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

This case presents one issue for the Court to review: whether an appeal from an order granting a motion for reasonable efforts bypass under R.C. §2151.419(A)(2)(e) is a final appealable order. That statute states that if a parent from whom the child was removed has had parental rights involuntarily terminated with respect to a sibling of the child then the juvenile court shall make a finding that the agency is not required to make reasonable efforts to prevent the removal of the child from the child's home, eliminate the continued removal of the child from the child's home, and return the child to the child's home.

Although there is no specific set of criteria that this Court uses to determine whether to accept discretionary review of an issue of public or great general interest, prior case law suggests certain factors. This Court has stated: "Novel questions of law or procedure appeal not only to the legal profession but also to this court's collective interest in jurisprudence."¹ The question or issue should have been raised before the court of appeals below² and should not have been passed upon in a prior appeal to the Court.³

The Court should review this case for several reasons. First, review of this case will not only allow the Court to expand the jurisprudence of what constitutes a final appealable order in abuse, neglect, and dependency cases but will also add to the jurisprudence as to what constitutes a final appealable order generally under R.C. §2505.02(B)(2) & (4). This Court has addressed the finality of an order in the child welfare context before a final disposition on several occasions. In *In re Murray*, this Court held that an adjudication by a juvenile court that a child is

¹ *Noble v. Colwell* (1989), 44 Ohio St.3d 92, 94.

² *Manigault v. Ford Motor Co.*, 96 Ohio St.3d 431, 2002-Ohio-5057 at ¶14, Lundberg Stratton, J. dissenting.

³ *Walker v. Glenwood Corp.* (1987), 30 Ohio St.3d 601, Douglas, J. dissenting.

abused, neglected, or dependent followed by an award of temporary custody to a public children's services agency is a final appealable order.⁴ The Court reaffirmed this holding in *In re H.F.*⁵ The Court has also held that an appeal of the denial of a motion to modify temporary custody to permanent custody by a public children's services agency is not a final appealable order.⁶ What the Court has not decided is whether other interim orders such as the grant of a reasonable efforts bypass motion is a final appealable order. Outside of orders of adjudication and the denial of a permanent custody motion by a children's services agency, the Court has not had occasion to comment on the finality of other orders in abuse, neglect, and dependency cases. This case presents the opportunity to expand juvenile jurisprudence, to expand on the meaning of R.C. §2505.02(B), provisional remedies, and elaborate on the circumstances when a "meaningful or effective remedy" is provided.

The Court should also review this case because there is a lack of case law regarding this issue. There appears to be no case on point from this Court which directly addresses the proposition raised in this appeal by this Court – whether a grant of a reasonable efforts bypass motion is a final appealable order. The Ninth District Court of Appeals noted that it was not able to find case law which permitted such an appeal. The reason for this is that there is generally a lack of case law even from the Courts of Appeals on this issue. The lack of case law in itself suggests the issue is appropriate for review because the jurisprudence is lacking. The lack of case law may also suggest that the issue is potentially one that is capable of repetition but evades review.

⁴ *In Re Murray* (1990), 52 Ohio St.3d 155.

⁵ *In re H.F.* (2008) 120 Ohio St.3d 499, 2008-Ohio-6810.

⁶ *In re Adams*, 115 Ohio St.3d 86, 2007-Ohio-4840

This case is also a matter of public or great general interest because it concerns a parent's fundamental right to the custody of her child. Whether a parent is able to challenge the grant of a reasonable efforts bypass motion during the case may greatly affect the outcome. The efforts of the public children's services agency are designed to eliminate the removal of the child from the parent's home. This occurs by the public children's services agency provision of services and referrals to parents which help to eliminate the problem that caused the removal of the child. However, if the agency is excused from making those efforts during the case and such an order is not appealable until the end of the case, a parent is deprived of the due process protections (in the form of the public children's services agency's efforts). If the deprivation is wrongful, the parent may not receive vital assistance during the case. The need to determine whether the due process protections, in the form of agency reasonable efforts, should remain in place during the case is critical to the success or failure of parents whose child has been removed. Knowing whether an appeal may be had during the case as to the grant of a reasonable efforts bypass motion is important because the answer to that question tells courts, attorneys, and the public the extent of parent's constitutional rights. It allows public children's services agencies, parents, and their attorneys to take appropriate steps and plan the best strategies for their cases.

The public also has an interest in knowing whether the juvenile system is adequately protecting the custodial rights of parents and whether the courts are requiring the appropriate amount of effort by the State to reunite a fractured family. The public has an interest in seeing that errant decisions are corrected in a timely fashion such that parents have an effective remedy which enables them to pursue reunification with their child.

For the reasons stated herein, Appellant submits that this case is a matter of public or great general interest and this Court should review the case.

STATEMENT OF THE CASE AND FACTS

Appellant Rita Treadway had three prior children whom the Summit County Juvenile Court granted permanent custody of to Summit County Children's Services Board ("CSB"). Minor child A.T. was removed at birth from the hospital by CSB. A complaint was filed alleging that A.T. was an abused and dependent child. After a contested adjudication, the assigned Magistrate found the child to be abused and dependent. Rita objected to the Juvenile Court and requested the Juvenile Court to hear the balance of the case. CSB requested permanent custody as an initial disposition. Prior to beginning the dispositional hearing, the parties reached an agreement as to the outstanding issues. The parties stipulated that A.T. was a dependent child. The Juvenile Court dismissed the abuse allegation. The parties also stipulated that A.T. should be placed in the temporary custody of CSB and the case plan submitted was adopted with minor modifications. CSB asked for a finding that it *had* made reasonable efforts to prevent the removal of the child under R.C. §2151.419(A)(1). Rita did not object to CSB's request and the Juvenile Court granted that request.

Not less than two weeks later, CSB moved the Juvenile Court for a finding that it be excused from making reasonable efforts under R.C. §2151.419(A)(2)(e). Rita did not dispute that prior sibling children had been placed in the permanent custody of CSB. But Rita challenged the constitutionality of R.C. §2151.419(A)(2)(e) and challenged whether the motion should be granted on equitable grounds given the agreement at the dispositional hearing. The parties extensively briefed the issues. The Juvenile Court dismissed Rita's challenges in a one sentence entry.

Rita then appealed to the Ninth District Court of Appeals. Rita raised the same constitutional and other challenges in her appeal that she argued at the Juvenile Court. The

Ninth District questioned whether the order appealed from was a final appealable order. Rita briefed the issue for the Court of Appeals and thereafter submitted her merit brief. Prior to CSB submitting its brief, the Ninth District dismissed the appeal for lack of a final appealable order. It is from this decision that Rita now appeals to this Court.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law No. I: An order determining that a public children's services agency is not required to make reasonable efforts to prevent the removal of the child from the child's home, eliminate the continued removal of the child from the child's home, and return the child to the child's home under Ohio Revised Code §2151.419(A)(2)(e) is a final appealable order.

A. Final Appealable Orders

A court of appeals has jurisdiction to hear final appealable orders.⁷ What constitutes a final appealable order is defined by statute in Revised Code §2505.02. In relevant part that section provides:

“(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:

...

(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.”⁸

⁷ Ohio Const. Art. IV, Sec. 3, B(2).

⁸ R.C. §2505.02(B).

The terms “provisional remedy” is defined in R.C. §2505.02(A). Juvenile proceedings are special statutory proceedings.⁹ Moreover, parental custody of a child is a substantial right within the meaning of R.C. §2505.02.¹⁰ This Court has stated that “A final order, therefore, is one disposing of the whole case or some separate and distinct branch thereof.”¹¹

2. Orders Granting Reasonable Efforts Bypass are Final Appealable Orders Under R.C. 2505.02(B)(4)

A provisional remedy is “a proceeding ancillary to an action.”¹² An ancillary proceeding is one that is attendant upon or aids another proceeding.¹³ The order also must meet two criteria as well. First it must determine the action and prevent a judgment in favor of the appealing party with respect to the provisional remedy.¹⁴ Second, 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.”¹⁵ “The lack of a ‘meaningful or effective remedy,’ however, does not require the absence of every theoretical remedy.”¹⁶

An order granting reasonable efforts bypass is appealable under Section 2505.02(B)(4). A proceeding to determine whether reasonable efforts bypass should be granted is an ancillary to the underlying case because it is attendant upon the underlying abuse, neglect, or dependency action. It cannot exist outside of that context nor be heard outside of the case. The process is initiated by motion, is adversarial, may be contested, may be heard at its own separate hearing,

⁹ *In re Adams*, 115 Ohio St.3d 86, 2007-Ohio-4840, ¶43.

¹⁰ *In re Murray* (1990), 52 Ohio St.3d 155, 157.

¹¹ *Lantsberry v. Tilley Lamp Co.* (1971), 27 Ohio St.2d 303 , 306.

¹² R.C. §2505.02(A)(3).

¹³ *In re A.J.S.*, 120 Ohio St.3d 185, 2008-Ohio-5307 at ¶20.

¹⁴ R.C. §2505.02(B)(4)(a).

¹⁵ R.C. §2505.02(B)(4)(b).

¹⁶ *Bob Krihwan Pontiac-GMC Truck, Inc. v. Gen. Motors Corp.*, 141 Ohio App. 3d 777 (10th Dist. Franklin County 2001).

and is granted by order of the juvenile court. Thus an order granting reasonable efforts bypass represents a proceeding which is ancillary to the action and as such is a provisional remedy.

An order granting reasonable efforts bypass determines the action with respect to the provisional remedy (the reasonable efforts bypass request). Once a juvenile court grants the request, it cannot revisit the matter. The statute specifically requires that the juvenile court grant the motion under certain circumstances. The request for reasonable efforts bypass is conclusively determined unless reversed upon appeal.

An order granting reasonable efforts bypass prevents a judgment in favor of the parent with respect to a provisional remedy (the reasonable efforts bypass request). Once the request has been granted, the agency is relieved of its duty to make reasonable efforts. A parent cannot obtain a reinstatement of that obligation as there is no process to do such. The General Assembly has created a process to eliminate part of a parent's substantive due process protections. Once removed, those protections cannot be reinstated other than by a reviewing court on appeal.

A parent appealing at the termination of the case is not provided an effective remedy. Generally if a parent is appealing the custody determination, the parent has lost custody to the State (permanent custody), to a long term placement (PPLA), or to another person (legal custody). An order granting reasonable efforts bypass eliminates the duty of a public children's services agency to make reasonable efforts to prevent the removal of the child from the child's home, eliminate the continued removal of the child from the child's home, and return the child to the child's home. The public children's services agency makes reasonable efforts by providing the parent with services or facilitating services which are designed to correct the reason for removal. When an order eliminates the public children's services agency's duty to make

reasonable efforts, the agency now has no obligation to make provide services, facilitate services, or make referrals to assist a parent. Thus when a juvenile court grants a motion for reasonable efforts bypass for a parent who has had a child removed, that parent must then proceed to attempt to correct the problem through the balance of the case without the assistance of the agency.

Forcing a parent to wait until an adverse conclusion to appeal the reasonable efforts bypass does nothing to provide meaningful review. The entire juvenile court system is designed to give parents the assistance they need to eliminate the problem that resulted in removal of the child as well as to reduce the time children spend in foster care or out of their parent's home. But if a parent must wait till an adverse decision at the end of a case to appeal the grant of a reasonable efforts bypass decision and if the result of the appeal is that it reverses the adverse decision granting the reasonable efforts bypass, then the parent must go back to the juvenile court, receive the assistance of the services which were improperly denied to begin with, and re-litigate the case to conclusion again. During this whole process, the child remains out of the home of the parent and possibly in foster care which is exactly what the juvenile system attempts to avoid.

However, the damage to the parent child relationship by the absence of the child from the home can be significant. Forcing a parent to wait a year or 2 years till an adverse conclusion effectively deprives the parent of the assistance to correct the cause of removal early on in the case. Without the assistance of the State, some parents cannot correct the cause of the removal on their own. Moreover, some problems get worse over time if not corrected (i.e. drug and alcohol dependency). But when a juvenile court cuts off reasonable efforts during the case, the vital assistance that could be used during the case by the parent is thereby eliminated. Denying the parent the right to appeal the reasonable efforts bypass may deprive the parent of any real

hope to fix the problem even if the case is appealed at its conclusion because the problem may be too bad at that point to be corrected even if the case is reversed on appeal.

The impracticability of appeal after a final judgment is a significant factor in determining whether immediate review is available.¹⁷ Because a parent is not provided effective appellate review of an order granting reasonable efforts bypass by being forced to wait until the conclusion of the case, the final part of the test is met. A grant of reasonable efforts bypass is a provisional remedy which meets the qualifications of subsection (B)(4) and as such is a final appealable order under that subsection.

CONCLUSION

For the reasons stated herein, this case involves questions of public and great general interest. Appellant requests 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,



Derek Cek #0072477
Counsel for the Appellant
2725 Abington Rd., Suite 102
Fairlawn, Ohio 44333
(330) 869-6000 (Office)
(330) 869-6060 (Fax)
d.cek@sbcglobal.net

¹⁷ *Columbus v. Adams* (1984), 10 Ohio St.3d 57, 60.

CERTIFICATION OF SERVICE

I hereby certify that a copy of this Memorandum in Support of Jurisdiction was sent by regular U.S. Mail postage prepaid on the 23rd day of November 2009 to each of the following:

Richard Kasay
Summit County Safety Building
53 University Ave., 6th Floor
Akron, Ohio 44308
Attorney for CSB

Terra Howell
CASA/Guardian ad Litem
650 Dan St.
Akron, OH 44310

Walter Young, III
385 S. Van Buren
Barberton, OH 44203



Derek Cek #0072477
Counsel for the Appellant

APPENDIX

COURT OF APPEALS
STATE OF OHIO DANIEL M. HORRIGAN
)ss:
COUNTY OF SUMMIT A110: 18

COURT OF APPEALS
DANIEL M. HORRIGAN
NINTH JUDICIAL DISTRICT

2009 OCT 28 AM 10: 22

IN RE: SUMMIT COUNTY
CLERK OF COURTS

SUMMIT COUNTY
CLERK OF COURTS
C.A. No. 24911

A. T.

JOURNAL ENTRY

Upon review of the initial filings, the Court determines that it is without jurisdiction to hear this appeal. Specifically, we conclude that the order granting Summit County Children Services' motion for a reasonable efforts by-pass pursuant to R.C. 2151.419(A)(2)(e) is not a final, appealable order pursuant to R.C. 2505.02.

Appellant has appealed the trial court's July 17, 2009, order granting appellee's motion for a reasonable efforts by-pass issued in the permanent custody matter below. That order states in relevant part:

"The Motion of Summit County Children Services for a reasonable efforts by-pass is granted. R.C. 2151.419(A)(2)(e). Mother * * * has previously had her parental rights involuntarily terminated as to three other children. The provisions of R.C. 2151.419 mandates (sic) that the Court issue an Order that the agency not be required to make reasonable efforts should one of the numerated factors be found. The Court is not persuaded by Mother's argument that the statute is unconstitutional."

R.C. 2151.419(A)(2)(e) provides:

“If any of the following apply, the court shall make a determination that the agency is not required to make reasonable efforts to prevent the removal of the child from the child's home, eliminate the continued removal of the child from the child's home, and return the child to the child's home:

* * *

(e) The parent from whom the child was removed has had parental rights involuntarily terminated with respect to a sibling of the child pursuant to section 2151.353, 2151.414, 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.”

The Ohio Supreme Court has, on several occasions, addressed finality in the context of parental rights matters and has set forth generally when a matter will be determined final for purposes of appeal. The court has held that an adjudication by a juvenile court that a child is “neglected,” “dependent,” or “abused” as defined in R.C. Chapter 2151, followed by a disposition, including the disposition of temporary custody to a public children services agency, pursuant to R.C. 2151.353(A)(2), is a final appealable order. See *In re Murray* (1990), 52 Ohio St.3d 155, 556 N.E.2d 1169; *In Re H.F., et al.* (2008), 120 Ohio St. 3d 499. We have found no case law, however, permitting an interlocutory appeal from a motion granting a reasonable efforts by-pass.

Nor are we persuaded by appellant’s argument that this matter is immediately appealable under either R.C. 2505.02(B)(2) or (B)(4) as a substantial right in a special proceeding or as a provisional remedy. Appellant first argues that the order affects a substantial right in a special proceeding. Appellant contends that by eliminating the

applicability of the reasonable efforts requirement, the court "is eliminating the need for a public children's services agency to make reasonable efforts. In so doing the juvenile court is removing part of the statutory due process protections * * *. Although the process is a statutory process, the order granting reasonable efforts bypass is an order which affects a substantial right* * *."

Appellant also contends that the order is final because it denies a provisional remedy. Appellant argues that "[f]orcing a parent to wait until an adverse conclusion to appeal the reasonable efforts by-pass does nothing to provide meaningful review. * * * During this whole process, the child remains out of the home of the parent and possibly in foster care * * *."

To be immediately appealable under either of the above categories, however, effective review must be precluded absent immediate appeal. See *Southside Community Develop. Corp. v. Levin*, 116 Ohio St.3d 1209, 2007-Ohio-6665 and R.C. 2505.02(B)(4). We are not persuaded that this element has been met. Rather, this court has addressed claimed error in the granting of such a motion upon appeal from the final order of adjudication and disposition. See *In Re J.E.*, 9th Dist. No. 23865, 2008-Ohio-412. Furthermore, we find no support for the opposite conclusion.

Accordingly, we conclude that appellant will not be precluded effective relief absent immediate appeal and therefore this matter is not final and appealable.

The appeal is dismissed. Costs are taxed to appellant.

The clerk of courts is ordered to mail a notice of entry of this judgment to the parties and make a notation of the mailing in the docket, pursuant to App.R. 30, and to provide a certified copy of the order to the clerk of the trial court. The clerk of the trial

court is ordered to provide a copy of this order to the judge who presided over the trial
court action.



Judge

Concur:
Belfance, J.
Carr, J.