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Supreme Court of Ohio

CASE NO. 2022-1251

APPEAL FROM THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
ASHTABULA COUNTY, OHIO
CASE NO. 2022-A-0014

IN RE Z.C.

BRIEF OF AMICI CURIAE CASE WESTERN LAW PROFESSORS AND CUYAHOGA COUNTY PUBLIC DEFENDER IN SUPPORT OF APPELLANT D.C. (FATHER)

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Treatises

Law-Review Articles

Other Authorities

STATEMENT OF INTEREST OF AMICI CURIAE CASE WESTERN LAW PROFESSORS

Three amici are law professors who practice in appellate courts and/or write and teach in the area of litigation. They all have studied litigation procedure, including questions of appellate review like the one raised in this appeal.

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Andrew S. Pollis is a Professor of Law at Case Western Reserve University School of Law, where he teaches an appellate-litigation clinic and evidence. He is the co-author of Painter & Pollis, *Baldwin's Ohio Appellate Practice* (2022–2023 ed.) and annual editions dating back to 2008. He has also authored four law-review articles focusing on appellate jurisdiction and

procedure: Pollis, *The Appellate Judge as the Thirteenth Juror: Combating Implicit Bias in Criminal Convictions*, 95 Temple L.Rev. 1 (2022); Pollis, *Fixing the Broken System of Assessing Criminal Appeals for Frivolousness*, 53 Akron L.Rev. 481 (2019); Pollis, *Civil Rule 54(b): Seventy-Five and Ready for Retirement*, 65 Fla.L.Rev. 711 (2013); and Pollis, *The Need for Non-Discretionary Interlocutory Appellate Review in Multidistrict Litigation*, 79 Fordham L.Rev. 1643 (2011). He has a specialty certification in appellate law from the Ohio State Bar Association and has handled numerous appeals in Ohio and other state and federal courts around the country.

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STATEMENT OF INTEREST OF AMICUS CURIAE CUYAHOGA COUNTY PUBLIC DEFENDER

The Cuyahoga County Public Defender's office was established in 1977 to provide legal services to indigent adults and children charged with violations of the criminal code in Cuyahoga County. The 100-plus member staff of the Cuyahoga County Public Defender's office includes attorneys, law clerks, paralegals, social workers, investigators, and support staff. In total, the office handles over 10,000 cases annually, including misdemeanor cases in Cleveland Municipal Court, felony cases in the Cuyahoga County Court of Common Pleas, juvenile and parental-rights cases in the Juvenile Division, as well as appeals from all the foregoing courts and surrounding municipal courts. The office has represented and currently represents a sizable number of adults whose parental rights have been terminated. Accordingly, a significant number of the Public Defender's present and future clients would be directly impacted by the outcome of the present litigation.

INTRODUCTION

Start with the statute. R.C. 2151.414 requires a trial court to make two findings before granting permanent custody of a child to an agency. First, the trial court must find that any subsection of R.C. 2151.414(B) applies. Second, the trial court must find, under R.C. 2151.414(D), that granting permanent custody to the agency is in the child's best interest. Clear and convincing evidence must support each of these findings.

With the statute's evidentiary focus in mind, the answer to the question certified for review becomes clear: it depends. Specifically, the appropriate standard of review of a trial court's decision to terminate parental rights depends on what the parent challenges on appeal. If the parent challenges the decision's evidentiary sufficiency, the appellate court should review the decision *de novo*. And if the parent argues that the trial court's decision ran counter to the manifest weight of the evidence, the appellate court should apply Ohio's traditional manifest-weight standard.

As this Court explained in *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, sufficiency review and manifest-weight review are "distinct concepts." *Id.* at ¶ 7–8. Neither precludes the other. And neither

implicates the abuse-of-discretion standard, which the Eleventh District erroneously applied below. The Court should therefore reverse.

LAW AND ARGUMENT

A. Parents may challenge the evidentiary sufficiency of a trial court's decision to terminate their parental rights.

1. This Court has already confirmed the availability of sufficiency review in termination-of-parental-rights cases.

In *In re Adoption of Holcomb*, 18 Ohio St.3d 361, 481 N.E.2d 613 (1985), this Court clarified the default standard of review in cases that "involve the termination of fundamental parental rights": "the reviewing court must examine the record and determine if the trier of fact had sufficient evidence before it to satisfy [the clear-and-convincing-evidence] burden of proof." *Id.* at 368. True, *Holcomb* involved a termination of parental rights under Ohio's adoption statute, not R.C. 2151.414. *See id.* at 365–66. But both statutes provide for "proceedings that may result in the involuntary termination of a parent-child relationship." *In re Adoption of Y.E.F.*, 163 Ohio St.3d 521, 2020-

Ohio-6785, 171 N.E.3d 302, ¶ 19. So there is no reason for the standard of review to differ in the R.C. 2151.414 context.[1]

Following *Holcomb*'s directive, at least nine of Ohio's appellate districts have straightforwardly applied this standard in reviewing a trial court's decision to terminate parental rights under R.C. 2151.414.[2] Likewise, two members of this Court have acknowledged the propriety of sufficiency review in the R.C. 2151.414 context. *See, e.g.*, *In re B.K.*, 1st Dist. Hamilton No. C-160514, 2016 Ohio App. LEXIS 3816, at *2 (Sep. 23, 2016) (Fischer, J.) (reviewing for "sufficiency of the evidence"); *In re C.H.*, 1st Dist. Hamilton Nos. C-140415 and C-140416, 2014-Ohio-4821, ¶ 18 (DeWine, J.) (reviewing

[1] Indeed, the certified-conflict question does not specify R.C. 2151.414; it refers broadly to "a trial court's decision to terminate parental rights." *See In re Z.C.*, 169 Ohio St.3d 1439, 2023-Ohio-482, 203 N.E.3d 730.

[2] *See, e.g.*, *In re W.W.*, 1st Dist. Hamilton Nos. C-110363 and C-110402, 2011-Ohio-4912, ¶ 46; *In re A.B.*, 2d Dist. Montgomery No. 22351, 2008-Ohio-1154, ¶ 23; *In re K.M.S.*, 3d Dist. Marion Nos. 9-15-37, 9-15-38, and 9-15-39, 2017-Ohio-142, ¶ 27; *In re H./PO. Children*, 5th Dist. Stark Nos. 2015CA00095 and 2015CA00096, 2015-Ohio-3860, ¶ 15; *In re L.C.*, 6th Dist. Lucas No. L-09-1250, 2010-Ohio-690, ¶ 20; *In re E.T.*, 7th Dist. Mahoning Nos. 22 MA 0116 and 22 MA 0133, 2023-Ohio-444, ¶ 62–63; *In re M.J.*, 8th Dist. Cuyahoga No. 100071, 2013-Ohio-5440, ¶ 24; *In re E.M.*, 11th Dist. Trumbull No. 2022-T-0057, 2022-Ohio-3867, ¶ 18; *In re R.B.*, 12th Dist. Butler Nos. CA2022-01-003 and CA2022-01-004, 2022-Ohio-1705, ¶ 28.

for the existence of "some competent and credible evidence" that "supports the essential elements of the case").

Of course, "[w]hether the evidence is legally sufficient to sustain a verdict is a question of law." *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). Therefore, a sufficiency challenge implicates *de novo* review. *State v. Groce*, 163 Ohio St.3d 387, 2020-Ohio-6671, 170 N.E.3d 813, ¶ 7; *see also Johnson v. Abdullah*, 166 Ohio St.3d 427, 2021-Ohio-3304, 187 N.E.3d 463, ¶ 39 (emphasizing that "courts lack the discretion to make errors of law"). When reviewing for evidentiary sufficiency, then, appellate courts owe no deference to a trial court's decision to terminate parental rights.

2. R.C. 2151.414's clear-and-convincing-evidence burden of proof informs an appellate court's sufficiency review.

The *Holcomb* standard also makes clear that appellate courts should review the evidentiary sufficiency of a trial court's decision to terminate parental rights through the prism of the statutory clear-and-convincing-evidence standard. *Holcomb*, 18 Ohio St.3d at 368, 481 N.E.2d 613 (instructing appellate courts to "examine the record and determine if the trier of fact had sufficient evidence before it ***to satisfy this burden of proof***" (emphasis added)). And clear and convincing evidence "requires that the proof

'produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established.'" *Id.*, quoting *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954), paragraph three of the syllabus (internal ellipsis omitted).

In surveying the caselaw on this conflict, the Eleventh District mistakenly suggested that at least one court had applied a clear-and-convincing standard of review ***on appeal***. *See In re Z.C.*, 2022-Ohio-3199, 195 N.E.3d 590, ¶ 19 (11th Dist.), citing *In re W.W.*, 1st Dist. Hamilton Nos. C-110363, C-110402, 2011-Ohio-4912. But the *W.W.* court actually conducted a ***sufficiency*** review, properly calibrated to "the statutory clear-and-convincing standard." *See W.W.* at ¶ 46. In other words, the *W.W.* court faithfully applied *Holcomb*. And, of course, an evidentiary standard of proof could never also be an appellate standard of review. *See State v. Gwynne*, Slip Opinion No. 2022-Ohio-4607, ¶ 20.

Beyond *Holcomb*, this Court has long recognized that appellate courts should consider the applicable burden of proof when reviewing for evidentiary sufficiency. For example, in *Ford v. Osborne*, 45 Ohio St. 1 (1887), the Court reversed a trial court's judgment where the evidence presented sufficed to meet a "simple preponderance" standard but not the required

clear-and-convincing standard. *Id.* at 3, 7. And in the criminal context, the Court has noted that a sufficiency review analyzes "whether the evidence presented * * * would allow any rational trier of fact to find the essential elements of the crime ***beyond a reasonable doubt***." (Emphasis added.) *Groce*, 163 Ohio St.3d 387, 2020-Ohio-6671, 170 N.E.3d 813, at ¶ 7. After all, "[a]s a matter of logic, a finding that must be based on clear and convincing evidence cannot be viewed on appeal the same as one that may be sustained on a mere preponderance." *In re C.H.*, 89 S.W.3d 17, 25 (Tex. 2002) (termination-of-parental-rights case); *see also Conservatorship of O.B.*, 9 Cal.5th 989, 1005, 266 Cal.Rptr.3d 329, 470 P.3d 41 (2020) (unanimously holding that an appellate court "must make an appropriate adjustment to its analysis when the clear and convincing standard of proof applied before the trial court").

In sum, sufficiency review is available to parents challenging a trial court's decision to terminate their parental rights. Because sufficiency is a legal question, *de novo* is the appropriate standard of review. And when an appellate court undertakes such a review, it "must independently decide whether the evidence in the record is sufficient to" satisfy R.C. 2151.414's clear-and-convincing-evidence burden of proof. *See Bose Corp. v. Consumers*

Union, 466 U.S. 485, 511, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984) (analyzing First Amendment claims requiring a similarly heightened burden of proof).

B. Parents also may argue that a trial court's decision to terminate their parental rights was against the manifest weight of the evidence.

"[T]here should be no question that a court of appeals has the authority to reverse a judgment as being against the weight of the evidence." *Eastley*, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, at ¶ 7. Accordingly, when parents have argued that a trial court's decision to terminate their parental rights was against the manifest weight of the evidence, Ohio appellate courts have been willing to weigh " 'the evidence and all reasonable inferences,' " consider " 'the credibility of witnesses,' " and determine " 'whether in resolving conflicts in the evidence, the trier of fact clearly lost its way.' " *See State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997), quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983). As this language suggests, a manifest-weight challenge is "quantitatively and qualitatively different" from a sufficiency challenge. *Id.* at 386. "Weight of the evidence concerns 'the inclination of the greater amount of credible evidence, offered in a trial, to support one side of

the issue rather than the other,'" whereas "sufficiency is a test of adequacy." *Id.* at 386–387, quoting *Black's Law Dictionary* 1594 (6th Ed.1990).

Yet in the R.C. 2151.414 context, appellate courts have failed to heed this Court's clear guidance in *Eastley* and *Thompkins* in three major ways. First, some courts have indicated that parents may challenge a trial court's decision to terminate their parental rights on ***only*** manifest-weight grounds. *See, e.g.*, *In re B.B.H.*, 10th Dist. Franklin No. 14AP-882, 2015-Ohio-2347, ¶ 14 ("A trial court's determination in a [permanent-custody] case will not be reversed on appeal unless it is against the manifest weight of the evidence."); *In re A.H.*, 6th Dist. Lucas No. L-11-1057, 2011-Ohio-4857, ¶ 11 (same). Second, some courts have blended their manifest-weight and sufficiency analyses. *See, e.g.*, *In re C.E.*, 4th Dist. Athens No. 19CA10, 2019-Ohio-4125, ¶ 30–31, *In re Y.W.*, 3d Dist. Allen No. 1-16-60, 2017-Ohio-4218, ¶ 12. And third, some courts have suggested that it may be necessary to determine whether to apply a "civil" or "criminal" manifest-weight standard. *See, e.g.*, *In re M.D.*, 11th Dist. Geauga No. 2021-G-0038, 2022-Ohio-1462, ¶ 50; *In re B.M.*, 8th Dist. Cuyahoga No. 109956, 2021-Ohio-1196, ¶ 43.

Post-*Eastley*, however, this confusion should not exist. After all, *Eastley* established that (1) manifest-weight review and sufficiency review are not

mutually exclusive; (2) manifest-weight review and sufficiency review are analytically distinct; and (3) the same manifest-weight standard applies in civil and criminal cases. *Eastley* at ¶ 7–23.

Thus, parents should raise their sufficiency and manifest-weight challenges as independent assignments of error. And appellate courts should analyze them separately, remaining mindful of the distinct standards at play and the available remedies.

C. Appellate courts should not apply the abuse-of-discretion standard when reviewing a trial court's decision to terminate parental rights.

Under the abuse-of-discretion standard of review, appellate courts must defer to a trial court's decision so long as it is not "unreasonable, arbitrary or unconscionable." *State v. Beasley*, 152 Ohio St.3d 470, 2018-Ohio-16, 97 N.E.3d 474, ¶ 12.[3] But neither sufficiency review nor manifest-weight review implicates that standard, so the Eleventh District erred in applying it below. *See Z.C.*, 2022-Ohio-3199, 195 N.E.3d 590, at ¶ 11.

As support for its decision to review for an abuse of discretion, the Eleventh District cited *In re Snow*, 11th Dist. Portage No. 2003-P-0080, 2004-

[3] To be sure, Ohio's abuse-of-discretion standard is itself the subject of various competing formulations. *See* Painter & Pollis, *Ohio Appellate Practice*, Appendix G, at G-8 to G-13 (2022–2023 Ed.).

Ohio-1519, ¶ 28. And *Snow*, for its part, cited *Miller v. Miller*, 37 Ohio St.3d 71, 74, 523 N.E.2d 846 (1988). But *Miller* ***did not involve the termination of parental rights***; it dealt instead with a change-of-custody proceeding between divorced parents. *Id.* And as the *Miller* decision itself acknowledged, such a proceeding "***has no relevance***" to a termination of parental rights under R.C. 2151.414. (Emphasis added.) *Id.* at 75.

The statute governing change-of-custody proceedings, R.C. 3109.04, confirms the point. Unlike R.C. 2151.414, R.C. 3109.04 prescribes ***no*** evidentiary standard (much less a heightened one) to guide a trial court's custody determination. And it requires trial courts merely to "***take into account*** that which would be in the best interest of the children." (Emphasis added.) R.C. 3109.04(B)(1). This permissive language equips trial courts with "broad discretion" to allocate parental rights under R.C. 3109.04. *Pater v. Pater*, 63 Ohio St.3d 393, 396, 588 N.E.2d 794 (1992).[4]

[4] Even so, this Court has held that appellate courts should review a trial court's custody award for the existence of "a substantial amount of credible and competent evidence." *Bechtol v. Bechtol*, 49 Ohio St.3d 21, 23, 550 N.E.2d 178 (1990). So although *Miller* and *Bechtol* claim to prescribe an abuse-of-discretion standard of review for such awards, *Bechtol*'s articulation of that standard suggests that sufficiency review is more appropriate.

The same broad discretion is unwarranted when deciding whether to terminate parental rights altogether, as permitted under R.C. 2151.414. As this Court has observed, such a termination is " 'the family law equivalent of the death penalty in a criminal case.' " *In re Hayes*, 79 Ohio St.3d 46, 48, 679 N.E.2d 680 (1997), quoting *In re Smith*, 77 Ohio App.3d 1, 16, 601 N.E.2d 45 (6th Dist.1991). Parents thus "must be afforded every procedural and substantive protection the law allows." *Smith* at 16. One such protection is R.C. 2151.414's clear-and-convincing-evidence burden of proof, which is required by the U.S. Constitution. *See Santosky v. Kramer*, 455 U.S. 745, 768–70, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982). On appeal, the corresponding protection logically should be the dual availability of sufficiency review and manifest-weight review—not the inapposite imposition of the abuse-of-discretion standard.

CONCLUSION

The Court should reverse the Eleventh District's decision and hold that the appropriate standard of review of a trial court's decision to terminate parental rights is *de novo* for sufficiency and the traditional manifest-weight standard for a challenge to manifest weight.

Respectfully submitted,

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