

In the Matter of:

K.D.

: On Appeal from the Franklin  
County Court of Appeals, Tenth  
Appellate District

(N.M.,

:

Appellant).

:

Case No. 14-0415

---

MEMORANDUM IN OPPOSITION OF JURISDICTION  
OF APPELLEE FRANKLIN COUNTY CHILDREN SERVICES

---

Robert J. McClaren (0046657) (COUNSEL OF RECORD)  
4071 E. Main St.  
Whitehall, Ohio 43213  
Phone: 614-275-2587  
Fax: 614-236-1739  
E-Mail: [rjmccclar@fccs.co.franklin.oh.us](mailto:rjmccclar@fccs.co.franklin.oh.us)

COUNSEL FOR APPELLEE FRANKLIN COUNTY CHILDREN SERVICES

John T. Ryerson (0055727)  
2546 Indianola Ave.  
Columbus, Ohio 43202

COUNSEL FOR APPELLANT N.M.

Istvan Gajary (0089084)  
Peterson, Conners, Fergus & Peer, LLP  
Two Miranova Place  
Columbus, Ohio 43215

COUNSEL FOR APPELLANT K.D. II

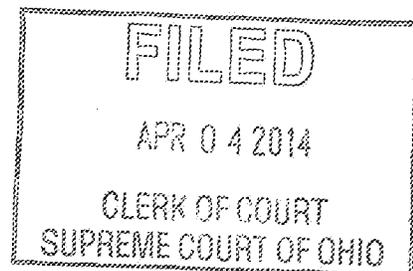


TABLE OF CONTENTS

	<u>PAGE(S)</u>
EXPLANATION OF WHY THIS HONORABLE COURT SHOULD NOT ACCEPT REVIEW.....	2
PROCEDURAL HISTORY.....	2
STATEMENT OF FACTS.....	3
ARGUMENTS IN OPPOSITION TO PROPOSITIONS OF LAW PROPOSED BY APPELLANT.....	8
A. <u>Appellant’s proposition of law is contrary to existing law.</u>	
B. <u>Existing case law decided by this Court and R.C. 2151.414(D) directs a trial court to weigh all statutory best interest factors.</u>	
C. <u>The Ohio Supreme Court does not review based on manifest weight of the evidence.</u>	
D. <u>Permanent Custody is in the best interests of the child.</u>	

TABLE OF AUTHORITIES

	<u>PAGE(S)</u>
<u>CASES</u>	
<i>Brown &amp; Sons v. Honabarger</i> , 171 Ohio St. 247, 168 N.E.2d 880 (1960).....	9
<i>In re C.G.</i> , 10 <sup>th</sup> Dist. No. 13AP-632, 2014-Ohio-279.....	8
<i>In re C.R.</i> , 108 Ohio St. 3d 369, 2006-Ohio-1191 at ¶21-22, 843 N.E.2d 1188 (2006)...	10
<i>In re S.D.</i> , 8 <sup>th</sup> Dist. No. 99410, 2013-Ohio-3535.....	9
<i>In re Shaeffer Children</i> , 85 Ohio App.3d 683, 621 N.E.2d 426.....	2, 8
<i>In re Trowbridge</i> , 10 <sup>th</sup> Dist. No. 03AP-405, 2004-Ohio-2645.....	9
<i>Santosky v. Kramer</i> , 455 U.S. 755, 760, 102 S. Ct. 1388, 1398, 71 L. Ed. 2d 599 (1982).....	9
<u>STATUTES</u>	
Ohio Revised Code Section 2151.414(D).....	2
Ohio Revised Code Section 2309.59.....	9
Ohio Revised Code Section 2503.43.....	9

## EXPLANATION OF WHY THIS HONORABLE COURT SHOULD NOT ACCEPT REVIEW

This case involves a permanent custody case involving a special needs child. The child has been placed in the same foster home for a substantial period of time. He is familiar with that foster home and can be adopted by that foster home. The child loves and is bonded to the foster parents.

Appellant presents a fact specific proposition of law that should not be accepted for review. Most importantly current statutory law contained in R.C. 2151.414(D) the best interests statute, and the *In re Shaeffer Children*, 85 Ohio App.3d 683, 621 N.E.2d 426, case already decided by this court already address the issues raised in Appellant's proposition of law. Which is that in permanent custody cases, all the statutory factors are weighed, including facts such as the facts Appellant alleges; in making a determination as to whether an award of permanent custody should be granted. Appellant's proposition of law if used to decide a permanent custody case would be contrary to statutory law. Since there is no need for a decision in this area of the law, and due to the trial court's decision and the Court of Appeals' decision being in the best interests of the child, this Court should not accept review.

## PROCEDURAL HISTORY

A complaint was filed on January 10, 2010. The complaint alleged the child was brought to the emergency room due to being unresponsive. At the hospital the child was found to be severely dehydrated and demonstrating a decrease in weight. He had previously been admitted due to a respiratory/cardiac arrest. At the previous admission the child had lost 17% of his body weight, possibly from social deprivation or inadequate calorie intake. Appellant was given instructions regarding a home feeding regimen as well as the recommendation to closely follow the child's weight. Appellant failed to follow up with some of the recommendation. An emergency custody order was issue on January 10, 2010.

On January 12, 2010 FCCS received a temporary order of custody of the child. On April 5, 2010 the child was adjudicated a dependent minor and committed to the temporary custody of FCCS. The case plan was approved and made an order of the court. A first extension of temporary custody was granted February 15, 2011. A second extension of temporary custody was granted on August 8, 2011.

The motion for permanent custody was filed on November 29, 2011. The trial concerning the motion for permanent custody occurred on: December 11, 2012; February 6, 2013; and on April 24, 2013. Thereafter a judgment entry granting the award of permanent custody was issued on July 2, 2013. On July 31, 2013 Appellant filed a notice of appeal in the Tenth District Court of Appeals. On January 28, 2014, the Tenth District Court of Appeals affirmed the decision of the trial court granting the motion for permanent custody. On March 17, 2014, Appellant filed the instant appeal before this Court.

#### STATEMENT OF FACTS

The child was removed from Appellant in January of 2010. When the child was removed he was diagnosed with non-organic failure to thrive and was losing weight to a very unhealthy level that was putting his life at risk. (Tr. 2/6/13, p. 106). The child was initially placed with his foster mother, where he has always been placed. (Tr. 2/6/13, p. 108). The CASA guardian ad litem testified that the child is bonded with the foster mother and calls her "mommy". (Tr. 4/24/13, p. 197). Foster mother is a foster to adopt placement who would be interested in adopting the child. (Tr. 12/11/12, p. 162).

The child has a number of special needs and needs numerous services. FCCS caseworker Rainbolt testified that the child is the size of a six or seven month infant. His arms and legs are shorter than what they should be. He has clubbed feet, one cauliflower ear, and hitchhiker

thumbs. (Tr. 2/6/13, p. 132). When Ms. Rainbolt had the case, the child would roll to get around. (Tr. 2/6/13, p. 132). He used a brace and a feeding tube. (Tr. 2/6/13, p. 133).

Foster mom has special training and cares for some medically fragile children. (Tr. 12/11/12, p. 126). She receives thirty hours of training a year. (Tr. 12/11/12, p. 128). She has cared for the child for three years. (Tr. 12/11/12, p. 128).

A nurse comes in eight hours a day to care for the child. The child goes to many doctor's appointments including OT/PT and speech. He is on a very strict diet and she works with the nurses to make sure he does not go over his caloric intake. (Tr. 12/11/12, p. 128). She goes over his medicines with the doctors and had needed oxygen. (Tr. 12/11/12, p. 129, 136). He needs assistance taking a bath. (Tr. 12/11/12, p. 130-131). The nurse goes to school with the child two hours a day and the nurse goes with foster mother to the doctor's office with them. (Tr. 12/11/12, p. 132). The child takes flovent, omeprazole, albuterole, acid reflux medication, (Tr. 12/11/12, p. 135). He attends a preschool program two hours a day, five days a week. (Tr. 12/11/12, p. 137). He attends occupational therapy twice a week. (Tr. 12/11/12, p. 137). He needs physical therapy. (Tr. 12/11/12, p. 137). The child receives speech therapy at school. (Tr. 12/11/12, p. 138).

Many medical professionals see the child. He has two appointments with physical medicine. He goes to pulmonary four times a year. He has a dentist, a neuro-surgeon, an occupational therapist who monitors the child's feet. He will need vepar surgery and spinal fusion. (Tr. 12/11/12, p. 138-139). At one time the child saw seventeen doctors. Now he has six to eight that he sees twice a year. (Tr. 12/11/12, p. 141).

The FCCS caseworker testified that the child continues to receive weekly; occupational therapy, physical therapy, and speech therapy. (Tr. 4/24/13, p. 31). The caseworker indicated that the child continues to receive nursing visits but for less hours. (Tr. 4/24/13, p. 33).

The CASA guardian ad litem testified that the child is medically fragile and born with a disability. (Tr. 4/24/13, p. 208). He has decreased lung capacity and asthma. (Tr. 4/24/13, p. 208). Lung infections are an issue and can be triggered by cigarette smoke or eating too much food. He has trouble swallowing food. (Tr. 4/24/13, p. 208). He is on a reduced calorie diet that must be carefully monitored. (Tr. 4/24/13, p. 209). The child has mobility issues and must be carried places or put into a wheelchair. (Tr. 4/24/13, p. 209). The child was born with a cleft palate so he talks in short sentences and can be difficult to understand. (Tr. 4/24/13, p. 209). A caregiver must maintain all of his medical appointments and follow up with physicians. (Tr. 4/24/13, p. 209). The child was not able to communicate. The guardian recommended that the motion for permanent custody be granted. (Tr. 4/24/13, p. 214-215).

Appellant was offered services designed to reunify her with the child. Yet, she failed to complete the necessary services to achieve reunification. Appellant testified that concerning her case plan that she had to continue visitation, keep in contact with the foster mother, go to his appointments, Drug Court participation and completion, stay sober, stable housing, and employment. (Tr. 12/11/12, p. 229). Appellant is on probation for endangering her child. (Tr. 12/11/12, p. 229). Appellant plead guilty to child endangering. (Tr. 12/11/12, p. 231).

Appellant initially denied that she has drug and alcohol issues. (Tr. 12/11/12, p. 232). After the child was removed Appellant tried to kill herself by using heroin. (Tr. 12/11/12, p. 233). She used six to ten bags of heroin a day. (Tr. 12/11/12, p. 236). She used Percocet while pregnant. (Tr. 12/11/12, p. 234). Once she was addicted to heroin she would take opiates or Percocet. (Tr. 12/11/12, p. 240). She used heroin just two months before the trial began. (Tr. 12/11/12, p. 241). She used drugs twice since April of 2011. (Tr. 12/11/12, p. 242). She also took someone else's morphine. (Tr. 2/6/13, p. 16-17). She feels depression causes her to use illegal drugs. (Tr. 2/6/13, p. 19).

Appellant was enrolled in Drug Court but she was kicked out a month before the trial for non-compliance. (Tr. 2/6/13, p. 223, 277). She stated she was in aftercare at CompDrug where she sees a counselor and attends NA meetings. (Tr. 12/11/12, p. 257). Appellant was seeing a counselor for depression. (Tr. 12/11/12, p. 261). Appellant was only compliant with CompDrug aftercare for a month. (Tr. 12/11/12, p. 263). However, she used heroin just a month or two before the trial. (Tr. 12/11/12, p. 267). Appellant needed to remain in the aftercare program for a year. (Tr. 12/11/12, p. 268). Appellant had problems complying with drug testing required by the case plan.

As to the child's medical appointments, at first she missed some because she had heroin that day. (Tr. 12/11/12, p. 290-291). Appellant did not attend all of his medical appointments in the last six months. (Tr. 12/11/12, p. 298).

Appellant was not involved in mental health counseling concerning depression in regard to the removal of the child. (Tr. 2/6/13, p. 10-11). Appellant is not taking any mental health medications. (Tr. 2/6/13, p. 12). Appellant has threatened to harm herself. (Tr. 2/6/13, p. 13). Appellant felt that she did not complete everything in her case plan. (Tr. 2/6/13, p. 21). She felt she did not complete the psychiatric evaluation and needed to complete more drug screens, (Tr. 2/6/13, p. 22).

K.D., the non-appealing biological father entered prison on May 21, 2009 and had a release date of May 1, 2013<sup>1</sup>. (Tr. 12/11/12, p. 29). K.D. was convicted of felonious assault, a crime of violence. (Tr. 12/11/12, p. 48, 49). He was incarcerated the entire time that the child was in the custody of FCCS. (Tr. 12/11/12, p. 30). The child was six months old when he went to prison. (Tr. 12/11/12, p. 30). K.D. last lived with the child in May of 2009. (Tr. 12/11/12, p. 36). He resided in the home of Appellant prior to being imprisoned. (Tr. 12/11/12, p. 36).

---

<sup>1</sup> He did appeal to the Tenth District Court of Appeals. He did not appeal to this Court.

The FCCS caseworker testified that she was concerned about K.D.'s ability to meet the child's medical needs due to: his incarceration for the majority of the case, that there was no opportunity for K.D. to demonstrate whether he would be able to meet those needs within the case's timeframe, and K.D. was not attending the child's medical appointments. The caseworker was not sure whether K.D. was knowledgeable to meet the day-to-day care of the child and knew what those medical needs would require. (Tr. 4/24/13, p. 54). The caseworker testified that K.D. only attempted to attend one medical appointment, although he claimed he attended five. (Tr. 4/24/13, p. 60, 154). The caseworker was concerned that K.D. did not live at a place where it would be feasible for the child to reside with him. (Tr. 2/6/13, p. 215). K.D. at the end of the trial could not pay bills, pay rent or afford a house. (Tr. 4/24/13, p. 187).

ARGUMENTS IN OPPOSITION TO PROPOSITIONS OF LAW PROPOSED BY  
APPELLANT

- A. Appellant's proposition of law is contrary to existing law.
- B. Existing law decided by this Court and R.C. 2151.414(D) directs a trial court to weigh all statutory best interest factors.
- C. The Ohio Supreme Court does not review based on manifest weight of the evidence.
- D. Permanent Custody is in the best interests of the child.

Appellant's proposition of law is contrary to the statutory law and the decision of this Court *In re Shaeffer Children*, 85 Ohio App.3d 683, 621 N.E.2d 426 (1993). Appellant presents a situation where the trial court is only weighing the alleged situation regarding the parents and the trial court does not consider any other factors. However, in *Shaeffer* this Court directed the lower courts to weigh all of the best interest factors of R.C. 2151.414(D) and to not have any factor be overriding. *In re Shaeffer Children*, 85 Ohio App.3d 683, 621 N.E.2d 426 (1993). This Court further ruled that one factor is not given greater weight than the others. *In re Schaefer*, 111 Ohio St.3d 498, 505, 2006-Ohio-5513 at ¶56, 857 N.E.2d 532, 538. Also, none of the best interest factors is given heightened importance. *Id.* Also see *In re C.G.*, 10<sup>th</sup> Dist. No. 13AP-632, 2014-Ohio-279 at ¶37.

Appellant is effectively asking the Court to hold that a parents' situation should be an overriding factor for a trial court to consider in a permanent custody case. Appellant's proposition of law is thus contrary to the rule in *Shaeffer* and the best interest standard of R.C. 2151.414(D), in that Appellant is asking that her alleged facts regarding both parents be given heightened importance.

A parents' situation in a permanent custody case is not an overriding factor because parental rights are not absolute. In a permanent custody case the rights of parents are subject to limitations placed on them by the State because the parents have been determined to be unfit by

virtue of the prior abuse, neglect, or dependency finding at the start of the case. *In re C.R.*, 108 Ohio St. 3d 369, 373; 2006-Ohio-1191 at ¶¶21-22, 843 N.E.2d 1188, 1192 (2006). Even a removal for dependency demonstrates the parent's unfitness to care for a child. *In re Trowbridge*, 10<sup>th</sup> Dist. No. 03AP-405, 2004-Ohio-2645, ¶¶13-14. "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". *Santosky v. Kramer*, 455 U.S. 755, 760, 102 S. Ct. 1388, 1398, 71 L. Ed. 2d 599 (1982).

Appellant's proposition of law asks a trial court hearing a permanent custody case to only focus on what parents are able to demonstrate at trial. The proposition of law thus asks the juvenile courts of Ohio to ignore other evidence regarding the best interests of the child in order to make a permanent custody decision in favor of the parents.

Appellant claims that the Court of Appeals decision in this case partially conflicts with *In re S.D.*, 8<sup>th</sup> Dist. No. 99410, 2013-Ohio-3535. FCCS does not agree. In both cases the two Courts of Appeal applied the best interests of the children standard to the case, albeit with different results.

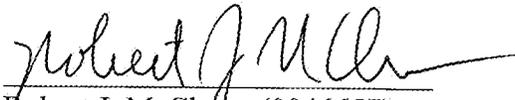
Appellant effectively asks the court to review the Court of Appeals review of the manifest weight of the evidence in the case. This Court has held that the Ohio Supreme Court will not review a determination by the Court of Appeals that a finding is against the manifest weight of the evidence. R.C. 2503.43 states that in a civil case or proceedings, except when its jurisdiction is original or as provided in R.C. 2309.59, the Supreme Court need not determine the weight of the evidence. Further, this Court has held that since it is not required to weigh the evidence, the court will not review a determination that a finding of the court of appeals is against the weight of the evidence. *Brown & Sons v. Honabarger*, 171 Ohio St. 247, 168 N.E.2d 880 (1960).

The facts also demonstrate that permanent custody is in the best interests of the child. Appellant did not resolve her drug issues, mental health issues, housing issues and did not substantially comply with the case plan. The biological father K.D. was in prison for most of the time the child was in foster care and did not have housing of his own when the trial ended. The child was in the same placement since removal in January of 2010, is bonded to the foster mother (calls her "mommy") and lives in a placement where he can be adopted. Thus, permanent custody is in the best interests of the child.

### CONCLUSION

For the reasons discussed above, this Court should deny review. FCCS requests that this Court dismiss the instant appeal.

Respectfully submitted,



Robert J. McClaren (0046657)  
4071 E. Main St.  
Whitehall, Ohio 43213  
Phone: 614-275-2587  
Fax: 614-236-1739  
E-Mail: [rjmclar@fcs.co.franklin.oh.us](mailto:rjmclar@fcs.co.franklin.oh.us)

### CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing memorandum in opposition to jurisdiction was mailed to:

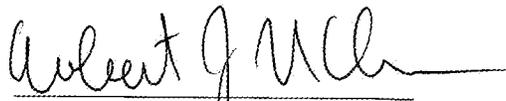
John T. Ryerson (0055727)  
2546 Indianola Ave.  
Columbus, Ohio 43202

COUNSEL FOR APPELLANT N.M.

Istvan Gajary (0089084)  
Peterson, Connors, Fergus & Peer, LLP  
Two Miranova Place  
Columbus, Ohio 43215

COUNSEL FOR APPELLANT K.D. II

On this 4<sup>th</sup> day of April, 2014 by ordinary U.S. mail.

A handwritten signature in cursive script, appearing to read "Robert J. McClaren", with a horizontal line extending to the right from the end of the signature.

Robert J. McClaren (046657)  
Counsel for FCCS