

THE SUPREME COURT OF OHIO

The State of Ohio, ex rel.	:	
Richland County Children Services, and	:	
Patricia A. Harrelson Exc. Dir.	:	
	:	Case No. 2017-1793
	:	
Relators,	:	
	:	
v.	:	
	:	
Richland County Court of Common Pleas,	:	
The Hon. Judge Heather Cockley, and	:	
Magistrate Steve McKinley	:	
	:	
Respondents.	:	

**RESPONDENTS' MOTION TO DISMISS**

Come now Respondents, by and through counsel, pursuant to Rule 12(B)(6) of the Ohio Rules of Civil Procedure and S.Ct. Prac.R. 12.04, and hereby move the Court to dismiss Relators' complaint for a writ of prohibition and mandamus. This motion is supported by the attached memorandum.

Respectfully submitted,

**/s/ Lisa M. Zaring**  
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*Counsel for Respondents*

## **Memorandum in Support**

Relators, Richland County Children Services (“RCCS”) and Patricia Harrelson, Executive Director of Richland County Children Services, seek a writ of mandamus and prohibition against Respondents, the Richland County Court of Common Pleas, Domestic Relations Division (the “Domestic Relations Court”), the Honorable Judge Heather Cockley of the Domestic Relations Court, and Magistrate Steve McKinley of the Domestic Relations Court. For the reasons stated herein, Respondents respectfully request this case be dismissed.

### **Factual Allegations**

The complaint stems from a case before the Domestic Relations Court—*Aldrich v. Carter*, Case No. 2012 PAT 0452, which began as a paternity suit (Complaint, p. 4.). The complaint seeks a writ of mandamus directing Respondents to vacate an order issued in that case on November 21, 2017 (the “Underlying Order”<sup>1</sup>), and a writ of prohibition forbidding Respondents from issuing future similar orders.

In the Underlying Order, Respondents ordered a child removed from the child’s parents after finding: it was not in the best interest of the child to designate either Plaintiff or Defendant as the residential parent and legal custodian of the child; both parents were unsuitable; and no other party had requested custody. *See* Exhibit A, p. 19. Respondents found there was probable cause to believe the child was a neglected and/or abused and/or dependent child, and ordered the child into the temporary custody of

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<sup>1</sup> The order in question is not attached to the complaint but it is cited to throughout. Accordingly, for purposes of this motion, this Court may consider the order part of the complaint. *See Marks v. Reliable Title Agency, Inc.*, 7th Dist. Mahoning No. 11 MA 2, 2012-Ohio-3006, ¶9 (“Courts will look only to the complaint, and where appropriate, any written instruments upon which a claim is predicated, to determine whether the allegations are legally sufficient to state a claim.”) A copy of the order is attached hereto as Exhibit A.

RCCS. *Id.* at p.19-20. Respondents then certified the case to the Richland County Juvenile Court (the “Juvenile Court”) for further proceedings. *Id.* at 20.

Relators bring this case asserting Respondents patently and unambiguously lacked jurisdiction to issue the Underlying Order. They claim Respondents did not have jurisdiction to remove the child from her parents and place her in RCCS’s custody because only the Juvenile Court has original and exclusive authority to do so. (Complaint, p. 6-7.) Relators seek an order vacating the Underlying Order and forbidding Respondents from exercising judicial power to issue orders of custody that are within the jurisdiction of the Juvenile Court.

### **Analysis**

“A motion to dismiss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of the complaint.” *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545, 548, 605 N.E.2d 378 (1992); *see also State ex rel. Carnail v. McCormick*, 126 Ohio St.3d 124, 2010-Ohio-2671, 931 N.E.2d 110, at ¶ 6 (A court can dismiss a mandamus action under Civ.R. 12(B)(6)). A court may not grant a motion to dismiss for failure to state a claim upon which relief may be granted unless it appears “beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery.” *O’Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242, 327 N.E.2d 753 (1975), syllabus; *see also Taylor v. London*, 88 Ohio St.3d 137, 139, 723 N.E.2d 1089 (2000). Furthermore, when considering a Civ.R. 12(B)(6) motion, the trial court must review only the complaint, accepting all factual allegations as true and making every reasonable inference in favor of the nonmoving party. *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 192, 532 N.E.2d 753 (1988); *Estate of Sherman v. Millhon*, 104 Ohio App.3d 614, 617, 662 N.E.2d 1098 (10th

Dist.1995); see also *JNS Ents., Inc. v. Sturgell*, 4th Dist. Ross No. 05CA2814, 2005–Ohio–3200, at ¶ 8. The court, however, need not presume the truth of legal conclusions that are unsupported by factual allegations. *McGlone v. Grimshaw*, 86 Ohio App.3d 279, 285, 620 N.E.2d 935 (4th Dist.1993), citing *Mitchell*, 40 Ohio St.3d at 193.

**I. Relators’ complaint for writ of mandamus directing Respondents to rule on Relator’s Motion to Set Aside is moot.**

The Supreme Court has held mandamus will not issue where the requested relief has been obtained: “Neither procedendo nor mandamus will compel the performance of a duty that has already been performed.” *State ex rel. Kreps v. Christiansen*, 88 Ohio St.3d 313, 318, 725 N.E.2d 663, 668 (2000).

On December 22, 2017, this Court issued a preemptory writ to Respondents in *State ex rel. Richland Cty. Children Servs. v. Richland Cty. Court of Common Pleas* (see Slip Opinion No. 2017-Ohio-9160) (“Slip Opinion”). Immediately following, Respondents issued an Order vacating the Underlying Order. (See Order of December 26, 2017, attached as Exhibit B.<sup>2</sup>) This matter is therefore moot.

Realizing Relator may dispute Respondents’ mootness arguments on grounds that, either voluntary cessation does not render a case moot,<sup>3</sup> or a concern that the issues are capable of repetition and yet evading review,<sup>4</sup> and because Relators’ request

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<sup>2</sup> The Court may consider this exhibit for purposes of Respondents’ mootness argument. *Pewitt v. Lorain Corr. Inst.*, 64 Ohio St.3d 470, 472, 1992-Ohio-91 (1992) (“an event that causes a case to become moot may be proved by extrinsic evidence outside the record”).

<sup>3</sup> See *United States v. W.T. Grant Co.*, 345 U.S. 629 (1953).

<sup>4</sup> An exception to the mootness doctrine is presented when issues are “capable of repetition, yet evading review.” *State ex rel. Plain Dealer Publishing Co. v. Barnes*, 38 Ohio St.3d 165, 527 N.E.2d 807 (1998), paragraph one of the syllabus. This Court has limited “this exception [to] exceptional circumstances in which the following two factors are both present: (1) the challenged action is too short in its duration to be fully litigated before its cessation or expiration, and (2) there is a reasonable expectation that the same

for a writ of prohibition is not moot,<sup>5</sup> Respondents submit the following additional arguments:

- 1) Richland County Domestic Relations Court has jurisdiction to order children into the care of RCCS because of the unusual jurisdictional scheme applicable in Richland County which requires the Domestic Relations Court to exercise juvenile jurisdiction; therefore, prohibition should not issue.
- 2) Public Policy necessitates that Richland County Domestic Relations Court be able to place children in RCCS custody following a finding that neither custodial parent is suitable and there is no alternative custodian available.

Respondents have briefed these arguments in their Motion for Reconsideration or Clarification in Case 2017-0604, and they provide additional support for these arguments herein. Further, if the Court reconsiders its Slip Opinion and finds Respondents acted with appropriate jurisdiction in Case 2017-0604, Respondents submit the same would apply to the claims asserted herein and prohibit a writ of prohibition from issuing.

**I. Richland County Domestic Relations Court has jurisdiction to order children into the care of RCCS because of the unusual jurisdictional scheme applicable in Richland County; therefore, a writ of prohibition should not issue.**

In the Slip Opinion, this Court held the Richland County domestic-relations court has concurrent jurisdiction with the Richland County juvenile court “to determine the care, custody, or control of any child not a ward of another court of this state.” *State ex rel. Richland Cty. Children Servs. v. Richland Cty. Court of Common Pleas*, Slip Opinion No. 2017-Ohio-9160, ¶14. R.C. 2301.03(G)(1). The only exception to this

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complaining party will be subject to the same action again.” *State ex rel. Calvary v. Upper Arlington*, 89 Ohio St.3d 229, 231, 2000-Ohio-142, 729 N.E.2d 1182.

<sup>5</sup> *State ex rel. Rogers v. McGee Brown* (1997), 80 Ohio St. 3d 408 (When a petition claims that a judge patently and unambiguously lacks jurisdiction, a prohibition action is not rendered moot by journalization of an entry disposing of the matter the court is said not to have jurisdiction over.)

concurrent jurisdiction is for cases “that are subject to the exclusive original jurisdiction of the juvenile court.” *Id.* And, by statute, a juvenile court has exclusive original jurisdiction “[c]oncerning any child who on or about the date specified in the complaint, indictment, or information, is alleged \* \* \* to be a[n] \* \* \* abused, neglected, or dependent child.” *Id.* at ¶11, citing R.C. 2151.23(A)(1).

This Court further held, however, that “[t]he domestic-relations court’s only recourse, upon suspicion of abuse, neglect, or dependency, is to transfer the matter to the juvenile court.” *Id.* at ¶18. The Court held Respondents could not place a child into the custody of RCCS under authority of R.C. 2151.31(A), because that statute provides that a child may be taken into custody “[p]ursuant to an order of the court,” and if “the court’ in R.C. 2151.31(A) were intended to apply to the domestic-relations court, then it should say so, given that the statute appears in the section governing juvenile courts.” *Id.* at ¶17.

Respondents contend that the Court’s holding failed to take into consideration the fact that, in Richland County (and three other counties in Ohio), R.C. 2301.03 gives the Domestic Relations Court juvenile court responsibilities, therefore “the court” reference in R.C. 2151.31(A) should be read to include the domestic-relations court in these four exceptional counties. Further, R.C. 2301.03(G) gives the Richland County Domestic Relations Court “juvenile \*\*\* court responsibility,” as the section header states:<sup>6</sup>

The division of domestic relations has concurrent jurisdiction with the juvenile division of the court of common pleas of Richland county to determine the care, custody, or control of any child not a ward of another court of this state, and to hear and determine a request for an order for the support of any child if the request is not ancillary to an action for divorce,

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<sup>6</sup> This statute section is captioned: “2301.03 Judges of domestic relations division; juvenile and probate court responsibility.”

dissolution of marriage, annulment, or legal separation, a criminal or civil action involving an allegation of domestic violence, or an action for support brought under Chapter 3115. of the Revised Code. Except in cases that are subject to the exclusive original jurisdiction of the juvenile court, the judge of the division of domestic relations shall be assigned and hear all cases pertaining to paternity or parentage, the care, custody, or control of children, parenting time or visitation, child support, or the allocation of parental rights and responsibilities for the care of children, all proceedings arising under Chapter 3111. of the Revised Code, all proceedings arising under the uniform interstate family support act contained in Chapter 3115. of the Revised Code, and all post-decree proceedings arising from any case pertaining to any of those matters.

This section provides Respondents with authority to act as a juvenile court and determine the care, custody, or control of the child because, until the court certifies the matter to the Juvenile Court for further proceedings, the child is not the ward of another court.

It then follows that, included with the court's "juvenile court responsibilities," must be the responsibility to place the child with RCCS if the domestic-relations court finds it is in the best interest for the care of the child. R.C. 5153.16(A)(3) requires RCCS to "[a]ccept custody of children committed to the public children services agency by a court exercising juvenile jurisdiction." The statute does not provide a children services agency must only accept custody of a child committed by a juvenile court; it provides an agency (i.e., RCCS) has a duty to receive custody of a child taken into custody *by a court exercising juvenile jurisdiction*.

Because the Richland County Domestic Relations Court has concurrent jurisdiction to determine the care, custody, and control of a child appearing before it (provided the matter has not yet been certified to the Juvenile Court), it *is a court exercising juvenile jurisdiction* concurrently with the Juvenile Court and it must be permitted to order a child into the custody of RCCS.

## **II. Public Policy weighs in favor of the Domestic Relations Court possessing jurisdiction to order a child into RCCS's custody.**

The Slip Opinion further held that “The domestic-relations court’s *only* recourse, upon suspicion of abuse, neglect, or dependency, is to transfer the matter to the juvenile court.” *State ex rel. Richland Cty. Children Servs. v. Richland Cty. Court of Common Pleas*, Slip Opinion No. 2017-Ohio-9160, ¶18.

Transfers from the Domestic Relations Court to the Juvenile Court operate under R.C. 3109.04 and 3109.06:

- R.C. 3109.04(D)(2) authorizes a domestic relations court to certify a case to the juvenile court upon finding “that it is in the best interest of the child for neither parent to be designated the residential parent and legal custodian of the child.”
- The first paragraph of R.C. 3109.06 provides: “Any court, other than a juvenile court, that has jurisdiction in any case respecting the allocation of parental rights and responsibilities for the care of a child under eighteen years of age and the designation of the child's place of residence and legal custodian or in any case respecting the support of a child under eighteen years of age, may, on its own motion or on motion of any interested party, with the consent of the juvenile court, certify the record in the case or so much of the record and such further information, in narrative form or otherwise, as the court deems necessary or the juvenile court requests, to the juvenile court for further proceedings; upon the certification, the juvenile court shall have exclusive jurisdiction.”
- The second paragraph of R.C. 3109.06 provides yet another manner for certifying a case to the Juvenile Court: “In cases in which the court of common pleas finds the parents unsuitable to have the parental rights and responsibilities for the care of the child or children and unsuitable to provide the place of residence and to be the legal custodian of the child or children, consent of the juvenile court shall not be required to such certification.”

Thus, a finding of parental unsuitability bypasses the need to obtain the juvenile court's consent prior to transferring a case under the second paragraph of R.C. 3109.06. In the Underlying Order, the Domestic Relations Court held it was in the best interest of the child for neither parent to be designated the residential parent and legal custodian of the child, and the court certified the matter to the Juvenile Court.



However, the Domestic Relations Court fully expects, based on recent history, that the Juvenile Court will reject the tendered transfer and send the matter back to the domestic-relations court. As explained in the Underlying Order, this is precisely what has been happening for more than a year:

Prior to October 31, 2016, when the Richland County Domestic Relations Court found both parents to be unsuitable and certified the case to the Richland County Juvenile Court under O.R.C. 3109.06, the Juvenile Court accepted jurisdiction. On October 31, 2016, the Richland County Court decided to process cases which the Domestic Relations Court certified to it in a different manner.

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On January 17, 2017, the Richland County Juvenile Court determined in In the Matter of [J.T.], Case Nos. 2015 PAT 1111 and 2017-MISC-00002, and In the Matter of [O.S.], Case Nos. 2005 PAT 1079 and 2017-MISC-00003, as follows.

BUT WHEREAS upon review of O.R.C. section 2151.23 and O.R.C. section 2301.03(G), which are to be read and interpreted in pari materia, this Court concludes that it does not have subject matter jurisdiction to adjudicate the matters which are the subject of the tendered certification/transfer; and/or the Juvenile Division herein is otherwise precluded as a matter of law from exercising jurisdiction over the tendered certification/transfer of issues;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the tendered certification/transfer is reflected as a nullity pursuant to law. In rendering the Court's ruling herein, it is to be noted that the refection herein of the tendered transfer of issues is based solely upon the statutory and jurisdictional mandates and restrictions of O.R.C. section 2151.23 and O.R.C. section 2301.03(G), as construed in pari materia with each other and with O.R.C. section 3109.04(D)(2) and O.R.C. section 3109.06; and not with regard to the consent provision of O.R.C. section 3109.06." *Id.* at p. 6-7.

The Domestic Relations Court asked the Juvenile Court to reconsider the tendered transfer of O.S.'s case, and the Juvenile Court declined:

[T]he Juvenile Division of the Richland County Court respectfully declines acceptance of the tendered re-transfer. Accordingly, all issues regarding allocation of parental rights and responsibilities regarding the child are

returned to, or otherwise remain in, the Domestic Relations Division of the Richland County Court. *Id.* at p. 8.

Although the Domestic Relations Court “firmly believes the Juvenile Court cannot declare the cases a nullity,” it “understands that two reasonable Courts can differ on the interpretation of the law.” *Id.* at p. 11. But the Juvenile Court’s change in procedure has left the Domestic Relations Court to solely determine how to best serve children in cases in which it determines that both parents are unsuitable and it is not in the best interest of the child to be placed with a relative or other third party. *Id.*

Thus, after the Juvenile Court stopped accepting tendered matters from the Domestic Relations Court in October 2016, the Domestic Relations Court was the only court in a position to protect the children involved. And, as long as the Domestic Relations Court and Juvenile Court continue to interpret the jurisdictional law as it applies in Richland County differently, this problem will continue.

Respondents respectfully submit it is not in the best interest of the children coming before Respondents, whom Respondents deem neglected, abused or dependent or without a suitable parent, to determine Respondents lack jurisdiction to issue an order temporarily placing them in the custody of RCCS. As one court recently pointed out, related to a similar jurisdictional question, a conclusion otherwise “would leave the parties with no venue in which to resolve their dispute.” *Soley v. Soley*, 2017-Ohio-2817, 82 N.E.3d 43 (6<sup>th</sup> District) (after finding that the domestic relations court involved was the only court that would possess subject matter jurisdiction to resolve the parties’ dispute as to the classification of the property incident to divorce, the appellate court “refused” to construe the relevant jurisdictional statute “in such a narrow fashion.”)

In the exercise of its *juvenile* jurisdiction, the Richland County Domestic Relations Court has authority to grant custody to RCCS on a temporary basis; otherwise

its (A)(2) authority over RCCS, implied by R.C. 2301.03(G)(1) & (2), 5153.16(A)(3), and 2151.31, is nullified. The legislature could not have intended either that a child have no legal custodian or that a child remain with an unsuitable parent because no court has jurisdiction.

### **Conclusion**

For these reasons, Respondents respectfully request this Court dismiss Relators' complaint.

Respectfully submitted,

**/s/ Lisa M. Zaring**

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*Counsel for Respondents*

### **CERTIFICATE OF SERVICE**

I hereby certify that on this 16<sup>th</sup> day of January, 2018, the foregoing was filed electronically with the Court. I further certify that a copy of the foregoing has been served by email, upon the following:

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**/s/ Lisa M. Zaring**

LISA M. ZARING (0080659)

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LINDA H. FRARY  
CLERK OF COURTS

**IN THE COURT OF COMMON PLEAS  
RICHLAND COUNTY, OHIO  
DIVISION OF DOMESTIC RELATIONS**

ASHLEY N. ALDRICH

Plaintiff,

CASE NO. 2012 PAT 0452

VS

JUDGE HEATHER M. COCKLEY

JORY A. CARTER

MAGISTRATE STEVE MCKINLEY

Defendant

**MAGISTRATE'S TEMPORARY ORDER**

**AND**

**MAGISTRATE'S DECISION**

This matter came before the Court on November 6, and November 17, 2017, for a hearing on Defendant's Ex Parte Complaint for Allocation of Parental Rights and Responsibilities. Plaintiff was present and represented by Attorney George R. Keyser. Defendant was present and represented by Attorney Kristin E. Brown.

**Findings of Fact**

The parties are the mother and father of Nadea Carter (DOB: 11-3-11). On October 13, 2017, Defendant filed a Complaint and Ex Parte Complaint for Allocation of Parental Rights and Responsibilities. Defendant was designated the temporary residential parent and legal custodian of the parties' child.

Richland County Children Services Board (RCCSB) became involved with the parties and their child in January of 2017. On January 9, 2017, Mother was charged with child endangering for leaving the child home alone. When Mother came home, she was high on posh, and with her boyfriend with whom she had a domestically violent relationship. Mother did not see a problem with being high while caring for the children. Her home conditions were poor.

Mother had a history of domestically violent relationships, very low self-esteem and was allowing violent persons in her home. She has also been diagnosed with bipolar disorder and anxiety, and has substance use/abuse issues. Both of her children tested positive for THC at birth.

As of January 12, 2017, RCCSB planned to file a request in the Richland County Juvenile Court for an interim order of temporary custody to the maternal grandfather with a protective supervision order.

The child began residing at her Paternal Grandmother, Angela Cogar's residence in January of 2017. The child was in Ms. Cogar and Father's care until May of 2017. RCCSB returned the child to Mother in May because she was being cooperative and doing what she needed to do. Therefore, Children Services was "testing the waters" and allowed her to have the child back.

On June 22, 2017, Mother overdosed on posh while the child was in her care. RCCSB wanted the child placed elsewhere, and Mother chose to return the child to Father's home with RCCSB's consent.

A safety plan was written on June 23, 2017 by the previous caseworker. Father signed it. Mother had relapsed and was incarcerated at the time so she never signed it. The safety plan was, therefore, never implemented.

As of July 25, 2017, RCCSB planned to file a complaint in the Richland County Juvenile Court requesting that Father and Ms. Cogar be designated the custodians and be required to cooperate with RCCSB. RCCSB did not file immediately because the child was out of Mother's care and RCCSB, therefore, felt it had additional time to file. After mother was incarcerated and went to a drug rehabilitation facility, the caseworker's supervisor decided there was no need to file because "everybody was compliant."

RCCSB gave Ms. Cogar and Father a "physical custody letter" signed by a caseworker, Carla Wilkinson, and dated July 25, 2017.

On September 30, 2017, Mother placed the child with her great-aunt, Tsawya Davis. RCCSB supported that placement and Ms. Wilkinson gave a "physical custody letter" to Mother and Ms. Davis dated October 5, 2017. RCCSB did not give a copy of the letter to Father. RCCSB gave authority to Ms. Davis to remove the child from the child's school and to enroll her in a new school, missing a full week of school. RCCSB also approved Ms. Davis' denying Father parenting time because RCCSB was worried that Father would not give the child back to Ms. Davis. When asked why the caseworker

did not file in Juvenile Court at that time, she responded, "What would we file for?"

Mother decided that the child would stay with Ms. Davis and the caseworker agreed. The caseworker has never been to Ms. Davis' home.

RCCSB is allowing Mother to make all of the decisions in spite of her legal and drug abuse issues because the case is voluntary, and RCCSB has "not made it [to Juvenile Court] yet."

Ms. Wilkinson has concerns with Ms. Cogar's apartment. The child does not have a bed. She sleeps with Ms. Cogar. There are two bedrooms. Ms. Cogar's nine year old son uses the second bedroom. The apartment is very small for two adults and two children of opposite sexes. There is no outdoor storage so Ms. Cogar stores bottles of antifreeze, car tires, the children's outdoor toys, and bikes piled in the living room. While there is a path to the living room, the stairs are clear and there is a place to sit, it gets congested at times.

Ms. Wilkinson is also concerned because the child is supposed to be in play therapy. She has been advising Father and Ms. Cogar to enroll the child in play therapy since July of 2017. They have not done so yet. RCCSB is recommending play therapy because of the trauma the child has experienced, including watching her mother overdose on drugs, being exposed to substance abuse, witnessing domestic violence, being left alone with unsuitable caregiver(s), being placed in multiple homes, and having issues in school and with her overall functioning.

Ms. Wilkinson is also concerned because Ms. Cogar has COPD and, therefore, does not get out of the house much. The child does not have socialization outside of school unless her Father takes her. In addition, Ms. Cogar's nine year old son hits Nadea and can be very physical with her. Her son is four years older than Nadea and much bigger. Also, while Defendant cares for the child when he is home, he is gone often and sometimes for days at a time due to his work schedule. Finally, Father has a history of drug use.

Father has witnessed Mother being high on posh since the child was born. He has told her not to come pick the child up because she was driving while she was high. In spite of his knowledge of her prior drug use, Father still supported the child being returned to Mother in May. At that time, he trusted RCCSB to do its job. He no longer trusts RCCSB since he was not notified that the child was going to stay with her great-aunt.

### **Conclusions of Law**

#### **In general**

O.R.C. Section 3109.04(D)(2) provides as follow. If the court finds, with respect to any child under eighteen years of age, that it is in the best interest of the child for neither parent to be designated the residential parent and legal custodian of the child, it may commit the child to a relative of the child or certify a copy of its findings, together with as much of the record and the further information, in narrative form or otherwise, that it considers necessary or as the juvenile court requests, to the juvenile court for



further proceedings, and, upon the certification, the juvenile court has exclusive jurisdiction.

O.R.C. Section 3109.06 provides, in part, as follows. In cases in which the court of common pleas finds the parents unsuitable to have the parental rights and responsibilities for the care of the child or children and unsuitable to provide the place of residence and to be the legal custodian of the child or children, consent of the juvenile court shall not be required to such certification.

In Richland County, Ohio

Under O.R.C. section 2151.23(E), the case of any child may not be certified to Juvenile Court in Richland County because Juvenile Court has purportedly been divested of subject matter jurisdiction over custody cases arising under O.R.C. section 2151.23(A)(2).

In an apparent conflict in statutes, this Court has concurrent jurisdiction with Richland County Juvenile Court pursuant to O.R.C. section 2301.03(G) over cases arising under O.R.C. section 2151.23(A)(2).

Prior to October 31, 2016, when the Richland County Domestic Relations Court found both parents to be unsuitable and certified the case to the Richland County Juvenile Court under O.R.C. 3109.06, the Juvenile Court accepted jurisdiction. On October 31, 2016, the Richland County Juvenile Court decided to process cases which the Domestic Relations Court certified to it in a different manner. See for example, In the Matter of: Aaleigha McCarty, Case No. 2016 MISC 00006, in which the Juvenile Court found,

“Upon consideration of ORC 2151.23(A)(2), 2301.03(G), and other applicable statutes, it appears to the Court that this Court does not have jurisdiction to adjudicate or otherwise legally process the tendered transfer of this case from Domestic Relations Court. Accordingly, the Court does not accept the tendered transfer of this case from the Domestic Relations Division at this time. It further appears to the Court that this child is a dependent or neglected child. The Court hereby directs RCCSB to file a dependency or neglect action in this Court to appropriately serve the safety and best interest of the child.”

On January 17, 2017, the Richland County Juvenile Court determined in In the Matter of John Taylor, II, Case Nos. 2015 PAT 1111 and 2017-MISC-00002, and In the Matter of Owen Swanger, Case Nos. 2005 PAT 1079 and 2017-MISC-00003, as follows.

“BUT WHEREAS upon review of O.R.C. section 2151.23 and O.R.C. section 2301.03(G), which are to be read and interpreted in pari materia, this Court concludes that it does not have subject matter jurisdiction to adjudicate the matters which are the subject of the tendered certification/transfer; and/or the Juvenile Division herein is otherwise precluded as a matter of law from exercising jurisdiction over the tendered certification/transfer of issues;

“IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the tendered certification/transfer is rejected as a nullity pursuant to law. In rendering the Court’s ruling herein, it is to be noted that the rejection herein of the tendered transfer of issues is based solely upon the statutory and jurisdictional mandates and restrictions of O.R.C.

section 2151.23 and O.R.C. section 2301.03(G), as construed in pari materia with each other and with O.R.C. section 3109.04(D)(2) and O.R.C. section 3109.06; and not with regard to the consent provision of O.R.C. section 3109.06.”

The Richland County Domestic Relations Court successfully certified the Taylor case to the Cuyahoga County Juvenile Court.

The Richland County Domestic Relations Court requested that the Richland County Juvenile Court reconsider the Swanger case based upon the law set forth in Thompson v. Valentine, 189 Ohio App.3d 661 (Ohio App. 12 Dist. 2010). Thompson stands for the proposition that although certification may not be done under O.R.C. section 2151.23(A)(2), it may be done under O.R.C. section 2151.23(A)(1).

The Juvenile Court decided as follows.

“WHEREAS by Judgment Entry of the Richland County Domestic Relations Court filed March 23, 2017 said Court tendered re-transfer of this case to the Juvenile Division of the Richland County Court of Common Pleas, for reconsideration of whether to accept the tendered transfer pursuant to the Juvenile Court’s exclusive jurisdiction under O.R.C. section 2151.23(A)(1);

“AND WHEREAS upon review the Judge of said Juvenile Court finds that acceptance of said tendered re-transfer is not appropriate for the reason that the child of the action does not appear to be a neglected, abused, or dependent child as defined by O.R.C. section 2151.03, O.R.C. section 2151.031, and O.R.C. section 2151.04, respectively;

“NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the Juvenile Division of the Richland County Court of Common Pleas respectfully declines acceptance of the tendered re-transfer. Accordingly, all issues regarding allocation of parental rights and responsibilities regarding the child are returned to, or otherwise remain in, the Domestic Relations Division of the Richland County Court of Common Pleas... .” See *Burdette v. Swanger*, Case Nos. 2005 PAT 1079 and 2017-MISC-00003.

In determining how to proceed with cases involving unsuitable parents in Richland County, one must consider the following.

There appear to be four counties in Ohio in which the Domestic Relations and Juvenile Court jurisdictions are different from those in the other 84 counties. Those four counties are Richland County, Fairfield County, Butler County and Summit County. The Richland County Domestic Relations Court has been in contact with the Fairfield County Domestic Relations Court, the Butler County Domestic Relations Court and the Summit County Juvenile Court. In Fairfield, Butler and Summit Counties, the Domestic Relations Courts certify cases to the Juvenile Court pursuant to O.R.C. section 3109.06. The Fairfield County Domestic Relations Court has determined that it has jurisdiction to place a child in the shelter custody of Fairfield County Child Protective Services and transfer the case to the Fairfield County Juvenile Court. In Summit County Juvenile Court, Summit County Children Services is joined as a party under O.R.C. section

2151.23(A)(2) and ordered to appear and to be prepared to take custody of children if necessary.

Richland County Domestic Relations Court has concurrent jurisdiction with the Juvenile Court over O.R.C. section 2151.23(A)(2) cases. Therefore, the Domestic Relations Court must have the authority, prior to a certification that is accepted by Juvenile Court, to join Children Services as a party, order the Agency to appear, and designate it as the legal custodian of a child when no parent is suitable and no other person has presented themselves to the Court making a claim for custody of the child. This authority to place a child into the custody of Children Services flows from its concurrent jurisdiction over (A)(2) cases granted by section 2301.03(G)(1) and its power to order that a child be taken into custody under O.R.C. section 2151.31(A). The legislature could not have intended that a child be deprived of the right to a child custody order, and the statutory scheme cannot be interpreted to permit such a result.

In fact, this Domestic Relations Court exercises its authority with the consent of RCCSB to remove a child from his or her parents under O.R.C. section 3109.06 and 2151.23(A)(2) each time the Court grants custody to a non-parent in a case filed through Richland County Children Services Board's Kinship Program.

This Court no longer has the option available to certify cases to the Juvenile Court as the Juvenile Court has determined that the transfers are a nullity. The Domestic Relations Court firmly believes that the Juvenile Court cannot declare the cases a nullity; but understands that two reasonable Courts can differ on the interpretation of the law.

Based upon the Juvenile Court's decision that these cases are a nullity, the Domestic Relations Court must determine how to serve children in which it has determined that both parents are unsuitable and that it is not in the best interest of a child to place the child with a relative or other third party.

The following factors further complicate the determination as to how the jurisdictional statute is to be interpreted in Richland County:

1. The fact that Kinship cases are filed in the Domestic Relations Court and not in the Juvenile Court.
2. The differing standards that Richland County Children Services Board and the Domestic Relations Court apply to determine what placements are appropriate and in the best interest of children.
3. The fact that Ohio, and in particular Richland County, is in the midst of a heroin epidemic.
4. The fact that, until this Court shared its concerns with Richland County Children Services Board Members in early 2017, and in spite of the heroin epidemic, the number of child abuse, neglect and dependency cases being filed in the Richland County Juvenile Court decreased over time as follows.
  - a. 2009 – 328 cases
  - b. 2010 – 274 cases
  - c. 2011 – 244 cases
  - d. 2012 – 185 cases

- e. 2013 – 175 cases
- f. 2014 – 153 cases
- g. 2015 – 168 cases
- h. 2016 – 172 cases

This Court is encouraged to discover that the number of cases filed in the Richland County Juvenile Court for the year 2017 is 285 as of November 20, 2017.

5. The fact that the Domestic Relations Court has been placed in a position of determining the best interest of children whose cases, in the past, have been determined by the Richland County Juvenile Court.
6. The fact that the tools available to assist the Court in determining the best interest of a child in the Domestic Relations Court are very expensive: attorneys, guardians ad litem, custody evaluations, home investigations and so forth; and the fact that parties often cannot afford these tools.
7. The fact that, but for the Kinship Program, many of the cases filed in the Richland County Domestic Relations Court would be filed in the Juvenile Court. The Juvenile Court has tools available to determine the best interest of children including, but not limited to, the services that ought to be provided by Richland County Children Services Board and the various service providers it is connected with, court-appointed attorneys and guardians ad litem, and volunteer guardians ad litem.

8. The fact that Domestic Relations Court dockets are restricted so that paternity cases are required to be completed in one year, custody cases in nine months and divorce cases with children in 18 months. The Juvenile Court is in a position to review cases on a regular basis.

As a result of the Kinship Program and RCCSB's discretion over which cases it chooses to file in the Juvenile Court, the Domestic Relations Court is handling a number of O.R.C. section 2151.23(A)(2) cases. RCCSB has placed children with foster parents, teachers, acquaintances, non-relatives, and drug users/abusers and then asked the Domestic Relations Court to grant custody to those persons. See for example, Ramsey v. Goble, Case No. 2015 PCU 172; Eslinger v. Laney, Case No. 2015 PCU 0105; Miller v. Zehner, Case No. 2015 PCU 0359; and McCarty v. Rinehart, Case No 2015 PCU 0746. This Court must be permitted to grant legal custody to RCCSB when RCCSB ratifies unsuitable placements.

Finally, RCCSB's placement of children with non-parents and non-relatives, without a hearing, without the right to appear at a hearing, and without the assistance of counsel unconstitutionally deprives parents of their children. See also Nelson v. Cecil, Case No. 2015 PCU 0876.

In Riggensbach v. Wilson, Case No. 2017 PAT 0080, this Court designated RCCSB the temporary legal custodian of a child and certified the case to the Richland County Juvenile Court. That case is subject to an Action for Writ of Prohibition and Mandamus that has been pending in the Ohio Supreme Court since May 5, 2017. This



Court has a number of pending cases that may be affected by the Ohio Supreme Court's decision and, therefore, remain pending in this Court without a final decision. However, this Court cannot allow the instant case to pend without further action as the parents are unsuitable, the child appears to be a neglected and dependent child, and RCCSB has failed to file a complaint in the Juvenile Court to the detriment of this young child.

A suitable parent has a paramount right to custody. Under *In re: Perales*, 52 Ohio St. 2d 89 (1977), custody may be awarded to a nonparent only upon a showing that the parents have: 1) abandoned the child; 2) contracted away their right to custody; 3) been found to be unable to support and care for the child. The parents may also be found to be unsuitable if an award of custody to the parent would be detrimental to the child. To find that such detriment exists, the court must measure the harmful effect of custody to either parent on the child. *In re: Hockstock*, 98 Ohio St. 3d 238, 243.

Plaintiff is unable to care for the child due to her illicit drug use and overdosing on drugs while caring for the child. Defendant is unsuitable due the facts that he has been too passive in protecting the child; he has been overly dependent on his mother to provide care for the child as evidenced by the fact that he has no home; the home in which the child stays is overcrowded and has antifreeze, car tires and other items typically stored outside stored in the living room; he has not provided a bed for the child; he has failed to obtain counseling for the child, and he has relinquished the child to an actively drug-abusing mother. The fact that Children Services ratified his choice to return the child to the mother in May of 2017, does not rescue him from his misjudgment. He nonetheless

should have acted to protect the child by filing a motion for custody at that time. There was insufficient evidence that he lacked the resources to do so. An award of custody to him would be contrary to the best interests of the child.

Under O.R.C. section 2151.03(A)(2), a neglected child is any child “[w]ho lacks proper parental care because of the faults or habits of [the child’s] parents, guardian or custodian.” The child is without proper parental care due to the faults and habits of the parents set forth above.

Under O.R.C. section 2151.04(A), a dependent child is one “who is homeless, destitute, or without proper care or support, through no fault of [the child’s] parents, guardian, or custodian.” In a dependency case involving subsection (A), the Ohio Supreme Court held that, “a child who is receiving proper care pursuant to an arrangement initiated by a parent with the caregiver is not a dependent child under R.C. 2151.04(A).” *In re: Riddle*, 79 Ohio St. 3d 259 (1997). A child is not dependent because the care the child receives by a non-parent is imputed to the parent because the parent acted voluntarily in securing that care. A child may be dependent if the parent who placed the child with a third party did so pursuant to an agreement with a children services agency. The Court, in that case found, “because the paternal grandparents were caring for [the child] pursuant to an agreement initiated by the caseworker, rather than pursuant to a voluntary informal agreement initiated by the child’s parent” the child was neglected.

O.R.C. section 2151.04(C) further defines dependency as any child:

(C) Whose condition or environment is such as to warrant the state, in the interests of the child, in assuming the child's guardianship.

A child may be dependent under O.R.C. section 2151.04(C) even when the child is receiving adequate parental care from a non-parent. Crucial to the analysis for determining whether dependency exists under subsection (C) is not simply whether the parent agreed to a third party providing care, but *whether the parent initiated the care-giving arrangement. In re: Riddle.*

In the case of *In re: L.L.*, 2013 Ohio 599, the Fifth District Court of Appeals upheld a dependency finding despite the child receiving adequate parental care by a non-parent third party. Children Services had informally intervened with a voluntary case plan. The parents did not initiate the placement of the children. The placement was initiated by a great-grandmother. The placement was not secure because the mother could have taken the children at any moment and had threatened to do so. The children would not have been adequately cared for in the exclusive care of the mother and the father, who lived in the home with the great-grandmother. Because of mother's inability to care for the children and father's employment, the great-grandmother provided the children's care.

A parent's voluntary surrender of a child precludes a dependency finding only if the third party custody arrangement was initiated by and voluntarily agreed to by the parent. An informal intervention by Children Services resulting in a voluntary case plan is voluntary, but it does *not* show a parent's initiative. Although harm had not come to the child and the child was being adequately cared for in *In re: L.L.* by the great-

grandmother, a dependency finding was permitted because the child would not have been adequately cared for had the great-grandmother not intervened and provided care. The mother's drug use, parenting skills, and lack of care for the children rendered the children dependent because the care-giving arrangement was not initiated by the mother. *In re: L.L.* illustrates that dependency may exist when a child is receiving adequate care if that voluntary care-giving arrangement was not initiated by a parent.

Subsection (C) does not include the language found in subsections (A) and (B) pertaining to a child lacking "adequate parental care." The focus of any court or agency considering whether dependency exists should not be simply on whether a parent acts voluntarily in receiving assistance in caring for the child; the focus must also be on whether the parent initiates a request for assistance. The law does not require waiting until a child is receiving inadequate care, and is actually harmed, before the state intervenes to protect a child.

*In re: L.L.* stands for the proposition that so long as a risk of harm is sufficiently grave, an actual detrimental impact on a child need not be shown. A court is "not required to experiment with the health and safety of a newborn baby where the state can show, by clear and convincing evidence, that placing the child in such an environment would be threatening to the health and safety of that child." *In re: Bishop*, 36 Ohio App. 3d 123 (5<sup>th</sup> District, 1987); *In re: R.C.*, 2017 Ohio 5729 (5<sup>th</sup> District).

The Agency agreed to this placement four months after it, and the father, knew the mother left the child alone and returned high on posh. The Agency did this despite knowing that it was returning physical custody to a person who admitted to the Agency

that she believed that she could care for a child while high. The Agency apparently did not think it was consequential that this belief remained part of the mother's parenting practice even after her child endangering charge. When the Agency was not dictating a placement, it was deferring to the choice of an actively drug-abusing mother.

The Agency should have acted to prevent harm to the child by filing an appropriate neglect and dependency case in Richland County Juvenile Court. By being returned to her mother in May of 2017, the child suffered an avoidable injury. Once the Agency saw that the father and grandmother were not pursuing counseling for the child for this mental injury, after they were told to do so, the Agency again should have filed a neglect and dependency action in Juvenile Court.

Assuming that the child is receiving adequate parental care in the home of Ms. Cogar and the father, or in the home of Ms. Davis, the child in this matter is still a dependent child. Neither parent in this case initiated a request for help from the Agency. The father turned the child back over to a drug abusing mother, knowing her to have drug problems. The father did not at that time file a motion for custody. The child still is not receiving the Agency-recommended play therapy while in the temporary custody of the father. The father continues to show a misplaced reliance on his mother to secure counseling for the child. The father does not have his own home, and but for the grandmother's intervention, the child would not be properly cared for.

The Court finds that it is not in the best interest of the child to designate Plaintiff or Defendant the residential parent and legal custodian of her. The Court further finds that both parents are unsuitable to have the parental rights and responsibilities for the care of the child, and unsuitable to provide the place of residence and to be the legal custodians of her. No other party has requested custody in this case.

Based upon the evidence before the Court, the Court finds that there is probable cause to believe that the child is a neglected and/or abused and/or dependent child as defined in O.R.C. sections 2151.03, 2151.031 and 2151.04.

The Court further finds that there are reasonable grounds to believe that the conduct, conditions, or surroundings of the child are endangering the health, welfare, or safety of the child. Therefore, the Court finds that it is in the best interest of the child to be removed from Plaintiff and Defendant. There is no other party to this action.

Reasonable efforts are not required to be made by Richland County Children Services as the child is in imminent risk, and Children Services has no opportunity to provide preventative services at this time.

#### **TEMPORARY ORDER**

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that, pursuant to Ohio Revised Code section 2151.31(A)(1), and the best interest of the child, the Court

RICHLAND COUNTY  
CLERK OF COURTS  
FILED

hereby places Nadea Carter, born November 3, 2011, in the temporary custody of

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Richland County Children Services Board.

LINDA H. FRARY  
CLERK OF COURTS

IT IS SO ORDERED.

  
MAGISTRATE STEVE MCKINLEY

**MAGISTRATE'S DECISION**

**I, the undersigned, a duly appointed Magistrate of this Court, in accordance with the provisions of the Ohio Revised Code and the Ohio Rules of Civil Procedure, have considered all the evidence in the above styled matter and hereby enter the following Magistrate's Decision.**

The findings of fact and conclusions of law set forth above are incorporated into this Magistrate's Decision by reference. / / / / / /

/ / / / / / / Based upon the same, this Court certifies this case to the Richland County Juvenile Court for further proceedings.

**The Clerk of Courts shall cause a certified copy of all documents listed on the docket in this case to be forwarded to the Richland County Juvenile Court by certified mail.**

**The Domestic Relations Court Administrator shall hand-deliver a copy of all Exhibits to the Juvenile Court.**

IT IS SO ORDERED.

  
MAGISTRATE STEVE MCKINLEY

LINDA HERRARY  
CLERK OF COURTS

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RICHLAND COUNTY  
CLERK OF COURTS  
FILED

**INSTRUCTIONS FOR SERVICE**

The Clerk of Court is hereby directed to immediately serve copies of the within Magistrate's Temporary Order and Magistrate's Decision upon Attorneys George R. Keyser and Kristin E. Brown, by ordinary U.S. Mail; and upon Patricia Harrelson, Executive Director of RCCSB, at 731 Scholl Road, Mansfield, Ohio 44907, by Richland County Sheriff.

  
MAGISTRATE STEVE MCKINLEY

**IMMEDIATE NOTICE**

**WITHIN FOURTEEN (14) DAYS OF THE FILING OF A MAGISTRATE'S DECISION, A PARTY MAY FILE WRITTEN OBJECTIONS TO THE MAGISTRATE'S DECISION. IF ANY PARTY TIMELY FILES OBJECTIONS, ANY OTHER PARTY MAY ALSO FILE OBJECTIONS NOT LATER THAN TEN (10) DAYS AFTER THE FIRST OBJECTIONS ARE FILED.**

**OBJECTIONS SHALL BE SPECIFIC AND STATE WITH PARTICULARITY ALL GROUNDS FOR OBJECTION. ANY OBJECTION TO A FACTUAL FINDING SHALL BE SUPPORTED BY A TRANSCRIPT OF ALL THE EVIDENCE SUBMITTED TO THE MAGISTRATE RELEVANT TO THAT FINDING OR AN AFFIDAVIT OF THAT EVIDENCE IF A TRANSCRIPT IS NOT AVAILABLE.**

**A PARTY SHALL NOT ASSIGN AS ERROR ON APPEAL THE COURT'S ADOPTION OF ANY FACTUAL FINDING OR LEGAL CONCLUSION, WHETHER OR NOT SPECIFICALLY DESIGNATED AS A FINDING OF FACT OR CONCLUSION OF LAW UNDER CIV. R. 53(D)(3)(a)(ii), UNLESS THE PARTY TIMELY AND SPECIFICALLY OBJECTS TO THAT FACTUAL FINDING OR LEGAL CONCLUSION AS REQUIRED BY CIV. R. 53(D)(3)(b).**



IN THE COURT OF COMMON PLEAS  
RICHLAND COUNTY, OHIO  
DOMESTIC RELATIONS DIVISION

RICHLAND COUNTY  
CLERK OF COURTS  
FILED

2017 DEC 26 A 8:07

LINDA H. FRARY  
CLERK OF COURTS

ASHLEY N. ALDRICH,

Plaintiff

CASE NO. 2012 PAT 0452

VS.

JUDGE HEATHER COCKLEY

JORY A. CARTER,

Defendant

JUDGMENT ENTRY

Based upon the Ohio Supreme Court's decision in Richland County Children Services v. Richland County Court of Common Pleas, Case No. 2017-Ohio-9160;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Judgment Entry adopting the Magistrate's Decision filed on November 21, 2017, is vacated.

Whereas, as a result of the Ohio Supreme Court's decision, the undersigned Judge and Judge Ron Spon of the Richland County Juvenile Court have spoken; and

Whereas, as a result of the Ohio Supreme Court's decision, Judge Spon has agreed to no longer reject or decline this Court's certifications/transfers as a nullity, but to hear the same;

The undersigned adopts the findings of fact set forth in the Magistrate's Decision filed on November 21, 2017; and issues the following findings and orders pursuant to O.R.C. sections 3109.04(D)(2) and 3109.06.

The Court finds that it is in the best interest of the child for neither parent to be designated the residential parent and legal custodian of the child; and certifies this case to the Richland County Juvenile Court.

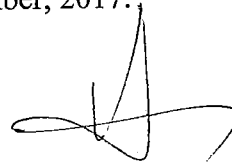
The Court further finds that both parents are unsuitable to have the parental rights and responsibilities for the care of the child, and unsuitable to provide the place of residence and to be the legal custodian of the child. There is no other party to this action.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that all issues as to the allocation of parental rights and responsibilities/custody of the child, Nadea Carter (born November 3, 2011) are certified to the Richland County Juvenile Court for further proceedings.

The Clerk of Courts is hereby directed to immediately serve a time-stamped copy of the within Judgment Entry upon Judge Ron Spon of the Richland County Juvenile Court, all parties and all attorneys of record, by ordinary U.S. Mail.

Court costs are taxed to Plaintiff.

ENTERED THIS 26<sup>th</sup> day of December, 2017.



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HEATHER COCKLEY, JUDGE