REUNIFICATION PLANNING FOR CHILDREN IN CUSTODY OF OHIO'S CHILDREN SERVICES BOARDS: WHAT DOES THE LAW REQUIRE?

INTRODUCTION

Ohio law mandates that each of its eighty-eight counties has a county department of welfare or a county children services board with powers and duties to provide appropriate care, protection or services to children whose situations warrant such intervention.\(^1\) This mandate is a reflection of society's recognition that where there is parental incapacity to provide a safe and healthful home environment for the children, the state has an obligation to intervene in the children's behalf.\(^2\) For some families this ultimately results in the termination of parental rights and the permanent placement of the children outside the parental home.

Our society and laws presume that parents are generally more capable of the proper care and control of their children than is the state.\(^3\) Consequently, for those parents who provide less than adequate care to their children, children services boards have traditionally offered counselling and other appropriate, rehabilitative services designed to strengthen the family unit and enable the children to remain with their parents.\(^4\) Where parental inability to protect and nurture the children is extreme, however, removal of the children may be necessary to ensure the children's safety and well-being.\(^5\) If the parents' problems are treatable and sufficient progress can be made to enable the children's safe return, the parents' rights can be restored.\(^6\) Nevertheless, there remains a small minority of parents whose inadequacies and abilities to provide care are such that reunification of the family unit is not possible.\(^7\) Because termination of parental rights is a drastic step which should be taken only when all efforts of rehabilitation have failed, questions arise as to when and under what circumstances the relationship between a child and his or her parents should be permanently severed.

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\(^1\)Ohio Rev. Code Ann. §§ 5153.07; 5153.16 (Page 1982).
\(^2\)J. Goldstein, A. Freud \& A. Solnit, Beyond the Best Interests of the Child 3-4 (1973).
\(^3\)Id. at 7-8.
\(^4\)Ohio Rev. Code Ann. § 5153.16 (Page 1982). This statutory provision sets out the powers and duties of county children services boards.

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I. IMPETUS TO CURRENT LEGISLATION

Over the past twenty-five years there have been a number of major studies focusing on the length of time children remain in situations of temporary care and custody. As a result of these studies, many concerns about the systems of state intervention emerged. These concerns included children remaining too long in the foster care system, the lack of rehabilitative services to the parents, and the lack of permanency for children due, in part, to inadequacies in existing laws and inadequate funding of social service programs.

In the mid-1970's a rethinking of the entire system of state intervention began. The Adoption Assistance and Child Welfare Act of 1980 provides a basis in federal law for imposing some degree of accountability on the states concerning enforcement of planning programs for the permanent custody of children in order to avoid unnecessary stays in foster care. This statute further provides for increasing the availability and delivery of preventive and reunification services for children and their families. This law marks the most direct federal intervention to date in child welfare policy, an area traditionally regulated by the states.

The impetus for permanent planning in behalf of children in placement in Ohio was initially formalized at the State level with the passage of H.B. 156 in 1976. This bill reflects the legislature's concerns about children remaining in foster care indefinitely with inadequate consideration being given to permanency for them, either through return to their parents or through adoption.

H. B. 156, which became effective January 1, 1977, required the initial review of all children in care and/or custody of child care agencies within the first four months of 1977, with annual reviews thereafter. The law provides

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2Id.
5See Wald, supra note 10 at 633.
6This bill was codified as Ohio Rev. Code Ann. § 5103.151(A) (Page 1981). This section of the statute provides the following:

   An annual review shall be made of every child placed in the care or custody of a public or private organization, society, association, agency, or individual certified to care for children or certified to place children pursuant to sections 5103.02 and 5103.03 of the Revised Code. This review shall be made by the agency having custody of the child, whether the custody or care arrangement is temporary or permanent, and whether the agency received custody pursuant to court order under chapter 2151. or pursuant to section 5103.15 of the Revised Code, or whether the child is in temporary care as a consequence of the issuance of an emergency court disposition pursuant to section 2151.33 of the Revised Code.
7Ohio Rev. Code Ann. § 5103.151(B) (Page 1981). This section of the statute contains the following
that the reviews are to be handled by the juvenile court or by a five-member county board appointed by the presiding judge of the juvenile court. At a minimum, the review is to evaluate the following: (1) the extent of the care and support provided by the parents while the child is in temporary custody, (2) the extent of communication with the child by the parents, (3) the degree of compliance by the agency with what is in the best interests of the child, (4) a recommendation for the future planning for the child, and (5) the social services being offered to the parents in order to resolve the problem which led to the removal of the care and/or custody of their children.

Following the implementation of H. B. 156, the first statewide information became available on children in custody in Ohio. Data indicated that there were more than 14,000 children in custody, averaging 3.7 years out of their homes. Twenty percent of those children had been in temporary custody as long as six years. The legislators noted several major obstacles to permanency for these children. Mary Boyle, State of Ohio Representative, stated:

language:

The annual review made by the agency having custody of a child shall be filed with the juvenile court that placed the child or in the case of a child placed pursuant to section 5103.15 of the Revised Code with the juvenile court of the county in which the child resides. The initial review shall be made and submitted to the court within sixty days after placement of the child. A review shall be made annually thereafter, except that a juvenile court may order a review to be done more frequently . . . .

Ohio Rev. Code Ann. § 5103.151(C) (Page 1981). This section provides the following:

The review procedures used by each agency having custody of children shall be examined and approved by the juvenile court that receives the report of the annual review of a child from an agency or by a five-member county board appointed for that purpose by the presiding judge of the juvenile court. Every report submitted to the juvenile court shall be reviewed and evaluated by the juvenile court, or the board appointed by the court, and the juvenile court or board shall, within ninety days of the filing of the report, approve the report or order it revised. If a board is appointed, it shall consist of one member representing the general public and four members who are trained or experienced in the care or placement of children by training or experience in the fields of medicine, psychology, social work, education, or related fields. Of the initial appointments made to the board, two shall be for a term ending one year after the effective date of their appointments, two shall be for a term ending two years after that date, and one shall be for a term ending three years after that date. Thereafter, terms shall be for three years, each term ending on the same day of the same month of the year as did the term which it succeeds. Each member shall hold office from the date of his appointment until the end of the term for which he was appointed. Any member appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall hold office for the remainder of such term.

These criteria are set out in Ohio Rev. Code Ann. § 5103.151(B) (Page 198), and they include the following:

(1) The extent of the care and support provided by the parents, or parent, while the child is in temporary custody;
(2) The extent of communication with the child by the parents, parent or guardian;
(3) The degree of compliance by the agency with what is in the best interests of the child;
(4) A recommendation for the child that includes a plan for the future and permanent placement or custody of the child, and the methods of achieving the objective. The plan shall be framed with the objective of doing what is in the best interests of the child.
(5) The nature and utilization of any social services offered to the parent or guardian in order to restore the home and return the child to the home, whether offered by the agency having custody or care of the child, another agency, or the court.


Id. at 1.

Id.
First, with the best intentions, and responding in part to heightened public awareness of child abuse and neglect, and to laws requiring more frequent intervention and removal of children from their homes, many counties had focused scarce resources on foster care. This left little time, money or staff to help to get the children back home safely. Second, juvenile courts were required to follow outdated and inadequate laws to terminate parental rights and thus free children for adoption. There were three distinct results of these termination statutes; some counties almost never petitioned for permanent custody; some counties petitioned but were rarely granted permanent custody; finally, other counties almost always petitioned and were frequently successful in receiving permanent custody.

The legislature drafted H. B. 695 to address these two major concerns. The bill draws on permanency planning concepts adopted in other states and on model termination statutes drafted by the National Juvenile Judges Association. In the view of Mary Boyle, one of the bill’s sponsors, “[T]he critical balance in H. B. 695 is between reunification of the child with his/her family and termination of parental rights.”

A different perspective on the adoption of H. B. 695 is held by Stephen D. Freedman, Attorney for the Franklin County Children Services Board. Attorney Freedman states that “H. B. 695, among other things, purports to provide standards for granting permanent custody of a child to a public agency. But in attempting to solve one set of problems, others replaced them . . . . H. B. 695 is a mixed bag.”

Prior to the implementation of H. B. 695, the ultimate controlling factor regarding child custody was the “best interest of the child.” This standard, undefined as it was and is, allowed the juvenile courts to focus their decisions on the children and their needs. H. B. 695, however, removes this as the controlling factor and makes it just one of three areas for determination by the courts. The other two areas for consideration by the courts are the agency’s efforts to reunite the family and the parental functioning as it relates to the

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1"Id. at 2.
2H.B. 695, adopted July 25, 1980, was to “amend Sections 2151.011, 2151.281, 2151.35, 2151.353, 2151.38, and 2103.151, and to enact Sections 2151.412, 2151.413, and 2151.414 of the Revised Code to authorize a juvenile court to grant permanent custody of a child to an agency to which it has previously granted temporary custody, of the child upon application of the agency and a finding by the court that the child’s parents have acted, and will continue to act, in such a manner that the child is without proper parental care or guardianship and to require certain reports and treatment plans to be filed by agencies that want to have or have temporary custody of children.”
3See Boyle, supra note 17, at 2.
4"Id.
5Freedman, H. B. 695 — A Two Year Retrospective in PUBLIC CHILDREN SERVICES ASSOCIATION OF OHIO NEWSLETTER (July, 1982).
6"Id. at 1-3.
7In re Cunningham, 59 Ohio St. 2d 100, 391 N.E.2d 1034 (1979).
child being without adequate parental care now and in the near future.\textsuperscript{28} To make possible the court’s evaluation of these factors, the law requires the child care agencies to submit an Initial Plan and a Comprehensive Reunification Plan in each case of temporary custody.\textsuperscript{29} These plans focus on parental responsibilities such as support and visitation, consultation with agency staff, and actions the parents are required to take. The plans also focus on the agency’s responsibility to facilitate visitation and provide needed services to the child and parents.\textsuperscript{30}

The problems raised by these various requirements are numerous. To examine some of the difficulties raised by this legislation and the consequent disparity in application by the courts, this paper analyzes fourteen Courts of Appeals cases from ten counties throughout the State of Ohio. The topics for discussion fall into three general areas. The first of these is the retroactive application of the law’s requirements. The second area includes the three factors to be considered by the courts in any motion for the permanent custody of a child. These factors encompass the efforts required by agencies to reunite families whose children have been temporarily removed, including the special problems presented by incarcerated parents. These factors also examine parental functioning, including what constitute the requirements of “adequate parental care” and “in the near future” and the “best interest of the child” standard, including the possible appointment of a guardian ad litem to protect the child’s interests. Finally, this article examines the standard of evidence required in permanent custody hearings.

Before consideration is given to these various topics, however, a brief discussion of temporary custody is necessary. Ohio’s juvenile courts have exclusive original jurisdiction to determine the custody of children alleged to be abused, neglected, or dependent.\textsuperscript{31} The courts, upon an adjudication of abuse, neglect or dependency, may make one of several dispositions.\textsuperscript{32} This paper is concerned with those children who are committed to the temporary custody of the children services boards or to the county departments of welfare which carry responsibility for the administration of child welfare. When temporary custody is granted to one of these agencies, the main provisions of H. B. 695 first apply, beginning with the requirement for the submission of an Initial Plan.\textsuperscript{33} The remaining requirements apply at specified times and upon an agency’s motion to change an order of temporary custody to an order of permanent custody.\textsuperscript{34} Throughout this period the parents retain rights of

\textsuperscript{30}Id.
\textsuperscript{33}Id.
\textsuperscript{34}Id. See also Ohio Rev. Code Ann. § 2151.414 (Page Supp. 1982).
visitation, obligations for support, and responsibilities to comply with court orders directed to their rehabilitation as well as reunification of the family. Only upon a court’s grant of permanent custody are all rights and obligations of parents terminated and the child freed for adoptive placement.

II. RETROACTIVE APPLICATION

The question of the retroactive application of the provisions of H. B. 695 has arisen in a number of cases which have reached Ohio’s courts of appeals. Ohio law provides that a “statute is presumed to be prospective in its operation unless expressly made retrospective.” Cases which are governed by H. B. 695 necessarily have a minimum of two court hearings, the initial hearing at which an order of temporary custody is requested and, subsequently, if temporary custody has been granted and if the agency petitions for permanent custody, the hearing to consider that request. Another question then arises as to whether the law applies only to those cases in which temporary custody was requested after the law’s effective date, October, 24, 1980, or also to those which were initiated for purposes of temporary custody prior to October 24, 1980, but in which the motions for permanent custody were filed later. The results in the following cases range from outright rejection of the retrospective application to consideration of its provisions without outright application, to application of a phase in provision, and to the minority position of mandatory application regardless of dates of initial custody, motion for permanent custody, or permanent custody hearing.

In the Stark County case of In re Cox, the Court of Appeals affirmed the trial court’s judgment granting permanent custody of an illegitimate child to the Stark County Welfare Department on the sole basis that the “statutory change is not applicable to actions filed before it became effective.” In this case the original complaint was filed May 16, 1980; a motion for permanent custody was filed November 19, 1980, less than a month after the effective date of H. B. 695. The father appealed the decision of the trial court on the

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38OHIO REV. CODE ANN. § 1.48 (Page 1982).
41In re Smith, No. 31-CA-52, (Greene, County Ct. App. Mar. 23, 1982).
42In re King, No. 10165, (Summit County Ct. App. Nov. 4, 1981);
44Id. slip op. at 3.
basis that H. B. 695 required the agency "to adopt a plan . . . looking toward the ultimate reuniting of the family . . . ." The court of appeals rejected the argument, and while it also discussed the best interests test, it affirmed on the "bare legal basis" that the law could not be applied retroactively.6

Three additional cases from the Fifth Appellate District, all Licking County cases, reached the same resolution. In the case of In re Wiseman, three assignments of error were made. The first two alleged the trial court's failure to comply with the provisions of Ohio Revised Code Section 2151.412 requiring the agency to submit and follow a plan "generally calculated to reunite and rehabilitate the family unit." The court of appeals noted that the statute upon which the appellant relied was enacted two years after the temporary custody award and overruled the assignment of error not only because the appellant father failed to raise the issue in the trial court but because it would have been "fatuous to consider that the government should have attempted a plan to reunite these children with their father who was imprisoned for abusing them." The court also found a third assignment of error to be "patently without merit."4

The second Licking County case, In re Penrose, followed Wiseman. In this case temporary custody of four children had been granted to the welfare department February 6, 1979, following the death of the father and the mother's inability to provide proper care. On May 20, 1981, the Common Pleas Court granted permanent custody to the welfare department. The trial court noted its consideration of the mandate set forth in Section 2151.414 and indicated that there was a written contract which set forth the specific areas of improvement the mother needed to meet in order to achieve the return of her children and with which the mother had failed to comply. The court of appeals, in affirming the trial court's grant of permanent custody, noted it had previously held that Section 2151.414 "is not applicable to dependency or neglect proceedings commenced prior to its effective date." It, nevertheless, also found that the trial court "substantially complied with the objectives of that statute and the mechanisms set forth therein for the implementation thereof." The third Licking County case, In re Golden, also held that Section 2151.414 was

4Id.
4Id.
4Id.
4Id.
4Id.
4Id.
4Id.
4Id.
4Id.
4Id.
4Id.
5Id. slip op. at 3.
5Id. slip op. at 5.
6Id. slip op. at 2.
not effective with respect to proceedings commenced before its first effective date (October 24, 1980).

The Greene County case of In re Smith was appealed on two grounds, one of which was the alleged failure of the Greene County Children Services Board to meet the requirements of Sections 2151.412, 2151.413, and 2151.414. In this case temporary custody had been granted September 6, 1979. On February 20, 1981, the Children Services Board moved for permanent custody of the children. The trial court granted permanent custody June 22, 1981. The court of appeals quoted Section 2151.414, which requires a Comprehensive Reunification Plan at the time of the second annual review of any child in temporary custody upon the effective date of the act (October 24, 1980). The court of appeals reasoned that the Board’s motion for permanent custody was filed after the first annual review (required under H. B. 156) on September 18, 1980, and prior to the second annual review. It said, “Ergo, there was no necessity that a written comprehensive reunification plan as contemplated by O.R.C. 2151.412 be prepared.” The court of appeals added that the Board, nevertheless, had “indeed complied with the spirit of the Code sections in issue” and affirmed the trial court’s judgment.

A Franklin County case, In re Wayne, was appealed on four assignments of error. One of these concerned “changes in Ohio law regarding permanent commitment.” Temporary custody of two brothers had been granted to the Franklin County Children Services Board immediately after their respective births in 1977 and 1979. On May 1, 1979, motions for permanent custody were filed, and the case was heard by a referee who recommended permanent commitment to the Children Services Board. The trial court so ordered. The court of appeals reversed the trial court and remanded for a new dispositional hearing. This second hearing took place April 9, 1981, and resulted in an award of permanent custody. At the time of the first dispositional hearing, H. B. 695 was not yet in effect; by the time of the second dispositional hearing, it was. The court of appeals concluded that under the new statutory scheme, three factors must be considered but that the court, under Section 2151.414(B),

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5In re Smith, No. 31-CA-52, (Greene County Ct. App. Mar. 23, 1982).
6Id. slip op. at 4. The court quoted the following language:

The second annual review made after the effective date of this act of any child who is in temporary custody upon the effective date of this act pursuant to a court order under Chapter 2151. of the Resived Code or pursuant to section 5103.15 of the Revised Code, which annual review is made pursuant to section 5103.151 of the Revised Code, shall include a comprehensive reunification plan prepared in accordance with division (D) of section 2151.412 of the Revised Code for the child if he is not abandoned or orphaned, a report on the attempts made to locate the parents of the child if he is an abandoned child, or a report on the attempts made to find a relative of the child who will take permanent custody of the child if he is an orphaned child.

7Id.
8Id. slip op. at 5.
10Id. slip op. at 2.
11Id. slip op. at 11.
may grant permanent custody of a child if the court determines by clear and convincing evidence that the child is without adequate parental care and will remain so in the near future." The court said H. B. 695 changed the procedure by which the dispositional hearing on remand was to be conducted but did not affect any of appellant's substantive rights. The court of appeals found no prejudice to appellant in the trial court's application of the best interest rule since the "factual findings lead to the same result under the new statute."

As a minority of one, the Summit County Court of Appeals made a retroactive application of the provisions of H. B. 695 when it overturned the decision of the Summit County Juvenile Court to grant permanent custody of Lisa and Brian King to the Summit County Children Services Board. The trial court had granted temporary custody May 10, 1979, and on September 9, 1980, the Children Services Board had filed a motion for permanent custody. A hearing was held November 24, 1980, and was continued until February 9, 1981. On March 16, 1981, an order of permanent custody was issued. The court of appeals examined the new provisions of Sections 2151.412 and 2151.414 and concluded their application was mandatory. In response to appellee's assertion that its motion was filed prior to the effective date of Sections 2151.412 and 2151.414, the court said the filing date of the motion for permanent custody was "not determinative." Instead, it held that Sections 2151.412 and 2151.414 are procedural and remedial in nature, rather than substantive and therefore not subject to the Ohio Constitutional prohibition of passage of retroactive laws. Leave to appeal to the Supreme Court of Ohio was sought to determine whether the statutes enacted in H. B. 695 should be applied retroactively, but the supreme court declined to hear the matter.

It is apparent that the legislature contemplated the situations presented in Smith and King. Smith appears to correctly apply the law, postponing the requirement of a Comprehensive Reunification Plan until the "second annual review made after the effective date of this act of any child who is in temporary custody upon the effective date of this act ...." The King court appears not to have considered the application of Section 3, which could have enabled them to affirm the trial court's decision.

61In re Wayne, slip op. at 15.
62Id.
64Id. slip op. at 4.
65Id. slip op. at 7.
66Ohio Const. art. XI § 28 states that "[t]he general assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts; but may, by general laws, authorize courts to carry into effect, upon such terms as shall be just and equitable, the manifest intention of parties, and officers, by curing omissions, defects and errors, in instruments and proceedings, arising out of their want of conformity with the laws of this state."
67In re King, Summit Co., 11/4/81, No. 10165, Motion to Supreme Court for Jurisdiction overruled 2/28/82.
68In re Smith, slip op. at 4.
69Id.
III. Good Faith Effort

Under the provisions of H. B. 695, one of the three determinations the trial courts must make is whether the agency holding temporary custody of the child(ren) has made a good faith effort to implement plans for reunification of the child(ren) with the parents. What does "good faith effort" encompass? An analysis of the available cases yields a wide variance in application of standards.

In the King case the court found that the failure of the Children Services Board to submit an Initial or Comprehensive Reunification Plan (a requirement the court applied retroactively) was sufficient to demonstrate a lack of good faith on the part of the agency to reunite the family. It refused to consider the Board's efforts with the mother independent of its failure to file the required plans with the court. The court also did not elect to apply the "best interests" standard.

The opposite approach was taken in the Wayne case where the court said "[a]lthough implementation of a reunification plan is a factor to be considered (in whether the Franklin County Children Services Board had made a good faith plan for reunification), such a plan is not required in order to permanently commit a child." The court discussed the efforts made by the agency and indicated that while the plan did not work, due to the mother's retardation and inability to develop appropriate parenting skills, its failure was not due to any lack of good faith effort on the part of the agency.

The Scioto County Court of Appeals reversed an award of permanent custody in In re Skaggs. The trial court found that the mother had not developed any plan nor taken any lasting measures to reform and rehabilitate herself so that she could be rejoined by her children. The trial court also found "meager attempts" by the Scioto County Children Services Board to rehabilitate her and reunite her with her children, but concluded that the mother had the greater duty to rehabilitate herself. The court of appeals disagreed, saying the Children Services Board has an affirmative duty to attempt to rehabilitate the family. Although this case was initiated prior to the adoption of H. B. 695 (October 24, 1980) the court of appeals did not render its opinion until several months after the bill's effective date. The court of appeals was obviously influenced by the legislation, emphasizing the requirement of the good faith effort on the part of the agency to reunite. The case seems to typify the view

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7In re King, slip op. at 5.
7Id. slip op. at 16-17.
7Id. slip op. at 4-5.
7Id. slip op. at 4-5.
7Id.
8Id. slip op. at 5-6.
of the courts that the greater duty for rehabilitation of the parents rests with the agencies, rather than with the parents themselves. This contradicts the generally held theory that persons who do not wish to modify or improve their behavior will not do so, regardless of the efforts others may pursue in their behalf.

IV. THE PROBLEM OF INCARCERATED PARENTS

A special problem is presented in cases where one, or both, parents are incarcerated at the time of the temporary or permanent custody hearings. Can an agency make a good faith effort to reunite a family where the parent is imprisoned and unavailable to visit or support his or her children and to meet with the caseworker? The law does not appear to permit a waiver or a postponement of the requirement to file plans of reunification under such a situation. On the other hand, might the courts consider it an act of bad faith for the agencies to file a plan calling for actions the parent could not possibly meet by virtue of his or her incarceration? At least one court of appeals has already found a lack of good faith in an agency’s failure to file plans of reunification under these circumstances. Might the courts view the required actions of the parents to be of no effect until the parent is free to begin work on the reunification plan? Courts of appeals have reached totally opposite results in determining agencies’ responsibilities in reuniting families where parents are incarcerated.

In the case of In re Tan, the Summit County Juvenile Court granted temporary custody of Joanna to the Children Services Board on April 3, 1980, as the result of extensive physical abuse. The mother had pleaded no contest to one count of felonious assault and had been found guilty and sentenced to three to fifteen years in prison. The father had pleaded no contest to one count of endangering children and had been found guilty and sentenced to one and one-half to five years in prison. In August, 1981, while both parents were still incarcerated, the Children Services Board filed a motion for permanent custody. The agency had timely submitted the two plans required under Ohio Revised Code Section 2151.412. The court of appeals pointed out that Section 2151.412 provides for any party to object to the reunification plan. No ob-

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8Id. Compare In re Wiseman, No. CA 2797, (Licking County Ct. App. Sept. 23, 1981) where the court found no lack of good faith by the agency which had not filed a reunification plan because the father was incarcerated.
8In re Tan, No. 10654, (Summit County Ct. App. Nov. 24, 1982).
8Ohio Rev. Code Ann. § 2151.412(E) provides the following:
(E) Any party to the action and the court may file a motion with the court requesting that an initial plan or comprehensive reunification plan prepared pursuant to this section be modified. The court shall notify all parties to the action that the motion has been filed, and any party to the action may, within seven days after receiving the notice, file an objection to the motion, the court shall incorporate the modification of the plan into the judgment entry setting forth the disposition made of the child if no objection to the modification is filed within the seven day period. If any party files an objection to the modified plan, the court shall consider the issues raised by...
jection had, however, been filed. It was on this basis that appellant's assignment of error was overruled. The court went further to say that, in the absence of a good faith effort to reunite, a Children Services Board can demonstrate such an attempt to be futile. The court went on to note that the record in the case demonstrated the futility of rehabilitative efforts for this family. In this case the court seemed to be impressed by the extent and effects of the abuse suffered by the child and the parents' subsequent imprisonment based on these acts. As a result two questions arise. Would the same result have been reached if the parents' incarcerations were not directly related to acts against the child? Even more importantly, should there not be provision in the law that no reunification plan be required when the abuse is of such magnitude that the precarious state of the child's physical and emotional health prohibits any attempt to reunite him or her with the parents? The Tan case suggests that situations do exist where reunification should not be attempted.

In a Gallia County case, In re Ratcliffe, the court of appeals found the Children Services Board to be lacking a good faith effort to reunite a family whose father was imprisoned. The agency had received temporary custody of the children on November 30, 1977, and had filed a motion for permanent custody February 19, 1980. Following an award of permanent custody, the father appealed on the basis of the trial court's failure to provide for his personal appearance at the hearings, either by granting a continuance until he was eligible for release from prison or by procuring his release from present incarceration to attend the hearings. The court of appeals stated that whether or not his presence denied him due process was not dispositive of the case. It said that the more important issue, which was not addressed by either side, would be considered sua sponte by the court. This is the issue of the Children Services Board's statutory duty to rehabilitate and reunify the family once the children are in the temporary custody of an agency.

The court of appeals found little or no attempt on the part of the Gallia County Children Services Board to rehabilitate Mr. Ratcliffe into a family setting in the event he would be released from prison. Mr. Ratcliffe was not, however, released nor was he expected to be released for two years. The court took a "dim view" of this alleged failure and commented in its opinion that:

If Mr. Ratcliffe had been sentenced to life imprisonment, or a term of years which would unquestionably keep him incarcerated until each of the objection, and may hold a hearing on the modified plan within fourteen days after the objection is filed. If the court approves any modification of the initial plan or the comprehensive reunification plan, the court shall incorporate the modification of the plan into the judgment entry setting forth the disposition made of the child.

8In re Tan, slip op. at 7-8.
10Id. slip op. at 2.
11Id. slip op. at 3.
his children were 30, then this court could perhaps understand (but not condone) the actions of Childrens Services. This is not the case here because Mr. Ratcliffe will be released from Chillicothe in 1982. He will have served his time and paid his debt to society for the crime he committed. However, if we accept Childrens Services' position, Mr. Ratcliffe will pay for his crime for the rest of his life, by being deprived of his children.\textsuperscript{90}

It is to be recalled that one of the main problems to be rectified by H. B. 695 was the lessening of the length of time children remain in foster care, either through return to their parents or placement into a permanent, adoptive home.\textsuperscript{91} In the \textit{Ratcliffe} case, the children had already been in temporary custody over two years when the agency decided to pursue a permanent plan for them. The father was still two years away from release, and even upon release it would be unrealistic to assume that he would be in a position to resume the immediate care of three children. Thus, the Ratcliffe children continued to be deprived of parents. As Stephen D. Freedman states, "Children need parents when they are children, not potential parents later in their lives . . . Children left in temporary care limbo, do not develop in the same way as children who have a permanent, secure home, either with natural parents or adoptive parents."\textsuperscript{92}

Although the court in the \textit{Ratcliffe} case said incarceration is not, by itself, a ground upon which permanent custody may be granted to Children Services, the court of appeals in \textit{Wiseman}\textsuperscript{93} had no such difficulty. In that case the father was imprisoned, and the court found the evidence "overwhelming" that "the boys are now dependent by reason of the incarceration of their father."\textsuperscript{94} The father was imprisoned as a consequence of his abuse of the two daughters. Recall from prior discussion of this case that the court determined it "fatuous" to consider that the agency should have even attempted a plan of reunification under these circumstances.\textsuperscript{95}

These opinions span the possibilities, from finding no need whatsoever for the agency to attempt reunification\textsuperscript{96} to an absolute postponement of permanent planning for the children until the parent is freed from prison or until the children become adults.\textsuperscript{97} One factor to be considered in such situations might be whether the incarceration is related to the criminal neglect or abuse of the children, as was the case in \textit{Tan} and \textit{Wiseman}. Even if the act resulting in imprisonment is not specifically directed to the children, however, any criminal activity ought to be considered by the courts in their evaluation of a parent's

\textsuperscript{90}Id. slip op. at 4.
\textsuperscript{91}Ohio Rev. Code Ann. § 5153.16 (Page 1982).
\textsuperscript{92}See Freedman, \textit{supra} note 24, at 3.
\textsuperscript{93}In re Wiseman, No. CA 2797, (Licking County Ct. App. Sept. 23, 1981).
\textsuperscript{94}Id. slip op. at 3.
\textsuperscript{95}Id.
\textsuperscript{96}In re Tan, No. 10654, (Summit County Ct. App. Nov. 24, 1982).
\textsuperscript{97}In re Ratcliffe, No. 80CA5, (Gallia County Ct. App. Sept. 23, 1981).
functioning and ability to provide proper care for his or her children.\textsuperscript{98} In support of its finding the Ratcliffe court used a 1929 case, \textit{In re Konneker}, which states that "Parents have a right to the custody of their children, the same as they have a right to the possession of property they may acquire . . . ."\textsuperscript{99} As long as such archaic thinking persists, it appears that children will be viewed as chattel and their needs and best interests will be subordinated to the stated, but not necessarily acted-upon, desires of the parents. This is clearly not the position taken by the Ohio Supreme Court in \textit{In Re Cunningham}\textsuperscript{100} where the court held that once a child has been found dependent, the best interests of the child are the primary consideration in determining whether an award of permanent custody to the department of welfare is justified. The supreme court said a separate finding of parental unfitness is not a prerequisite to an award of permanent custody.\textsuperscript{101} H. B. 695, thus, places the value of the Cunningham decision at issue through its emphasis on the additional factors of the agency's good faith effort to reunify the family and of the parents' responsibility to follow rehabilitative plans designed to effect reunification.

\textbf{V. Adequate Parental Care}

A second area for determination by the courts when agencies are requesting permanent custody of children already in their temporary custody is whether the parents have acted in such a manner that the child is a child without adequate parental care and will continue to be a child without adequate parental care.\textsuperscript{102} As can be seen, adequate parental care means something different in every case and in every court. However, the legislature defined adequate parental care as "the provision of adequate food, clothing, and shelter to ensure a child's health and physical safety and the provision of specialized services warranted by a child's physical or mental needs."\textsuperscript{103} The question can still be asked, "What is adequate?"

Another question which arises is what does "in the near future" mean? The Ratcliffe court made it clear that an incarceration of a parent until the youngest child turned 30 was insufficient for them to approve a permanent plan for the children apart from the parents.\textsuperscript{104} The Wayne case indicated that four years was a long time to leave small children in limbo.\textsuperscript{105} To be borne in mind might be two factors, namely, the intent of H. B. 695 to reduce the length of time children spend in temporary care and custody\textsuperscript{106} and, secondly,

\begin{itemize}
  \item \textit{Id.} at 108, N.E.2d at 1038.
  \item \textit{Id.} at 108, N.E.2d at 1038.
  \item \textit{In re Cunningham}, slip op. at 4.
  \item \textit{In re Ratcliffe, slip op. at 4.}
  \item \textit{In re Wayne, Nos. 81AP-631 and 81AP-632, slip op. at 17, (Franklin County Ct. App. Dec. 10, 1981).}
  \item \textit{See} Bayle, \textit{supra} note 17.
\end{itemize}
the long-term damage which results to children who are deprived for significant periods in their young lives of the security that comes only with having a permanent family.\textsuperscript{107}

In determining whether the parents have acted and will continue to act in a manner to make their child one without adequate parental care, the law requires the court to consider all relevant factors, including but not limited to five considerations:

(a) the extent to which the parents of the child have conformed to the initial and comprehensive reunification plans . . . . ;
(b) any existing emotional or mental disorders of the parents and the anticipated duration of the disorders;
(c) any physical, emotional, or sexual abuse of the child by the parents that occurs between the date that the original complaint alleging abuse was filed and the date of the filing of the motion for permanent custody;
(d) any existing excessive use of intoxicating liquor or drugs by the parents;
(e) any physical, emotional, or mental neglect of the child by the parents that occurs between the date that the original complaint alleging neglect was filed and the date of the filing of the motion for permanent custody.\textsuperscript{108}

The \textit{Wayne} case stated that the evidence showed that the appellant mother was unable to provide adequate food, clothing, and shelter for herself, much less for two small children.\textsuperscript{109} It stated further that the evidence showed she was unable to provide the stimulation, nurturance and stability the children required and that she had been totally resistant to the counselling and training which might help her to improve.

In responding to an assignment of error claiming lack of evidence that Joanna Tan\textsuperscript{110} would continue to be a child without adequate parental care, the Summit County Court of Appeals found the record "replete with expert testimony expressing grave doubt about the ability of these parents to ever provide adequate parental care of Joanna."\textsuperscript{111} It thus found that Joanna "is now and will continue to be a child without adequate parental care."\textsuperscript{112}

Another Summit County case, \textit{In re Smith},\textsuperscript{113} held that there was insufficient evidence to show that the child, Rachel, would continue to be a child

\textsuperscript{107}See J. GOLDSMITH, A. FREUD, & A. SOLNIT, \textit{supra} note 2 at 31-52.
\textsuperscript{109}\textit{In re Wayne}, slip op. at 17.
\textsuperscript{110}\textit{In re Tan}, No. 10654, (Summit County Ct. App. Nov. 24, 1982).
\textsuperscript{111}\textit{id.} slip op. at 8.
\textsuperscript{112}\textit{id.} slip op. at 9.
\textsuperscript{113}\textit{In re Smith}, No. 10335, (Summit County Ct. App. Feb. 3, 1982).
without adequate parental care. The court of appeals reversed the trial court’s award of permanent custody and reinstated the temporary custody award. The court of appeals based its opinion, not on evidence concerning the parents’ ability to adequately care for Rachel, a child whose developmental delays were such that she required specialized care, but on the parents’ ability to provide for a younger child in the home.\textsuperscript{114} The court stated that:

Throughout the term of the temporary custody the Smiths have demonstrated little capacity to understand Rachel’s disability and none of the skills necessary to ensure Rachel’s continued development . . . .

. . . The only major deficiency that the Smiths have yet to overcome appears to be in their ability to meet Rachel’s special needs. This, of course, is an area which can be improved through the involvement of support agencies.\textsuperscript{115}

In this case the court viewed the child within the parental home as not without adequate parental care and assumed that because the parents were caring for one “normal” child, they could provide adequate care for Rachel, despite its own statement that the parents had none of the skills necessary to ensure Rachel’s continued development.\textsuperscript{116} Among the factors to be considered by the courts in such situations include whether parents able to care for one or more children are necessarily able to meet the needs of and provide adequate care for all other children they might have, particularly those children with special needs. Another factor to be considered is the length of time the child will continue in a temporary custody situation. In Rachel’s case, at the time of the appeals hearing, she had already spent twenty-four of the twenty-eight months of her life in foster care. To reinstate the temporary custody award meant to extend that time even further. For this child and doubtless for others whose awards of permanent custody have been overturned as the result of various provisions of H. B. 695, the legislature’s intent appears thwarted.

VI. BEST INTERESTS

Prior to the implementation of H. B. 695, the ultimate controlling factor in cases of child custody between parents and public agencies was the overall “best interests of the child.”\textsuperscript{117} It is now just one of three factors for consideration.\textsuperscript{118} The applications by the courts of these factors concerning a good faith effort on the part of the agency to reunite the family coupled with parental ability to provide adequate care, have yielded widely ranging opinions. One question which arises immediately in the context of the new legislation

\textsuperscript{114}Id. slip op. at 7.

\textsuperscript{115}Id.

\textsuperscript{116}Id.

\textsuperscript{117}In re Cunningham, 59 Ohio St. 2d 100, 391 N.E.2d 1034 (1979).

is whether the best interests of the child are always served by continued parental custody. Obviously, they are not, but, with two of the three matters for consideration focused on the agency and on the parents, it would seem that the best interests of the child is now a lesser consideration. Clearly, it is, at least, no longer of paramount importance.

The best interests standard was challenged in *In re J.S.R.* as unconstitutionally vague. The District of Columbia Court of Appeals, in upholding the lower court’s termination of the mother’s rights, said that although the standard lacks precise meaning, it is not without content and bounds. The court of appeals said it was “plain that the standard ‘best interest of the child’ requires the judge, recognizing human frailty and man’s limitations with respect to forecasting the future course of human events, to make an informed and rational judgment, free of bias and favor, as to the least detrimental of the available alternatives.” Although the constitutional challenge was unsuccessful, an analysis of this definition yields little in the way of limits and guidelines to be applied in reaching a best interests standard, but leaves the court wide discretion in its determination of what is in the child’s best interests.

The impact of H. B. 695 is evident in the *Smith* case where the Summit County Court of Appeals acknowledged the special needs of the child and the parents’ lack of skills in meeting those needs. The court, nevertheless, in reversing the award of permanent custody, disregarded the best interests standard and instead based its opinion on the view that the child would not continue to be a child without adequate parental care.

Likewise, the *Ratcliffe* court overlooked the best interests rule and considered only the effects of the permanent custody on the parents. The *King* court considered nothing more than the lack of the Initial and Comprehensive Reunification Plans in its retroactive application of Ohio Revised Code Section 2151.412 and never looked to the best interests of the children.

One case giving little more than passing notice of the best interests standard is *Cox*, which actually affirmed the permanent custody award on the basis of the inapplicability of the new provisions of H. B. 695. It did, nevertheless, acknowledge the best interests of the child as the “pole star” in these cases and found the trial court’s judgment “consistent with that cardinal principle.”

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120 *Id.* at 863.
121 *Id.*
123 *Id.* slip op. at 7.
127 *Id.* slip op. at 3-4.
The Franklin County case of *Wayne* applied the best interests standard along with the other two tests of good faith effort and parental functioning. It concluded by saying that "[b]oth children need a stimulating, stable and supportive home which appellant cannot provide now or in the conceivable future. Thus, it is in their best interest to be permanently committed for purposes of adoption."

The Supreme Court of Ohio ruled on a "best interests" case in July, 1979, in *In re Cunningham.* Although the court acknowledged that the termination of the rights of a natural parent should be an alternative of last resort, it said that such a disposition is nevertheless sanctioned when it is necessary for the welfare of the child. It emphasized that a consideration of the best interests of the child should not enter into the initial factual determination of dependency but that it becomes a proper focus in determining whether an award of permanent custody to the department of welfare is justified. The court specifically compared the concepts of parental unfitness and best interests, saying that they are not always unrelated issues. The court said further that "[t]he mere fact that a natural parent is fit, though it is certainly one factor that may enter into judicial consideration, does not automatically entitle the natural parent to custody of his child since the best interests and welfare of that child are of paramount importance." As noted previously, however, the value of this opinion is at issue since the adoption of H. B. 695.

**VII. APPOINTMENT OF A GUARDIAN AD LITEM**

H. B. 695 also provides for the appointment of a guardian ad litem to protect the interest of the child pursuant to Ohio Revised Code Section 2151.414. Children in custody proceedings in Ohio have traditionally been represented by the agencies filing actions in their behalf and by the legal representatives of those agencies. However, with the concerns about the system of state intervention came questions about the motives of the agencies. They were viewed as suspect; and, consequently, the guardian ad litem provision was placed in the law to provide representation by an unbiased party.

112Id. slip op. at 18.
113Id. at 105, 391 N.E.2d at 1038.
114Id. at 107, 391 N.E.2d at 1039.
115Id.
116Id. at 106, 391 N.E.2d at 1038 (emphasis in original).
117Ohio REV. CODE ANN. § 2151.281(B) (Page Supp. 1982).
118Ohio REV. CODE ANN. § 5153.16 (Page 1982).
119Ohio REV. CODE ANN. § 2151.281(B) (Page Supp. 1982). This section provides the following:
   The court shall appoint a guardian ad litem to protect the interest of a child in any proceeding concerning an alleged abused or neglected child, and in any proceeding held pursuant to section 2151.414 of the Revised Code.

The court shall require such guardian ad litem to faithfully discharge his duties, and upon
litem, therefore, provides another kind of representation for the child. The law does not, however, require that the guardian ad litem be a person of legal background. Whether the representation by a lay person will prove beneficial in these circumstances remains to be seen. As yet, there is little data to illustrate the impact of the guardian ad litem, whether this be an attorney or lay person, in the permanent custody proceedings. One county in the state, Summit, has utilized trained, volunteer guardians ad litem for nearly two years. Although statistics have not been compiled which specifically compare the recommendations of the guardians ad litem with the requests of the Children Services Board, it is the impression of the Assistant Prosecutor who represents the Children Services Board that the recommendations of the guardians ad litem support the agency’s plan for the children in the vast majority of the cases. Agencies may take some comfort in knowing that their standards for children are given support by an independent evaluator.

VIII. CLEAR AND CONVINCING EVIDENCE

Following an analysis of the factors which the courts must now evaluate, a final area for consideration is the standard of evidence to be applied in permanent custody proceedings. On March 24, 1982, the United States Supreme Court ruled that due process requires states to establish by clear and convincing evidence allegations supporting an action to terminate parental rights. Ohio law had incorporated this standard with the adoption of H. B. 695 on October 24, 1980. (Prior to this a preponderance of the evidence was required.) Wayne attempted to assert a proof beyond a reasonable doubt standard when a severance of the parent-child relationship was sought. The Franklin County Court of Appeals overruled the assignment of error without comment.

Clear and convincing evidence is defined as “that measure or degree of proof which is more than a mere ‘preponderance of the evidence,’ but not to the extent of such certainty as is required ‘beyond a reasonable doubt’ in criminal case, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established.” Legal practitioners know

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138Conversation with Jacqueline Barnhart, Assistant Prosecutor, Summit County Prosecutor's Office. Ms. Barnhart's additional impression is that the volunteer guardians ad litem utilize a "common sense" approach, as opposed to a legalistic approach, in evaluating what is in a child's best interest.


140Ohio Rev. Code Ann. § 2151.35 (Page Supp. 1982). This section provides a clear and convincing evidence standard for an initial finding of abuse, neglect or dependency. Prior to the adoption of H.B. 695, this standard was not expressly applicable to a later proceeding in which an agency was requesting the permanent custody of a child previously found abused, neglected or dependent and placed in their temporary custody. In re Fassinger, 43 Ohio App. 2d 89, 334 N.W.2d 5 (Ohio Ct. App. 1974), aff'd, 42 Ohio St. 2d 505, 330 N.E.2d 431 (1975), held that the granting of permanent custody requires a contemporaneous finding of dependency, thus invoking the clear and convincing standard of § 2151.35. This was codified with the adoption of H.B. 695, in § 2151.414(B).

141Wayne, slip op. at 2.

that clear and convincing evidence is nothing more than what the judge says it is.

Despite the rule of law that an appellate court will not substitute its judgment for that of the trial court,143 Ohio's courts of appeals have done so in a number of custody cases involving standards of evidence.144 To be recalled is the Smith145 case, in which the Summit County Court of Appeals found insufficient evidence to determine that Rachel would continue to be a child without adequate parental care. This was the court of appeals' view notwithstanding the demonstration of the parents' incapacity to understand the child's disability and lack of skills in regard to her care.

The Hamilton County Court of Appeals found no clear and convincing proof to warrant the award of permanent custody by the Hamilton County Court of Common Pleas to the Hamilton County Welfare Department in the case of In re Hall.146 The court found "no more than a passing consideration . . . to maintaining the family unit" and the record "silent on the possibility of keeping the two children with the mother and the prospects of the mother's being capable of the care and support of both children."147 The court of appeals stated also that there was insufficient evidence to permit an application of the guiding principle of the child's own best interests. The court considered the positive steps the mother had taken to improve her situation and found "nothing in the record" to convince it that her rights and duties must be terminated permanently.148

The Ninth District Court of Appeals overturned the Wayne County Court of Common Pleas award of permanent custody to the Wayne County Children Services Board in In re Dillon.149 The trial court found that there had been repeated and good faith effort by the agency to maintain Dennis Dillon, Jr., in a home with his parents. The court also found that the father had provided no support and that both parents had shown extremely little effort to meet the requirements of care for the child. Finally, the court found that the parents had abused the child who was thus without proper parental care and would continue to be a child without adequate parental care, and that in the best interests of the child the parental rights should be terminated.150 As had occurred in the Smith151 case, the County Children Services Board had not petitioned

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145In re Smith, No. 10335, (Summit County Ct. App. Feb. 3, 1982).
147Id. slip op. at 3.
148Id. slip op at 4-5.
150Id. slip op. at 2-3.
151In re Smith, No. 10335, (Summit County Ct. App. Feb. 3, 1982).
for custody of another child in the parental home. The court asked whether it were fair to assume that if the Board deemed the home fit for one child it ought to be fit for the other child.152 The court’s answer, however, was obtained by reviewing Ohio Revised Code Section 2151.031(C)153 which defines an abused child and Section 2919.22,154 the statute providing for criminal penalties for child endangering. Because the court of appeals determined that the alleged physical abuse did not rise to the criminal standard, it was “forced to conclude” that the WCCSB [Wayne County Children Services Board] . . . failed to establish by clear and convincing evidence that Dennis is an abused child within the meaning of those statutes.”155 The court of appeals did not consider Section 2151.031(B) which specifically provides that no person need be convicted in order for a child to be found abused,156 nor did the court consider the greater burden of proof required by the criminal statute.157

In Athens County the court of appeals applied a standard of willful neglect in the case of In re Spears158 and determined there was insufficient evidence to affirm the trial court’s finding of neglect and award of permanent custody. The Children Services Board presented testimony going back seven years, and the court said this was too remote in time to have any relevancy. The court said this proved, at best, that the appellants were transient, something which is not a basis for finding neglect.159 An opinion, concurring in part, was concerned with the only alternative left to the trial court which was return of the children to the parents. The concurring judge said if that were the purport of the opinion, he would dissent on the basis that the evidence was sufficient to have supported a finding of neglect and/or dependency under other statutes.160 While this judge concurred in the determination of insufficient evidence to justify a permanent custody award, it was obvious that he had misgivings about the children’s possible return to their parents. Despite the court’s possibly proper rejection of evidence from seven years earlier, the question arises as to whether the best interests of the children are being served by continued maintenance in a neglectful situation of seven years’ duration. Past performance would seem to be an appropriate indicator of future performance.

CONCLUSION

Through the passage of H. B. 695, the Ohio legislature has responded to

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155In re Dillon, slip op. at 7.
156Ohio Rev. Code Ann. § 2151.031(B) (Page 1982).
157Ohio Rev. Code Ann. § 2901.05(A) (Page 1982).
159Id. slip op. at 2.
160Id. slip op. at 6. Judge Stephenson said the evidence would have supported a finding of neglect under Ohio Rev. Code Ann. § 2151.03(B) or dependency under Ohio Rev. Code Ann. § 2151.04(C).
public concerns about the foster care system and lack of permanency for children in the custody of Children Services Boards.\textsuperscript{161} In the two years since its implementation courts have applied its provisions in a variety of ways. Many cases governed by H. B. 695 have reached courts of appeals; none has yet been accepted for review by the Ohio Supreme Court.

With one exception\textsuperscript{162} thus far, the application of the law has been prospective. There may yet be some children who were in temporary custody at the time of the bill's implementation, October 24, 1980, and on behalf of whom agencies will yet file motions for permanent custody. However, because of the two-year grace period given to agencies to comply with certain requirements of the bill\textsuperscript{163} and because that time period has now passed, there should no longer be a problem of retrospective application. All cases of child custody vested in a Children Services Board are now subject to all provisions of H.B. 695.

The three main areas for determination by the court (good faith effort on the part of the agencies to reunite, adequate parental care, and best interests of the child) remain basically undefined. The cases heard thus far have reflected a wide variance in the meaning of these terms and, consequently, in their application. The extent of the efforts agencies must make in their efforts to reunite range from none, if they can demonstrate such an attempt to be futile\textsuperscript{164} or if a parent is inaccessible,\textsuperscript{165} to years of services extending to the adulthood of the child.\textsuperscript{166}

To establish that a child is one without adequate parental care and will continue to be a child without adequate parental care in the near future requires some consensus on what is "adequate" and what constitutes the "near future." It also requires an ability to foretell the future, something that no one in the field of human behavior has yet been able to accomplish.\textsuperscript{167} Obviously, courts do not agree on what kind of care is adequate for a particular child nor whether "adequate" care of one or two children in a family automatically constitutes an identical ability to provide "adequate" care to all children in the family. The experience of child welfare agencies that parents may be limited in the numbers of children or the kinds of children for whom they can properly care seems not to be recognized by the courts.\textsuperscript{168} As is evident from the cases reviewed, both from the language of the opinions and from the acts of reversal and remand, courts differ on how far the "near future"

\begin{thebibliography}{9}
\bibitem{161}See e.g., Boyle, supra note 17 and accompanying text.
\bibitem{162}In re King, No. 10165, (Summit County Ct. App. Nov. 4, 1981).
\bibitem{163}In re Smith, No. 31-CA-52, (Green County Ct. App. Mar. 23, 1982).
\bibitem{164}In re Tan, No. 10654, (Summit County Ct. App. Nov. 24, 1982).
\bibitem{165}In re Wiseman, No. CA 2797, (Licking County Ct. App. Sept. 23, 1981).
\bibitem{166}In re Rattcliffe, No. 80CA5, (Gallia County Ct. App. Sept. 23, 1981).
\bibitem{167}See J. Goldstein, A. Freud & A. Solnit, supra note 2 at 50-52.
\bibitem{168}In re Dillon, No. 1747, (Wayne County Ct. App. Oct. 28, 1981); see also In re Smith, No. 10335, (Summit County Ct. App. Feb. 3, 1982).
\end{thebibliography}
extend. The courts appear not to view time from the standpoint of the child, whose concept of time is far different from that of adults, nor even to weigh the effects of time except as it impacts on the parents. Children grow and develop new attachments while waiting for their parents who may or may not, struggle to make needed changes in their lives. Courts cannot lose sight of the balance which needs to be maintained between the rights of parents to their children and the rights of their children to a safe, permanent home. The placement of children must be treated by agencies and courts as a matter of urgency which gives consideration of a child's sense of time by granting such cases a high priority, by dealing with them rapidly, and by accelerating the course of review and final decision. Any temporary placement must be limited to the shortest fixed period compatible with sound judicial resolution.

The new law has kept the best interests of the child standard but appears to make this a lesser consideration than previously; it is now just one of three determinations the courts must make before an award of permanent custody. While this was the controlling factor in pre-H. B. 695 cases of child custody, some courts no longer even reach this determination if they decide that an agency has not made a good faith effort to reunite or that a child is not without adequate parental care nor likely to be without adequate parental care in the near future. Thus, the best interests standard, once the matter of paramount importance, appears in some instances to receive less consideration by the courts than do the agency's efforts and the parents' progress. This seems to support a presumption that the child's best interests are necessarily served by continued temporary care while agencies and parents make further efforts at rehabilitation of the parents and reunification of the family. This is in direct contradiction of the legislature's intent to prevent children from remaining too long in foster care and to establish permanency in their young lives.

The evidentiary standard of clear and convincing evidence places an increased, yet undefined, burden on agencies seeking permanent custody of children at a time when the factors for the courts' consideration in each case have also been increased. The intent is the protection of the parents' rights to their children. The law presumes that such protections ultimately function

169See J. Goldstein, A. Freud & A. Solnit supra note 2 at 40-45.
171See J. Goldstein, A. Freud & A. Solnit supra note at 44-45.
172See Freedman, supra note 24 at 3.
to protect the child which is true only if the child's interests are best served by continuing parental custody. Certainly, the appointment of the guardian ad litem is some protection of the child's rights, but it seems inescapable that the law’s provisions, with the greater standard of evidence required, operate to maintain parental rights of custody at significant cost to some children who ought to be released for permanent placement.

Our society recognizes that the vast majority of parents are capable of fulfilling their responsibilities to care for and nurture their children. It also recognizes that some children are in need of protection when their parents cannot provide at least a minimal level of care. The law provides for state intervention when conditions of dependency, neglect, or abuse occur. Ohio law requires specific steps to be taken to reunify those families where temporary removal of custody has proven necessary to ensure the child's safety and well-being.

The law has focused attention on the duty of agencies to provide various rehabilitative services, and it has focused on the expectation of parents to utilize these services to make changes deemed necessary for the return of their children to their care. On the other hand, the law appears to have drawn attention from the child and his or her needs and best interests. Instead, the courts are forced into making measurements of agencies' efforts and parents' progress. The nebulous language of the law provides few guidelines to the courts in making these determinations. As has been shown, the results are a wide disparity in application of the law's various provisions and, unfortunately, the perpetuation of children in a state of limbo, a condition the legislation was intended to correct. Additionally, no one knows for how many children permanent planning is unnecessarily postponed because agencies, which have in good faith worked to reunite families, delay asking for permanent custody because they realistically believe that the courts will view their efforts as insufficient or will view the parents' very minimal progress as a positive sign of potential improvement. Instead, the agencies continue providing services to the parents and continue the temporary care of the children. Whatever the reasons, the fact remains that the system continues to permit Ohio children to remain too long in situations of temporary care and custody. The children must wait for conditions to be resolved over which they, unfortunately, have no control. The ultimate responsibility to free these children for permanent placement at appropriate time rests with Ohio's courts and the extent to which they apply the law to achieve its intended purpose.

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