IN THE SUPREME COURT OF OHIO

CASE NO 2022-1251

IN THE MATTER OF: Z.C.	:	On appeal from the Ashtabula
	:	County Court of Appeals,
	:	Eleventh Appellate District
	:	
	:	Court of Appeals Case No.
	:	2022-A-0014
	:	

BRIEF OF AMICUS CURIAE CUYAHOGA COUNTY DIVISION OF CHILDREN AND FAMILY SERVICES (THIS BRIEF DOES NOT EXPRESSLY SUPPORT ANY PARTY'S POSITION)

Judith M. Kowalski (0061386)
333 Babbitt Road, Suite 323
Euclid, Ohio 44123
Phone: 216-261-1529
Fax: 216-261-4821
judykowalski@att.net

Counsel For Appellant D.C.

Colleen Mary O'Toole (0053652)
Ashtabula County Prosecutor
By: Christopher R. Fortunato (0038599)
Assistant Prosecuting Attorney
25 West Jefferson Street
Jefferson, Ohio 44047
Phone: 440-576-3662
Fax: 440-576-3692
crfortunato@ashtabulacounty.us

Counsel for Appellee Ashtabula County Children's Services Board

Michael C. O'Malley (0059592)
Cuyahoga County Prosecuting Attorney
By: Joseph C. Young (0055339)
Counsel of Record
Assistant Prosecuting Attorney
3955 Euclid Avenue
Cleveland, Ohio 44115
Phone: 216-881-3547
Fax: 216-431-4113
jyoung@prosecutor.cuyahogacounty.us

COUNSEL FOR Amicus Curiae Cuyahoga County Division of Children and Family Services

Michael P. Walton (0093016)
212 West Main Street
Cortland, Ohio 44410
Phone: 330-637-3906
E-mail: mpw@mwaltonlaw.com

Counsel for Mother N.H.

Joseph Palazzo (0095498)
30432 Euclid Avenue, # 116
Wickliffe, Ohio 44092
Phone: 440-516-1010
Fax: 440-516-1011
E-mail: josephkpalazzo@outlook.com

Guardian ad Litem for Z.C.

Andrew S. Pollis (0046392)
Counsel of Record
Case Western Law Professors
11075 East Boulevard
Cleveland, Ohio 44106
Phone: 216-368-2766
Fax: 216-368-4137
E-mail: Andrew.pollis@case.edu

Counsel for Amicus Curiae
Case Western Law Professors

Cullen Sweeney (0077187)
Cuyahoga County Public Defender
By: Britta M. Barthol (0052668)
Counsel of Record
Assistant Public Defender
301 Lakeside Avenue, Suite 200
Cleveland, Ohio 44113
Phone: 216-443-7583
E-mail: bbarthol@cuyahogacounty.us

Counsel for Amicus Curiae
Cuyahoga County Public Defender

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STATEMENT OF INTEREST OF AMICUS CURIAE CUYAHOGA COUNTY DIVISION OF CHILDREN AND FAMILY SERVICES

The Cuyahoga County Division of Children and Family Services files this amicus brief and urges this Honorable Court to answer the certified question by finding that an abuse of discretion standard of review is the correct standard to be applied when reviewing a trial court's decision to terminate parental rights.

Amicus Curiae Cuyahoga County Division of Children and Family Services ("CCDCFS") serves the residents of Cuyahoga County, Ohio, in the same way as does Appellee Ashtabula County Children's Services Board for its community. The primary interest of CCDCFS in this matter is the resulting impact on its daily provision of services to children at risk and on the finality and reliability of expeditious resolution of the children's cases within the child protection legal system at Cuyahoga County Juvenile Court. CCDCFS and the undersigned counsel are involved in trying cases involving termination of parental rights at the trial level and in defending permanent custody judgments at the appellate level, all in an effort to achieve expeditious permanency for the children served by CCDCFS. As such, CCDCFS has a great interest in the issue before this Honorable Court in this matter.

STATEMENT OF THE CASE AND FACTS

Amicus Curiae Cuyahoga County Division of Children and Family Services incorporates by reference the Statement of the Case and Facts as set forth by Appellant D.C.

INTRODUCTION

The Eleventh District Court of Appeals held in the case of *In re Z.C.*, 11th Dist. Ashtabula No. 2022-A-0014, 2022-Ohio-3199 that an abuse of discretion standard of review was to be applied when reviewing a claim that a trial court judgment of permanent custody was not supported by clear and convincing evidence. *Id*. at ¶11. In so holding, the *Z.C.* court noted

an apparent conflict between its application of the abuse of discretion standard of review and the approach taken by several other appellate districts in Ohio.

> We recognize that by applying an abuse of discretion standard of review our decision is in conflict with the judgment of the Sixth District Court of Appeals in *In re S.V.*, 6th Dist. Wood No. WD-13-060, 2014-Ohio-422; the Fifth District Court of Appeals in *Matter of Y.M.*, 5th Dist. Tuscarawas Nos. 2021 AP 09 0020 through 0023, 2022-Ohio-677; and the Fourth District Court of Appeals in *Matter of Ca.S.*, 4th Dist. Pickaway Nos. 21CA9 and 21CA10, 2021-Ohio-3874, ¶44, which apply a manifest weight of the evidence standard, and the First District in *In re W.W.*, 1st Dist. Hamilton Nos. C-110363 and C-110402, 2011-Ohio-4912, which applies a clear and convincing evidence standard, and the Twelfth District in *In re R.B.*, 12th Dist. Butler Nos. CA2022-01-003 and CA2022-01-004, 2022-Ohio-1705, which applies a sufficiency of the evidence standard.

Id. at ¶19. By entry issued on February 22, 2023, this Honorable Court deemed that a conflict exists and certified a conflict in this matter.

AMICUS POSITION ON ANSWERING THE CERTIFIED QUESTION:

Certified Question

When reviewing a trial court's decision to terminate parental rights, is the appella[te] standard of review abuse of discretion, manifest weight of the evidence, clear and convincing evidence, or sufficiency of the evidence?

Answer

The certified question suggests that there is but one standard of review for appeals involving the termination of parental rights. This is an oversimplification of the issue, as a party may claim a number of different types of error when appealing such a judgment. Therefore, the correct standard of review depends on the claimed error raised on appeal.

In relation to the wording of the certified question, an appealing party may appeal such a judgment and claim that the trial court judgment is unsupported by the "sufficiency of the evidence". Alternatively, the appealing party may claim that the judgment is "against

the manifest weight of the evidence". These two types of appellate claims are distinct claims and involve different standards of review on appeal. As this Honorable Court has noted, "[t]he legal concepts of sufficiency of the evidence and weight of the evidence are both quantitatively and qualitatively different." *State v. Thompkins*, 78 Ohio St.3d 380, 678 N.E. 2d 541 (1997), paragraph 2 of the syllabus. See also *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, 97 N.E.2d 517, ¶10, citing to *Thompkins*, *supra*. "The distinct inquiries that an appellate court undertakes in determining whether a conviction is supported by sufficient evidence and whether a conviction is against the manifest weight of evidence require different standards of review." *Thompkins*, *supra*, at 391 (Cook, J., concurring).

In the underlying appeal giving rise to this matter, the Appellant claimed that the trial court "erred and abused its discretion in finding that clear and convincing evidence supported granting permanent custody of the subject child to the Ashtabula County Department of Children and Family Services." *In re Z.C.*, 11th Dist. Ashtabula No. 2022-A-0014, 2022-Ohio-3199, ¶5. This assignment of error essentially claims that the trial court ruling was against the manifest weight of the evidence. It is respectfully suggested that the correct standard of review for a manifest weight claim is the "abuse of discretion" standard.

LAW and ARGUMENT

As this Honorable Court has noted, "[w]e have long held that juvenile court proceedings are civil, rather than criminal in nature." *In re Anderson*, 92 Ohio St.3d 63, 65, 2001-Ohio-131, 748 N.E.2d 67 (2001).

A. Clear and Convincing Evidence

The burden of proof to be used by the trial court when conducting permanent custody proceedings is that of clear and convincing evidence. R.C. 2151.414(B)(1).

> Clear and convincing evidence is that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established. It is intermediate, being more than a mere preponderance, but not to the extent of such certainty as is required beyond a reasonable doubt as in criminal cases. It does not mean clear and *unequivocal*.

(Emphasis in original). *Cross v. Ledford*, 161 Ohio St. 469, 477, 120 N.E.2d 118 (1954). A "clear and convincing evidence" standard is not the correct standard of review on appeal, as that is the burden of proof required at the trial court level, which burden does not apply during the appellate review process in this matter. This Honorable Court has distinguished between appellate standards of review and trial court evidentiary standards of proof. See, e.g., *State v Gwynne*, Slip Opinion 2022-Ohio-4607, in which this Honorable Court states:

> "Abuse of discretion," "clearly erroneous," and "substantial evidence" are traditional forms of appellate-court deference that are applied to a trial court's decisions. They are standards of review that are applied by a reviewing court to certain decisions that are made by a factfinder. They are, in essence, screens through which reviewing courts must view the original fact-finder's decision. In contrast, "preponderance," "clear and convincing," and "beyond a reasonable doubt" are evidentiary standards of proof. These standards apply to a fact-finder's consideration of the evidence.

Gwynne at ¶20. Applying a "clear and convincing evidence" standard of review for appellate review of all permanent custody judgments would be akin to requiring a de novo review in each case, regardless of the claims raised on appeal. Such a ruling would in effect relegate the trial court jurist to a mere collector of information, as the judgment on the evidence presented would, as a practical matter, be ultimately determined in every case on appeal by the reviewing court without any deference to the trial court's determination. See, e.g., *Westfield Ins. Co. V. Russo*, Summit App. No. 22529, 2005-Ohio-5942 ("Unlike an abuse of discretion standard, a de novo review requires an independent review of the trial court's decision without any deference to the trial court's determination." *Id*. at ¶8). This would not be a proper standard of review in this circumstance. Applying a blanket "clear and

convincing evidence" standard of review to all permanent custody appeals would be inappropriate. Such a process would give a party a "second bite at the apple" as it were, whenever the party is dissatisfied with the ruling of the trial court judge, in hopes that different minds might reach different conclusions. The possibility that another jurist might reach different conclusions as to weight and credibility based solely on a written record should not be promoted as the appropriate standard of review on appeal. This concept is anathema to the burden of proof at trial, which does not require proof beyond a reasonable doubt, and which therefore contemplates a degree of discretion to be exercised by the trial court and the possibility of disagreement among jurists. As noted above, "clear and convincing *** does not mean clear and *unequivocal*." *Cross v. Ledford*, *supra*.

Should this Honorable Court agree that the "clear and convincing" standard is not the appropriate standard of review on appeal, the remaining alternatives as set forth in the certified questions are "abuse of discretion", "manifest weight of the evidence", and "sufficiency of the evidence". Of these three options, the "abuse of discretion" standard of review is the correct choice in whatever parameters this Honorable Court deems appropriate.

B. <u>Sufficiency of the Evidence vs. Manifest Weight of the Evidence</u>

It is respectfully submitted that the determination that a judgment is not supported by sufficient evidence is a conclusion of law rather than a standard of review. Similarly, a determination that a judgment is against the manifest weight of the evidence is more appropriately characterized as a conclusion of fact rather than an actual standard of review. As this Honorable Court has noted, "[w]e consider questions involving legal sufficiency—for example, whether a certain type of evidence tends to prove an ultimate fact—de novo.

Determinations involving the weight of evidence, on the other hand, are purely factual, and we will reverse them only if the [factfinder] has abused its discretion." (Internal citations omitted.) *Emerson v. Erie Cnty. Bd. Of Revision*, 149 Ohio St.3d 148, 2017-Ohio-865, 73 N.E. 3d 496, ¶13. The two determinations are markedly different, as "even if a trial court judgment is sustained by sufficient evidence, an appellate court may nevertheless conclude that the judgment is against the manifest weight of the evidence". *Eastley*, *supra*, at ¶12. Because each is a conclusion reached after review, while a party may raise either as a claimed error, neither "manifest weight" nor "sufficiency of the evidence" is the correct standard of review to be applied in review of a permanent custody order.

Mother N.H. argues that "when reviewing a trial court's decision to terminate parental rights," the reviewing court should examine both the sufficiency of the evidence and the manifest weight of the evidence. Amicus CCDCFS respectfully submits that this claim is erroneous, as the reviewing court's analysis should be based on the error actually assigned by the Appellant in a given case. As this Honorable Court has noted, "[t]he legal concepts of sufficiency of the evidence and weight of the evidence are both quantitatively and qualitatively different." *Thompkins*, *supra*, at paragraph 2 of syllabus; *Eastley*, *supra*, at ¶10.

C. <u>Sufficiency of the Evidence claim</u>

As noted, a sufficiency of the evidence claim is a determination of law and involves a de novo standard of review. *Emerson*, *supra*. De novo review is a process in which the reviewing court affords no deference to the findings of the trial court. *Westfield Ins. Co., supra*. It must also be noted, however, that in this circumstance, the reviewing court does not assess weight or credibility of the evidence. Rather, in determining whether a permanent

custody judgment is supported by the sufficiency of the evidence, a reviewing court is required to view the evidence in a light most favorable to the prevailing party.

> The standard of review for sufficiency of the evidence is well established. "When evaluating the adequacy of the evidence, we do not consider its credibility or effect in inducing belief. Rather, we decide whether, if believed, the evidence can sustain the verdict as a matter of law." *State v. Richardson*, 150 Ohio St.3d 554, 2016-Ohio-8448, 84 N.E.3d 993, ¶13. In reviewing for sufficiency, we must consider the evidence "in a light most favorable to the prosecution." *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus, *superseded by constitutional amendment on other grounds as stated in State v. Smith*, 80 Ohio St.3d 89, 102, 1997-Ohio-355, 684 N.E.2d 668 (1997), fn. 4.

State v. McAlpin, 169 Ohio St.3d 279, 2022-Ohio-1567, 204 N.E.3d 459, ¶93. This rationale has been applied to civil cases as well.

> "When reviewing the sufficiency of the evidence in civil cases, the question is whether, after viewing the evidence in a light most favorable to the prevailing party, the judgment is supported by competent, credible evidence." *Mtge. Electronic Registration Sys. v. Mosley*, 8th Dist. Cuyahoga No. 93170, 2010-Ohio-2886, P 28. "Put more simply, the standard is whether the verdict is one which could be reasonably reached from the evidence. When engaging in this analysis, an appellate court must remember that the weight and credibility of the evidence are better determined by the trier of fact." *Id*.

Albert v. UPS of America, Inc., 8th Dist. No. 103163, 2016-Ohio-1541, ¶4. The Tenth District Court of Appeals, in reviewing a similar claim in a permanent custody appeal, has described the standard for resolving such a claim in a civil matter as follows:

> Sufficiency of the evidence is a question of law. *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L. Ed. 2d 560. "'The standard for review of the sufficiency of the evidence in a civil case is similar to the standard for determining whether to sustain a motion for judgment notwithstanding the verdict, which is whether the defendant is entitled to judgment as a matter of law when the evidence is construed most strongly in favor of the prevailing party.'" *In re A.E.*, 10th Dist. No. 07AP-685, 2008 Ohio 1375, P24, quoting *Brooks-Lee v. Lee*, 10th Dist. No. 03AP-1149, 2005 Ohio 2288, P19. "'In other words, is the verdict one which could reasonably be reached from the evidence?'" *Id*.

In re J.B., 10th Dist. Nos. 08AP-1108, No. 08AP-1109, No. 08AP-1122, No. 09AP-39, 2009-

Ohio-3083, ¶20. As such, in an appeal involving a claim that a permanent custody judgment is unsupported by the sufficiency of the evidence, the appellate court should employ a de novo standard of review and make its determination after viewing the evidence in a light most favorable to the prevailing party.

D. <u>Manifest Weight claim</u>

In determining whether a judgment is supported by the manifest weight of the evidence, a review court is required to undertake a different analysis than that which applies to a challenge to the sufficiency of the evidence in that it does not simply view the evidence in a light most favorable to the prevailing party. Manifest weight claims have been analyzed inconsistently, sometimes depending on whether the underlying case is civil or criminal in nature. For example, this Honorable Court noted in the civil case of *Seasons Coal Co. v. City of Cleveland*, 10 Ohio St.3d 77, 461 N.E.2d 1273 (1984), that " an appellate court should not substitute its judgment for that of the trial court when there exists, as in this case, competent and credible evidence supporting the findings of fact and conclusions of law rendered by the trial judge." *Id*. at 80. As noted above, "juvenile court proceedings are civil, rather than criminal in nature." *Anderson*, *supra*. This Honorable Court has noted that in civil cases "[j]udgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court ***as being against the manifest weight of the evidence***." (Emphasis added.) *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279, 280, 376 N.E.2d 578 (1978). This Court later noted in *Eastley* that "[t]he phrase 'some competent, credible evidence' in *C.E. Morris* presupposes evidentiary weighing by an appellate court to determine whether the evidence is competent and credible." *Eastley*, *supra*, at ¶15. After *C.E. Morris* was issued, this Honorable Court later stated:

> While we agree with the proposition that in some instances an appellate court is duty-bound to exercise the limited prerogative of reversing a judgment as being against the manifest weight of the evidence in a proper case, it is also important that in doing so a court of appeals be guided by a presumption that the findings of the trier-of-fact were indeed correct. [Footnote omitted.]
>
> The underlying rationale of giving deference to the findings of the trial court rests with the knowledge that the trial judge is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony.

Seasons Coal, *supra*, at 79. The *Seasons Coal* decision further referenced the above-cited holding from *C.E. Morris*, *supra*, as a "succinct" statement of the "interplay between the presumption of correctness and the ability of an appellate court to reverse a trial court decision based on the manifest weight of the evidence[.]" *Seasons Coal*, *supra*, at 80. These cases demonstrate that, in reviewing a manifest weight claim in a civil matter, an appellate court is to afford deference to the trial court conclusions relating to weight and credibility. In this context, this Honorable Court has noted as follows: "We must indulge every reasonable presumption in favor of the lower court's judgment and finding of facts. In the event the evidence is susceptible to more than one interpretation, we must construe it consistently with the lower court's judgment." (Internal citations omitted.) *Gerijo, Inc. v. Fairfield*, 70 Ohio St.3d 223, 226, 638 N.E.2d 533 (1994). This Honorable Court has also specifically held that "it is for the trial court to resolve disputes of fact and weigh the testimony and credibility of the witnesses." *Bechtol v. Bechtol*, 49 Ohio St.3d 21, 23, 550 N.E.2d 178 (1990). This Honorable Court, in reviewing an appellate decision in the case of *Miller v. Miller*, 37 Ohio St.3d 71, 523 N.E.2d 846 (1988), noted that "it was the opinion of the dissenting appellate judge that it was ' * * * inappropriate for this court to independently weigh the evidence and grant a change of custody.'" *Id*. at 73. In reversing the appellate decision, this Honorable Court stated: "[W]e agree with the dissenting appellate judge below

that it is inappropriate in most cases for a court of appeals to independently weigh evidence and grant a change of custody." *Id*. at 74. See also *Ross v. Ross*, 64 Ohio St.2d 203, 414 N.E.2d 426 (1980), in which this Honorable Court upheld a trial court custody judgment which was subject of a manifest weight claim on appeal. The *Ross* court stated that "[t]his court does not undertake to weigh the evidence and pass upon its sufficiency but will ascertain from the record whether there is some competent evidence to sustain the findings of the trial court." *Id*. at 204. Notwithstanding this deference to the trial court, the *Ross* court noted that "[t]his court has never stated that the judge in a custody matter is vested with absolute discretion" and further noted that the statutory best interest factors "have limiting effects upon the judge's discretion." *Id*. at 208. In the context of permanent custody cases, the Eighth District Court of Appeals relied on the *Seasons Coal* and *Miller* cases as follows:

> The discretion which the juvenile court enjoys in determining whether an order of permanent custody is in the best interest of a child should be accorded the utmost respect, given the nature of the proceeding and the impact the court's determination will have on the lives of the parties concerned. Moreover, the knowledge the juvenile court gains at the adjudicatory hearing through viewing the witnesses and observing their demeanor, gestures and voice inflections and using these observations in weighing the credibility of the proffered testimony cannot be conveyed to a reviewing court by a printed record. See, *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80, 461 N.E.2d 1273; Cf., *Miller v. Miller* (1988), 317 Ohio St.3d 71. Hence, this reviewing court will not overturn a permanent custody order unless the trial court has acted in a manner that is arbitrary, unreasonable or capricious. See, *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140 (defining "abuse of discretion").

In re Awkal, 95 Ohio App.3d 309, 316, 642 N.E.2d 424 (8th Dist. 1994). These sentiments were also reflected in the case of *In re Fast*, 9th Dist. Summit No. 15282, 1992 Ohio App. LEXIS 1578 (Mar. 25, 1992), in which the reviewing court noted that "[o]f all the tasks confronting a juvenile court none is more serious than deciding whether to terminate the rights of a

natural parent in his child. For this reason we are careful not to substitute our judgment for that of the juvenile court." *Id*. at *6, citing as support the case of *Seasons Coal*, supra.

Conversely, in the criminal context where a jury was the factfinder at trial, this Honorable Court has indicated that "[w]hen a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a "'thirteenth juror'" and disagrees with the factfinder's resolution of the conflicting testimony." *Thompkins*, *supra*, at 387. Notwithstanding the fact that the *Thompkins* decision endorses an independent weighing of the evidence by the appellate court, however, this Court noted in reviewing a manifest weight claim in a death penalty case that "'[t]he discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence ***weighs heavily against*** the conviction.'" (Emphasis added.) *State v Williams*, 99 Ohio St.3d 493, 2003-Ohio-4396, 794 N.E.2d 27, ¶86, quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1983). As this Honorable Court recently noted in the context of another death penalty appeal,

> To evaluate a claim that a jury verdict is against the manifest weight of the evidence, we review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses, and determine whether in resolving conflicts in the evidence, ***the jury clearly lost its way and created such a manifest miscarriage of justice that we must reverse the conviction and order a new trial***.

(Emphasis added.) *State v. Garrett*, Slip Opinion 2022-Ohio-4218, ¶136, citing *State v. Wilks*, 154 Ohio St.3d 359, 2018-Ohio-1562, 114 N.E.2d 1092, at ¶168. The indication in *Williams* that the evidence must weigh "heavily against the conviction" to support reversal, and the requirement in *Garrett* that a reviewing court must find that "the jury clearly lost its way and created such a manifest miscarriage of justice" before reversing on manifest weight grounds, demonstrate that neither contemplates a de novo review with unfettered substitution of

judgment by the appellate court. It is also noteworthy that the language in *Garrett* sounds strikingly similar to the "abuse of discretion" standard of review, which has been described by this Honorable Court as involving a trial court determination that is "so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias." *Huffman v. Hair Surgeon, Inc.*, 19 Ohio St.3d 83, 87, 482 N.E.2d 1248 (1985), citing *State v. Jenkins*, 15 Ohio St.3d 164, 222, 473 N.E.2d 264 (1984).

It is respectfully suggested that perhaps the terms "abuse of discretion" and "manifest weight" have been used somewhat interchangeably in appellate jurisprudence, which has fostered some of the confusion over the correct standard of review on appeal as opposed to the claimed error. Appellant D.C. argues within his merit brief that "abuse of discretion is not suitable for the important considerations in a permanent custody case." This claim fails to recognize that the seriousness of the issues involved in permanent custody cases are reflected in the heightened "clear and convincing evidence" burden of proof at trial, which differs from the "preponderance of the evidence" burden of proof in other civil cases. Additionally, as this Honorable Court noted in *Eastley*, *supra*, "because 'manifest weight of the evidence' refers to a greater amount of credible evidence and relates to persuasion, ***it does not matter that the burden of proof differs in criminal and civil cases***. In a civil case, in which the burden of persuasion is only by a preponderance of the evidence, rather than beyond a reasonable doubt, evidence must still exist on each element (sufficiency) and the evidence on each element must satisfy the burden of persuasion (weight)." (Emphasis added.) *Eastley* at ¶19. Having made clear that the heightened burden of proof at trial does not require a different manner of review, the *Eastley* court then noted that in conducting

such a review, an appellate court is required to afford a considerable amount of deference to the trial court when considering a manifest weight claim on appeal, even citing to the *Seasons Coal* case in support of this deference.

> In weighing the evidence, the court of appeals must always be mindful of the presumption in favor of the finder of fact.
>
> > "[I]n determining whether the judgment below is manifestly against the weight of the evidence, every reasonable intendment and every reasonable presumption must be made in favor of the judgment and the finding of facts. * * *
> >
> > "If the evidence is susceptible of more than one construction, the reviewing court is bound to give it that interpretation which is consistent with the verdict and judgment, most favorable to sustaining the verdict and judgment."
>
> *Seasons Coal Co., Inc. v. Cleveland*, 10 Ohio St.3d 77, 80, 10 Ohio B. 408, 461 N.E.2d 1273 (1984), fn. 3, quoting 5 Ohio Jurisprudence 3d, Appellate Review, Section 60, at 191-192 (1978).

Eastley at ¶21. The *Eastley* court concluded with the admonition that "[r]eversal on the manifest weight of the evidence and remand for a new trial are not to be taken lightly." *Id*. at ¶31. This required deference to the trial court is also recognized by this Honorable Court in *Garrett*, *supra*, wherein it was noted that a reviewing court must "determine whether in resolving conflicts in the evidence, ***the jury clearly lost its way and created such a manifest miscarriage of justice that we must reverse the conviction and order a new trial***." *Garrett*, *supra*. Given that this Court has afforded such deference even in criminal death penalty cases, it cannot be legitimately argued that such deference should not be afforded to the trial court in a civil permanent custody case, which case involves a lesser burden of proof at trail and contemplates a less severe outcome.

Appellant D.C., Mother N.H., and Amici Case Western Law Professors and Cuyahoga County Public Defender (hereinafter referred to as "Amici") all argue within their respective

Briefs that a termination of parental rights pursuant to R.C. 2151.414 is the family law equivalent to the death penalty, citing to *In re Smith*, 77 Ohio App.3d 1, 601 N.E.2d 45 (6th Dist. 1991). This argument is flawed, in that it focuses on the outcome as it relates to a parent rather than to the child. This Honorable Court has long recognized that "'it is plain that the natural rights of a parent are not absolute, but are always subject to the ultimate welfare of the child, which is the polestar or controlling principle to be observed.'" *In re Cunningham*, 59 Ohio St.2d 100, 106, 391 N.E.2d 1034 (1979), citing *In re R. J. C.* (Fla.App. 1974), 300 So.2d 54, 58. Moreover, "a juvenile court proceeding is a civil action." *Anderson*, *supra*. Additionally, as noted above, deference to the trial court factfinder is warranted even in criminal death penalty cases. *Garrett*, *supra*. Finally, the "death penalty" comparison argument relies on a citation that appears to be misapplied and overused.

The argument that permanent custody actions are "the family law equivalent of the death penalty in a criminal case" became a popular claim following the decision in the case of *In re Smith*, *supra*. The *Smith* court stated: "A termination of parental rights is the family law equivalent of the death penalty in a criminal case. The parties to such an action must be afforded every procedural and substantive protection the law allows." *Id*. at 16.[1] This statement related to a trial court's failure to comply with the requirements of the Rules of Juvenile Procedure when accepting an admission at an adjudicatory hearing. *Id*. It must be noted that the *Smith* pronouncement relates to a right to demand a trial court's adherence to procedural and substantive protections, as opposed to its exercise of discretion in reaching a decision on the merits. Notwithstanding this difference, such an argument may be

[1] This Honorable Court has included such a reference in the case of *In re Hayes*, 79 Ohio St.3d 46, 679 N.E.2d 680 (1997), wherein it analyzed the application of the filing requirements of a permanent custody matter. *Id*. at ¶47-48.

appropriate for purposes of determining the potential effect on a parent, but is not as relevant from the viewpoint of a child awaiting permanency who cannot proceed in attaining this goal until such issues are finally resolved by the courts. Permanent custody proceedings are not designed to be punitive in nature, but are governed by statutes enacted to ensure the protection of our society's most vulnerable citizens. When a child is without adequate parental care for whatever reason, our society has a duty to take action to correct this deficiency in protection of the child. The result may well be undesirable to some (or even all) of the parties involved, but the goal is to ensure the safety and security of the child who is unable to provide for him or herself. While a parent is certainly entitled to "every procedural and substantive protection the law allows" in a case, that parent is not entitled to have their interests promoted inordinately at the expense of the child. To hold otherwise provides a parent with much more than the process due them in the proceedings, and operates to significantly prejudice the child in question, which is anathema to the entire framework of the child protection statutes. Such an argument improperly focuses on the parents rather than on the child. The child, however, is the true focus of child protection proceedings. While parents must be afforded due process, "'it is plain that the natural rights of a parent are not absolute, but are always subject to the ultimate welfare of the child, which is the polestar or controlling principle to be observed.'" *Cunningham*, *supra*. In fact, a trial court is statutorily precluded from focusing on the parents to the detriment of the child. See, e.g., R.C. 2151.414(C), which states, in pertinent part: "In making the determinations required by this section or division (A)(4) of section 2151.353 of the Revised Code, a court shall not consider the effect the granting of permanent custody to the agency would have upon any parent of the child." This principle was recognized by the Supreme Court of Illinois

in a case cited in the Merit Brief of Appellant D.C., that being the Case of *In re D.T.*, 212 Ill.2d 347, 818 N.E.2d 114 (2004). In *D.T.*, the Illinois Supreme Court analyzed its own permanent custody statute, noting that the statute contained different burdens of proof at different stages of the proceedings. In declining to apply a more rigorous "clear and convincing evidence" burden at the best interest stage of the proceedings rather than a "preponderance of the evidence" burden, the *D.T.* court commented that "[t]he stricter clear and convincing burden of proof would place a greater share of the risk of an erroneous determination on the State, operating to the benefit of the parent, but to the detriment of the child." *Id*. at 364. Likewise, the Texas case of *In the Interest of C.H.*, 89 S.W.3d 17, 45 Tex. Sup. J. 1000 (Tex. 2002) as cited in the Merit Brief of Appellant D.C. also recognizes that "[w]hile parental rights are of constitutional magnitude, they are not absolute. Just as it is imperative for courts to recognize the constitutional underpinnings of the parent-child relationship, ***it is also essential that emotional and physical interests of the child not be sacrificed merely to preserve that right***." (Emphasis added.) *Id*. at 26-27. In recognizing the interests of parent and child as separate and competing considerations, the *C.H.* case held that "the appellate standard for reviewing termination findings is whether the evidence is such that a factfinder ***could reasonably form a firm belief or conviction about the truth of the State's allegations***." (Emphasis added.) *Id*. at 23. This Texas standard, much like the language in this Court's decision in *Garrett*, supra, sounds similar to the "abuse of discretion" standard of review as described by this Honorable Court in *Huffman*, *supra*, in that it recognizes deferral to a trial court's reasoned discretion. As such, Appellant D.C.'s citations to *D.T. and C.H.* lend little, if any, support to D.C.'s claim that an "abuse of discretion" standard of review would be inappropriate in the context of a permanent custody manifest weight appeal in

Ohio. Further, Appellant D.C.'s citation to the language in *D.T.* criticizing the "sound discretion" burden of proof is irrelevant in that said language related to the trial court burden of proof being reviewed and not to the appellate standard of review. *Id*. at 366. In the present case, there has been no finding of error in the conduct of the trial such as to merit a retrial. The parties were afforded "every procedural and substantive protection the law allows" from the case initiation to the conclusion of the trial, and the only issue before the Court is whether or not the appellate court applied the correct standard of review on appeal as to the weight of the evidence.

E. <u>Abuse of Discretion Standard of Review</u>

Given the fact that the trial court is entrusted with discretion to "resolve disputes of fact and weigh the testimony and credibility of the witnesses" (*Bechtol*, supra), it stands to reason that when an appellate court reverses a trial court judgment as being against the manifest weight of the evidence, it must have determined that the trial court in some way abused the discretion entrusted to the trial court on the issues of weight and/or credibility. It is therefore respectfully suggested that, however it has been labeled in past cases, the correct standard of review to be applied in considering manifest weight claims is the "abuse of discretion" standard, and that this standard of review is appropriately applied regardless of the trial court burden of proof. *Eastley*, *supra*, at ¶19. Such a standard of review as applied to a permanent custody action pursuant to R.C. 2151.414 does not afford a trial court with unfettered discretion to decide a case, as the trial court must reach its decision based on the "clear and convincing" burden of proof at trial in relation to all relevant factors including the enumerated statutory factors. Cf. *Ross*, *supra*, at 208. Nonetheless, given the well-established deference to the trial court's determinations as to weight and credibility, this

Honorable Court has repeatedly acknowledged that, even in a case involving proof beyond a reasonable doubt and a death sentence, a trial court judgment should not be reversed unless the evidence weighs heavily ***against*** the trial court judgment. See *Garrett*, *supra*. This standard connotes a degree of deference to the discretion possessed by the trial court, which discretion should not be disregarded absent a finding that the factfinder "clearly lost its way and created such a manifest miscarriage of justice" that the trial court judgment must be reversed. *Garrett*, *supra*. A decision to reverse on manifest weight grounds should not be taken lightly (*Eastley*, *supra*) and "should be exercised only in the exceptional case in which the evidence weighs ***heavily against*** the conviction." (Emphasis added.) *Williams*, *supra*. The *Eastley* decision states that the standard of review should be the same in civil and criminal cases, yet even *Eastley* acknowledges that "[i]n weighing the evidence, the court of appeals must always be mindful of the presumption in favor of the finder of fact." *Id*. at ¶21.

This Court has previously applied an "abuse of discretion" standard in considering a juvenile court matter involving a "clear and convincing evidence" burden of proof. In the case of *In re Doe 1*, 57 Ohio St.3d 135, 566 N.E.2d 1181 (1990), the issue on review was "whether the trial court abused its discretion in finding that appellant did not prove by clear and convincing evidence that: (1) she is sufficiently mature and well enough informed to decide whether to have an abortion without parental notification; and/or (2) that parental notification of her desire to have an abortion is not in her best interest." *Id*. at 137. In upholding the appellate court determination in that case, the *Doe* court noted that deference is given to a trial court's judgment in juvenile proceedings involving a "clear and convincing evidence" burden of proof, stating: "When applying the abuse of discretion standard, a reviewing court is not free to merely substitute its judgment for that of the trial court." *Id*. at

137, citing *Berk v. Matthews*, 53 Ohio St.3d 161, 169, 559 N.E.2d 1301, 1308 (1990).

Amici argue that an "abuse of discretion" standard is inappropriate and that the aforementioned *Miller* case is inapplicable to this discussion because it did not involve the termination of parental rights, while failing to acknowledge that neither did the *Thompkins* or *Eastley* decisions involve the termination of parental rights, although Amici rely in part upon these decisions to support their argument. Amici further claim that "the *Miller* decision itself acknowledged, such a proceeding '***has no relevance***' to a termination of parental rights under R.C. 2151.414", which is a misstatement of the cited language from *Miller*. The cited language in question actually notes that the provisions of R.C. 2151.414 have no relevance to the custody matter at issue in *Miller* (not vice versa as is suggested by Amici) and that those provisions have not supplanted the "best interest of the child" standard traditionally held applicable to child custody proceedings. See *Miller*, *supra*, at 75 ("First, R.C. 2151.414 has no relevance to the cause sub judice since it deals with matters pertaining to motions for permanent custody of a child by a county department, board or certified organization that has temporary custody of the child. Second, a review of the pertinent language contained in R.C. 3109.04, which governs the instant action requesting a change of custody, reveals that the 'best interest of the child' standard continues to be the law of Ohio in these matters."). *Miller* did not indicate that its application of the abuse of discretion standard of review bore no relevance to proceedings grounded in R.C. 2151.414. Amici cite to this Court's decision of *Pater v. Pater*, 63 Ohio St.3d 393, 588 N.E.2d 794 (1992) in further support of their claim. *Pater* itself notes, however, that the child custody statute at issue in *Pater* contains language which requires that "the domestic judge *must* consider all relevant factors", including those enumerated at R.C. 3109.04, "that are relevant to the best interests of the child." *Pater*, *supra*,

at 396. *Pater* cites to *Miller* for the position that "[a] reviewing court will not overturn a custody determination unless the trial court has acted in a manner that is arbitrary, unreasonable, or capricious." *Pater* at 396. Notwithstanding Amici's argument that the change-of-custody statute is markedly different than the permanent custody statute, the statutory language of R.C. 3109.04 which was at issue in *Pater*[2] strongly resembles the provisions of R.C. 2151.414(D)(1). R.C. 3109.04(F)(1) states that, "[i]n determining the best interest of a child pursuant to this section *** the court shall consider all relevant factors, including, but not limited to" the specific factors enumerated therein. Similarly, the permanent custody statute requires that "[i]n determining the best interest of a child at a [permanent custody hearing], the court shall consider all relevant factors, including, but not limited to," the specific factors enumerated therein. R.C. 2151.414(D)(1). As can be seen, the statutory requirements for the two types of cases are similar, and since "***it does not matter that the burden of proof differs"*** at the trial level for the two types of cases (*Eastley*, *supra*, at ¶19), there is no reason to outright reject the reasoning in *Miller* and *Pater* as Amici suggest.

When making the determination of a child's best interest pursuant to R.C. 2151.414(D)(1), a trial court is not required to make any particularized findings of fact other than that an order of permanent custody is in the child's best interest. While R.C. 2151.414(D)(1) requires that the trial court "shall consider all relevant factors, including, but not limited to," the enumerated factors within that section, this Honorable Court has noted that "[t]here is not one element that is given greater weight than the others pursuant

[2] The *Pater* court analyzed the provisions of R.C. 3109.04(F)(1), formerly R.C. 3109.04(C). See *Pater*, supra, at 396.

to the statute." *In re Schaefer*, 111 Ohio St.3d 498, 2006-Ohio-5513, 857 N.E.2d 532, ¶56. This Honorable Court has also held that "R.C. 2151.414(D)(1) does not require a juvenile court to expressly discuss each of the best-interest factors in R.C. 2151.414(D)(1)(a) through (e). Consideration is all the statute requires." *In re A.M.*, 166 Ohio St.3d 127, 2020-Ohio-5102, 184 N.E.3d 1, ¶31. Given the fact that the trial court is required to "consider all relevant factors, including*, but not limited to*" the five explicitly enumerated statutory best interest factors, it has been held that "[u]nder the statute, even in the absence of clear and convincing evidence of one of the enumerated factors, a trial court could still properly determine that granting permanent custody to a state agency is in a child's best interest." *In re Shaeffer Children*, 85 Ohio App.3d 683, 692, 621 N.E.2d 426 (3rd Dist. 1993). These holdings reflect the fact that the trial court is afforded considerable discretion in determining whether or not an order of permanent custody is in a child's best interest.

CONCLUSION

The factual determinations required in a permanent custody trial are not the result of mere mathematical formulae capable of repetition notwithstanding the experience of the jurist. It is vital that if we as a society expect our elected juvenile court judges to make the difficult decisions involved in these cases, we must afford them the discretion to make those judgments without threat of reversal simply based on a disagreement as to weight and credibility, especially given the fact that the trial court jurist is in the unique and best position to be able to make those determinations. *Bechtol*, *supra*.

Amicus Curiae Cuyahoga County Division of Children and Family Services urges this Honorable Court to answer the certified question by holding that, when reviewing a trial court's decision to terminate parental rights on a claim that the judgment is against the

manifest weight of the evidence, the correct appellate standard of review is abuse of discretion. Additionally, if the claim on appeal is to the sufficiency of the evidence, the appellate court should conduct a de novo review in which the appellate court determines whether, after viewing the evidence in a light most favorable to the prevailing party, the judgment is supported by competent, credible evidence.

Respectfully submitted,

AMICUS CURIAE CUYAHOGA COUNTY DIVISION
OF CHILDREN AND FAMILY SERVICES

MICHAEL C. O'MALLEY
CUYAHOGA COUNTY PROSECUTOR

By: **/s Joseph C. Young**_____
JOSEPH C. YOUNG (0055339)
ASSISTANT PROSECUTING ATTORNEY
3955 Euclid Avenue
Cleveland, Ohio 44115
Phone: 216-881-3547
E-mail: jyoung@prosecutor.cuyahogacounty.us

CERTIFICATE OF SERVICE

I certify that on May 11, 2023, I filed the foregoing *Brief of Amicus Curiae Cuyahoga County Division of Children and Family Services* via the Court's electronic filing system and that copies were sent via electronic mail to:

Judith M. Kowalski (0061386)
E-mail: judykowalski@att.net
Counsel For Appellant D.C.

Christopher R. Fortunato (0038599)
E-mail: crfortunato@ashtabulacounty.us
Counsel for Appellee Ashtabula County Children's Services Board

Michael P. Walton (0093016)
E-mail: mpw@mwaltonlaw.com
Counsel for Mother N.H.

Joseph Palazzo (0095498)
E-mail: josephkpalazzo@outlook.com
Guardian ad Litem for Z.C.

Andrew S. Pollis (0046392)
E-mail: Andrew.pollis@case.edu
Counsel for Amicus Curiae Case Western Law Professors

Britta M. Barthol (0052668)
E-mail: bbarthol@cuyahogacounty.us
Counsel for Amicus Curiae Cuyahoga County Public Defender

/s Joseph C. Young
JOSEPH C. YOUNG (0055339)
Assistant Prosecuting Attorney