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GUARDIAN AD LITEM FOR MINOR CHILD

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## EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST

This cause presents an important issue for all parents of medically fragile children with special needs in the State of Ohio: when a public children services agency is seeking to permanently deprive them of their parental rights, what kind of showing do they have to make in order to preserve their parental rights and have their children returned to them?

It is a long-held proposition of law that parents should not be deprived of their custodial rights over their children, absent some overwhelming reason. This Court recognized in *In re Hayes*, 79 Ohio St.3d 46 (1997) that the right to raise a child is an essential and basic civil right. *Id.* at 48. Further, the Court went on to state that “[p]ermanent termination of parental rights [as is the case in the instant matter] 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.’ [Citations omitted.] *Id.* at 48. Appellant N. M. is not arguing that she has been deprived of procedural protection. However, what she is arguing, and what this Court has never clarified, is the extent of the “substantive protection” that should be granted to a parent in the situation involving a medically fragile special needs child.

## STATEMENT OF THE CASE AND FACTS

This case originated with the filing of a Complaint in early 2010 alleging that the minor child K. D., a boy, was an abused, neglected and dependent child. He was removed from the care of his parents following a preliminary hearing, due to concerns about his

physical problems, including low weight, which were caused by a genetic condition known as diastrophic dysplasia. A reunification case plan was then adopted.

Around the time of the removal, the father, K. D. II, was arrested, charged and convicted of a criminal offense unrelated to the care of the minor child. He served his time and was released to a halfway house in late 2012, and then completely released in May, 2013.

Mother N. M. was charged and convicted of child endangering in relation to this matter, and placed on probation. She also has participated in Drug Court, Comp Drug and other services due to her drug related issues. During the life of this case, she consistently has visited with her son, and now is living independently, operating her own cleaning business. Both parents had received specialized training in the care of their son at the time of his birth and infancy. Since father's release to a halfway house, both he and the mother have been attending the medical appointments relating to their son on a regular basis. Both parents were clearly bonded to the child, according to the testimony of all witnesses at the trial on this matter.

Franklin County Children Services (FCCS) filed a Motion for Permanent Custody in November, 2011, alleging that the minor child should be permanently committed to FCCS for the purpose of adoption, since neither parent had made enough progress on the case plan. Multiple days of trial resulted in a decision in the trial court filed July 2, 2013, granting FCCS's Motion. Timely appeals were filed by both father and mother to the Tenth District Court of Appeals, and those appeals were overruled, and this matter is now before this Court.

In support of her position on these issues, the appellant presents the following argument:

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law No. 1: Permanent custody of medically fragile minor children should not be granted where the parents are able to demonstrate (1) they have received the proper training to take care of their children and (2) an ability to utilize nursing and other medical services available to them, a foster parent or a prospective adoptable home.

Both mother N. M. and father K. D. II both established through their testimony that they had received extensive training in the care of their son K. D., who has several serious medical conditions, including diastrophic dysplasia, a condition producing difficulty in breathing, eating and developing normally. Further, the testimony adduced at the trial established that although mother and father were not residing together, they could share in the care and custody of their minor child. Finally, the testimony revealed that the minor child was eligible for a home health nurse up to 40 hours per week, and assistance for the child while in attendance at a school for developmentally disabled children of up to 40 hours per week, both year round.

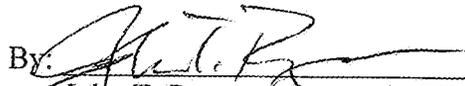
Although these services were available to the parents, the both the trial court and the Court of Appeals in their decisions appeared to ignore these facts, and conclude that neither parent could take care of their minor child, and that only the foster mother could take care of the minor child, even though the Court of Appeals noted the availability of the home health nurse in the house of the foster mother, which would be available to the parents, and the specialized training of the foster mother – training that both parents completed.

This case is extremely important for the parents of medically fragile children in the State of Ohio, for it appears that no matter what the parents of K. D. had done and accomplished in caring for him, and no matter what outside resources were and would be available, they would never have an opportunity to raise and care for their own child, due to prior problems in their lives, which both parties subsequently have addressed. This Court should take notice of the recent decision of the Eighth District Court of Appeals in *In re S. D., et al.*, 8<sup>th</sup> Dist. Cuyahoga, Nos. 99410, 99411, 99412, 2013-Ohio-3535 where the Court of Appeals reversed the decision of the trial court granting permanent custody of three minor children, with special needs, partially on the basis that the mother, as here, had been “educated in the specialized medical needs of the children” and had attended the vast majority of the child’s medical appointments. The Court further noted that – as in this case – there was testimony that the mother had been trained to deal with the digestive and other medical problems of the children. *Id.* at \*9. Although the decision in the Eighth District case *In re S. D., et al.* is not in direct conflict with the instant case, because other factors were involved, this Court should take notice that the decisions of the Eighth and Tenth Districts are in disagreement as they relate to the issue of parental care for medically fragile children facing the possibility of the grating of permanent custody for the purpose of adoption. Parents such as N. M. and K. D. II should be given the opportunity to raise their medically fragile special needs when they are trained to take care of their children, are bonded to them and can take advantage of home nursing and other services available to both foster parents and prospective adoptive parents.

CONCLUSION

For the reasons discussed above this case involves matters of public and great general interest. The appellant requests that this court grant jurisdiction and allow this case so that the important issues presented in this case will be reviewed on the merits.

Respectfully submitted,

By:   
John T. Ryerson, Counsel of Record  
COUNSEL FOR APPELLANT,  
N. M.

Proof of Service

I certify that a copy of this Notice of Appeal was sent by ordinary U.S. Mail to Istvan Gajary, Esq., Peterson, Connors, Fergus & Peer, LLP, Two Miranova Place, Columbus, Ohio 43215, Robert J. McClaren, Esq., Franklin County Children Services 4071 E. Main Street, Columbus, Ohio 43213 and Sharon Carney-Packard, Esq., CASA of Franklin County, 373 S. High Street, 15<sup>th</sup> Floor, Columbus, Ohio 43215 this 17<sup>th</sup> day of March, 2014.

  
John T. Ryerson, Counsel of Record  
COUNSEL FOR APPELLANT,  
N. M.

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

In re:	:	
K. D.,	:	No. 13AP-607
(K. D., II,	:	(C.P.C. No. 10JU-01-399)
	:	(REGULAR CALENDAR)
Appellant).	:	
In re:	:	
K. D.,	:	No. 13AP-667
(N. M.,	:	(C.P.C. No. 10JU-01-399)
	:	(REGULAR CALENDAR)
Appellant).	:	

DECISION

Rendered on January 28, 2014

*Peterson, Conners, Fergus & Peer LLP, and Istvan Gajary,*  
for appellant K.D.

*John T. Ryerson,* for appellant N.M.

*Robert J. McClaren,* Franklin County Children Services, for  
appellee.

*Sharon Carney-Packard,* Guardian ad Litem.

APPEAL from the Franklin County Court of Common Pleas,  
Division of Domestic Relations, Juvenile Branch

TYACK, J.

{¶ 1} K.D. II and N.M. are appealing from the order of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch, granting permanent custody of K.D. to appellee Franklin County Children Services ("FCCS").

{¶ 2} K.D. II assigns three errors for our consideration:

I. THE TRIAL COURT'S GRANT OF PERMANENT CUSTODY OF K.D. TO FRANKLIN COUNTY CHILDREN SERVICES IS NOT IN THE BEST INTERESTS OF THE CHILD AND NOT SUPPORTED BY CLEAR AND CONVINCING EVIDENCE.

II. THE TRIAL COURT ABUSED ITS DISCRETION IN FINDING THAT APPELLANT FAILED TO SUBSTANTIALLY COMPLETE HIS CASE PLAN.

III. THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO ALLOW APPELLANT AT LEAST TWELVE (12) MONTHS TO COMPLETE HIS CASE PLAN.

{¶ 3} N.M. has assigned a single error for our review:

The Court below erred in granting the Motion for Franklin County Children Services (FCCS) for Permanent Custody, as FCCS failed to establish by clear and convincing evidence that permanent custody was in the best interest of the minor child.

{¶ 4} K.D. came to the attention of FCCS because of a variety of medical problems and because of a failure to thrive. At the time, his mother was fighting drug addiction problems. His father was in prison as the result of a felonious assault conviction.

{¶ 5} Because of her problems and her treatment of K.D., the mother was convicted of endangering children. K.D. is now five years old. He suffers from diastrophic dysplasia. Dysplasia is abnormal growth or development. Diastrophic dysplasia is an inherited dysplasia affecting bones and joints. It is commonly characterized by clubfoot, deformities of the fingers and cleft palate. It is sometimes called "diastrophic dwarfism."

{¶ 6} FCCS has had custody of K.D. since early 2010. Both parents have had contact with K.D. and apparently have bonded with their child after getting their own legal problems addressed. Both assert in this appeal that a grant of permanent custody of their son to FCCS is not in K.D.'s best interest.

{¶ 7} The trial court judge awarded permanent custody to FCCS because the judge felt K.D.'s full-time custody needs were "likely to exceed the father's abilities." Permanent Custody Judgment Entry, at 4. If the father tried and failed, another placement in foster care was seen as potentially devastating for K.D.

{¶ 8} N.M. has not conducted herself in a way which indicates she could ever serve as a custodian for the child. While K.D. II was incarcerated, N.M.'s care seriously endangered K.D., even to the point of his being taken to a hospital non-responsive. Her inability to be reliable affected the trial court judge's ruling because the judge felt K.D. II would have to be solely responsible for meeting all of K.D.'s needs.

{¶ 9} The foster mother for K.D. apparently specialized in caring for medically fragile children. She has special training and has cared for K.D. for over three years, with the daily help of a nurse for eight hours per day.

{¶ 10} This is a case with no apparent solution. Caring for K.D. is a full-time occupation. The foster mother has fulfilled that role. K.D. is very bonded both to the foster mother and to his father. The trial judge weighed the known, the current level of care, against an unknown, namely the father's ability to care for such a medically fragile child and still maintain employment.

{¶ 11} We cannot find the trial court erred in its determination of what is in K.D.'s best interests.

{¶ 12} The assignments of error are all overruled. The judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch, is affirmed.

*Judgment affirmed.*

KLATT and BROWN, JJ., concur.

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(N. M.,	:	(C.P.C. No. 10JU-01-399)
	:	(REGULAR CALENDAR)
Appellant).	:	

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on January 28, 2014, the assignments of error are overruled. Therefore, it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch, is affirmed. Costs shall be assessed against appellants.

TYACK, BROWN & KLATT, JJ.

/S/JUDGE

\_\_\_\_\_  
Judge G. Gary Tyack