

IN THE SUPREME COURT OF OHIO

In the Matter of:
Kayla H. And Joshua H.

Case No. 2007-2454

On Appeal from the Lucas County
Court of Appeals,
Sixth Appellate District

REPLY BRIEF OF APPELLANTS TODD H. AND SARAH H.

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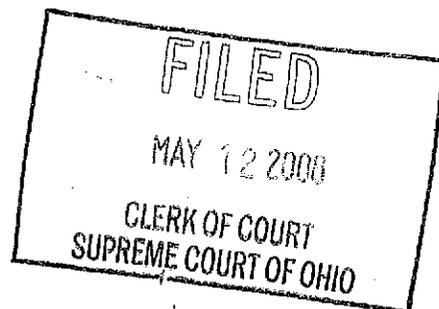


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STATEMENT OF FACTS

At page 9 of Appellee's Brief, in response to a question regarding "grooming" and "relapse prevention plans" for sex offenders, Nancy Larson, a social worker at Harbor Behavioral Health Care, is said to have stated that she believed that Appellant Todd H. was grooming and planning toward a molestation "when he had contact with his sister's daycare and with the child he thought he was going to move in with." This statement could be read to suggest that Todd was planning to move in with a child from his sister's daycare. In fact, the child being referred to by Larson was Sarah's son Jonathan, Sarah being Todd's soon-to-be wife. (Appellee's Supp. 163, 178, 179, 186, Tr. 41, 56, 57, 64). Todd indeed lived with Jonathan for several years after marrying Sarah, and there was no evidence that Jonathan had been sexually abused or molested by Todd. (Supp. 56, Tr. 206).¹ In fact, Jonathan specifically denied that Todd had ever touched him. *Ibid.*

ARGUMENT

In Appellants' Merit Brief, Appellants argued that the testimony at trial failed to support a conclusion that Todd H., a convicted sex offender and diagnosed pedophile, and the natural father of Kayla H. and Joshua H., presented a threat to his children. This argument was based upon several facts: that Todd's offense occurred many years ago, that he had not been accused of any sex offense since that time, in spite of the fact that he had been living for several years with Jonathan and with his own natural children, and the fact that risk assessments performed for Todd indicated only a medium-low risk to re-offend. The argument was based further upon the fact that numerous studies have demonstrated that sex offenders, including child molesters, are far less likely to re-offend than is popularly believed, and in fact display a remarkably low rate of recidivism compared to other offenses.

Appellants further argued that the testimony at trial which portrayed Todd as a threat to molest his children generally amounted to an assertion that all pedophiles are a threat to their

¹(Supp. xx...) refers to the Supplement filed with Appellants' Merit Brief.

children, and that since Todd is a pedophile, he necessarily is a threat to his children. Hence William Emahiser, who is employed at Unison Behavioral Health Group as a supervisor and counselor for the sex offender treatment program, testified that it was a “standard policy” of the sex offender treatment program that they did not advocate for reunification with children. (Supp. 28, Tr. 80; Appellee’s Supp. 217, Tr. 95). He further testified that “we don’t recommend reunification because it goes against the principles of the program.” (Appellee’s Supp. 221, Tr. 99). In fact, when asked to step away from Unison policy and to state whether Todd would be at higher risk of reoffending if he lived in the home with his family, Emahiser responded, “His risk – I should tell you that policy is my policy. I set that up so I don’t know how to separate that necessarily.” (Appellee’s Supp. 273-274, Tr. 151-152).

Similarly, Nancy Larson, a social worker at Harbor Behavioral Health Care, when asked whether, generally, she would recommend that an individual with a diagnosis of pedophilia be moved back in the home with small children, she answered that she would not.. (Supp. 11-13, Tr. 28-30; Appellee’s Supp. 192, Tr. 70). More telling, in a letter written by Larson, admitted as State’s Exhibit 3, Larson states that in her expert opinion, Todd “was an extremely high risk to reoffend and that his time on probation had done nothing to lower that risk.” (Appellee’s Supp. 143, 144, 151). The fact that, as set forth in Appellants’ Merit Brief, the risk assessments classified Todd as a relatively low risk to reoffend, and yet Larson found him from the beginning to be “an extremely high risk to reoffend,” supports Appellants’ contention that Larson simply believes as a matter of course that pedophiles are extremely likely to reoffend, a popular notion that is completely inconsistent with scholarly research.

In response to Appellants’ argument in this regard, at pages 30 through 32 of their Merit Brief, Appellee argued that there was evidence presented at trial specific to Todd. Much of that evidence was anecdotal, such as the fact that during supervised visitation, Todd had his daughter on his lap, or that Todd changed his infant son’s diaper. Appellee also relied upon the expressed

opinion of the therapists that Todd had “failed to incorporate therapeutic requirements into his life” and the like.

However, Appellee has never suggested that any therapist has ever offered any remotely quantitative evidence as to the level of threat Todd provides to his children, or the significance, if any, of the fact that the two children molested by Todd 17 or 18 years ago were unrelated to Todd, while the children Todd would be living with, were he to be reunited with the children, are his biological children. As set forth in Appellants’ Merit Brief, research on the topics strongly suggests that the likelihood of Todd reoffending is low to begin with, and is even lower with regard to reoffending against his biological children.

At page 33 of its Merit Brief, Appellee argues that “it is also clear, under the law, that a court need not wait until Appellant father sexually molests his own children before it intervenes.”

Appellants do not remotely suggest otherwise. Appellants suggest only that more is required than the finding that Appellant is a convicted sex offender and a pedophile. Likewise, Appellants take no issue with the holding of *In re Campbell* (1983), 13 Ohio App. 3d 34, also set forth at page 33 of Appellee’s Merit Brief, that “a juvenile court should not be forced to experiment with the health and safety [of a child] where the state can show, by clear and convincing evidence, that placing the child in such an environment would be threatening to the health and safety of that child.” Appellants’ argument is only that Appellee failed to prove, by clear and convincing evidence, that Todd’s children would be threatened by his presence in the home, where no attempt was made to quantify the likelihood of his reoffending, and where numerous studies have shown that the likelihood of reoffending, even among child molesters, is relatively low, and appears to be even lower where the prior victim was unrelated to the offender and where the children under the court’s protection are the offender’s biological children.²

²In using such terms as “quantify,” Appellants do not suggest that Appellee should be required to give a numerical probability of Todd’s reoffending. Appellants only suggest that, in light of the relatively low probability of reoffending demonstrated by child molesters in general, and the even further reduced likelihood of reoffending where the prior offense was an unrelated child, and

With regard to the scholarly studies set forth in their Merit Brief by Appellants, Appellee at pages 34-36 of its Merit Brief argues that this Court cannot consider such material. However, while it is clear that Appellants cannot retry the case before this Court by raising new evidence particular to the parties, this Court has considered exactly the same type of information, although on a different topic, apparently raised for the first time, or perhaps *sua sponte*, by this Court.

In *State v. Souel* (1978), 53 Ohio St. 2d 123, this Court cited to numerous scholarly treatises concerning the reliability of polygraph examinations, in ruling upon the admissibility of polygraph results in a criminal trial:

For estimates of accuracy see F. Horvath and J. Reid, *The Reliability of Polygraph Examiner Diagnosis of Truth and Deception*, 62 *Journal of Criminal Law, Criminology and Police Science* 276, 278-279 (1971) (91.4 percent accurate for examiners with more than one year's experience); R. Pfaff, *The Polygraph: An Invaluable Judicial Aid*, 50 *A. B. A. J.* 1130, 1132 (1964) (96 percent accurate, 3 percent inconclusive, 1 percent maximum known error); L. Burkey, *The Case Against the Polygraph*, 51 *A. B. A. J.* 855, 856 (1965) (70 percent accurate).

Souel at 134, fn. 5.

Appellee also argues, at page 35 of its Merit Brief, that “these various Web citations are not from well-recognized law journals, and possibly not even recognized as authorities by any experts.” However, all of the authorities cited by Appellants are either from law journals or are from other authoritative sources. Hence, of the four such authorities cited by Appellants, and as cited in detail in Appellants’ Merit Brief, one was published in the *International Journal of Law and Psychiatry* and one was commissioned by the State of Ohio Department of Rehabilitation and Correction, an agency of the State of Ohio whose interests clearly do not lie in minimizing the threat of reoffending by convicted child molesters. A third study cited by Appellants, Hanson and Thornton, *Static 99: Improving Actuarial Risk Assessments for Sex Offenders, 1999-2002*,

the present concern is with the biological children of the offender, Appellee should be required to provide evidence pursuant to which the trial court could make an informed judgment as to whether the offender demonstrates characteristics that would substantially increase the likelihood of his reoffending, over the general population of child molesters in similar circumstances.

retrieved December 27, 2007, from http://ww2.ps-sp.gc.ca/publications/corrections/199902_e.pdf, was authored by researchers from the Department of the Solicitor General of Canada, Ottawa, and Her Majesty's Prison Service, London, again, agencies whose interests do not lie in minimizing the concerns at the heart of the instant case. The fourth study cited by Appellants, Fortney, Levenson, Brannon & Baker, *Myths and Facts about Sexual Offenders: Implications for Treatment and Public Policy*, was published in the journal *Sexual Offender Treatment*, the peer-reviewed journal of the International Association for the Treatment of Sexual Offenders (IATSO).

Appellants suggest that the sources cited in their Merit Brief are learned treatises of the same nature as those cited by this Court in *Souel*. Learned treatises are “[l]earned writings * * * regarding specialized areas of knowledge or skill” which include “sufficient assurances of trustworthiness to justify equating a learned treatise with a personally-testifying expert.” *Stinson v. England* (1994), 69 Ohio St.3d 451, 460, fn. 1. The four publications cited by Appellants meet each of those requirements.

At page 36 of its Merit Brief, Appellee makes the following statement:

Similarly, this court should also not be persuaded by Appellants as they argue that the Appellate Court made factual errors. While Appellants assert that the record contains a finding of pedophilia only by Nancy Larsen, a social worker, the record contains *testimony* of Nancy Larsen (declared by the court to be an expert in sexual abuse therapy, not just a “social worker” but an LISW who is also qualified to diagnose and treat sex offenders) that Appellant father is a pedophile, *not only* in her opinion but in the opinion of Court Diagnostic and Treatment, an arm of the local Common Pleas Court, which she testified also performed an assessment.

Emphasis *sic*.

However, the testimony is nowhere near as straightforward as Appellee portrays it.

First off, as stated by Larson herself, the “LISW” label means nothing more than that she is an independent practitioner. (Appellee’s Supp. 152, Tr. 30). Appellants never argued that she had not been qualified by the court as an expert; Appellants only pointed out that she was not a doctor or psychologist, and Appellee does not appear to contend otherwise.

Secondly, Larsen did not testify that Court Diagnostic and Treatment found Todd to be a pedophile, but only that they evaluated him:

Based on my assessment of his pathology, he is a diagnosed pedophile and in that Court Diagnostic and Treatment Center, who did an evaluation for him also, it is not something that he can safely do.

(Appellee's Supp. 160, Tr. 38).

In reference to this testimony, Larson subsequently testified, "Yes, I had referenced Court Diagnostic but I also said I also diagnosed him as [a pedophile] also." (Appellee's Supp. 196, Tr. 74). However, as has already been seen, in that prior testimony, she did not state that Court Diagnostic had diagnosed him as a pedophile, but only that they had done an evaluation for him.

Appellee next makes the following argument, at page 37 of its Merit Brief:

Similarly, Appellants make the incredible statement that they "do not suggest that risk assessments and statistical data must necessarily override contrary clinical predictions by qualified professionals," when that is exactly what they appear to have argued continuously for several pages, but they also then "suggest, however, that before subjecting sex offenders to...termination of parental rights, some individualized evidence that the sex-offender or even pedophile parent, presents a particular risk to his children in the particular circumstances of the case, ought to be required." And that is *exactly* what was presented to the trial court, "particularized evidence" offered by *expert, treating* therapists.

Emphasis *sic*.

Appellants respectfully assert that, while particularized evidence was presented to the court, with regard to such matters as Todd's participation in sex offender treatment programs, no individualized evidence that Todd presents a particular risk to his children in the particular circumstances of the case was ever presented. More specifically, as set forth by Appellants in their Merit Brief, the objective assessments of Todd suggest that he has a relatively low probability of reoffending. Furthermore, scholarly studies have repeatedly shown that sex offenders as a group demonstrate a surprisingly low probability of reoffending. No expert in these matters at the trial of the instant case offered even a single word of testimony as to the re-offense rate of child molesters, and why Todd stands apart from the general population of child molesters, or why the risk assessments done on Todd should be disregarded, or whether there

was any relevance to the fact that Todd was seeking to be reunited with his natural children, the relevance of which has been clearly shown by scholarly research. Testimony that Todd did or did not participate in a particular manner in a particular program was never connected up to the conclusion that Todd was the unusual case, likely to go against the odds and repeat his offense, this time against his natural children.

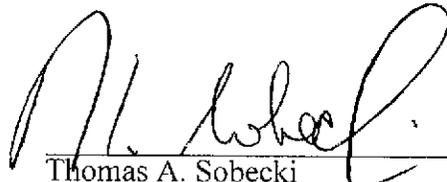
Finally, there is no doubt that, as Appellee points out, the right of persons to marry does not *ipso facto* preclude a court from terminating parental rights when there is evidence that a sex offender or pedophile resides in the home, and where he presents a particular risk of harm to the children. Appellee sets forth a substantial list of cases in which termination of parental rights in such conditions has been upheld. Appellants will not, and indeed could not possibly, go back and review the record of each such case to determine whether the particular facts and circumstances of the case warranted termination, or compare favorably or unfavorably to the facts and circumstances of the instant case. Appellants have never argued that a court could never terminate the parental rights of a pedophile father; Appellants argue only that in the instant case, there was little or no testimony as to why Todd presented a particularized risk of reoffending against his natural children, beyond the fact that many, many years previously, he offended against two young boys who were not related to him, and that a licensed social worker with experience in the treatment of sex offenders, testified that she diagnosed him as a pedophile.

Particularly in light of the undisputed evidence that, for several years, Todd lived not only with his own biological children, but with Sarah's son, fathered by another man, without even a suggestion that he has ever re-offended against them, something more is required beyond what was presented to the trial court. The evidence before the trial court failed to establish, by clear and convincing evidence, that Todd presented a particularized threat to his biological children. Therefore, the court was not justified in terminating the parental rights of Todd and Sarah, and the lower courts' decisions to terminate should be reversed.

CONCLUSION

Appellee has failed to demonstrate that sufficient evidence of Todd's likelihood to reoffend was presented to the trial court, which would justify its finding of termination of parental rights. To the contrary, the evidence suggests that there is a relatively low probability of Todd's reoffending. Furthermore, as set forth in Appellants' Merit Brief, if Todd and Sarah are reunited with their children, there are numerous resources and strategies available to further reduce the risk of harm to their children. Therefore, the decision below should be reversed.

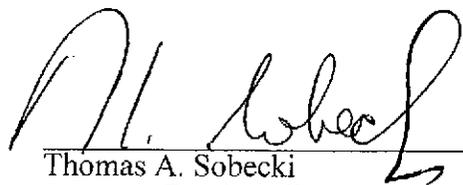
Respectfully submitted,



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CERTIFICATION

I hereby certify that a copy of this Reply Brief was sent by ordinary U.S. Mail, postage prepaid, on this 10th day of May, 2008, to Dianne Keeler, Lucas County Children Services Board, 705 Adams Street, Toledo, OH 43604.



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