involvement with T. J. consisted of unruly behavior and violation of court orders; there were never any felony charges or aggressive behaviors. Mr. Garbrandt became involved with T.J. in 2004 when he was 14 years of age. Mr. Garbrandt described Carla York as always cooperative, doing what was asked of her and not uncooperative in any regard. He described her response to her son's behavior as ineffective. She was not doing anything wrong; it just was not impacting his behavior in a positive way. Mr. Garbrandt testified that T.J. was placed at Rogers Group Home for a period of time after his mother could no longer manage his behavior. This was the one time that she called and requested that he be removed from her home. In fact, he received necessary mental health treatment at that facility that seemed to positively impact his behavior for a period of time after he returned home. Mr. Garbrandt testified that during his involvement, he never had any concerns related to child abuse or neglect that required him to make a report to the agency. However, he expressed his concern about a placement of a young

child into the home of Carla York based upon the delinquent behavior of her own children and her inability to have any impact in changing that behavior.

{¶11} Mr. Jeff Kiggans is an attorney licensed to practice law in Ohio and is employed by TCJFS. Mr. Kiggans was the initial attorney at TCJFS handling this case. He testified that the complaint in this case was filed in November 2010. Mr. Kiggans recalled having some concerns relative to Carla York brought to his attention. He was advised that the court may have concerns about this placement. As a result of the same, he and Cindy McGuire, the agency intake worker contacted David Garbrandt by telephone to discuss this matter. He testified that nothing during their conversation caused him to have concern regarding the placement of the child with Carla York.

{¶12} Mr. Kiggans testified that the child had been placed with Carla York pursuant to a Grandparent Power of Attorney since August 13, 2010. This affidavit was filed with Tuscarawas County Juvenile Court and predated the involvement of the agency. A certified copy of this power of attorney was entered into evidence at the hearing. Mr. Kiggans, a licensed attorney, testified that the power of attorney is authorized by the Ohio Revised Code and, while it does not actually change custody, it does empower a grandparent to enroll a child in school and obtain necessary medical treatment.

{¶13} Elizabeth Benedetto, the ongoing case manager testified that she made regular drop-in visitations at the home of Carla York and had no concerns. Additionally, she was in regular contact with the service providers and was pleased with the information she was receiving. She testified that Carla had been in her current

residence for one year, and that all the bills were being paid. Her paramour, Mr. John Head, was employed and providing adequate income.

**{¶14}** Ms. Benedetto testified that at the early juncture in the case, she believed it too early to make any long-term decisions regarding S.Y.'s placement. Ms. Benedetto also testified that she had reviewed the entirety of the juvenile court history of the children of Carla York. She confirmed that the testimony of Mr. Garbrandt concerning T.J. York was consistent with her review of the same. She further testified that Tanika York, Carla's daughter was charged one time with an unruly charge when Tanika was seventeen years old. The juvenile probation records disclosed that she was progressing satisfactorily and was maintained in her mother's custody.

**{¶15}** Ms. Benedetto testified that she did not share the probation staff's concern with a placement with Carla York. She testified to her concern regarding regression in his behavior and advances he had made while with his grandmother. She expressed concern about this regression, particularly in light of the delays from which this child already suffered.

**{¶16}** Lastly, Ms. Benedetto testified regarding psychological evaluations that the court ordered for both Carla York and her paramour John Head. Copies of the assessments were entered into evidence. As noted in the report, Dr. Anita Exley, the psychologist conducting the assessments, specifically recommended that the child remain with Carla York, noting no particular concern in her assessment or that of Mr. Head

**{¶17}** Ms. Benedetto discussed the history of Children Services involvement with Carla York dating back to 1992. When asked she simply read the dates, the allegations

and the dispositions into the record. (T. at 111). The records from those previous involvements were not entered into evidence or otherwise made a part of the record. She also testified that the history of Carla York was indeed relevant to an assessment of her home. However, given the positive changes she has made and how well S.Y. was doing in her home, she believed that the same significantly overcame her history.

{¶18} The report of the Guardian Ad Litem [hereinafter "GAL"] was file with the Court on February 1, 2011. This report likewise summarily discusses various cases filed against Carla York or her children dating back as far as 1992. The GAL concludes that Carla York has been able to put S.Y.'s needs first for the past year and S.Y. is progressing as a result.

{¶19} By judgment entry dated April 20, 2011, the juvenile court removed S.Y. from his grandmother's home and placed him in the temporary custody of the agency.

{¶20} It is from this entry that TCJFS has appealed.

## II. Assignments of Error

{¶21} On appeal, TCJFS asserts the following assignments of error:

{¶22} "I. THE TRIAL COURT IMPROPERLY CONSIDERED EVIDENCE THAT WAS NOT PART OF THE RECORD BELOW IN REACHING ITS CONCLUSION TO REMOVE S.Y. FROM THE TEMPORARY CUSTODY OF HIS GRANDMOTHER. THE TRIAL COURT'S CONSIDERATION OF EVIDENCE OUTSIDE THE RECORD DEPRIVED THE AGENCY OF PROCEDURAL DUE PROCESS AS GUARANTEED BY THE UNITED STATES CONSTITUTION.

**{¶23}** "II. THE TRIAL COURT ABUSED ITS DISCRETION IN REMOVING S.Y. FROM THE TEMPORARY CUSTODY OF HIS GRANDMOTHER AT THE DISPOSITIONAL HEARING."

A. Burden of Proof.

**{¶24}** In the case at bar, appellant, the parents and the grandmother did not appeal the trial court's finding at the adjudicatory phase that S.Y. is a Dependant, Neglected or Abused child.

**{¶25}** After a child has been adjudicated as dependent neglected or abused, the trial court can make an order of disposition as set forth in R.C. 2151.353(A).

**{¶26}** R.C. 2151.353(A) states in pertinent part that, "If a child is adjudicated an abused, neglected, or dependent child, the court may make any of the following orders of disposition:

**{¶27}** "(1) Place the child in protective supervision;

**{¶28}** "(2) Commit the child to the temporary custody of a public children services agency, a private child placing agency, either parent, a relative residing within or outside the state, or a probation officer for placement in a certified foster home or in any other home approved by the court;

**{¶29}** "(3) Award legal custody of the child to either parent or to any other person who, prior to the dispositional hearing, files a motion requesting legal custody of the child;

**{¶30}** "(4) Commit the child to the permanent custody of a public children services agency or private child placing agency\* \* \*."

{¶31} "A juvenile court must consider the 'best interests' of the child when it considers the statutorily permissible dispositional alternatives enumerated in R.C. 2151.353(A)." *In the matter of: Jacob, Nicholas, Neil, and Clair Barcelo* (June 26, 1998) Geauga App. No 97-G-2095, citing *In re Cunningham* (1979), 59 Ohio St.2d 100, 107, 391 N.E.2d 1034. See also, *In re Brown* (2001), 142 Ohio App.3d 193, 755 N.E.2d 365; *In re Pryor* (1993), 86 Ohio App.3d 327, 620 N.E.2d 973.

{¶32} Once the juvenile court adjudicates a child dependent, the court may award legal custody of the child to a parent or to a non-parent upon a timely motion. See R.C. 2151.353(A)(3). In doing so, the juvenile court shall consider the best interest of the child. R.C. 2151.42(A). This procedure does not constitute a "termination of all residual parental rights, privileges, and responsibilities," and therefore, does not foreclose the ability of the parents or the appellant to seek a change of custody in the future, in accordance with R.C. 2151.42. *In re C.R.*, 108 Ohio St.3d 369, 2006-Ohio-1191 at ¶ 23.

{¶33} R.C. 2151.353(E)(2) allows any party, other than the parents whose parental rights have been terminated, to move for an order modifying or terminating any dispositional order, including an award of temporary or permanent custody. The statute provides:

{¶34} "Any public children services agency, any private child placing agency, the department of job and family services, or any party, other than any parent whose parental rights with respect to the child have been terminated pursuant to an order issued under division (A)(4) of this section, by filing a motion with the court, may at any time request the court to modify or terminate any order of disposition issued pursuant to

division (A) of this section or section 2151.414 [2151.41.4] or 2151.415 [2151.41.5] of the Revised Code. The court shall hold a hearing upon the motion as if the hearing were the original dispositional hearing and shall give all parties to the action and the guardian ad litem notice of the hearing pursuant to the Juvenile Rules. If applicable, the court shall comply with section 2151.42 of the Revised Code.

{¶35} Unlike in a permanent custody proceeding where a juvenile court's standard of review is by clear and convincing evidence, a juvenile court's standard of review in legal custody proceedings is by a preponderance of the evidence. *Id.*; *In re Nice* (2001), 141 Ohio App.3d 445, 455; *In re A. W.-G.* A preponderance of the evidence is "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it." *In re Nice* (2001), 141 Ohio App.3d 445, 455; *In re Law*, Tuscarawas App. No. 2003 AP 06 45, 2004-Ohio-117 at ¶14. If the court's decision regarding legal custody is not supported by competent, credible evidence, then it is unreasonable and we may reverse it. *Nice*, 141 Ohio App. 3d at 455, 751 N.E. 2d 552; *In re Law*, 2004-Ohio-117 at ¶14.

{¶36} Grandparents generally have no legal rights of access to their grandchildren. *In re Fusik*, Athens App.No. 02CA16, 2002-Ohio-4410, citing *In re Whitaker* (1988), 36 Ohio St.3d 213, 214, 522 N.E.2d 563; *In re Martin*, 68 Ohio St.3d 250, 1994-Ohio-506. Additionally, the Ohio Supreme Court has stated that grandparents have no constitutional right of association with their grandchildren. See *In re Schmidt* (1986), 25 Ohio St.3d 331, 336, 496 N.E.2d 952. Nonetheless, the General Assembly has provided dispositional options which impact the role of grandparents in dependency, neglect, and abuse cases. Among these are R.C. 2151.415(A)(3), which

permits a grant of legal custody to a relative, and R.C. 2151.415(F), which permits a parent to file a motion seeking relative placement of the child.

{¶37} In the case at bar, the grandmother did not file a motion seeking legal custody of S.Y. Nor did the parents file a motion seeking relative placement. However, as a preliminary matter the question in this appeal is not whether grandmother had a right to custody of S.Y. but rather whether TCJFS may assert the grandmother's rights.

#### B. Standing.

{¶38} In its two assignments of error TCJFS argues that the trial court considered evidence outside the record and abused its discretion by removing S.Y. from his grandmother's custody. Prior to considering the merits of appellant's assignments of error, we find it necessary to address the issue of standing (i.e. whether appellant, TCJFS, has standing to challenge the trial court's denial of temporary custody to the grandmother, Carla York.)

{¶39} Carla York filed a grandparent power of attorney with the juvenile division of common pleas court pursuant to R.C. 3109.52, which provides,

{¶40} "The parent, guardian, or custodian of a child may create a power of attorney that grants to a grandparent of the child with whom the child is residing any of the parent's, guardian's, or custodian's rights and responsibilities regarding the care, physical custody, and control of the child, including the ability to enroll the child in school, to obtain from the school district educational and behavioral information about the child, to consent to all school-related matters regarding the child, and to consent to medical, psychological, or dental treatment for the child. The power of attorney may not grant authority to consent to the marriage or adoption of the child. *The power of attorney*

does not affect the rights of the parent, guardian, or custodian of the child in any future proceeding concerning custody of the child or the allocation of parental rights and responsibilities for the care of the child and does not grant legal custody to the attorney in fact.” (Emphasis added).

{¶41} Accordingly, this power of attorney did not grant Carla York legal custody of S.Y. Nor did the power of attorney constitute a request for custody. In this respect we note that R.C. 3109.77 expressly authorizes a trial court to treat a *subsequent* request for a grandparent power of attorney as a petition for legal custody. *In re B.R.*, Cuyahoga App. No. 94099, 2010-Ohio-3092. That statute provides in relevant part:

{¶42} ““(A) On the filing of a power of attorney or caretaker authorization affidavit under section 3109.76 of the Revised Code<sup>5</sup>, the court in which the power of attorney or caretaker authorization affidavit was filed shall schedule a hearing to determine whether the power of attorney or affidavit is in the child's best interest.\* \* \*

{¶43} “ \* \* \*

{¶44} “(C) At the conclusion of the hearing, the court may take any of the following actions that the court determines is *in the child's best interest*:

{¶45} “(1) Approve the power of attorney or affidavit. If approved, the power of attorney or affidavit shall remain in effect unless otherwise terminated under section 3109.59 of the Revised Code with respect to a power of attorney or section 3109.70 of the Revised Code with respect to an affidavit.

{¶46} “(2) Issue an order terminating the power of attorney or affidavit and ordering the child returned to the child's parent, guardian, or custodian. If the parent, guardian, or custodian of the child cannot be located, the court shall treat the filing of

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<sup>5</sup> R.C. 3109.76 governs “second or subsequent power of attorney” created under R.C. 3109.52

the power of attorney or affidavit with the court as a complaint under section 2151.27 of the Revised Code that the child is a dependent child.

{¶47} “(3) *Treat the filing of the power of attorney or affidavit as a petition for legal custody and award legal custody of the child to the grandparent designated as the attorney in fact under the power of attorney or to the grandparent who executed the affidavit.*” (Emphasis added.)

{¶48} The express language of R.C. 3109.77(C)(3) therefore allows the court to treat a second power of attorney as a petition for legal custody. *In re B.R.* supra at ¶26. However, because that express language is not contained in R.C. 3109.52 an initial grandparent power of attorney cannot be treated by the trial court as a petition for legal custody.

{¶49} “Appeal lies only on behalf of a party aggrieved by the final order appealed from. Appeals are not allowed for the purpose of settling abstract questions, but only to correct errors injuriously affecting the appellant.” *Ohio Contract Carriers Assn. v. Pub. Util. Comm.* (1942), 140 Ohio St. 160, 23 O.O. 369, 42 N.E.2d 758, syllabus; *Ohio Domestic Violence Network v. Pub. Util. Comm.* (1992), 65 Ohio St.3d 438, 439, 605 N.E.2d 13, 14. An appealing party may complain of an error committed against a non-appealing party when the error is prejudicial to the rights of the appellant. *In re Smith* (1991), 77 Ohio App.3d 1, 13, 601 N.E.2d 45, 52. In *In re Rackley* (Apr. 8, 1998), Summit App. No. 18614, the court stated “an appellant may not challenge an alleged error committed against a non-appealing party absent a showing that she herself has been prejudiced by the alleged error.” See, also, *State v. Ward* (Sept. 21,

1988), Summit App. No. 13462, unreported; *In re Matis* (May 24, 1995), Summit App. No. 16961. *In re Leo D.* supra.

{¶50} In the case of *In re Pittman*, Summit App. No. 20894, 2002-Ohio-2208, at ¶ 70, the Ninth District Court of Appeals explained that:

{¶51} " \* \* \* [A] parent has standing to challenge the juvenile court's failure to grant a motion for legal custody of a child to a relative, where the court's denial of that motion led to a grant of permanent custody to the children services agency and impacted the residual rights of the parent. [Citations omitted.] However, the parent is limited to challenging only how the court's decision impacted the parent's rights and not the rights of the relative. A parent has no standing to assert that the court abused its discretion by failing to give \* \* \* [a family member] legal custody; rather, the challenge is limited to whether the court's decision to terminate parental rights was proper."

{¶52} We note that neither of the parents has appealed the trial court's adjudication or disposition of S.Y. Additionally, the maternal grandmother did not file a motion for custody of S.Y. We further note that from the record before this court we are unable to determine whether the maternal grandmother, Carla York, was even present during the dispositional hearings that took place in the trial court on February 1, 2011<sup>6</sup> and February 23, 2011.<sup>7</sup>

{¶53} In the case at bar, the trial court awarded temporary custody of S.Y. to TCJFS. TCJFS has made no showing that the trial court's decision adversely impacted TCJFS rights or that they were prejudiced by the trial court's award of temporary custody to them and the denial of temporary custody to the maternal grandmother.

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<sup>6</sup> See, T. at 1-3.

<sup>7</sup> See, T. at 18-19.

{¶54} Therefore under the facts and circumstances of this case we find that TCJFS does not have standing to assert on appeal that the trial court erred in not granting temporary custody of S.Y. to his maternal grandmother Carla York with protective supervision to TCJFS.

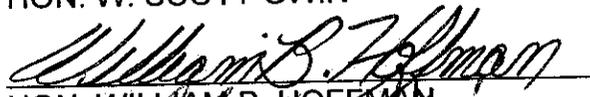
{¶55} For the foregoing reasons, appellant's appeal is dismissed.

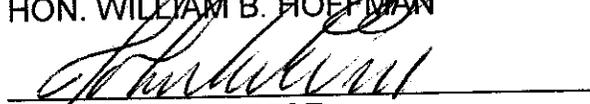
By Gwin, P.J.,

Hoffman, J., and

Wise, J., concur

  
HON. W. SCOTT GWIN

  
HON. WILLIAM B. HOFFMAN

  
HON. JOHN W. WISE

WSG:clw 0823

IN THE COURT OF APPEALS FOR TUSCARAWAS COUNTY, OHIO

FIFTH APPELLATE DISTRICT

IN THE MATTER OF:  
S.Y., C.F., AND A.F.

**FILED**  
5th District Court of Appeals  
Tuscarawas Co., Ohio

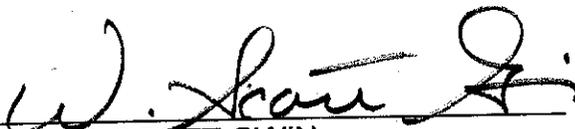
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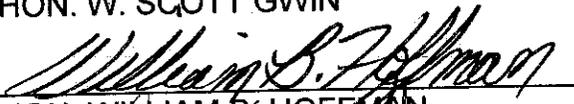
ROCKNE W. CLARKE  
Clerk of Courts

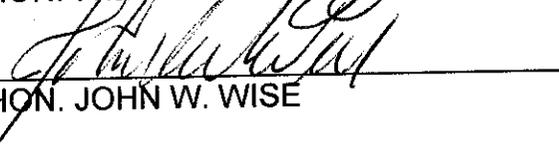
JUDGMENT ENTRY

CASE NO. 2011AP04 0018

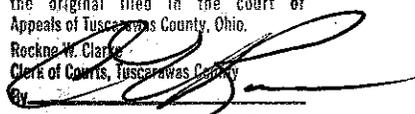
For the reasons stated in our accompanying Memorandum-Opinion, this appeal is dismissed . Costs to appellant.

  
HON. W. SCOTT GWIN

  
HON. WILLIAM B. HOFFMAN

  
HON. JOHN W. WISE

I the undersigned- Clerk of Courts hereby  
testify this to be a true and correct copy of  
the original filed in the court of  
Appeals of Tuscarawas County, Ohio.

Rockne W. Clarke  
Clerk of Courts, Tuscarawas County  
  
Deputy Clerk