**[Cite as *In re McDaniel*, 2004-Ohio-2595.]**

**THE COURT OF APPEALS**

**ELEVENTH APPELLATE DISTRICT**

**LAKE COUNTY, OHIO**

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| IN RE: | : | **O P I N I O N** |
| BRANDON McDANIEL,<br>ALLEGED DEPENDENT CHILD, | :<br>: | **CASE NOS. 2002-L-158<br>and 2002-L-159** |
| MARIAH McDANIEL,<br>ALLEGED DEPENDENT CHILD. | : | |
| | : | |

Civil Appeal from the Court of Common Pleas, Juvenile Division, Case Nos. 2000 DP 2777 and 2001 DP 2463.

Judgment: Affirmed.

*Marvin R. Plasco,* 38040 Euclid Avenue, Willoughby, OH 44094 (For Appellants Randle J. and Lisa Marie French, Foster parents).

*Charles E. Coulson*, Lake County Prosecutor and *Brian L. Summers*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH (For Appellee, Lake County Department of Job and Family Services).

*Richard P. Morrison,* 38118 Second Street. P.O. Box 490, Painesville, OH 44077 (For Appellee, Cindy J. McDaniel, Mother).

*Russell J. Meraglio,* 1400 Midland Building, 101 Prospect Avenue West, Cleveland,

OH 44115 (Cindy McDaniel's Guardian).

*Brett J. Plassard*, 1875 West Jackson Street, Painesville, OH 44077 (Guardian ad litem).

*Richard V. Demeter,* 9944 Johnnycake Ridge Road, Painesville, OH 44077 (For Appellee, Willis Farley, Putative father).

CYNTHIA WESTCOTT RICE, J.

**{¶1}** Appellants, Randle and Lisa Marie French, appeal the denial of their Motion to Join Foster Parents as Necessary Parties and Motion for Custody and Companionship Rights.

**{¶2}** On December 21, 2000, the Lake County Department of Job and Family Services ("LCDJFS") filed a motion for emergency temporary custody of Brandon McDaniel, born November 24, 2000. Pursuant to the motion, LCDJFS alleged Brandon was a dependent child to the extent that neither of his parents nor any of his immediate relatives were willing or able to care for him. On December 26, 2000, the juvenile court issued a judgment entry granting emergency temporary custody to LCDJFS.

**{¶3}** On November 14, 2001, LCDJFS filed a motion for emergency temporary custody of Mariah McDaniel, born November 13, 2001. Pursuant to this motion, LCDJFS claimed Mariah was a dependent child because neither of her parents nor any

of her immediate relatives were willing or able to care for her. On November 15, 2001, the juvenile court issued a judgment entry granting emergency temporary custody of Mariah to LCDJFS.

**{¶4}** Subsequent to being granted emergency temporary custody of both Brandon and Mariah McDaniel, LCDJFS placed the children into the foster care of Randle and Lisa Marie French, appellants herein.

**{¶5}** On May 30, 2002, after learning of LCDJFS' intent to permit unsupervised visitation with a niece of the children's natural mother, appellants filed the following motions relating to both dependency cases: A "motion to join foster parents as necessary parties, a "motion for custody and companionship rights," and an "emergency motion to restrain LCDJFS from removing the minor children from foster parents." Appellants then moved the court to join them as necessary parties in the ongoing litigation pursuant to Civ.R. 18 and 19.

**{¶6}** Soon after appellants filed the above motions, LCDJFS removed the children from appellants' foster care. No record documents fully detail the manner in which the children were removed. It appears, however, the children were unceremoniously removed without prior notice or specific justification.

**{¶7}** On June 12, 2002, the record indicates that a review hearing was held. On the same day, the court issued a judgment entry indicating that the caseworker and

counsel for appellants, LCDJFS, and the children's natural mother were present in court. The judgment entry further indicates that the main issue for consideration was LCDJFS' motion to extend custody, which was granted. However, the judgment entry also states:

**{¶8}** "The Motion to make Randall and Lisa Marie French parties to this matter is denied, however, Mr. and Mrs. French and their legal counsel, Attorney Plasco, are permitted to participate in this hearing." Although this indicates some formal consideration of appellants' joinder to the case, we have no way of knowing the precise nature of the issues addressed during the hearing.

**{¶9}** On August 26, 2002, the juvenile court issued a judgment entry striking appellants' "emergency motion to restrain LCDJFS from removing the minor children from foster parents." The juvenile court gave appellants the opportunity to file a jurisdictional brief addressing their remaining motions.

**{¶10}** On September 6, 2002, appellants filed their jurisdictional brief. In response, Cindy McDaniel, the children's' natural mother, filed a brief in opposition to appellants' jurisdictional brief. On October 2, 2002, the juvenile court issued two identical judgment entries for each dependency case in which the court denied appellants' two remaining motions. The cases were consolidated and appellants now appeal assigning the following errors for our consideration:

**{¶11}** "[1.] The trial court erred to the prejudice of appellants, in its decision filed October 2, 2002, by refusing to exercise jurisdiction to hear appellants' motion for allocation of parental rights relative to Brandon and Mariah McDaniel. [sic]

**{¶12}** "[2.] Juvenile Rule 2(Z) unconstitutionally deprives a specific class of citizens, [sic.] the right to pursue legal remedies in juvenile court matters."

**{¶13}** Under their initial assignment of error, appellants argue that the juvenile court abused its discretion when it determined it had no jurisdiction to hear their motion for allocation of parental rights. Moreover, appellants contend, the juvenile court abused its discretion in failing to hold a hearing on the matter and/or make a determination that the best interest of the child requires foster parents to be joined as parties pursuant to Juv.R. 2(Z). We shall address each claim in turn.

**{¶14}** At the time of the proceedings in question, Juv.R. 2(Z) stated:

**{¶15}** "'Party' means a child who is the subject of a juvenile court proceeding, the child's spouse, if any, the child's parent or parents, or if the parent of a child is a child, the parent of that parent, in appropriate cases, the child's custodian, guardian, or guardian ad litem, the state, and any other person specifically designated by the court."

**{¶16}** Juv.R. 2(Z) affords a juvenile court broad discretion to include foster parents as parties to a proceeding pursuant to its "any other person specifically

designated by the court" provision. LCDJFS does not therefore dispute that the juvenile court had the authority to make appellants parties to the instant matter.

**{¶17}** However, appellants argue that the trial court failed to recognize that it had the discretion to name appellants as parties. This argument is based on a misstatement of the trial court's judgment entry. In their brief, appellants state:

**{¶18}** "*** The Judgment Entry filed October 2, 2002, states in part:

**{¶19}** "'This Court believes that *it does not have the authority* as outlined in Juvenile Rule (2)(Z) to designate the movants as parties and therefore consider the Motion.'

**{¶20}** "If the court mistakenly interpreted Rule (2)(Z) to conclude it lacked the requisite legal authority to name appellants as parties then it did not recognize it had the discretion to name appellants as parties to the ongoing litigation." (Emphasis added).

**{¶21}** Appellants' recitation of the juvenile court's judgment entry is erroneous. Quoted accurately, the juvenile court's judgment entry reads:

**{¶22}** "This Court believes that it *does have authority* as outlined in Juvenile Rule (2)(Z) to 'designate' the movants as parties and thereafter consider the Motion. For the reasons that follow, however, the Court declines to exercise that authority at this time." It is evident from the juvenile court's judgment that it recognized that it had the authority pursuant to Juv.R. (2)(Z) to designate appellants as parties to the litigation.

However, the juvenile court declined to exercise its discretion. Because appellants misstate the basis of the juvenile court's holding, their initial contention under their first assignment of error lacks merit.

**{¶23}** Appellants' misreading notwithstanding, the juvenile court did not abuse its discretion when it declined to make appellants a party to the underlying juvenile proceedings.

**{¶24}** An abuse of discretion involves more than an error of law or judgment; it implies the court's determination was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983) 5 Ohio St.3d 217, 219. Absent an abuse of discretion, a trial court's determination will not be disturbed on appeal. *Williams v. Williams,* 11th Dist. No. 2002-L-096, 2003-Ohio-1977, ¶16. When applying the abuse of discretion standard, an appellate court is not permitted to substitute its judgment for that of the trial court. Id.

**{¶25}** In our view, the lower court took great care to balance the competing interests of all parties of interest, including the children, the foster parents, the biological parents, and the state. In doing so, it arrived at a thoughtful judgment that cannot be characterized as unreasonable or arbitrary.

**{¶26}** In its judgment entry, the court stated:

**{¶27}** "These children have been found to be dependent children and, therefore are the subjects of case plans which have been prepared, approved by this court, and are executed in an effort to reunite them with their parents in compliance with the law. In furtherance of that goal, temporary custody was granted to the Lake County Department of Job and Family Services. Both Court and the Department are mandated to make efforts to attain reunification.

**{¶28}** "It has not been determined that there is no possibility of reuniting these children with their mother or of reuniting Mariah with her father. That may happen. It is also possible that all parental rights may never be terminated because, based on the facts and circumstances of this case, perhaps the best interests of the children would be served by a planned permanent living arrangement. These determinations have yet to be made, and before they are, much additional effort must be exerted in compliance with the case plan. Until such a decision is made, any consideration of custody would be counterproductive of the case plan goals, and would be premature."

**{¶29}** The trial court noted that reunification is the statutorily mandated goal of the underlying case. The court underscored that, despite the children's dependency and their placement in the temporary custody of LCDJFS, they may still be reunited with one or more of their parents. The court therefore determined that appellants joinder to the proceedings was, at that time, inappropriate. It is important to note, however, that

appellants were not permanently foreclosed from participating in the case: The trial court simply indicated that their motion for custody, at that point, would undercut the goal of reunification.

**{¶30}** However, appellants contend that the juvenile court erred by not holding a hearing to consider whether it would be in the children's best interest for appellants to be made parties. Again, we disagree.

**{¶31}** The juvenile court is not required to hold a hearing and determine whether a child's best interest will be served by the addition of a party to litigation involving that child's custody.[1] In determining whether movants shall be made parties to a juvenile proceeding, a court may consider the impact of the movants' joinder on the child. However, there is no explicit procedural requirement. Moreover, foster parents have no enforceable right to custody under Ohio law, and the legislature has not decided to provide for their participation in the adjudication of the rights of a child and his or her natural parents. *In the Matter of Hunter* (Nov. 26, 1985), 4th Dist. No. 1762, 1985 WL 17459, at 3.

**{¶32}** In the current matter, appellants thoroughly briefed their position as to why they should be admitted as parties. After reviewing appellants' brief and responses

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1. As indicated in the facts, there is evidence in the record that the trial court did in fact address this issue during its June 12, 2002 review hearing. However, as we have no transcript of this hearing, we have no

thereto, the juvenile court refused to join appellants. Although no hearing was held, appellants were afforded sufficient opportunity to set forth their position to the court. Hence, the court was not required to engage in a full evidentiary hearing to determine whether the foster parents' input in custody proceedings would be in a child's best interest. Because (1) the court was not required to engage in a full evidentiary hearing to determine whether the foster parents' input would be in the children's best interest and (2) the court found that the foster parents' participation would be counterproductive to the goal of reunification, the lower court's judgment was neither arbitrary nor unreasonable.

**{¶33}** Thus, appellants' first assignment of error is overruled.

**{¶34}** In their second assignment of error, appellants contend that Juv.R. 2(Z) violates their right to due process by not affording foster parents a right to pursue actions in juvenile courts. However, the record does not demonstrate that appellants raised this issue in the juvenile court. That is, there is no evidence in the record that appellants objected to the court's ruling upon this basis. If a party fails to raise the issue of a statute's constitutionality that is apparent at the time of trial, that party waives the issue on appeal. *State v. Awan* (1986), 22 Ohio St.3d 120, syllabus.

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way of knowing whether the court actually did consider the children's best interest. In any event, as the analysis infra will demonstrate, we believe any such hearing was unnecessary.

**{¶35}** Although *Awan* speaks of waiver in terms of a statute's constitutionality, it stands to reason that the same rule applies when attacking the constitutionality of a procedural rule. To wit, as a matter of appellate practice, a trial court must pass upon an issue in order for that issue to be properly before this court. To the extent that appellants failed to properly present the instant issue to the lower court, our examination of the matter would be premature. Because appellants cannot assert their constitutional argument for the first time on appeal, their second assignment of error is overruled.

**{¶36}** However, even if appellants had appropriately preserved the current issue, their argument lacks merit. Under Ohio law, the rights and limitations of the foster care relationship are clearly defined. *In re Martin* (Aug. 27, 1999), 2d Dist. Nos. 17432, 17461, and 17464, 1999 Ohio App. LEXIS 3999, at 5. As indicated above, foster parents have no right to custody under Ohio law. Moreover, in *Renfro v. Cuyahoga Cty. Dept. of Human Serv.* (C.A.6, 1989), 884 F.2d 943, 944, the Sixth Circuit stated:

**{¶37}** "Under Ohio law, *** [f]oster parents have no mechanism to challenge the removal of a foster child from their care; they have no statutory right to a hearing either before of after the child has been removed; nor are they entitled to a written explanation for the agency's action or an appeal. The temporary nature of the foster care relationship provides sufficient notice to all participants that their rights are limited." (Citations omitted.)

**{¶38}** The court in *Renfro* recognized the "strong emotional bond that might evolve in a foster care situation," but declined to characterize the relationship as a constitutionally protected liberty interest. Instead, the court described the relationship as "a temporary arrangement created by state and contractual agreements." Id. at 944. In effect, foster parents care for a child as agents of the children services board, which is the child's legal custodian. See *In re Martin*, supra, at 6.

**{¶39}** Accordingly, foster parents have no constitutionally protected liberty interest in a foster care situation. Therefore, foster parents have no constitutional right to pursue actions involving their foster child(ren) in Ohio's courts. However, we must view this in light of the United States Supreme Court's discussion of the foster care relationship in *Smith v. Organization of Foster Families for Equality & Reform ("OFFER")*, (1977), 431 U.S. 816.

**{¶40}** In *OFFER*, the court suggested, in dictum, that long-term foster parents may be entitled to some due process protection in view of the mutual care and support developed in these relationships. However, *OFFER* acknowledged the "virtually unavoidable" tension between the rights of biological parents and those of foster parents. Id. at 846. The court also stated that "whatever emotional ties may develop between foster parent and foster child," the relationship has its origins, in state law and contractual arrangements which define expectations and entitlements Id. at 845-846.

**{¶41}** Although participation may be warranted in some cases, when the issue is deprivation of parental rights, the foster parents' interest in preventing the return of the child to the parent in order to further their own desire for adoption is too predictable to justify the addition of the foster parents as parties. Although they may claim to represent the interest of the child, these interests are better represented by the neutral guardian ad litem than by the foster parents, whose own interests may color their view of the child's. *In re Hunter*, supra, at 3. Such is the case in the current matter.

**{¶42}** In any event, Juv.R.(2)(Z) is not unconstitutional for failure to give foster parents an affirmative right to join as a party to a juvenile proceeding. As such, appellants' second assignment of error is overruled.

**{¶43}** For the foregoing reasons, appellants' assignments of error lack merit and therefore the decision of the Lake County Court of Common Pleas is affirmed.

Judgment affirmed.

DIANE V. GRENDELL, J., concurs with a concurring opinion.

WILLIAM M. O'NEILL, J., dissents with a dissenting opinion.

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DIANE V. GRENDELL, J., concurring.

**{¶44}** I concur with the well-reasoned opinion of the majority.

**{¶45}** While foster parents provide an important service, they do so by arrangements created by state and contractual agreements. The fact that good foster parents may develop a strong emotional bond with the children placed in their care does not change the state statutory provisions or contractual terms governing the temporary nature of the foster relationship. The United States Supreme Court's dictum in *Smith v. Organization of Foster Families for Equity & Reform* (1977), 431 U.S. 816, 844, concerning long term foster care of a child from infancy who has never known his or her natural parents, is not applicable to the case before this court. Moreover, the Supreme Court tempered its dictum, stating "whatever emotional ties may develop between foster parent and foster child have their origins in an arrangement in which the State has been a partner from the outset. While the Court has recognized that liberty interests may in some cases arise from positive-law sources, *** in such a case, and particularly where, as here, the claimed interest derives from a knowingly assumed contractual relation with the State, it is appropriate to ascertain from state law the expectations and entitlements of the parties." Id. at 845-846 (internal citation omitted).

**{¶46}** In *OFFER*, the U.S. Supreme Court concluded that since New York law and foster contracts accorded only limited recognition to the foster family, foster parents were entitled to only "the most limited constitutional 'liberty'" recognition. Id. at 846. In

the present case, Ohio law and foster contracts accord far less recognition to a foster family than New York law. Compare *Renfro v. Cuyahoga Cty. Dept. of Human Serv.* (C.A.6, 1989), 884 F.2d 943, 944 (wherein it discusses the rights and limitations of foster parents in Ohio) with *OFFER*, 431 U.S. at 830 (wherein the court discusses the more extensive rights of foster parents in New York). Therefore, foster parents in Ohio have no expectation of participation in the foster parent selection or continuation process that rises to the level of a constitutional liberty interest. See *Renfro*, 884 F.2d at 944 (since the temporary nature of a foster care relationship in Ohio is created by state and contractual agreements that clearly define the rights and limitations of the foster care relationship, this relationship cannot be characterized "as a constitutionally protected liberty interest").

**{¶47}** For these reasons, and the reasons stated in the majority opinion, I concur in the judgment affirming the decision of the Lake County Court of Common Pleas, Juvenile Division.

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WILLIAM M. O'NEILL, J., dissenting.

**{¶48}** I must respectfully dissent. I believe appellants' second assignment of error has merit.

**{¶49}** The actions of LCDJFS in this case set a disturbing precedent. Appellants were asked to bring the children to the children services center for a "visit." Thereafter, they were told they could leave, *without the children*, and that they were no longer needed as foster parents. As egregious as this deception is, I believe the greater dilemma is that appellants had no means of asking "why" or saying "this is wrong." The decision was made. The agency had spoken. The kids were gone.

**{¶50}** The facts of this case readily expose the lack of due process protection for foster parents in the state of Ohio. Both children were placed in the care of appellants shortly after their birth. Appellants were the only parents they knew until they were one-and-a-half and two-and-a-half-years-old, respectively. In May 2002, the children were taken from appellants. However, appellants were afforded absolutely no due process rights. There was no hearing, either formal or informal. There was no opportunity for appellants to argue their case to a neutral party.

**{¶51}** The Supreme Court of the United States has held that the following factors are to be used to determine the amount of due process protection a particular situation warrants: (1) the individual's interest that will be affected by the action; (2) the risk of error that could arise without providing additional procedural safeguards; and (3) the

cost to the government agency to provide the additional procedural safeguards.[2] In addition, the court held that this is the test to be applied in situations where children are removed from their foster parents.[3]

**{¶52}** "'Under Ohio law, the rights and limitations of the foster care relationship are clearly defined. Foster parents have no mechanism to challenge the removal of a foster child from their care; they have no statutory right to a hearing either before or after the child has been removed; nor are they entitled to a written explanation for the agency's action or an appeal. The temporary nature of the foster care relationship provides sufficient notice to all participants that their rights are limited.'"[4]

**{¶53}** Since Ohio law does not recognize a liberty interest in foster parents, they essentially have no due process rights.[5] Thus, under the *Mathews v. Eldridge* test, the government agency is not required to provide any procedural safeguards.

**{¶54}** Under Ohio's current system, a set of foster parents could have a child in their care for years and, by all accounts, be "perfect" foster parents to the child. However, if the director of the children services agency is a Cleveland Browns fan, and the hypothetical foster parents are Pittsburgh Steelers fans, the child could be taken

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2. *Mathews v. Eldridge* (1976), 424 U.S. 319, 335.
3. *Smith v. Org. of Foster Families for Equity & Reform* (1977), 431 U.S. 816, 848-849.
4. *In re Martin* (Aug. 27, 1999), 1999 Ohio App. LEXIS 3999, at *5-6, quoting *Renfro v. Cuyahoga Cty. Dept. of Human Serv.* (C.A.6, 1989), 884 F.2d 943, 944.

from the home. While this situation may seem a little far-fetched, it is important to see the ramifications of Ohio's current system. Stated simply, a child may be removed from a foster parent for *any* reason, including the foster parent's race, gender, sexual orientation, religion, or political views. The foster parents have absolutely no recourse. The agency does not have to provide the foster parents a hearing or even a letter explaining the reasons for taking the child. Under current Ohio law, the foster parents have no due process rights. The child is gone, no questions asked.

**{¶55}** The *Smith* case describes the procedural safeguards in place in New York at the time of that case. Except in an emergency, the agency had to give the foster parents ten days notice of a potential removal. Thereafter, the foster parents could request a "conference" with the children services agency, where they had a right to be heard and be represented by counsel. After the conference, a decision was sent to the foster parents. If the foster parents were still unsatisfied with the result, they could appeal for a full administrative hearing.[6] I see no reason why a similar procedural system could not be implemented in Ohio.

**{¶56}** Foster parents perform an essential function in Ohio's children services system. I recognize that a foster parent's role, by its very nature, is often temporary.

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5. See, e.g., *In re Baatz* (Aug. 11, 1993), 9th Dist. Nos. 92CA005478 and 92CA005479, 1993 Ohio App. LEXIS 3996.
6. *Smith v. Org. of Foster Families for Equity & Reform*, 431 U.S. at 829-830.

Further, I acknowledge that in the vast majority of cases, a foster parent's rights will be secondary to those of the natural parents and that the primary goal of the case plan will be reunification with the natural parents.  However, the fact that foster children can be removed, without the children services agency providing any reason or allowing the foster parents to argue their position, can have nothing but a chilling effect on prospective foster parents.  Why would an individual invest years in a child's life, only to have the child arbitrarily removed – without much more than a "thank you"?