

IN THE SUPREME COURT OF OHIO
2009

ORIGINAL

STATE OF OHIO,

Plaintiff-Appellant,

-vs-

ADRIAN L. JOHNSON,

Defendant-Appellee

Case No.

09-1552

On Appeal from the
Franklin County Court
of Appeals, Tenth
Appellate District

Court of Appeals
Case No. 08AP-990

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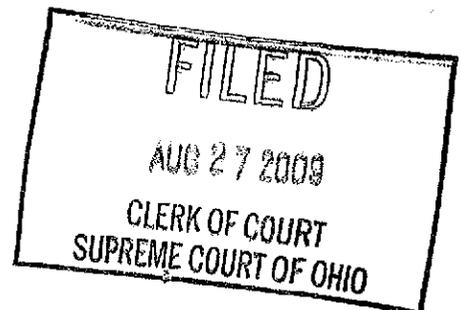


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EXPLANATION OF WHY THIS COURT SHOULD ACCEPT JURISDICTION

One could say the score is tied 2-2. The trial judge, and the dissenting appellate judge, found that the search of defendant's pocket was supported by probable cause. The two-judge appellate majority, however, concluded that probable cause was lacking, doing so on what can only be described as the very subtlest of distinctions, i.e., upon a police officer smelling burnt marijuana, the existence of probable cause to search or arrest a person, as opposed to search a car, will turn on whether the officer can discern that the marijuana odor is emanating from the person, as opposed to the car. Even if this heretofore unannounced bellwether fact was legally controlling, its significance was so subtle and new that the police officers could hardly be blamed for failing to grasp it.

The present case thus highlights the need for this Court to address the applicability of the Exclusionary Rule. Police officers must make snap judgments, and to suppress evidence of crime in close cases is too heavy a penalty, especially when the judges later addressing the issue in relative leisure of time are themselves split on the question.

The State argued below that the fruits of the search should not be suppressed because, as recently observed in *Herring v. United States* (2009), 129 S.Ct. 695, the federal Exclusionary Rule should be limited to instances involving the intentional, reckless, or grossly negligent disregard of Fourth Amendment rights. The two-judge majority below did not address this contention, erroneously assuming that exclusion followed as a matter of course. Given the continuing controversy over the scope and existence of the Exclusionary Rule, this Court should address these issues under the State's first proposition of law in light of *Herring*.

In addition to relying on *Herring* vis-à-vis the federal Exclusionary Rule, the State also argued that, based on *State v. Lindway* (1936), 131 Ohio St. 166, defendant could not rely on the Ohio Constitution to justify suppression. Under *Lindway*, there is no Exclusionary Rule for violating the search-and-seizure provisions in Article I, Section 14, of the Ohio Constitution. The two-judge appellate majority did not address this argument, even though *Lindway*'s rejection of the Exclusionary Rule has never been overruled. See pp. 7-10, *infra*. The present case is a prime example of why exclusion has been and should be rejected as a remedy under the Ohio Constitution. The constable erred in the spur of the moment (according to two of four judges), and the end result is to let the guilty go free and unpunished. The State's second proposition of law would allow this Court to address this backward result.

The State's third proposition would allow this Court to address the existence of probable cause. As the dissenting judge pointed out, "the facts here seem even stronger to indicate the likelihood of possession by this defendant than existed in *State v. Moore*, 90 Ohio St.3d 47, 2000-Ohio-10 * * *." Dissent, at ¶ 41. This case not only involved the odor of marijuana in the car defendant had arrived in; it also involved the actual observation of the marijuana blunt, and defendant's walking away in an attempt to vacate the area, an act which itself showed a consciousness of guilt. Even Judge Tyack's lead opinion conceded in ¶ 2 that "[o]ne or more of the men had been smoking marijuana in the car before they parked it * * *." Given the fact that "a car passenger * * * will often be engaged in a common enterprise with the driver, and have the same interest in concealing the fruits or the evidence of their wrongdoing," see *Wyoming v. Houghton*

(1999), 526 U.S. 295, 303, probable cause was present, even absent the discernment of marijuana odor on defendant's person. See, also, *Maryland v. Pringle* (2003), 540 U.S. 366 (probable cause vis-à-vis front-seat passenger regarding drugs in back seat).

While the State asserted that the search could be justified based on probable cause to search, plus exigent circumstances, the State also argued that the search could be justified as a search incident to arrest. The two-judge majority rejected this contention based on their conclusion that probable cause was not present and based on the further contention that no "lawful" arrest could occur because the arrest would have violated R.C. 2935.26. The State's fourth proposition of law would allow this Court to address the validity of this legal analysis in light of *Virginia v. Moore* (2008), 128 S.Ct. 1598, and *State v. Jones*, 121 Ohio St.3d 103, 2009-Ohio-316, which follows *Moore*. The constitutional validity of an arrest does not turn on whether a state statute authorized it, see *Moore*, and, furthermore, the Exclusionary Rule is not justified for a violation of a mere statute unless the statute so provides. See *Jones*.

The State respectfully submits that review is warranted because the case involves a substantial constitutional question and involves questions of public and great general interest. The case also warrants the granting of leave to appeal in this felony case.

STATEMENT OF FACTS

At approximately 1:30 a.m. on June 11, 2007, Columbus police officers stopped at a Dairy Mart convenience store because there was a lot of narcotics activity at the location and they had encountered guns and drugs there in the past. Officer Justin Coleman walked past an empty vehicle parked in the lot of the store and smelled the odor

of burnt marijuana coming from the vehicle. The windows of the car were down, and using a flashlight, Coleman observed a marijuana "blunt" in the center console area in plain view. Coleman testified that he had been trained as to the appearance and smell of fresh and burnt marijuana and that he came into contact with marijuana almost daily. The officers waited to see who was going to come outside and get inside the car.

Moments later, defendant and two other men exited the store together. The threesome approached the car in the way "you naturally approach a car if the car belonged to you." Defendant walked to the driver's side rear passenger door, while the other two men approached the front doors on either side of the car. The two other men began to open their doors, and defendant acted as if he was going to get in the car, but, upon the police making contact with the driver Pearson, defendant "turned and began slowly kind of walking away from the area, walking away from the vehicle." He was carrying a bag containing several beers; the others were empty-handed.

Coleman spoke to Pearson, who indicated that the car belonged to him, apologized for the marijuana, and offered to throw it away. Pearson also indicated that he and defendant "had arrived at that location and come up to the store together."

Defendant was acting odd because he decided not to enter the car and turned, walking away from everyone. Defendant also began patting his pockets as if looking for something. Coleman testified that he had seen this behavior before on people with contraband or weapons on them.

Officers Johnson and Sanderson thereafter made contact with defendant at Coleman's request. Coleman had informed the other officers of what he had seen.

Coleman told Sanderson, "Hey, stop him. He was in the car too."

Officer Greg Sanderson approached defendant and told him that there was "weed" in the car and that he was going to make sure defendant did not have anything else on him such as weapons. Sanderson patted down defendant around the waistband for weapons and outside the pockets for possible sharp objects. Then, knowing that there was marijuana in the car, Sanderson searched defendant's pockets. Sanderson found cocaine, crack cocaine, and marijuana in defendant's left pocket.

Sanderson then walked defendant from the street back to the cruiser and placed defendant inside. Defendant waited there while officers finished searching the car.

Sanderson read defendant his *Miranda* warnings. Defendant signed a waiver and agreed to talk. Defendant stated that he found the drugs at a Waffle House restaurant and he was trying to give them to somebody to sell for him.

Defendant was indicted on counts of possession of crack cocaine and possession of cocaine. The defense filed motions to suppress the search and defendant's statements. The State opposed the motions.

In the suppression hearing, Officers Coleman and Sanderson testified. The court denied the motions to suppress, concluding that there was probable cause and exigent circumstances to search defendant pursuant to *State v. Moore* (2000), 90 Ohio St.3d 47.

Defendant later pleaded no contest to the counts as charged. The recitation of facts indicated that the amount of cocaine base was 1.6 grams and the amount of cocaine was .6 grams. The court sentenced defendant to community control.

In a 2-1 ruling consisting of separate opinions by Judges Tyack and Bryant, and a

dissenting opinion by Judge McGrath, the Tenth District reversed and ordered the suppression of drugs in defendant's pocket and the suppression of defendant's statements as a fruit of the illegal search. This timely State's appeal follows.

ARGUMENT

Proposition of Law No. 1. The federal Exclusionary Rule will only be applied to suppress evidence when the Fourth Amendment violation is the result of deliberate, reckless, or grossly negligent disregard of Fourth Amendment rights or involves circumstances of recurring or systemic negligence. (*Herring v. United States* (2009), 129 S.Ct. 695, followed)

"The fact that a Fourth Amendment violation occurred—i.e., that a search or arrest was unreasonable - does not necessarily mean that the exclusionary rule applies." *Herring v. United States* (2009), 129 S.Ct. 695, 700. "[E]xclusion 'has always been our last resort, not our first impulse' * * *." *Id.*, quoting *Hudson v. Michigan* (2006), 547 U.S. 586, 591. "[T]he exclusionary rule is not an individual right and applies only where it results in appreciable deterrence." *Herring*, 129 S.Ct. at 700 (quote marks & brackets omitted). "The extent to which the exclusionary rule is justified by these deterrence principles varies with the culpability of the law enforcement conduct." *Id.* at 701.

To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence.

Id. at 702.

As in *Herring*, "[t]he error in this case does not rise to that level," and therefore the federal Exclusionary Rule should not be applied to suppress the drugs or defendant's confession. There was no evidence that the police deliberately, recklessly, or with gross

negligence violated constitutional search-and-seizure protections. No systemic negligence was involved. Indeed, with the benefit of close study and considered reflection, it can be seen that two substantial bases exist to support the validity of the search. The lower-court judges have split 2-2 on the validity of the search. If the officers made an error, they did so in the necessary haste of a fast-developing situation. They were not even negligent vis-à-vis the constitutionality of their actions, let alone grossly negligent, reckless, or deliberate. The State's first proposition of law warrants review.

Proposition of Law No. 2. There is no Exclusionary Rule for a violation of the search-and-seizure provisions of Article I, Section 14, of the Ohio Constitution. (*State v. Lindway* (1936), 131 Ohio St. 166, paragraphs four, five, and six of the syllabus, approved and followed).

To the extent defendant attempts to justify exclusion under the Ohio Constitution, and to the extent Judge Bryant referenced the Ohio Constitution as a possible basis for exclusion, see concurring opinion, at ¶ 25, such arguments fail to come to grips with the fact that there is no Exclusionary Rule for a violation of the search-and-seizure provisions in Article I, Section 14, of the Ohio Constitution.

Syllabus law of this Court holds that the Ohio Constitution does not recognize an Exclusionary Rule for illegal searches and seizures thereunder:

4. In a criminal case, evidence obtained by an unlawful search is not thereby rendered inadmissible, and, if otherwise competent and pertinent to the main issue, will be received against an accused.

5. An application or motion to suppress or exclude such evidence made before trial or during trial is properly denied. The court need not concern itself with the collateral issue of how the evidence was procured. (Fifth paragraph of the syllabus of *Nicholas v. City of Cleveland*, 125 Ohio St., 474, and *Browning v. City of Cleveland*, 126

Ohio St., 285, overruled.)

6. The immunities from compulsory self-incrimination and unreasonable searches and seizures given by Sections 10 and 14, respectively, Article I, of the Constitution of Ohio, are not violated by the denial of such application or motion, and the admission of such evidence.

State v. Lindway (1936), 131 Ohio St. 166, paragraphs four, five, and six of the syllabus.

In *State v. Mapp* (1960), 170 Ohio St. 427, 430, this Court followed *Lindway* in concluding that “evidence obtained by an unlawful search and seizure is admissible in a criminal prosecution.” To be sure, in *Mapp v. Ohio* (1961), 367 U.S. 643, the United States Supreme Court determined that the evidence must be excluded, but it did so only by applying the federal Exclusionary Rule to the states. The *Mapp v. Ohio* Court could not countermand this Court’s constitutional ruling in *Lindway* or *Mapp*. Thus, even after *Mapp v. Ohio*, Ohio courts recognized as late as 1978 and 1993 that *Lindway* had never been overruled. *Cincinnati v. Alexander* (1978), 54 Ohio St.2d 248, 255-56 n. 6; *State v. Thierbach* (1993), 92 Ohio App.3d 365, 370 n. 5 (“never been overruled”).

Some noteworthy cases have failed to overrule *Lindway*. In *State v. Pi Kappa Alpha Fraternity* (1986), 23 Ohio St.3d 141, the Court ruled in the defendant’s favor on a search issue, and the syllabus cited the Ohio constitutional provision. But the Court also relied on the Fourth Amendment in the opinion. *Id.* at 145. Moreover, the existence of the Exclusionary Rule was apparently never raised, and *Lindway* was not discussed.

In *State v. Burkholder* (1984), 12 Ohio St.3d 205, the Court exclusively relied on Section 14, Article I of the Ohio Constitution in saying that an Exclusionary Rule applied in probation revocation proceedings. But the underlying opinion assumed that an

Exclusionary Rule applied at trial, and the Court appeared to be wrestling only with the narrow question of whether such a rule should be applicable in a probation revocation hearing. The Court did not discuss *Lindway* or the more fundamental question of whether an Exclusionary Rule should apply at trial. *Burkholder* was later overruled. *State ex rel. Wright v. OAPA* (1996), 75 Ohio St.3d 82, 91 (“We disapprove of *Burkholder*’s reliance on the Ohio Constitution to support application of the exclusionary rule in this regard.”).

In *State v. Jones* (2000), 88 Ohio St.3d 430, the Court cited both the Fourth Amendment and Section 14, Article I, of the Ohio Constitution in discussing the Exclusionary Rule. But the citation to the Fourth Amendment makes it unclear whether the Court believed an independent Exclusionary Rule would or could apply under the Ohio constitutional provision. *Id.* at 434 (“[t]he Fourth Amendment exclusionary rule”). *Lindway* was not discussed, which again suggests that the issue of *Lindway*’s non-exclusionary rule was neither presented nor decided by the Court.

When the Court in *State v. Brown*, 99 Ohio St.3d 323, 2003-Ohio-3931 recognized in 2003 that it could no longer rely on the Fourth Amendment to prohibit minor-misdemeanor arrests based on probable cause, the Court shifted to relying solely on the Ohio Constitution as a basis for exclusion. But the Court merely assumed that an Exclusionary Rule applied; the prosecutor apparently had not argued that issue.

It is unlikely that this Court ever intended to overrule *Lindway*. The Court would not have left such an important shift in constitutional policy to mere implication. At best, the foregoing cases suggest that the Court has not been squarely faced with the issue of whether it should adhere to or overrule the *Lindway* non-exclusionary rule.

A decision is not firm precedent on an issue unless it “squarely addresses” that issue. See *Brecht v. Abrahamson* (1993), 507 U.S. 619, 630-31. Accordingly, “[a] reported decision, although in a case where the question might have been raised, is entitled to no consideration whatever as settling, by judicial determination, a question not passed upon at the time of the adjudication.” *B.F. Goodrich v. Peck* (1954), 161 Ohio St. 202, paragraph four of the syllabus. Although some might think that earlier cases implicitly decided this point, there are no “implicit” precedents, and this Court is not bound by “perceived implications” of an earlier decision that did not “definitively resolve” the issue. *State v. Payne*, 114 Ohio St.3d 502, 2007 Ohio 4642, ¶¶ 10, 12.

There should be no Exclusionary Rule for search-and-seizure violations under Section 14, Article I, of the Ohio Constitution. An Exclusionary Rule exacts “substantial social costs.” *United States v. Leon* (1984), 468 U.S. 897, 907.

The costs of applying the exclusionary rule even at trial and on direct review are well known: the focus of the trial, and the attention of the participants therein, are diverted from the ultimate question of guilt or innocence that should be the central concern in a criminal proceeding. Moreover, the physical evidence sought to be excluded is typically reliable and often the most probative information bearing on the guilt or innocence of the defendant. * * * Application of the rule thus deflects the truthfinding process and often frees the guilty. The disparity in particular cases between the error committed by the police officer and the windfall afforded a guilty defendant by application of the rule is contrary to the idea of proportionality that is essential to the concept of justice.***

Stone v. Powell (1976), 428 U.S. 465, 489-90 (footnotes omitted); see, also, *Penn. Bd. of Probation v. Scott* (1998), 524 U.S. 357, 364, 366.

An Exclusionary Rule also allows the defense to mislead the jury by claiming

innocence when the suppressed physical evidence would show otherwise. To be sure, a defendant taking the witness stand is subject to impeachment with the otherwise suppressed physical evidence. *United States v. Havens* (1980), 446 U.S. 620. But the defense is free to put other witnesses on the witness stand to support the defendant's claim of innocence without fear of such impeachment. *James v. Illinois* (1990), 493 U.S. 307.

There is no indication that the Ohio Constitution meant to create this kind of shell game where the truth is hidden from the factfinder and the factfinder is affirmatively deceived. "After all, a trial before a judicial tribunal is primarily a truth-determining process, and if it in any sense loses its character as such, it becomes the veriest sort of a mockery." *State v. Marinski* (1942), 139 Ohio St. 559, 560. As *Lindway* states:

"All this is misguided sentimentality. For the sake of indirectly and contingently protecting the Fourth Amendment, this view appears indifferent to the direct and immediate result, viz., of making Justice inefficient, and of coddling the criminal classes of the population. It puts Supreme Courts in the position of assisting to undermine the foundations of the very institutions they are set there to protect. It regards the over-zealous officer of the law as a greater danger to the community than the unpunished murderer or embezzler or panderer." And to bring the list more up to date we might add the terms gangster, gunman, racketeer and kidnaper.

Lindway, 131 Ohio St. at 181 (quoting Wigmore). This Court itself has noted recently that "the exclusionary rule and the concomitant suppression of evidence generate substantial social costs in permitting the guilty to go free and the dangerous to remain at large." *State v. Oliver*, 112 Ohio St.3d 447, 2007-Ohio-372, ¶ 12 (internal quotation marks omitted).

This Court should follow *Lindway*. The State's second proposition of law warrants review.

Proposition of Law No. 3. Probable cause only requires a fair probability of criminal activity, not a showing by a preponderance of the evidence or beyond a reasonable doubt. In assessing probable cause, a court must consider the facts in their totality.

Judge McGrath's dissent amply lays out the facts showing the existence of probable cause vis-à-vis the search of defendant, and the State hereby incorporates his discussion by reference here. See McGrath dissent, at ¶¶ 38-44. Other cases have found probable cause to search a passenger in such circumstances based on the odor of marijuana in a car. See *State v. Perryman*, 8th Dist. No. 82965, 2004-Ohio-1120, ¶ 18; *State v. Simmons*, 8th Dist. No. 85297, 2005-Ohio-3428, ¶ 26; *State v. Bird* (1992), 4th Dist. No. 92 CA 2. This Court's case law confirms that an observation combined with the odor of marijuana will provide probable cause to arrest the occupants of the car for possession of marijuana. *State v. Brown* (1992), 63 Ohio St.3d 349, 351-52, overruled on other grounds in *State v. Murrell* (2002), 94 Ohio St.3d 489.

Judges Tyack and Bryant erred in drawing great significance out of the fact that there was no testimony that the police discerned the odor of marijuana emanating from defendant himself. See Opinions, at ¶¶ 20, 35. Defendant's undoubted occupancy of the car in which the marijuana was smoked was itself a fact that sufficiently tied defendant to the criminal behavior, as shown by cases like *Wyoming v. Houghton* and *Maryland v. Pringle*. "We think it an entirely reasonable inference from these facts that any or all three of the occupants had knowledge of, and exercised dominion and control over, the [drugs]", and there was probable cause that the passenger was involved, "either solely or jointly." *Pringle*, 540 U.S. at 372. In addition, defendant himself was acting suspiciously in attempting to walk away, which, again, served to focus probable cause not only on the

car but also on defendant himself.

Probable cause only requires a fair probability of criminal activity, not a showing by a preponderance of the evidence or beyond a reasonable doubt. *State v. George* (1989), 45 Ohio St.3d 325, 329. The facts must be considered in their totality. *State v. Gantz* (1995), 106 Ohio App.3d 27, 35; *United States v. Sokolow* (1989), 490 U.S. 1, 8, 9-10. The State's third proposition of law warrants review.

Proposition of Law No. 4. For purposes of search-incident-to-arrest doctrine, an arrest is "lawful" even if violative of state law governing when a person can be arrested for a minor offense. A violation of R.C. 2935.26 therefore does not provide a basis for finding an arrest invalid for constitutional purposes; nor does it provide a basis for finding a violation of the Ohio Constitution, which does not provide a basis for suppression in any event.

Judges Tyack and Bryant rejected the State's search-incident-to-arrest argument on the additional ground that an arrest would not have been "lawful" because R.C. 2935.26 generally bars an arrest for a minor misdemeanor. See Opinions, at ¶¶ 21-26, 34. They did not address the State's reliance on *Virginia v. Moore* (2008), 128 S.Ct. 1598, which recognized that the lawfulness of an arrest for Fourth Amendment purposes would not be affected by a statute like R.C. 2935.26 governing the arrest of minor misdemeanants. They also did not address the State's contention that a violation of R.C. 2935.26 could not be bootstrapped into a violation of the Ohio Constitution and that the Ohio Constitution provides no basis for exclusion in any event.

The "not arrestable" argument finds its beginning in *State v. Jones* (2000), 88 Ohio St.3d 430. In *Jones*, this Court held under the federal and Ohio constitutions that custodial arrests for a minor misdemeanor were prohibited unless one of the exceptions

allowing arrest under R.C. 2935.26 applies. Subsequently, the United States Supreme Court held in *Atwater v. Lago Vista* (2001), 532 U.S. 318, that the Fourth Amendment does not forbid a warrantless arrest for a minor misdemeanor based on probable cause. Despite *Lago Vista*, this Court concluded in *State v. Brown*, 99 Ohio St.3d 323, 2003-Ohio-3931, that it would adhere to *Jones* as a matter of Ohio constitutional law.

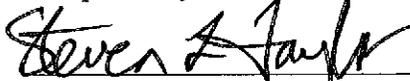
Jones and *Brown* are undermined by *Virginia v. Moore* (2008), 128 S.Ct. 1598, which determined that state-law standards governing whether minor misdemeanants will be arrested are irrelevant to the Fourth Amendment probable-cause standard or to the ability of the police under the Fourth Amendment to make a search incident to such an arrest. *Id.* at 1606-1607.

This Court has followed *Moore* in *State v. Jones*, 121 Ohio St.3d 103, 2009-Ohio-316. The defendants in *Jones* complained that the officer's extraterritorial stop of their car violated the officer's statutory jurisdiction. Relying on *Virginia v. Moore*, this Court concluded under the Fourth Amendment that the statute governing the officer's jurisdiction could not be elevated to be the basis for suppression. "The sole focus of the inquiry should have been on the stop itself because the violation of R.C. 2935.03 does not rise to the level of a constitutional violation for the reasons expressed in *Moore*." *Jones*, 2009-Ohio-316, ¶ 20. "[T]he General Assembly chose not to provide any remedy for a violation" of the pertinent statute, and "establishing a remedy for a violation of a statute remains in the province of the General Assembly, not the Ohio Supreme Court." *Id.* at ¶¶ 21, 22. "[T]he remedy for a violation of the statute falls within the realm of the legislative branch." *Id.* at ¶ 23.

Although this 2009 *Jones* decision was addressing only the Fourth Amendment, its reasoning naturally applies to the Ohio Constitution as well. The General Assembly should control whether a violation of its statutes will warrant exclusion of evidence. R.C. 2935.26 does not set forth an Exclusionary Rule for violations, and Ohio courts should not bootstrap such *statutory* violations into a constitutional basis to exclude evidence. In light of this 2009 *Jones* decision, the 2003 decision in *Brown* stands on tenuous footing, as it makes little sense to use an Ohio *statute* as a basis to extend the Ohio Constitution beyond the Fourth Amendment.

Even if a violation of R.C. 2935.26 somehow could be elevated to a constitutional dimension, the constitutional violation still would not provide a basis for exclusion. See Second Proposition of Law, *supra*. The State's fourth proposition of law warrants review.

Respectfully submitted,



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Assistant Prosecuting Attorney
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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was hand delivered on this 27th day of Aug., 2009, to the office of Allen Adair, 373 South High Street, 12th Floor, Columbus, Ohio 43215, counsel for defendant-appellee.



STEVEN L. TAYLOR

Pfeiffer J.
FILED
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FRANKLIN CO. OHIO

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

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State of Ohio,

Plaintiff-Appellee,

v.

Adrian L. Johnson,

Defendant-Appellant.

No. 08AP-990
(C.P.C. No. 07CR-12-8749)

(REGULAR CALENDAR)

D E C I S I O N

Rendered on July 14, 2009

Ron O'Brien, Prosecuting Attorney, and *Steven L. Taylor*, for appellee.

Yeura R. Venters, Public Defender, and *Allen V. Adair*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

TYACK, J.

{¶1} Adrian L. Johnson is appealing from his convictions for possession of cocaine and possession of crack cocaine. He assigns two errors for our consideration:

First Assignment of Error: The trial court erroneously overruled appellant's motion to suppress evidence seized during the warrantless search of his person.

Second Assignment of Error: The trial court erroneously overruled appellant's motion to suppress statements obtained in the aftermath of the illegal search of his person.

{¶2} On the evening of June 11, 2007, Adrian L. nson and two other men went to a Dairy Mart at the intersection of Main Street and Weyant on the east side of Columbus, Ohio. One or more of the men had been smoking marijuana in the car before they parked it outside the store with the windows open. A Columbus police officer checked the car and smelled the marijuana smoke. The officer shone his flashlight inside the car and saw what he considered to be a marijuana "blunt" sitting in the console between the front seats.

{¶3} The occupants of the car returned. Steven Pearson approached the door by the driver's seat. Omar Nolen approached the front passenger's seat. Johnson started toward the door behind the driver's door or the rear door on the passenger side, but decided to walk away when a police officer began asking Pearson about the marijuana in the car.

{¶4} Pearson admitted the car was his, apologized for having the marijuana and offered to throw it away. No one was ever charged with a marijuana offense, which is a minor misdemeanor in Ohio.

{¶5} Columbus Police Officer Justin Coleman was the officer who smelled the marijuana smoke and who questioned the driver. When Johnson began to walk away, Coleman directed a fellow officer, Greg Sanderson, to stop Johnson because "he was in the car, too." (Tr. 33.)

{¶6} Officer Sanderson frisked Johnson for weapons and found none. Officer Sanderson then searched Johnson's pockets and found small quantities of marijuana, cocaine and crack cocaine in a cigarette case.

{¶7} Johnson was placed in the back of a police cruiser and questioned. He acknowledged having the drugs, claiming he had found them at a restaurant earlier.

{¶8} The first question to be addressed is whether the police officer had the right to stop and search Johnson.

{¶9} The Fourth Amendment to the United States Constitution states that individuals have the right to be free of unreasonable searches and seizures. The Supreme Court of the United States has held in *Katz v. United States* (1967), 389 U.S. 347, 88 S.Ct. 507, that warrantless searches are per se unreasonable, subject to a few, well-delineated exceptions. However, a police officer can stop and frisk a citizen if the officer has a reasonable articulable suspicion of the citizen being involved in illegal activity. See *Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct. 1868.

{¶10} Officer Sanderson went well beyond a frisk of Johnson. Having conducted a frisk, the officer searched Johnson's pockets. Officer Sanderson's action was beyond that authorized by *Terry*, so legal justification for the search must be found elsewhere if the search of Johnson's pockets is to be considered a reasonable, legal search.

{¶11} Because no warrant was involved, the burden falls upon the government to set forth one of the well-delineated exceptions which justify the search of Johnson's pockets. In the trial court, the State asserted two grounds for the search to be considered reasonable and legal. First, the assistant prosecuting attorney asserted that the police officer had "probable cause to know that this car was involved in something illegal. That's all that's required under these circumstances." (Tr. 41.) Second, the assistant prosecuting attorney asserted that "exigent circumstances" justified the search of Johnson's pockets after the frisk for weapons had revealed no weapons.

{¶12} Addressing the motor vehicle exception to the warrant requirement, first we find the exception not to apply here. The motor vehicle exception requires the search of a motor vehicle. The exception also requires that probable cause to search be present. See *Carroll v. United States* (1925), 267 U.S. 132, 45 S.Ct. 280, and its progeny.

{¶13} The issue in Johnson's case is not the search of a motor vehicle, but the search of Johnson's pockets outside the motor vehicle. For this reason alone, the motor vehicle exception to the warrant requirement does not apply.

{¶14} Further, no probable cause to believe that Johnson had contraband in his pockets existed. Probable cause to search one location (the car) does not automatically result in probable cause to search another location (Johnson's pockets).

{¶15} The second justification for the search asserted below was "exigent circumstances." The exigent circumstances exception has consistently required probable cause to search the location to be searched or to seize the object to be seized. Also, the exigent circumstances exception has only been applied by the United States Supreme Court in circumstances far more exigent than one in which it is possible that a person is walking away with a small amount of marijuana in his pocket. Thus, in *Ker v. California* (1963), 374 U.S. 23, 83 S.Ct. 1623, the issue before the United States Supreme Court was whether police action was illegal with respect to a known drug dealer who had recently made a drug sale of a pound of marijuana to an undercover police officer. The drug dealer complained about police officers using a passkey to enter his apartment to seize a sizeable quantity of drugs when a serious risk existed that the drugs would be distributed before a warrant could be procured.

{¶16} In *Schmerber v. California* (1966), 384 U.S. 757, 86 S.Ct. 1826, officers were permitted to have blood drawn from a man who smelled of alcohol on his breath, had bloodshot eyes, and had caused serious injury to a passenger as a result of a motor vehicle collision.

{¶17} In *Mincey v. Arizona* (1978), 437 U.S. 385, 98 S.Ct. 2408, the United States Supreme Court struck down a prosecution theory that the severity of an offense, including murder, automatically created exigent circumstances such that a warrant was not required.

{¶18} In *Welsh v. Wisconsin* (1984), 466 U.S. 740, 104 S.Ct. 2091, the United States Supreme Court held that the warrant requirement should rarely be disregarded when minor offenses are involved, especially in the context of entering residences.

{¶19} The state has argued that the case of *State v. Moore*, 90 Ohio St.3d 47, 2000-Ohio-10, applies and supports a finding of exigent circumstances with respect to the search of Johnson's pockets. The syllabus for the *Moore* case reads:

The smell of marijuana, alone, by a person qualified to recognize the odor, is sufficient to establish probable cause to conduct a search.

{¶20} If the issue before us were the search of the car, *Moore* would apply. However, no testimony at the hearing on the motion to suppress indicated that Johnson had any odor of marijuana smoke on him. At most, Johnson had been in a car while someone smoked marijuana earlier, but his presence in the car did not provide probable cause to believe he possessed marijuana at the time he was searched, especially in light of the driver's acknowledgement that the marijuana belonged to him (the driver). There

was no probable cause to believe that more marijuana or any other controlled substance was in the possession of anyone outside the car.

{¶21} The state also has submitted that the warrant exception of a search incident to a lawful arrest applies here. The lawful arrest posited is an arrest for possession of the marijuana left in the car when the men went into the Dairy Mart.

{¶22} To possess a controlled substance in Ohio, the individual must have control over the controlled substance. R.C. 2925.01(K) defines "possess" as follows:

"Possess" or "possession" means having control over a thing or substance, but may not be inferred solely from mere access to the thing or substance through ownership or occupation of the premises upon which the thing or substance is found.

At most, Johnson previously had access to the marijuana blunt left in the console between the front seats of the car. Police officers had no basis for believing that Johnson had control over it, especially after Pearson claimed responsibility for it.

{¶23} Further, the Ohio Legislature has specifically barred arrest for minor misdemeanors, subject to exceptions which do not apply here. See R.C. 2935.26.

{¶24} In addition, the Supreme Court of Ohio has ruled that custodial arrests are prohibited unless compliance with R.C. 2935.26 is demonstrated.

{¶25} The Supreme Court of the United States has recently restricted the doctrines of searches incident to a lawful arrest in the case of *Arizona v. Gant*, ___ S.Ct. ___, 2009 WL 1045962 (U.S. Ariz.), 77 USLW, and narrow the scope of permissible searches under *New York v. Belton* (1981), 453 U.S. 454, 101 S.Ct. 2860.

{¶26} In short, no lawful arrest of Johnson was occurring, so no search incident to a lawful arrest could occur.

{¶27} Since none of the well-delineated exceptions to the warrant requirement apply, the search of Johnson's pockets was illegal per se and unreasonable. Hence, the trial court should have suppressed the small amount of controlled substances which was found and seized.

{¶28} The first assignment of error is sustained.

{¶29} The custodial interrogation of Johnson was a result of the search of Johnson's pockets and hence a fruit of the proverbial poisonous tree. See *Wong Sun v. United States* (1962), 371 U.S. 471, 83 S.Ct. 407. Therefore, the statement obtained as a result of the illegal search and seizure also should be suppressed.

{¶30} The second assignment of error is sustained.

{¶31} Both assignments of error having been sustained, the judgment of the Franklin County Court of Common Pleas is reversed and the case is remanded for further proceedings.

*Judgment reversed and remanded
for further proceedings.*

BRYANT, J., concurs separately.
McGRATH, J., dissents.

BRYANT, J., concurring separately,

{¶32} I concur in the majority's judgment reversing the judgment of the Franklin County Court of Common Pleas that denied defendant's motion to suppress, but because I do so for different reasons than does the majority, I write separately.

{¶33} Even if we assume the police officers were justified under *Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct 1868, in conducting an investigative stop and frisk of Johnson, the police officer who detained and searched Johnson exceeded *Terry's*

constitutionally permissible bounds when he reached into Johnson's pockets and seized the small quantities of marijuana, cocaine and crack cocaine. The "plain feel" exception to the warrant requirement of the Fourth Amendment does not apply here because Officer Sanderson testified at the suppression hearing the contraband was not detected during his patdown search of Johnson's outer clothing. See *Minnesota v. Dickerson* (1993), 508 U.S. 366, 113 S.Ct. 2130, and *State v. Evans* (1993), 67 Ohio St.3d 406 (stating a police officer conducting a lawful *Terry*-type search may seize nonthreatening contraband, such as controlled substances, when its incriminating nature is "immediately apparent" to the searching officer through his sense of touch during a patdown search). See also *State v. Daugherty*, 8th Dist. No. 89373, 2007-Ohio-6822, and *State v. Crusoe*, 150 Ohio App.3d 208, 2002-Ohio-6389 (concluding police exceeded the bounds of a lawful *Terry* search in seizing crack cocaine and drug paraphernalia from pockets). A police officer must have probable cause, not just reasonable suspicion to believe that an item is contraband before seizing it to "ensure * * * against excessively speculative seizures." *Dickerson* at 376; *State v. Moore* (2000), 90 Ohio St.3d 47.

{¶34} The state argues the search was proper as incident to arrest or because exigent circumstances were present. The suspected illegal conduct that gave rise to the investigatory stop and frisk of Johnson was, by Officer Coleman's own testimony at the suppression hearing, possession of a "very small amount of marijuana" which, if charged, would have been the basis only for a minor misdemeanor offense. R.C. 2935.26 prohibits police officers from arresting individuals for a minor misdemeanor unless one of four statutory exceptions applies, and none is applicable here. Because Johnson would not have been subject to lawful arrest even if the marijuana blunt found in the car were his,

the exception for search incident to a lawful arrest does not apply. See *State v. Jackson*, 8th Dist. No. 85639, 2005-Ohio-5688; *State v. Richardson* (Dec. 7, 1999), 10th Dist. No. 98AP-1500.

{¶35} Ohio's Supreme Court has concluded that Ohio's constitution provides greater protection than the Fourth Amendment against warrantless arrests for minor misdemeanors, and evidence obtained as the result of an arrest for a minor misdemeanor is subject to suppression in accordance with the exclusionary rule. *State v. Brown*, 99 Ohio St.3d 323, 2003-Ohio-3931; *State v. Jones*, 88 Ohio St.3d 430, 2000-Ohio-374; *Jackson*, supra. Although in this case the presence of the marijuana blunt and an odor of freshly burnt marijuana emanating from the automobile may have provided the officers with probable cause to conduct a search of the automobile's passenger compartment, it did not provide probable cause to arrest or search Johnson incident to arrest, when Johnson, unlike the defendant in *Moore*, had no detectible odor of marijuana coming from him. See *State v. Kelly* (Dec. 7, 2001), 11th Dist. No. 2000-P-0113.

{¶36} Although "exigent circumstances" may provide an exception to the Fourth Amendment warrant requirement, probable cause to arrest or to search must be present. *Moore*; *State v. Robinson*, (1995), 103 Ohio App.3d 490, 497, citing *Steagald v. United States* (1981), 451 U.S. 204, 101 S.Ct. 1642. Because police had no probable cause to arrest Johnson or to conduct more than a *Terry*-type patdown search of him during a lawful investigative detention, the question of whether "exigent circumstances" existed to excuse the warrant requirement is not reached, and the controlled substances seized from Johnson's pockets, together with statements made by him after the illegal search

and seizure, must be suppressed. *Wong Sun v. United States* (1962), 371 U.S. 471, 83 S.Ct. 407.

{¶37} Accordingly, I agree with the majority's conclusion that the motion to suppress should have been granted. Because the trial court did not, I agree that the judgment of the trial court be reversed.

McGRATH, J., dissenting.

{¶38} Being unable to agree with the majority or concurring opinions herein, I respectfully dissent. Essentially, both the majority and concurring opinions find that, under the facts of this case, the police officers had neither a reasonable suspicion nor probable cause to believe that the defendant possessed a controlled substance at the time of the search of the defendant's pockets. Both opinions conclude that the odor of burning marijuana in a vehicle in which the defendant was a passenger and the observing of a "blunt" marijuana cigarette on the center console of the vehicle does not give rise to probable cause or reasonable suspicion, as there was no specific odor of marijuana coming from the defendant's body once he was out of the car and being addressed by the searching police officer.

{¶39} Probable cause requires a fair probability of criminal activity, not a showing by preponderance of the evidence or beyond a reasonable doubt. Moreover, in assessing probable cause or reasonable suspicion, a court must consider the facts in their *totality*. *State v. Gantz* (1995), 106 Ohio App.3d 27, 35. Police officers may draw inferences based upon their experience and training in order to decide whether probable cause exists and, of course, those inferences may not be obvious to an untrained person. *United States v. Cortez* (1981), 449 U.S. 411, 417, 101 S.Ct. 690, 694.

{¶40} I believe additional factors here support the reasonableness of the officers' conduct. Not only did the defendant arrive in the vehicle a short time before the search took place in the company of two other men, the vehicle was one in which the odor of burnt marijuana was present, and marijuana was observed on the front console. The defendant and the other two men had exited the car and entered the Dairy Mart store. The officers knew this to be a particular location of heavy narcotics activity and it was 1:30 a.m. The officers waited to see if anyone approached the car. All three men returned to the car to their respective doors as if to get into the vehicle. As the police then approached, the driver spoke to Officer Coleman, acknowledged the marijuana, apologized for it, and offered to throw it away. The defendant, approaching a rear passenger door as if to enter the vehicle, saw the driver's encounter with the police and changed course as he turned and started to walk away and distance himself from the vehicle and from the police. As the driver identified the defendant as being an occupant of the vehicle and that the three men had all arrived together, Officer Coleman saw the defendant attempting to exit the area and patting his pockets. Officer Coleman relayed what he had seen to his fellow officer, Officer Sanderson, who ultimately stopped the defendant and searched him. Officer Coleman testified that police training and his experience both indicate that, in drug possession situations, persons very often pat the areas of the body where they may have drugs or other contraband. Such is considered by police to be a telltale sign or body cue indicative of possession of an illegal or controlled substance.

{¶41} Although I agree that the officers did not testify to smelling marijuana on the defendant's person, the facts here seem even stronger to indicate the likelihood of

possession by this defendant than existed in *State v. Moore*, 90 Ohio St.3d 47, 2000-Ohio-10, or *State v. Taylor* (Oct. 22, 1997), 9th Dist. No. 96CA006592.

{¶42} Officer Coleman was emphatic that the smell of marijuana here was of burnt marijuana, not simply the odor of marijuana itself. Thus, the defendant was among one of three individuals in the vehicle where a blunt producing burnt marijuana odor was plainly visible. The defendant had arrived in the car and obviously had left the car and had come back with a grocery bag containing beer. As he was about to enter the car, the defendant saw the police and then attempted to vacate the area. As he did so, he gave one of the "body cues" or telltale signs known to police with respect to drug possession situations—the defendant was patting his pockets and leaving the area.

{¶43} Under these circumstances and the cases of *Moore*, supra; *State v. Perryman*, 8th Dist. No. 82965, 2004-Ohio-1120; *State v. Garcia* (1986), 32 Ohio App.3d 58; *State v. Simmons*, 8th Dist. No. 85297, 2005-Ohio-3428; or *State v. Bird* (1992), 4th Dist. No. 92 CA 2, I believe these officers had more than sufficient probable cause to search the defendant's pockets for marijuana.

{¶44} Furthermore, though rejected by the majority and separate concurring opinions, the state has argued the exigency exception to the warrantless search. If there is probable cause to believe that a defendant possesses a controlled substance, then his exiting the area and getting out of the sight of the police officers produces an "exigent" situation by the mere fact that the drugs could easily then be disposed of and the police officers would not be aware that they had been thrown away. In essence, the drugs are going down the street and out of the possible controlled situation of the officers similar to a vehicle going down the street with controlled substances.

{¶45} Therefore, I would find that, not only did the officers have probable cause, but an exigent circumstance did exist justifying a warrantless search. Accordingly, I would agree with the trial court's disposition of the matter and would affirm the trial court's denial of the motion to suppress.

20619 - H61

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FRANKLIN CO. OHIO

2009 JUL 14 PM 1:26

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

CLERK OF COURTS

State of Ohio,

Plaintiff-Appellee,

v.

Adrian L. Johnson,

Defendant-Appellant.

No. 08AP-990
(C.P.C. No. 07CR-12-8749)

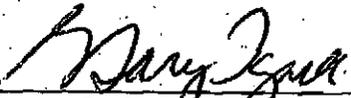
(REGULAR CALENDAR)

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on July 14, 2009, the assignments of error are sustained and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is reversed and this cause is remanded to that court for further proceedings in accordance with law consistent with said decision. Costs shall be assessed against appellee.

BRYANT, J., concurs separately.

By:



Judge G. Gary Tyack

BFF

IN THE SUPREME COURT OF OHIO

ORIGINAL

IN THE MATTER OF: *

THE ADOPTION OF CHARLES B. *

Case No. 88-2163

ON COMPUTER

APPEAL FROM THE COURT OF APPEALS OF LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT, FROM A JUDGMENT ENTRY IN
CASE NO. CA-3382 DATED OCTOBER 28, 1988

* * * * *

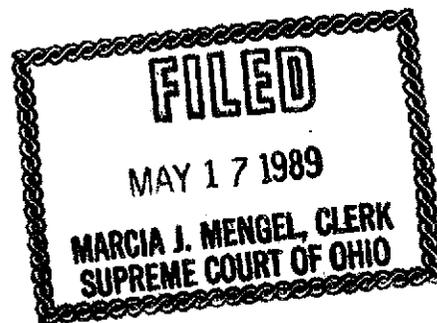
BRIEF OF RESPONDENT-APPELLEE, LICKING COUNTY
DEPARTMENT OF HUMAN SERVICES

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IN THE SUPREME COURT OF OHIO

IN THE MATTER OF: *

THE ADOPTION OF CHARLES B. *

Case No. 88-2163

APPEAL FROM THE COURT OF APPEALS OF LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT, FROM A JUDGMENT ENTRY IN
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* * * * *

**BRIEF OF RESPONDENT-APPELLEE, LICKING COUNTY
DEPARTMENT OF HUMAN SERVICES**

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COMBINED STATEMENT OF THE FACTS AND CASE

Charles B. was born on June 17, 1981. On April 23, 1985, the Licking County Juvenile Court accepted voluntary permanent surrenders of the child and granted permanent custody of Charles to the Licking County Department of Human Services, Children's Services Division (R. 231). Charles B. has been in four foster placements since permanent custody was granted to the Licking County Department of Human Services, Children's Services Division (R. 227-228).

Charles B. is a special needs child. Charles was diagnosed as having acute lymphocytic leukemia in January of 1984. He was treated with a program of radiation and chemotherapy and is currently in a state of remission. Charles has had delayed speech and language development. As a result of his treatment for leukemia, Charles may have a tendency for learning disabilities. Charles has some stigmata indicative of fetal alcohol syndrome (R. 107-109, 219-220).

Charles was registered with OARE on August 1, 1985, for adoption and has been registered in several different exchanges for adoptive children (R. 231-234).

Mr. B. filed a petition for adoption of Charles on January 15, 1988. Mr. B. is not a relative of Charles. Mr. B. is a homosexual residing with an adult male homosexual, Mr. K., in a relationship they regard as a marriage (R. 158, 185, 203). Mr. B. has known Charles since July of 1986 when he entered into a therapeutic relationship with Charles as a psychological assistant (R. 158-159). On April 13, 1988, Russell Payne, the

executive head of Licking County Department of Human services, filed a withholding of consent to the petition for adoption (R. 73-77). On April 14, 1988, a hearing was held in Licking County Probate Court on the petition for adoption. By Entry filed on May 9, 1988, the trial court found that the consent of the Agency was not necessary as provided in Ohio Revised Code Section 3107.07(F) and that the adoption of the child by Mr. B. is in the best interests of the child. The court further ordered that the child be placed in the physical custody of Mr. B. on May 31, 1988.

The Licking County Department of Human Services filed a notice of appeal, appealing the aforementioned entry of the trial court, on May 24, 1988, and filed a request for transcript and motion for stay of execution on the same date.

On May 27, 1988, the Licking County Department of Human Services filed an application for stay of execution in the Court of Appeals, Licking County, Ohio, Fifth Appellate District. A temporary stay of execution was granted.

On June 8, 1988, a hearing was held in the Court of Appeals, Fifth Appellate District, on appellee's motion to vacate the temporary stay. By Entry filed on June 10, 1988, the motion to vacate the stay was overruled.

On September 27, 1988, the Court of Appeals heard oral arguments on the appeal of the Licking County Department of Human Services. On October 28, 1988, the Court of Appeals filed its Entry and Opinion reversing the trial court's decision.

On November 21, 1988, Mr. B. and the guardian ad litem for

the child filed their joint notice of appeal in the Court of Appeals.

This matter is now before this Honorable Court.

ARGUMENT

PROPOSITION OF LAW NO. 1

THE TRIAL COURT'S FINDING THAT THE ADOPTION OF THE CHILD BY MR. B. IS IN THE BEST INTERESTS OF THE CHILD IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

A characteristic profile of the preferred adoptive placement for Charles was prepared by the Agency. That profile consisted of the following characteristics:

1. A two-parent family with older sibling(s)
2. A family with a child-centered lifestyle
3. A family with parenting experience and adoptive experience
4. A family with a proven ability to deal with behavior disorder issues
5. A family open to pre-adoptive and post-adoptive counseling

The profile was developed for Charles based on his psychological evaluation, his agency records, medical and special needs, consultations with his psychologist, his foster parents, and other key people in his life (R. 212-216)

The appellee, Mr. B., does not meet all the characteristics of the profile. He has entered into a permanent relationship

with Mr. K., but there are no other children in the home to provide respite or role modeling for Charles (R. 182). Due to Charles' medical condition and behavior problems, a two-parent family with older siblings would be considered ideal (R. 214).

Mr. B. and Mr. K. do not meet the characteristics of a family with a child-centered lifestyle (R. 217-218, 235).

In any adoption, and particularly in the case of a special needs child, the adoptive parents need to be able to integrate the child quickly and comfortably into their environment.

Mr. B. and Mr. K. have no prior adoptive experience. Neither Mr. B. nor Mr. K. has been a parent (R. 182, 184, 204). Mr. B. was a foster parent for a sixteen or fifteen-year old for a period of nine months (R. 182). Mr. B. and Mr. K. are not a family with a proven ability to deal with behavior disorder issues (R. 218-219, 236).

The evidence presented clearly shows that the appellee does not meet the experiential characteristics of the profile.

It is the best interests of the child, not of the prospective adoptive parent, that are paramount.

It is uncontroverted that Mr. B. and Mr. K. are homosexual. They regard their relationship as a marriage (R. 158, 185, 205). This relationship is not a legally sanctioned union. The State of Ohio does not sanction marriages between members of the same sex. Ohio Revised Code Section 3101.01.

The best interests of Charles B. are not served by being adopted into the home of two male homosexuals living as husband and wife in a relationship they consider a marriage. In such a

home Charles B. would have as parental role models two adult men who live and treat one another as man and wife. A marital union that is not and cannot be legally sanctioned will be Charles B.'s model of a family unit. Charles will not be able to pass as the natural child of such a union and would be subject to controversy. Announced homosexuality is hostile and incompatible with the goals of the adoption statute, to provide children with appropriate parental role models and a home environment that provides the child with the closest approximation of a birth family that is available. The best interests of the child control in an adoption proceeding, and it cannot be in the best interests of a child to be placed for adoption into the home of a homosexual couple living as man and wife.

PROPOSITION OF LAW NO. 2

AS A MATTER OF LAW, HOMOSEXUALS ARE INELIGIBLE TO ADOPT IN OHIO.

In Ohio, adoption is a statutory concept. There is no common law adoption in Ohio. As stated by the Court of Appeals in its decision now on appeal, "The fundamental rationale for adoption is to provide a child with the closest approximation to a birth family that is available."

Ohio Revised Code Section 3107.03 states:

The following persons may adopt:

- (A) A husband and wife together, at least one of whom is an adult;
- (B) An unmarried adult;
- (C) The unmarried minor parent of the person to be adopted;
- (D) A married adult without the other spouse joining as a petitioner if any of the following apply:
 - (1) The other spouse is a parent of the person to be adopted and consents to the adoption;
 - (2) The petitioner and the other spouse are separated under section 3103.06 or 3105.17 of the Revised Code;
 - (3) The failure of the other spouse to join in the petition or to consent to the adoption is found by the court to be by reason of prolonged unexplained absence, unavailability, incapacity, or circumstances that make it impossible or unreasonably difficult to obtain either the consent or refusal of the other spouse.

A legislative intent to make homosexuals eligible to adopt cannot be imputed to the legislature from the language of R.C. 3107.03. A court cannot assume from the absence of restrictions

that a given result, such as homosexual adoptions, was intended by the legislature, but must review it. See, Matter of Adoption of Robert Paul P. (1984) 481 N.Y.S. 2d 652, 63 N.Y. 2d 233, 471 N.E. 2d 424.

Mr. B. and Mr. K. regard their relationship as a marriage (R. 158, 185, 203). This relationship is not a legally sanctioned union. The State of Ohio does not sanction marriages between members of the same sex. Ohio Revised Code Section 3101.01.

The parental role model and home environment that would be created in this instance would be that of two adult males living as husband and wife in a legally unsanctioned marriage. This would not provide the child with appropriate parental role models or a home environment that is in any way approximate to a birth family. Announced homosexuality is hostile to the goals of the adoption statute and incompatible with the concept of adoption. As stated by the Court of Appeals in its opinion, "It will be impossible for the child to pass as the natural child of the adoptive 'family' or to adapt to the community by quietly blending in free from controversy and stigma."

Therefore the Court of Appeals found, as a matter of law, that it is not in the best interest of a seven-year old male child to be placed for adoption into the home of a pair of adult male homosexual lovers. As stated by the Appellate Court in its decision, "It is not the business of the government to encourage homosexuality."

PROPOSITION OF LAW NO. 3

THE COURT OF APPEALS DID NOT ABUSE ITS DISCRETION IN FINDING THAT AS A MATTER OF LAW, IT IS NOT IN THE BEST INTERESTS OF A SEVEN-YEAR OLD MALE CHILD TO BE PLACED IN THE HOME OF A PAIR OF ADULT MALE HOMOSEXUAL LOVERS.

The Court of Appeals is not substituting its judgment for the judgment of the trial court. The Court of Appeals, rather, concluded that the trial court had no discretion to exercise, as the goals of announced homosexuality are hostile to the goals of the adoption statute, and the concepts of homosexuality and adoption are inherently mutually exclusive and inconsistent.

As set forth in Proposition of Law No. 2, a legislative intent to make homosexuals eligible to adopt cannot be imputed to the legislature from the language of Revised Code 3107.03, and, as a matter of law, it is not in the best interests of a seven-year old male child to be placed for adoption into the home of a pair of adult male homosexual lovers.

PROPOSITION OF LAW NO. 4

THE FINDING THAT HOMOSEXUALS ARE INELIGIBLE TO ADOPT AS A MATTER OF LAW DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF EITHER THE OHIO CONSTITUTION ART. 1 SECTION 16, OR THE UNITED STATES CONSTITUTION, AMENDMENTS V AND XIV.

The due process provisions of the Ohio Constitution and the United States Constitution require that no state deprive any person of life, liberty or property without due process of law. There is no cognizable life, liberty or property interest in adopting a child. As there is no such interest in adopting a child, there is no entitlement thereto. See Opinion of the Justices, 525 A. 2d 1095, 1100 (1987). This is not a case involving the legally cognizable interest of a parent in the custody of his own child. Mr. B. is neither the parent nor a relative of the child. As stated in Opinion of the Justices, 525 A. 2d 1095 at 1100 (1987), "Mere desire or expectation does not give rise to the level of an interest requiring procedural due process protections."

The finding of the Court of Appeals that, as a matter of law, it is not in the best interests of a seven-year old male child to be placed in the home of a pair of adult male homosexual lovers bears a rational relationship to the State's legitimate interests in the welfare of children and providing adopted children with appropriate parental role models and a home environment that provides the child with the closest approximation to a birth family that is available.

Announced homosexuality, as stated by the Court of Appeals, defeats the goals of adoption.

PROPOSITION OF LAW NO. 5

THE FINDING THAT HOMOSEXUALS ARE INELIGIBLE TO ADOPT AS A MATTER OF LAW DOES NOT VIOLATE EQUAL PROTECTION OF THE LAWS AS PROVIDED IN THE OHIO CONSTITUTION ART. I SECTION 2 AND UNITED STATES CONSTITUTION AMENDMENT XIV.

The Equal Protection Clause of the Fourteenth Amendment requires that no State, "deny to any person within its jurisdiction the equal protection of the laws." The Ohio Constitution Art. I, Section 2 states that government is instituted for the equal protection and benefit of the people.

The Supreme Court of New Hampshire addressed the question of whether prohibiting homosexuals as a matter of law from adopting children is a violation of the equal protection clauses of the Federal Constitution and the New Hampshire State Constitution in Opinion of the Justices, 525 A. 2d 1095 (N.H. 1987) and stated as follows at page 1098 of the opinion:

For purpose of federal equal protection analysis, homosexuals do not constitute a suspect class, nor are they within the ambit of the so-called "middle tier" level of heightened scrutiny, as sexual preference is not a matter necessarily tied to gender, but rather to inclination, whatever the source thereof. Nor is there a fundamental right to engage in homosexual sodomy. See Bowers v. Hardwick, --U.S.--, 106 S.Ct. 2841, 92 L.Ed. 2d 140 (1986). There is, further, no such right to adopt, to be a foster parent, or to be a child care agency operator, as these relationships are legal creations governed by statute.

As there is no suspect or quasi-suspect class or fundamental right involved, the question becomes whether or not the finding that homosexuals are ineligible to adopt as a matter of law is rationally related to a legitimate state interest and does not violate the equal protection clauses of the Federal or State Constitutions.

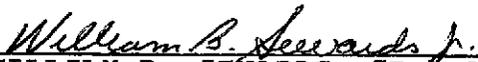
As set forth in Proposition of Law No. 4, the finding that homosexuals are ineligible to adopt as a matter of law is rationally related to a legitimate state interest.

CONCLUSION

The Appellate Court's decision that, as a matter of law, it is not in the best interests of a seven-year old male child to be placed for adoption into the home of a pair of adult male homosexual lovers does not ignore the best interest of Charles B. Rather than ignoring the best interest of this child, the decision of the Appellate Court upholds the best interest of Charles B. The best interest of the child, not of the petitioner, must be the determining factor in an adoption and here it is clear that it is not in the best interest of this child to be placed in a home where the parental role models will be two adult males living together as husband and wife, where the model of a family unit will be a marital union that is not and cannot be legally sanctioned, where the adopting "couple" have no parenting experience and do not meet the experiential characteristics of the characteristic profile for an adoptive family for Charles B.

Appellee, the Licking County Department of Human Services, Children's Services Division, respectfully requests this Honorable Court to affirm the decision of the Court of Appeals, Fifth Appellate District.

Respectfully submitted,



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TITLE XXXI [31]

DOMESTIC RELATIONS—CHILDREN

Chapter

- 3101 MARRIAGE
- 3103 HUSBAND AND WIFE
- 3105 DIVORCE, ALIMONY, ANNULMENT, DISSOLUTION OF MARRIAGE
- 3107 ADOPTION
- 3109 CHILDREN
- 3111 PARENTAGE
- 3113 NEGLIGENCE, ABANDONMENT, OR DOMESTIC VIOLENCE
- 3115 RECIPROCAL ENFORCEMENT OF SUPPORT
- 3117 CONCILIATION OF MARITAL CONTROVERSIES

CHAPTER 3101: MARRIAGE

- Section
- 3101.01 Persons who may contract matrimony.
 - 3101.02 Method of consent.
 - 3101.03 Consent of absent parent or guardian.
 - 3101.04 Consent of juvenile court.
 - 3101.05 License application; misrepresentation prohibited.
 - 3101.06 Denial of license.
 - 3101.07 Expiration date of license.
 - 3101.08 Who may solemnize.
 - 3101.09 Prohibition.
 - 3101.10 License.
 - 3101.11 Recording of license.
 - 3101.12 Record as evidence.
 - 3101.13 Record of marriage.
 - 3101.14 Notice on license of penalty for failure to return certificate.
 - 3101.99 Penalties.

§ 3101.01 Persons who may contract matrimony.

Male persons of the age of eighteen years, and female persons of the age of sixteen years, not nearer of kin than second cousins, and not having a husband or wife living, may be joined in marriage. A minor must first obtain the consent of his parents, surviving parent, parent awarded custody by a court of competent jurisdiction, the guardian of his person, or any one of the following who has been awarded permanent custody of him by a court exercising juvenile jurisdiction:

- (A) An adult person;
- (B) The department of human services or any child welfare organization certified by such department;
- (C) A county department of human services or a county children services board.

A minor shall not be required to obtain the consent of a parent who resides in a foreign country, has neglected or abandoned such minor for a period of one year or longer immediately preceding his application for a marriage license, has been ad-

judged incompetent, is an inmate of a state mental or penal institution, has been permanently deprived of his custody by a court exercising juvenile jurisdiction, or has been deprived of his custody or control, or both, by the appointment of a guardian of the person of the minor by the probate court or by any other court of competent jurisdiction.

HISTORY: RS § 6384; S&C 855; 67 v 6; GC § 8001-1; 110 v 126; 114 v 320(476), § 2; 121 v 557(570); 124 v 178; Bureau of Code Revision, 10-1-53; 133 v S 49 (Eff 8-13-69); 141 v H 428. Eff 12-23-86.

Analogous to former GC § 11181.

Cross-References to Related Sections

Age of majority, RC § 3109.01.

Consent—

Method, RC § 3101.02.

Of absent parent or guardian, RC § 3101.03.

Of juvenile court, RC § 3101.04.

Grounds for annulment, RC § 3105.31.

When annulment action must be commenced and by what parties, RC § 3105.32.

Ohio Rules

Consent to marry, JuvR 42.

Comparative Legislation

Capacity to marry:

CA—Civil Code § 4100

FL—FSA § 741.01

IL—Ann Stat ch 40 § 201

IN—Code § 31-7-1-1

KY—Rev Stat Ann §§ 402.010, 402.020

MI—Comp Laws Ann § 551.2

NY—Dom Rel § 1

PA—Stat Ann tit 48 § 1-5

Legal age:

CA—Civil Code § 4101

FL—FSA § 741.04

IL—Ann Stat ch 40 § 203

IN—Code § 31-7-1-5

KY—Rev Stat Ann § 402.020

MI—Comp Laws Ann § 551.51

NY—Dom Rel § 7

PA—Stat Ann tit 48 § 1-5

Text Discussion

Breach of promise. 2 Ohio Civ. Prac. §§ 34.01-34.03
 Consent to marriage of a minor. 1 Anderson Fam. L. § 8.4
 Consent to marry. 2 Anderson Fam. L. § 9.18
 Contracts of minors, authorized by law. 1 Anderson Fam. L. § 5.4
 Minimum age for marriage. 1 Anderson Fam. L. § 7.1
 Nonage. 1 Anderson Fam. L. § 10.3
 Single and of the opposite sex. 1 Anderson Fam. L. § 7.6

Forms

Breach of promise—
 Complaint. 2 Ohio Civ. Prac. § 34.04
 Interrogatories to defendant. 2 Ohio Civ. Prac. § 34.05
 Common-law marriage. 3 OJI 317.15

Research Aids

Breach of promise:
 Am-Jur2d: Breach Prom § 1 et seq
 Capacity to marry:
 O-Jur3d: Fam L §§ 15-17, 29, 30, 33
 Am-Jur2d: Marr §§ 14-26
 C.J.S.: Marriage §§ 3, 10-17, 23
 West Key No. Reference
 Marriage 4-7, 9-11, 19

ALR

Commonlaw marriage between parties previously divorced. 82 ALR2d 688.
 Concealment of or misrepresentation as to prior marital status as ground for annulment of marriage. 15 ALR3d 759.
 Conflict of laws as to validity of marriage attacked because of nonage. 71 ALR2d 687.
 Marriage between persons of the same sex. 63 ALR3d 1199.
 Mental capacity to marry. 82 ALR2d 1040.
 Validity of common-law marriage in American jurisdictions. 39 ALR 538, 60 ALR 541, 94 ALR 1000, 133 ALR 758.

Law Review

The legal system and homosexuality. Same-sex marriage: the linchpin issue. G. Sidney Buchanan. 10 UDayL-Rev 541 (1985).
 The Loving decision and the freedom to marry. Robert F. Drinan. 29 OSLJ 358 (1968).

CASE NOTES AND OAG**INDEX**

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1. (1979) A common-law marriage entered into in Ohio between an uncle and his niece is incestuous and void ab initio: In re Estate of Stiles, 59 OS2d 73, 13 OO3d 62, 391 NE2d 1026.

2. (1958) Although a marriage in Ohio between first cousins is not approved by law, it is not expressly prohibited and made void by any statutory enactment, and, where first cousins by blood, one a resident of Massachusetts and the other a resident of Ohio, are lawfully married in Massachusetts and remove to Ohio to live, such marriage is not void in Ohio, and an action by the Ohio resident instituted in Ohio to annul the marriage on the ground that it is void ab initio can not be maintained: *Mazzolini v. Mazzolini*, 168 OS 357, 7 OO2d 123, 155 NE2d 206.

3. (1958) Male persons under the age of eighteen years and female persons under the age of sixteen years (and first cousins and persons having living spouses) may not be joined in marriage: *State v. Gans*, 168 OS 174, 5 OO2d 472, 151 NE2d 709.

4. (1958) The first sentence of this section sets forth who "may be joined in marriage." It follows that all persons not included in the terms of reference of such sentence may not "be joined in marriage": *State v. Gans*, 168 OS 174, 5 OO2d 472, 151 NE2d 709.

5. (1892) No action lies for breach of contract of marriage made in Ohio where parties are first cousins: *Reed v. Reed*, 49 OS 654, 32 NE 750.

6. (1884) Where the parties to a marriage in this state arrive at the common law age of consent, and also arrive at a period when they are man and woman, the parents have no authority to compel a separation, on the ground that such wife had not, at the time of the marriage, arrived at the age of sixteen years, and that the marriage was without the parents' consent: *Holtz v. Dick*, 42 OS 23.

7. (1884) A marriage entered into in this state, when the wife is less than sixteen years of age, becomes irrevocable by cohabitation at the time, and after she arrives at that age; she may also ratify the marriage in other ways: *Holtz v. Dick*, 42 OS 23.

8. (1883) In an action by one as surviving husband, against the heir of a deceased wife, to recover an estate by the curtesy, where the marriage is put in issue, a marriage in fact may be proved by showing that they lived together and cohabited as man and wife, etc.: *Bruner v. Briggs*, 39 OS 478.

9. (1878) Where coverture is relied on to save an action from the bar of the statute of limitations, the marriage may be shown by proof of cohabitation as husband and wife: *Lawrence R. Co. v. Cobb*, 35 OS 94.

10. (1877) A marriage, solemnized in due form, is presumed lawful until some enactment which annuls it is produced and proved by those who deny its validity: *Evans v. Reynolds*, 32 OS 163.

11. (1877) Infancy, when pleaded, is a valid defense to an action for the breach of a marriage promise: *Rush v. Wick*, 31 OS 521.

12. (1872) The marriage contract of one affected with congenital imbecility of mind, to a degree rendering him incapable of consent, is void ab initio. A court of chancery,

in the exercise of its ordinary powers, will entertain jurisdiction, at the suit of imbecile's guardian, to declare such marriage a nullity: *Waymire v. Jetmore*, 22 OS 271.

13. (1859) Mutual promises to marry in the future, though made by parties competent to contract, and followed by cohabitation as husband and wife, is not, in itself, a valid marriage: *Duncan v. Duncan*, 10 OS 181 [reversing *ClevLRep* 29].

14. (1851) Marriages contracted in this state by male persons under the age of eighteen and females under the age of fourteen, are invalid unless confirmed by cohabitation after arriving at those ages respectively; and such marriage not so confirmed does not subject a party to punishment for bigamy for contracting a subsequent marriage while the first husband or wife is living: *Shafter v. State*, 20 O 1.

15. No particular form of words or ceremony is necessary at common law to create a marriage contract. The mutual assent of both parties inter se to the relation of husband and wife is sufficient: *In re Barrett*, 49 Bull 222.

16. Common law marriage cannot be annulled by woman on death bed on account of old religious belief: *In re Barrett*, 49 Bull 222.

17. (1935) Although the validity of a contractual common law marriage is determined by the law of the place where made and if not valid in the state where made it will not be recognized in Ohio, if a contract for common law marriage is made in such a foreign state and the parties thereto move to Ohio and continue cohabitation as husband and wife, the law will impute a renewal of the marriage contract in praesenti: *Knight v. Shields*, 19 OLA 37 (App).

18. (1932) Common law marriage is not established by fact that some acquaintances recognized them as husband and wife while others did not know of such relation and man occasionally referred to woman as his wife but did not live with her, and later procured license and entered into ceremonial marriage; ceremonial marriage is strong, if not conclusive evidence of disapproval of common law marriage: *State ex rel. Judd v. Huber*, 13 OLA 137 (App).

19. (1931) Marriage of girl of nearly fifteen to man of forty-one years of age without parent's consent did not constitute her a "delinquent," nor render man guilty of contribution to her delinquency: *Peefer v. State*, 42 OApp 276, 182 NE 117.

20. (1931) Permitting witness who did not know accused to testify, in prosecution for contributing to delinquency of a minor, that accused was immoral, held prejudicial error: *Peefer v. State*, 42 OApp 276, 182 NE 117.

21. (1916) If a girl, under the age requiring parent's consent to marriage, is induced to marry a man older than herself with whom she is but slightly acquainted, by his persistent solicitation, which overcomes her will, and such marriage takes place without the knowledge or consent of her parents and no cohabitation follows, and such girl on the contrary repudiates such marriage promptly, the court will declare such marriage a nullity: *Moser v. Long*, 8 OApp 10, 27 OCA 145, 28 CD 288.

22. (1909) A divorce granted for fraud in the marriage contract concealing defendant's congenital insanity from the plaintiff, is not void because the act was committed while insane, for if the defendant was insane when he committed the fraud, the marriage is void: *Benton v. Benton*, 16 CC(NS) 121, 26 CD 613.

23. (1906) Cohabitation and acknowledgement of the marriage relation by a man and woman, but without stat-

utory marriage, do not, in Ohio, constitute a valid marriage on which an indictment for bigamy can be founded: *Bates v. State*, 9 CC(NS) 273, 19 CD 189 [reversing *State v. Bates*, 4 NP(NS) 503, 17 OD 301].

24. (1893) Marriage of person while under decree of lunacy and guardianship, with a woman fully informed of the fact, and ratification after being adjudged sane, but while in fact insane, will be annulled: *Goodhart v. Speer*, 18 CC 679, 7 CD 47, 28 Bull 227.

25. (1896) Adultery will never, however long continued, constitute marriage: *Swartz v. State*, 13 CC 62, 7 CD 43.

26. (1891) Marriage of person under guardianship, consented to by guardian, and death of husband before steps to annul the marriage, marriage valid: *McCleary v. Barclaw*, 6 CC 481, 3 CD 547.

27. (1987) A post-operative male to female transsexual is not permitted under Ohio law to marry a male person: *In re Ladrach*, 32 OMisc2d 6, 513 NE2d 828 (PC).

28. (1940) The marriage between an uncle and niece in the state of Ohio is void ab initio and can be collaterally attacked, though both parties to the marriage are dead: *Heyse v. Michalske*, 18 OO 254 (PC).

29. (1934) The validity of a marriage is determined by the law of the jurisdiction where made: *In re Twellman*, 32 NP(NS) 201.

30. (1934) A relationship between a man and a woman, illicit in the state where formed, is presumed to continue so although the parties move to Ohio; and in order to legitimize relationship here, it is necessary to comply with Ohio law relative to the creation of common law marriage: *In re Twellman*, 32 NP(NS) 201. See also case note 17 above.

31. (1928) Marriage between persons under legal age but over the common law age of consent, is not void, but only voidable; and where such marriage is consummated by cohabitation (which will be assumed in the absence of averment to contrary), it will be held valid without the consent of parents: *Pearlman v. Pearlman*, 27 NP(NS) 46; *Klinebell v. Hilton*, 25 NP(NS) 167.

32. (1926) A marriage in this state by a female under sixteen is void unless confirmed or ratified by her: *State v. Wilcox*, 26 NP(NS) 343.

33. (1923) A marriage of a female over sixteen, followed by cohabitation, is valid, although her parents have not consented: *Allen v. Allen*, 21 OLR 313.

34. (1894) In order to avoid a marriage contract, the deception complained of must be as to the essentials of the marriage contract: *Ott v. Ott*, 3 NP 161, 3 OD 684.

35. (1896) Although the marriage and intercourse between the parties were prohibited by the laws of the state when the parties originally came together, yet upon the removal of such family to this state, the father at all times recognizing a marriage, recognizing his children born in that state, such a marriage is valid in Ohio, although the contract originally was void and interdicted by law: *Johnson v. Dudley*, 3 NP 196, 4 OD 243.

§ 3101.02 Method of consent.

Any consent required under section 3101.01 of the Revised Code shall be personally given before the probate judge or a deputy clerk of the probate court, or certified under the hand of the person consenting, by two witnesses, one of whom must appear before the judge and make oath that he saw

birthday of the minor occurs prior to the decision of the court, the court shall require the person who is to be adopted to submit a written statement of consent or objection to the adoption. If an objection is submitted, the petition shall be dismissed, and if a consent is submitted, the court shall proceed with the case, and may issue an interlocutory order or final decree of adoption.

HISTORY: 136 v H 156 (Eff 1-1-77); 139 v H 1 (Eff 8-5-81); 140 v H 71. Eff 9-20-84.

For section analogous to former RC § 3107.02 [GC § 8004-2; 120 v 434; 124 v 178; Bureau of Code Revision, 10-1-53], repealed, 136 v H 156, § 2, eff 1-1-77, see now RC § 3107.03.

Cross-References to Related Sections

Confidentiality of records and proceedings, RC § 3107.17.
Definitions, RC § 3107.01.

Ohio Administrative Code

Subsidized adoptions of special need children. OAC ch. 5101:2-44.

Text Discussion

Historical background. 1 Anderson Fam. L. § 3.1
Persons who may be adopted. 1 Anderson Fam. L. § 3.3

Forms

Order dismissing petition for adoption and ordering custody. 1 Anderson Fam. L. No. 3.14

Outlines of Procedure

Adoption procedure checklist. 1 Anderson Fam. L. No. 3.01; Leyshon No. 83

Research Aids

Who may be adopted:
O-Jur3d: Fam L §§ 217, 218
Am-Jur2d: Adopt § 11
C.J.S.: Adop §§ 18-24, 51-72

West Key No. Reference
Adoption 5, 7.1

Law Review

Adoption reform in Ohio. Note. 24 ClevStLRev 146 (1975).
The law of adoption in Ohio. Beverly E. Sylvester. 2 CapitalULRev 23 (1973).
Proposed Ohio adoption act of 1974. Note. 4 CapitalULRev 301 (1975).
The revised law of adoption in Ohio. Beverly E. Sylvester. 7 CapitalULRev 219 (1977).
A survey of state law authorizing stepparent adoptions without the noncustodial parent's consent. Comment. 15 AkronLRev 567 (1982).

CASE NOTES AND OAG

1. (1983) Revised Code § 5103.16, the procedure for independently placing a child for adoption, is in derogation of the common law and must be strictly construed: *Lemley v. Kaiser*, 6 OS3d 258, 6 OBR 324, 452 NE2d 1304.
2. (1985) The provisions of RC § 3107.02(B), permitting the adoption of an adult in certain circumstances, are primarily a vehicle for legitimizing relations between a child and parental surrogates when, because of inadvertence, neglect or some other reason, the child reaches the age of

majority before the adoption proceedings are completed: *In re Adoption of Huitzil*, 29 OApp3d 222, 29 OBR 267, 504 NE2d 1173.

3. (1985) The relationship of "child-foster parent" set forth in RC § 3107.02(B)(3) is essentially analogous to a child-parent relationship. Thus, to determine whether a child-foster-parent relationship existed during the child's minority, allowing his adoption as an adult, a court should look for the attributes related to the raising and nurturing of a child, including the provision of emotional and financial support, food, shelter, discipline, guidance, education, religious training, medical care, and love and affection: *In re Adoption of Huitzil*, 29 OApp3d 222, 29 OBR 267, 504 NE2d 1173.

§ 3107.03 Who may adopt.

The following persons may adopt:

- (A) A husband and wife together, at least one of whom is an adult;
- (B) An unmarried adult;
- (C) The unmarried minor parent of the person to be adopted;
- (D) A married adult without the other spouse joining as a petitioner if any of the following apply:
 - (1) The other spouse is a parent of the person to be adopted and consents to the adoption;
 - (2) The petitioner and the other spouse are separated under section 3103.06 or 3105.17 of the Revised Code;
 - (3) The failure of the other spouse to join in the petition or to consent to the adoption is found by the court to be by reason of prolonged unexplained absence, unavailability, incapacity, or circumstances that make it impossible or unreasonably difficult to obtain either the consent or refusal of the other spouse.

HISTORY: 136 v H 156. Eff 1-1-77.

Analogous to former RC § 3107.02.

For section analogous to former RC § 3107.03 [CC § 8004-3; 120 v 434; 121 v 448; 124 v 178; Bureau of Code Revision, 10-1-53; 133 v S 49], repealed, 136 v H 156, § 2, eff 1-1-77, see now RC § 3107.05.

The effective date of H 156 is set by § 3 of the act.

Cross-References to Related Sections

Confidentiality of records and proceedings, RC § 3107.17.
Definitions, RC § 3107.01.

Text Discussion

Persons who may adopt. 1 Anderson Fam. L. § 3.4

Research Aids

Who may adopt:
O-Jur3d: Fam L § 218
Am-Jur2d: Adopt § 10
C.J.S.: Adop § 13 et seq
West Key No. Reference
Adoption 4

ALR

Age of prospective adoptive parent as factor in adoption proceedings. 84 ALR3d 665.

PROPERTY OF THE

Marital or sexual relationship between parties as affecting right to adopt. 42 ALR4th 776.

Marital status of prospective adopting parents as factor in adoption proceedings. 2 ALR4th 555.

Race as factor in adoption proceedings. 34 ALR4th 167.

Religion as factor in adoption proceedings. 48 ALR3d 383.

Requirements as to residence or domicile of adoptee or adoptive parent for purposes of adoption. 33 ALR3d 176.

Residence or domicile of adoptive parent for purposes of adoption. 33 ALR3d 176.

Law Review

Fathers, biological and anonymous, and other legal strangers: determination of parentage and artificial insemination by donor under Ohio law. Susan C. Eisenman. 45 OSLJ 383 (1984).

The revised law of adoption in Ohio. Beverly E. Sylvester. 7 CapitalULRev 219 (1977).

CASE NOTES AND OAG

1. (1980) Adoption is a legal proceeding whereby the relationship of parent and child is created between persons who are not so related by nature. Parents of minor children cannot absolve their legal obligation to their children by the process of adoption by one of the parents. A natural parent cannot be the sole adoptive parent of a natural child even with the consent of other natural parent as a matter of law. The sound public policy of Ohio dictates that adoption statutes should not be construed to allow a natural mother to adopt her own children: In re Craham, 63 OMisc 22, 16 OO3d 347, 409 NE2d 1067 (PC).

[CONSTRUING FORMER ANALOGOUS RC § 3107.02]

1. (1958) Jurisdiction over adoption proceedings is vested exclusively in the probate court by this section: In re Biddle, 168 OS 209, 6 OO2d 4, 152 NE2d 105; Logan v. Logan, 13 OO2d 364, 170 NE2d 922 (App).

2. (1965) Jurisdiction in adoption cases and in cases of placement of minors is vested in the probate court by this section, as to the former, and RC § 5103.16 as to the latter: In re McTaggart, 2 OApp2d 214, 31 OO2d 336, 207 NE2d 562.

§ 3107.04 Where petition to be filed; caption.

(A) A petition for adoption shall be filed in the court in the county in which the person to be adopted was born, or in which, at the time of filing the petition, the petitioner or the person to be adopted or parent of the person to be adopted resides, or in which the petitioner is stationed in military service, or in which the agency having the permanent custody of the person to be adopted is located.

(B) If the court finds in the interest of justice that the case should be heard in another forum, the court may stay the proceedings or dismiss the petition in whole or in part on any conditions that are just, or certify the case to another court.

(C) The caption of a petition for adoption shall be styled, "in the matter of adoption of".

The person to be adopted shall be designated in the caption under the name by which he is to be known if the petition is granted.

HISTORY: 136 v H 156. Eff 1-1-77.

For section analogous to former RC § 3107.04 [GC § 8004-4; 120 v 434; 121 v 448; 124 v 178; Bureau of Code Revision, 16-1-53; 136 v S 145], repealed, 136 v H 156, eff 1-1-78, see now RC § 3107.11.

Cross-References to Related Sections

Confidentiality of records and proceedings, RC § 3107.17.

Definitions, RC § 3107.01.

Ohio Rules

Venue in probate division, CivR 73(B).

Text Discussion

Contents of petition. 1 Anderson Fam. L. § 3.6

Petition for adoption; filing. 1 Anderson Fam. L. § 3.5

Research Aids

Commencement of proceedings:

Am-Jur2d: Adopt §§ 48-57

Petition:

O-Jur3d: Fam L. §§ 218, 219

C.J.S.: Adop §§ 49, 73-287

West Key No. Reference

Adoption 9, 11

CASE NOTES AND OAG

1. (1986) In a civil action captioned "Wrongful Adoption" which alleges that adoptive parents were fraudulently misled to their detriment by an adoption agency's material misrepresentations of fact concerning an infant's background and condition, the parents must prove each element of the tort of fraud. The elements of fraud are:

(a) a representation or, where there is a duty to disclose, concealment of a fact,

(b) which is material to the transaction at hand,

(c) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred,

(d) with the intent of misleading another into relying upon it,

(e) justifiable reliance upon the representation or concealment, and

(f) a resulting injury proximately caused by the reliance. (Cohen v. Lamko, Inc. [1984], 10 OS3d 167, followed.); Burr v. Stark Cty. Bd. of Commrs., 23 OS3d 69, 23 OBR 200, 491 NE2d 1101.

2. (1979) The continuing jurisdiction in a divorce action of the court of common pleas, domestic relations division, to determine the custody of a minor child does not deprive the court of common pleas, probate division, of jurisdiction in adoption proceedings relating to that child: Syversten v. Carrelli, 67 OApp2d 105, 21 OO3d 418, 425 NE2d 930.

[CONSTRUING FORMER ANALOGOUS SECTIONS]

1. (1974) Original and exclusive jurisdiction over adoption proceedings is vested specifically in the probate court pursuant to RC Chapter 3107.: State ex rel. Portage County Welfare Dept. v. Summers, 38 OS2d 144, 67 OO2d 151, 311 NE2d 6.

2. (1978) Although a man, after marrying a child's mother, signs a declaration of paternity indicating he is

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing Brief of Respondent-Appellee was duly served upon the following parties by ordinary U.S. Mail, postage prepaid, this

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BTF

ORIGINAL

IN THE SUPREME COURT OF OHIO

ON COMPUTER

IN THE MATTER OF *
 THE ADOPTION OF * CASE NO. 88-2163
 CHARLES B. *

APPEAL FROM THE COURT OF APPEALS OF LICKING COUNTY,
 OHIO, FIFTH APPELLATE DISTRICT,
 FROM A JUDGMENT ENTRY IN CASE NO. CA-3382,
 DATED OCTOBER 28, 1988

BRIEF ON THE MERITS OF
 THE GUARDIAN AD LITEM OF
 THE CHILD, CHARLES B.

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entry, the Trial Court found that the Agency's consent was not necessary under Section 3107.07, (F), O.R.C., in light of its failure to file a timely objection to the petition once having been notified of its pendency. The Trial Court further found that the adoption of Charles B. by the Petitioner was in the child's best interests.

The Agency then filed its Notice of Appeal in this matter on May 25, 1988. On June 10, 1988, the Fifth District Court of Appeals issued a judgment entry staying placement of the child pending the disposition of the appeal. Charles B. thereafter remained in a foster home in Licking County, Ohio. On October 28, 1988, the Fifth District Court of Appeals filed its opinion and judgment entry in which it reversed, by a 2-1 vote, the decision of the Trial Court. In its decision, the majority of the Court of Appeals found that the Agency's consent to the adoption was not required but that homosexuals as a matter of law are ineligible to adopt in Ohio. On November 21, 1988, then, the Petitioner and Charles B., by and through his Guardian Ad Litem, filed a combined Notice of Appeal with the Clerk of the Fifth District Court of Appeals. A copy of this Notice of Appeal together with the Memorandum in Support of Jurisdiction of the Guardian Ad Litem was filed with the Ohio Supreme Court on December 20, 1988. On February 15, 1989, the Ohio Supreme Court allowed the Appellants' motion for an order directing the Court of Appeals for Licking County, Ohio, to certify its record and the claimed appeal as of right from said Court. On the same date, this Court denied the motion to expedite which had been

filed by the Guardian Ad Litem. On February 21, 1989, the original papers and transcript of proceedings in this case were filed with the Clerk's Office of the Ohio Supreme Court.

STATEMENT OF THE CASE

For the purpose of this Brief on the Merits and as set forth in the Memorandum in Support of Jurisdiction, the parties shall be referred to as follows:

- (a) Mr. B., the Petitioner for the adoption of Charles B., the Appellee at the Court of Appeals and Appellant in this action before the Supreme Court shall be referred to as "Petitioner";
- (b) The Licking County Department of Human Services, the Appellant at the Court of Appeals and Appellee in this action before the Supreme Court shall be referred to as "Agency"; and
- (c) Charles B., the child who is the subject of the Petitioner's adoption petition, who has filed his Notice of Appeal and who is an Appellant in this proceeding before the Supreme Court shall be referred to as "Charles B." or "the child".
- (d) References to the transcript of the proceedings shall be cited as follows, for example: T.100. This reference would note a quotation from page 100 of the transcript of the trial.

The Petitioner filed his application for the pre-placement of Charles B. during the summer of 1987. On January 15, 1988, the Petitioner filed his petition for the adoption of Charles B. The Agency filed its Statement of Withholding Consent to Adoption on April 13, 1988. T.2 Prior to that, on January 19, 1988, an employee of the Agency, one Betsy Cobb, had received the Petitioner's letter in which the Agency's consent to his petition for adoption of Charles B. was requested. T.1 The hearing on Petitioner's petition for adoption of Charles B. was held in the Licking County Common Pleas Court, Probate-Juvenile Division, on April 14, 1988, before the Honorable Robert J. Moore. Thereafter, on May 9, 1988, the Trial Court issued its judgment entry in which it ruled in favor of the Petitioner. In this

STATEMENT OF FACTS

Charles B., was born on June 17, 1981. On April 2, 1985, and April 23, 1985, respectively, his biological mother and father surrendered permanent custody of him to the Agency. T.156. In August of 1985, Charles B. was registered for adoption by the Agency. T. 151. Since 1985, the child has been placed in five (5) different foster homes. T.140.

Charles B. has not had an easy life in his seven short years. He has suffered from a bout with leukemia which is presently in remission. T.167. In 1987, he was assessed to be suffering from a speech impediment, to have a low average range of intelligence, and to exhibit some stigmata (facial features) which may be suggestive of fetal alcohol syndrome, although a diagnosis of such malady has not been made. T. 27. During the past two years, Charles B. has been seen by at least two counselors who have worked with him to address his behavioral and social skill problems. T.79. One of his counselors was Mr. B., the Petitioner in this case. T.79. Charles B. and Mr. B. were introduced into a counseling relationship in July of 1986. T.79. The relationship between these two grew from that of counselor-patient into one in which the Petitioner, with the complete knowledge and consent of the Agency, was afforded every other weekend visitation with Charles B. T.79-80. The relationship involving visitations, has gone on for the past two and one-half years. T.80. During this time, the Petitioner has fulfilled one of the important goals which was identified for Charles B. by his other counselor, namely Mr. B. has served as the only consistent

adult positive role model in Charles B.'s life during the past two years. T.39-40.

Mr. B. first approached the Agency regarding the possibility of adopting Charles B. in February of 1987. T.80. During the subsequent months, the Petitioner was frustrated in his repeated and persistent efforts to obtain a placement for Charles B. in his home and to obtain a home study by the Agency due to the Agency's persistent refusal or failure to honor his requests. T.82-83. Mr. B.'s petition for adoption of Charles B. was filed on January 15, 1988. The Petitioner served upon the Agency on January 19, 1988, a letter by which he requested the consent of the Agency to the adoption. T.1. (Plaintiff's Exhibit "A") The Agency failed to respond until April 13, 1988, when, less than twenty-four hours prior to the hearing on the petition, it filed a statement withholding consent to the proposed adoption.

At the hearing on the Petitioner's petition for adoption of Charles B. which was held on April 14, 1988, the Petitioner presented the verbal testimony of seven (7) witnesses who testified in favor of the adoption. Dr. Joseph Shannon who holds a Ph.D. in psychology and is licensed to practice psychology in the State of Ohio testified that he was acquainted with the Petitioner and found his reputation to be "beyond reproach, both professionally and personally." T. 6-7; 21-22. He further testified that the Petitioner is a stable individual. Dr. Shannon indicated that a significant portion of his work was with "gay or lesbian couples" who have children and that the problems encountered by such couples are no different than those met by

heterosexual couples. T.19-20. He further indicated that it was his experience that children of a "gay or lesbian" couple did not experience a stigmatization due to the sexual orientation of their parents. T.19-20.

Dr. Victoria Blubaugh testified that she holds a doctorate in psychology and is likewise licensed to practice in Ohio. She described her extensive professional experience with Charles B. and opined that the child was in need of consistency, a stable adult who will be available for him, a parent who will not be intimidated by the health care system and one who can manage his behavior. T.27-28. She is acquainted with the Petitioner and, in fact, the Petitioner often acts as a baby-sitter for the doctor. Dr. Blubaugh, in her counseling role, testified that she had observed a bonding develop over the years between Charles B. and the Petitioner. T.33-34. She also testified that it was in the best interests of Charles B. to be placed with the Petitioner for adoption. T.35. When asked by the Agency's attorney whether she really meant this, Dr. Blubaugh replied:

I think that to disrupt an attachment that he has reached out and made would be extremely harmful to the child. T. 38-39.

Mrs. B. and Miss B., the mother and sister, respectively, of the Petitioner also testified. The essence of these ladies' testimony was that Charles B. had become integrated into their family. This was, they opined, beneficial to Charles B. as well as to them and the Petitioner. Further, both ladies indicated they had developed grandmother-grandson and aunt-nephew, respectively, type relationships with Charles B. T.48-58.

Carol Menge, an adoptive parent herself and vice-president of Lutheran Social Services testified of the requirements of special needs children such as Charles B. and of the general need of the prospective adoptive party to be stable and flexible, factors which were noted to be characteristic of the Petitioner. T.62-65. Mrs. Menge testified that the best interests of each child, not one's sexual orientation, is the determinative factor to control in an adoption. T.68.

The Petitioner, Mr. B., testified and described his occupation (psychologist assistant), income (approximately \$36,000.00 per annum), debts, assets, educational background, parenting experience (that of a former foster parent), the fact that he is homosexual and is engaged in a monogamous relationship with Mr. K. T.75-78. Mr. K. testified as to his professional background and employment and his commitment to Mr. B. T.121-123. Both Mr. B. and Mr. K. testified as to their commitment to Charles B. as a son, their expectations and hopes for the child and the eagerness to finalize the adoption. T.124-125. Mr. B. testified that he had spent much time with children. He had not only baby-sat on many occasions, but had also served as a foster parent for nine months for the Muskingum County Juvenile Court. T.84-85. Mr. B. had approached the Agency in February of 1986 about his adopting Charles B. T.80. The Agency, at that time, allowed Mr. B. to have regular visitation with Charles B. T.91. The visits began as daytime ones and subsequently lengthened into weekend and holiday visits, all with the consent of the Agency. T-91. Both Mr. B. and Mr. K., his life partner, are experienced

in caring for children. T.124. Both testified that they love Charles B. T.124. The child's Guardian Ad Litem presented to the Trial Court a detailed report of his investigation into the Petitioner, his home, and his ability to parent the child. T.163-175. The Guardian Ad Litem also expressed the wishes of Charles B., namely to be adopted by Mr. B., and made his recommendation in favor of the proposed adoption. T.169.

The Agency offered in rebuttal to the petition the testimony of one witness, Miss Handley, who is the Administrator of Social Services of the Agency T.131. She has no formal education in either social work or psychology, T.131. Miss Handley's testimony consisted almost entirely of opinions formed as a result of her review of the Agency's home study and that she was aware of the existence of no guidelines or policies in Ohio regarding the consideration of a homosexual as an adoptive parent. T.142. No documentary evidence (such as the homestudy, medical records, or memoranda of the Agency) were adduced into evidence, to advance Miss Handley's testimony. The gist of the Agency's position, as reflected in its assignments of error later filed with the Fifth District Court of Appeals was that Mr. B. did not meet the Agency's so-called "characteristic profile of preferred adoptive placement" and that there was no practical precedent, studies or other predictors as to adoption by a homosexual. Miss Handley testified, describing the characteristics of the "ideal profile" that the Agency was searching for in a family for Charles B. T.134. These characteristics included: a two parent family (Id.); a family

with a child-centered lifestyle (T.135); a family with parenting experience (Id.); parents with proven abilities to deal with behavioral disorders (Id.); and a family open to counseling (T.136).

Miss Handley testified further that she had met Charles B. only once for an hour. T.133, 147-148. She also testified that she had not observed Charles B. with Mr. B. T.133. The Agency presented no testimony or other evidence that it was not in the best interests of Charles B. to be adopted by Mr. B.

The Trial Court, at the conclusion of the hearing, entered its judgment granting the adoption. The Agency filed its timely notice of appeal with the Fifth District Court of Appeals which subsequently reversed the Trial Court by a vote of 2-1 with a strong and well-reasoned dissent by Judge Wise.

ARGUMENT

WHERE, AT THE CONCLUSION OF A HEARING UPON A PETITION FOR ADOPTION UNDER SECTION 3107.14 (A), OHIO REVISED CODE, THE TRIAL COURT FINDS THAT THE REQUIRED CONSENT IS UNNECESSARY UNDER SECTION 3107.07 (F), OHIO REVISED CODE, AND THAT THE ADOPTION IS IN THE BEST INTERESTS OF THE PERSON SOUGHT TO BE ADOPTED, IT IS A PROPER EXERCISE OF THE TRIAL COURT'S DISCRETION TO GRANT SUCH PETITION.

A. INTRODUCTORY STATEMENT - A BRIEF OVERVIEW OF OHIO STATUTES PERTAINING TO ADOPTION.

The right of adoption was unknown at common law and exists in Ohio today only by virtue of those statutes which have been enacted by the General Assembly. Re Adoption of Sargent, 28 Ohio Misc. 261, 57 Ohio Ops. 2d 135, 272 NE 2d 206 (Preble County Common Pleas Court, 1970). Since adoption proceedings are wholly statutory, then, it has been held under Ohio law that such statutes must be strictly construed and clearly followed in order to give a court jurisdiction to grant an adoption In Re Privette 45 Ohio App. 51, 185 NE 435 (Court of Appeals of Franklin County, 1932); Belden v. Armstrong, 93 Ohio App. 307, 113 NE 2d 693 (Court of Appeals, Summit County, 1951).

Two statutes exist which describe persons who may be adopted and those who may adopt. Section 3107.02, O.R.C., which addresses the former, reads as follows:

(A) Any minor may be adopted.

(B) An adult may be adopted under any of the following conditions:

(1) If he is totally and permanently disabled;

(2) If he is determined to be a mentally retarded person as defined in section 5123.01 of the Revised Code;

(3) If he had established a child-foster parent or child-stepparent relationship with the petitioners as a minor, and he consents to the adoption.

(C) When proceedings to adopt a minor are initiated by the filing of a petition, and the eighteenth birthday of the minor occurs prior to the decision of the court, the court shall require the person who is to be adopted to submit a written statement of consent or objection to the adoption. If an objection is submitted, the petition shall be dismissed, and if a consent is submitted, the court shall proceed with the case, and may issue an interlocutory order or final decree of adoption.

Section 3107.03, O.R.C. which pertains to the latter, has the following text:

The following persons may adopt:

(A) A husband and wife together, at least one of whom is an adult;

(B) An unmarried adult;

(C) The unmarried minor parent of the person to be adopted;

(D) A married adult without the other spouse joining as a petitioner if any of the following apply:

(1) The other spouse is a parent of the person to be adopted and consents to the adoption;

(2) The petitioner and the other spouse are separated under section 3103.06 or 3105.17 of the Revised Code;

(3) The failure of the other spouse to join in the petition or to consent to the adoption is found by the court to be by reason of prolonged unexplained absence, unavailability, incapacity, or circumstances that make it impossible or unreasonably difficult to obtain either the consent or refusal of the other spouse.

The inclusion of the word "may" in Sections 3107.02 and 3107.03, O.R.C., indicates that while such persons might be able to adopt or to be adopted, there is no such person as one who "shall" have the absolute right to adopt or to be adopted. Such

language certainly lends itself to emphasize that the underlying and fundamental nature of Ohio adoption proceedings is such that those actions are to be determined by the able exercise of discretion by the trial court on a case-by-case basis.

This grant of discretion has been codified in Section 3107.14, O.R.C. which reads as follows:

(A) The petitioner and the person sought to be adopted shall appear at the hearing on the petition, unless the presence of either is excused by the court for good cause shown.

(B) The court may continue the hearing from time to time to permit further observation, investigation, or consideration of any facts or circumstances affecting the granting of the petition, and may examine the petitioners separate and apart from each other.

(C) If, at the conclusion of the hearing, the court finds that the required consents have been obtained or excused and that the adoption is in the best interest of the person sought to be adopted, it may issue, subject to division (D)(6) of section 3107.12 of the Revised Code and any other limitations specified in this chapter, a final decree of adoption or an interlocutory order of adoption, which by its own terms automatically becomes a final decree of adoption on a date specified in the order, which shall not be less than six months or more than one year from the date of issuance of the order, unless sooner vacated by the court for good cause shown.

In an interlocutory order of adoption, the court shall provide for observation, investigation, and a further report on the adoptive home during the interlocutory period.

(D) If the requirements for a decree under division (C) of this section have not been satisfied or the court vacates an interlocutory order of adoption, or if the court finds that a person sought to be adopted was placed in the home of the petitioner in violation of law, the court shall dismiss the petition and may determine the agency or person to have temporary or permanent custody of the person, which may include the agency or person that had custody prior to the filing of the petition or the petitioner, if the court finds it is in the best interest of the person, or if the person is a minor, the court may certify the case to the juvenile court

of the county where the minor is then residing for appropriate action and disposition.

B. OHIO STATUTES PERTAINING TO ADOPTION MANDATE THAT A PROSPECTIVE ADOPTION BE DETERMINED ON THE BASIS OF THE BEST INTERESTS OF THE PERSON TO BE ADOPTED.

As noted at page 8 of Judge Wise's dissenting opinion, the language of Section 3107.02, O.R.C., as amended in 1977, clearly indicates that any minor may be adopted. Likewise, it is significant to note that the 1977 amendment which resulted in the enactment of Section 3107.03, O.R.C., expanded the scope of its precursor, the former Section 3107.02, O.R.C., to permit any "unmarried adult" to adopt. Neither statute contains any prohibition, either expressly or by implication, against an adoption by a homosexual male or female. Very simply and straightforwardly, it is submitted that had the General Assembly intended to exclude male or female homosexuals from adopting a child, it would have done so by express language.

Ohio law, however, contains no such prohibition. Rather, the plain language of Section 3107.14 (C), O.R.C., preserves the right of a trial court to exercise its discretion on a case-by-case basis and to grant or deny a petition for adoption on the basis of the evidence unique to each case.

As noted in In Re Harshey, 45 Ohio App. 2d 97, 341 N.E. 2d 616 (Court of Appeals of Cuyahoga County, 1975), the primary purpose of adoption is to find suitable homes for children rather than to find children for families. Each adoption petition must be examined upon its own particular merits. When conducting a hearing on an adoption petition pursuant to Section 3107.14, Ohio

Revised Code, a trial court must decide two basic issues:

First, is the petitioner suitably qualified to care for and to rear the child?

Second, will the best interests and welfare of the child be promoted by the proposed adoption?

In accord: State, ex rel. Portage County Welfare Department v. Summers, 38 Ohio St. 2d 144, 67 Ohio Ops. 2d 151, 311 N.E. 2d 6 (1974).

The proper test to be applied is, then, whether the Court abused its discretion in the context of the factors recognized in Summers, supra. The Appellate Court holding, as set forth at Page 15 of the majority opinion, ignores the discretion accorded the Trial Court and Charles B. by ruling as follows:

However, we reverse this judgment on a solitary question of law and conclude that the trial court had no discretion to exercise.

This holding ignores the evidence at trial as well as the language of the statutes cited in the foregoing paragraphs in part "A". It also constitutes a situation which is contrary to the holding and rationales advanced in Summers, supra.

C. UNDER PERTINENT OHIO CASE LAW, A TRIAL COURT'S ALLOWANCE OF A PETITION FOR ADOPTION MAY BE SET ASIDE ONLY UPON A SHOWING OF ABUSE OF DISCRETION.

This Court recently held in Miller v. Miller, 37 Ohio St. 3d 71, 523 N.E. 2d 846 (1988) that the time-honored standard as to what is in the best interest of the child

should be the overriding concern in any child custody case. See Gishwiler v. Dodez (1855), 4 Ohio St. 615; In re Cunningham (1979), 59 Ohio St. 2d 100, 13 O.O. 3d 78, 391 N.E. 2d 1034; Pruitt v. Jones (1980), 62 Ohio St. 2d 237, 16 O.O. 3d 276, 405 N.E. 2d 276; In re Palmer (1984), 12 Ohio St. 3d 194, 12 OBR 259, 465 N.E. 2d

1312. Given the plain language of R.C. 3109.04 and the precedents cited above, it is clear that the Appellate Court's observation in this regard was clearly erroneous. 523 N.E. 2d 846, at 850.

This Court also observed, at page 849 of 523 N.E. 2d 846:

The discretion which a trial court enjoys in custody matters should be accorded the utmost respect, given the nature of the proceeding and the impact the court's determination will have on the lives of the parties concerned. The knowledge a trial court gains through observing the witnesses and the parties in a custody proceeding cannot be conveyed to a reviewing court by a printed record. Trickey v. Trickey (1952), 158 Ohio st. 9, 13 O.O. 481, 483, 106 N.E. 2d 772, 774.

Such reasoning, it is submitted, is no less appropriate in and applicable to adoption proceedings under Section 3107.14 (C), O.R.C. The court in either an adoption proceeding or a custody motion hearing is charged with determining the best interests of the child. These interests are no lesser or greater in one proceeding than the other.

If, then, the proper standard by which to judge the Trial Court's decision is that of "abuse of discretion", it is first necessary to examine as to how Ohio court's have chosen to define this critical phrase.

In Miller, supra, this Court made reference to the definition employed in Blakemore v. Blakemore (1983), 5 Ohio St. 3d 217, 219, 5 OBR 481, 482, 450 N.E. 2d 1140, 1142, noting:

The term "abuse of discretion" connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. Steiner v. Custer (1940), 137 Ohio St. 448 [31 N.E. 2d 855] [19 O.O. 148]; Conner v. Conner (1959), 170 Ohio St. 85 [162 N.E. 2d 852 [9 O.O. 2d 480]; Chester Township v. Geauga County Budget Commission (1976), 48 Ohio St. 2d 372 [358 N.E. 2d 610] [2 O.O. 2d 484]. 450 N.E. 2d 1140, at 1142.

With the evidence before it, it is manifestly clear that the Trial Court did not abuse the discretion accorded it under Section 3107.14 (C), Ohio Revised Code. The following are examples of evidence gleaned from the trial transcript which support the Trial Court's decision that the adoption of Charles B. by Mr. B. is in the child's best interests:

- A. Mr. B. loves Charles B., has a "very close relationship" with him, and wants what is best for him. T.91.
- B. Mr. B. recognizes Charles B.'s special needs and is committed to providing him with therapy, counseling and proper medical care. T.96, ff.
- C. Charles B. wishes for Mr. B. to adopt him. T.169.
- D. Charles B. has adopted Mr. B. T.45.
- E. Charles B. and Mr. B. have bonded. T.34.
- F. Charles B. and Mr. B. have a "very good" relationship. T.55.
- G. Charles B. has been in at least four or five foster homes, which placements have been stressful for him. T.97-101.
- H. Mr. B. and Mr. K. are committed to providing a secure, loving, stable home for Charles B. T.97.
- I. Charles B. has a good relationship with the families of Mr. B. and Mr. K. T.94-95.
- J. Mr. B.'s family and Mr. K.'s family contain several female members who would be suitable female role models for Charles B. T.173.
- K. Mr. B. has had experience as a foster father. T.102.
- L. Mr. B. is familiar with child care issues which apply to children in general and Charles B. in particular. T.102-103.
- M. Mr. B. and Mr. K. have a life commitment to each other and have maintained this stable relationship for more than two years. T.105.

The Agency and the Appellate Court in its majority opinion place great emphasis upon the "gay lifestyle" of Mr. B. which is "patently incompatible with the manifest spirit, purpose and goals of adoption". (Majority opinion at page 5). However, the evidence before the Trial Court overwhelmingly established a close-knit and devoted relationship built upon commitment. There is no evidence whatsoever in the record of this case which would support the conclusion that anything which Mr. B. has done or will do would be injurious or otherwise harmful to Charles B.

An analogous situation which warrants scrutiny was brought before this Court in In re Burrell, 58 Ohio St. 3d 37, 388 N.E. 2d 738 (1979). In Burrell, supra, this Court considered a case in which the two minor daughters of a woman were found to be neglected under Section 2151.03 (B), O.R.C., essentially because their mother had her boyfriend living with her in the presence of the girls. In reversing this finding, this Court wrote that absent evidence showing a detrimental impact upon the children as a result of the children's' mother's relationship, there was insufficient evidence to warrant state intervention. "The impact cannot be inferred in general, but must be specifically demonstrated in a clear and convincing manner." 388 N.E. 2d 738, 739.

In a like manner, it appears that the Court of Appeals has made an erroneous, improper and unfounded inference that simply because Mr. B. is a homosexual, there must be a profound, detrimental effect to be vested upon Charles B. Such a conclusion, however, is neither supported by nor warranted by the

record.

The Guardian Ad Litem respectfully contends that it is manifestly clear, in light of the evidence contained in the trial transcript (and as set forth in further detail on page 16 of this Brief) that the Trial Court did not abuse its discretion in this case.

D. CHARLES B. MAY NOT BE DENIED THE STATUTORY MANDATE OF SECTION 3107.14 (C), OHIO REVISED CODE, IN AN ARBITRARY AND CAPRICIOUS MANNER.

The decision of the Appellate Court, as applied to this child, constitutes a violation of both the Due Process Clause of the Fourteenth Amendment of the Ohio Constitution and the United States Constitution as well as a denial of Equal Protection under the laws of the State of Ohio and the United States Constitution.

The Appellate Court's decision completely disregards the evidence of what is in the best interests of Charles B. By ignoring or disregarding this evidence and denying the Trial Court its statutorily granted discretion, the result is to afford Charles B. disparate treatment separate and apart from other children who seek to be adopted under Section 3107.14, D.R.C. Similar instances of singling out children and the ensuing detrimental effects were struck down by the United States Supreme Court in Trimble v. Gordon 430 U.S. 762 (1977) (the Court invalidated an intestacy statute under which illegitimate children were denied inheritances unless they were legitimated by subsequent legal action) and Plyler v. Doe, 457 U.S. 202 (1982) in which the Court struck down a statute which prohibited the children of illegal aliens from attending public schools.

In the case at bar the Court of Appeals decision virtually directs that the best interests of the child not be considered. By absolutely prohibiting the Petitioner from adopting, the Appellate Court has mandated that Charles B's best interests not even be examined. The child is thus deprived of a right accorded by statute and is afforded a separate and distinct treatment from other persons who are the subjects of adoption proceedings in Ohio.

The decision of the Appellate Court also clearly denied Charles B. a finding of his best interests - guaranteed by statute - based on the evidence at trial. Such a result is contrary to holdings of the United States Supreme Court which has held that a statutorily entitled right may not be denied on an arbitrary basis. See, e.g., Goldberg v. Kelly, 397 U.S. 254, 262.63 (1970); and Thompson v. Louisville, 362 U.S. 199 (1960).

Such a decision, as submitted by The American Civil Liberties Union in its Brief, leads to an inescapable conclusion that the child has been denied a fair hearing in this case and thus denied the protection guaranteed by the Constitutions of the United States and State of Ohio.

Finally, as previously noted by the Guardian Ad Litem in his Memorandum in Support of Jurisdiction, Judge Wise in his dissenting opinion in the Appellate case and The American Civil Liberties Union in its Brief, the basic thrust of House Bill 695, as amended, which was adopted by the General Assembly in 1980, was to

"put back into the child welfare system and the courts with a goal to reuniting biological families where

possible, and where not possible getting on with the business of providing permanence (bonding) for children, i.e. getting them out of long term foster care and squelching the evil of foster care drift already manifested in this case." Dissenting opinion at pages 10 and 11.

This is precisely the goal which was embodied in the Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C.A. Section 620, et seq. The permanency which is the goal of these two statutory plans and which has been sought - justifiably so - in this case, has been utterly frustrated by the Appellate Court's¹ decision.

¹The proposition that the child's interest should be of paramount concern has been afforded an excellent, insightful treatment in Beyond the Best Interests of the Child, Joseph Goldstein, Anna Fried and Albert J. Solnit; Macmillan Publishing Company, 1973. At pages 31 through 52, the authors propose three component guidelines for decision makers determining the placement process for children. These guidelines are based upon the belief that a child whose placement becomes the subject of controversy should be provided with an opportunity to be placed with adults who are or are likely to become his or her psychological parents. These guidelines are:

- A. Placement decisions should safeguard the child's need for continuity of relationships.
- B. Placement decisions should reflect the child's, not the adult's, sense of time.
- C. Child placement decisions must take into account the law's incapacity to supervise interpersonal relationships and the limits of knowledge to make long-range predictions.

The record at trial is replete with evidence that these factors were clearly before the Trial Court judge when rendering his decision.

CONCLUSION

The overwhelming weight of the evidence adduced at trial in this case supports the finding that the proposed adoption is in the best interests of the child, Charles B. Mr. B. and Charles B. have bonded together. There is no question that a close, loving and nurturing relationship has developed between them. One of the expert witnesses, Dr. Victoria Blubaugh, testified poignantly that "Mr. B. hasn't adopted Charlie yet, but it sounds like Charlie has adopted Mr. B." T.45.

In contrast to the plethora of evidence in manifest support of the proposed adoption, the Agency has failed to set forth any specific rationale as to why the adoption is not in the child's best interests.

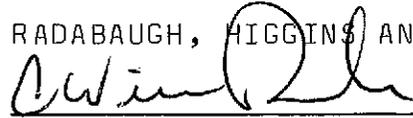
Ohio law guarantees Charles B's. right to have his best interests accorded great weight and consideration. The decision of the majority of the Appellate Court, however, strikes down and virtually ignores not only the evidence but also the very clear and unambiguous mandate of Section 3107.14 (C), Ohio Revised Code under which Charles B's best interests must be considered. Contrary to the finding of the Appellate Court below, there is no statutory basis for concluding that a homosexual is ineligible to adopt in Ohio. This case, however, is not a case of "gay rights". It is a case, rather, in which the best interests of the child, based upon the evidence unique to this matter, have been arbitrarily ignored.

In conclusion, then, I agree with Judge Wise as he expressed his opinion at Page 12 of his dissent: Charles B. should get Mr.

B. for his father.

Respectfully submitted,

RADABAUGH, HIGGINS AND RICKRICH



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A P P E N D I X

IN THE COURT OF APPEALS, LICKING COUNTY **FILED**
FIFTH APPELLATE DISTRICT

1988 NOV 21 PM 3:13

COURT OF APPEALS
LICKING COUNTY, OHIO

IN THE MATTER OF
THE ADOPTION OF:

CHARLES B.

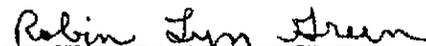
Case No. CA-3382

NOTICE OF APPEAL

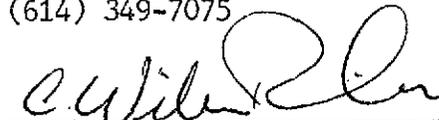
The petitioner-appellee, Mr. B., and the minor child, Charles B., hereby give notice of appeal to the Supreme Court of Ohio from the judgment of the Court of Appeals of Licking County, Ohio entered on October 28, 1988 reversing the judgment of the Court of Common Pleas of Licking County, Ohio for appellees.

This case involves substantial constitutional questions.

This case presents a question of public or great general interest.



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The undersigned, attorney for Licking County Department of Human Services, Appellant, hereby acknowledges receipt of a copy of the foregoing

notice of appeal on the 21st day of November, 1988.

William B. Sowards, Jr.
Robert Becker, Prosecuting
Attorney for Licking County, Ohio
By: William B. Sowards, Jr.
Registration Number 0037287
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The undersigned, attorneys for appellees, certify that a copy of the foregoing notice of appeal was served on William B. Sowards, Jr., attorney for appellant, by personally delivering him a copy on the 21st day of November, 1988.

Robin Lyn Green
Robin Lyn Green
Attorney for petitioner-appellee,
Mr. B.

C. William Rickrich
C. William Rickrich
Attorney and guardian ad litem
for Charles B., appellee

STATEMENT OF ASSIGNMENT OF ERRORS

- I. THE TRIAL COURT ERRED IN FINDING THAT THE CONSENT OF THE AGENCY IS NOT NECESSARY AS PROVIDED IN O.R.C. 3107.07(F).

- II. THE TRIAL COURT'S FINDING THAT THE ADOPTION OF THE CHILD BY THE APPELLEE IS IN THE BEST INTERESTS OF THE CHILD IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

A. APPELLEE DOES NOT MEET THE CHARACTERISTIC PROFILE OF THE PREFERRED ADOPTIVE PLACEMENT FOR CHARLES.

B. APPELLEE AND MR. K. ARE A HOMOSEXUAL COUPLE AND THERE ARE NO PRACTICAL PRECEDENT, STUDIES, OR OTHER PREDICTORS AS TO ADOPTIONS BY A HOMOSEXUAL COUPLE AND THE VIABILITY OR RISKS ATTENDANT TO SUCH AN ADOPTION.

FILED

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COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN THE MATTER OF
THE ADOPTION OF:

CHARLES B.

: JUDGES:
: Hon. Norman J. Putman, P.J.
: Hon. Earle E. Wise, J.
: Hon. Ira G. Turpin, J.

:
: Case No. CA-3382
:
:

: O P I N I O N
:

CHARACTER OF PROCEEDING:

Civil Appeal from Common Pleas
Court, Probate-Juvenile Division,
Case No. 87-A-78

JUDGMENT:

Reversed

DATE OF JUDGMENT ENTRY:

APPEARANCES:

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TURPIN, J.

This is an appeal from a judgment in an adoption case that places a seven year-old boy into the home of an announced homosexual male and his announced life partner. We reverse. Our reason is that the goals of announced homosexuality are hostile to the goals of the adoption statute. The polestar that must guide this court is what is best for the child, not what is best for the petitioner. In this context, so-called "gay rights" are irrelevant. Our focus must be upon what is best for the child.

As a matter of law, it is not in the best interest of a seven (7) year old male child to be placed for adoption into the home of a pair of adult male homosexual lovers. It will be impossible for the child to pass as the natural child of the adoptive "family" or to adapt to the community by quietly blending in free from controversy and stigma.

In our opinion, the concepts of homosexuality and adoption are so inherently mutually exclusive and inconsistent, if not hostile, that the legislature never considered it necessary to enact an express ineligibility provision.

Accordingly, we cannot impute to the legislature an intention that announced homosexuals are eligible to adopt. It is not the business of the government to encourage homosexuality.

A more detailed explanation follows.

This is an appeal from a judgment of the Court of Common Pleas allowing a placement of a seven year-old boy, Charles B., into the home of a Mr. B. (appellee herein), a petitioner for

Charles' adoption, a preliminary step leading to the ultimate granting of the adoption petition. The Licking County Department of Human Services (hereinafter called the agency or appellant) objected and appeals, having secured a stay from this court.

This case has been handled in such a way as to make it reversal proof once the threshold issue of legal eligibility to adopt has been established.

The trial court's determination of best interest of the child has been rendered immune from any effective or meaningful appellate review by the failure of the agency (appellant herein) to secure from the trial court separate fact findings from law conclusions.

Our governmental authority in this appeal is sharply reduced by the absence of separate written fact findings by the trial court. See Civ.R. 52(B) and Cherry v. Cherry (1981), 66 Ohio St.2d 348.

This directs our attention to whether the petitioner is eligible to adopt as a matter of law. We conclude he is not and reverse.

No one requested and the trial court did not furnish separate written findings of fact separate from conclusions of law (Civ.R. 52(B)). The agency offers no reason why it made no such request.

Because of the limited nature of the power of reviewing courts in Ohio, we must, from the general judgment of the trial court, presume that the facts that were actually found by the trial court are those most favorable in support of his judgment.

Credibility of the witnesses is not appealable. Failure to request from the trial court separate fact findings greatly reduces the power of the reviewing court of appeals. Cherry v. Cherry, supra. That means as a practical matter we must conclude that the trial court in this case did not believe the testimony of the agency that other adoptive homes were available after three years of nationwide searching. The trial court must be presumed to have concluded that this child needed a loving home and that this one was the only one he would ever get. We have no de novo jurisdiction in this case. That means we cannot "re-decide" the facts.

Driven as we are to those fact conclusions, if the trial court had any discretion to exercise in this case, no gross abuse of discretion, as that term is defined by the Ohio Supreme Court, can be said to appear. Blakemore v. Blakemore (1983), 5 Ohio St.3d 217. "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." Therefore, the judgment must be affirmed unless, as an unexceptional matter of absolute per se law, homosexuals are ineligible to adopt in Ohio. See, Matter of Adoption of Robert Paul P. (1984), 481 N.Y.S.2d 652, 63 N.Y.2d 233, 471 N.E.2d 424 (a court cannot assume from the absence of restrictions that the legislature intended a given result, but must review it).

In Ohio, as elsewhere, adoption is a statutory concept, a creature of the legislature. There is no such thing as a common law adoption. There is no right to adopt except as it is

conferred by the legislature. Who may adopt has been made the subject of expressly enacted law. R.C. 3107.03:

The following persons may adopt:

(A) A husband and wife together, at least one of whom is an adult;

(B) An unmarried adult;

(C) The unmarried minor parent of the person to be adopted;

(D) A married adult without the other spouse joining as a petitioner if any of the following apply:

(1) The other spouse is a parent of the person to be adopted and consents to the adoption;

(2) The petitioner and the other spouse are separated under section 3103.06 or 3105.17 of the Revised Code;

(3) The failure of the other spouse to join in the petition or to consent to the adoption is found by the court to be by reason of prolonged unexplained absence, unavailability, incapacity, or circumstances that make it impossible or unreasonably difficult to obtain either the consent or refusal of the other spouse.

To impute to the legislature from that language, an intention to make homosexuals eligible to adopt is, in our opinion, inappropriate and unwarranted.

The so-called "gay lifestyle" is patently incompatible with the manifest spirit, purpose and goals of adoption. Homosexuality negates procreation. Announced homosexuality defeats the goals of adoption. It will be impossible for the

child to pass as the natural child of the adoptive "family" or to adapt to the community by quietly blending in free from controversy and stigma. A principle inherent in adoption since Roman days is "adoptio naturam imitatur," adoption imitates nature. Id. The fundamental rationale for adoption is to provide a child with the closest approximation to a birth family that is available.

There is evidence that at the present time, this child desires this home. How will he adapt to his community and respond positively to its government when he matures, understands and fully comprehends what it has done to him by this adoption? On the other hand, what will be his reaction if and when he discovers the law did not permit him to be adopted by the only person who was willing to take him with all his problems?

In our view, this apparent dilemma actually reinforces the conclusion that homosexuals must be ineligible to adopt in any case. This flows inescapably from the manifest spirit and purpose of the adoption statute. See Holy Trinity Church v. U.S. (1891), 143 U.S. 457; McBoyle v. U.S. (1931), 283 U.S. 25; U.S. v. Alpers (1950), 338 U.S. 680; Towne v. Eisner (1918), 245 U.S. 418.

We proceed now to comply with App.R. 12(A) requiring our written response to each assigned error.

As previously stated, this is an appeal from a judgment of the Court of Common Pleas, Probate-Juvenile Division, of Licking County, Ohio, that granted a placement, a step leading to the granting the petition of Mr. B., to adopt Charles B. In deciding

to grant the petition, the trial court determined that the consent of the Licking County Department of Human Services (hereinafter the agency), the legal custodian of Charles B. since 1985, was not necessary under R.C. 3107.07(F).

Charles B. is a special needs child who was diagnosed as having acute lymphocytic leukemia in January, 1984. He was treated with radiation and chemotherapy, and is presently in remission. The radiation and chemotherapy may result in growth and developmental delays. It can cause learning disabilities, attention deficit disorders, and language and speech disorders. Charles has not been diagnosed as having fetal alcohol syndrome, but has certain characteristics of that disorder. The agency reports that he had a history of neglect by his biological parents. Since 1985, he has been in several foster homes. In August of 1985, he was registered for adoption with several different exchanges (one nationwide) without result prior to this petition being filed.

Mr. B. is not a relative of Charles B. He is a psychological assistant who began work with Charles over two years ago, because the agency assigned him to do so. They developed a personal as well as a professional relationship, and the agency permitted Mr. B. to have frequent, unsupervised visitation, including weekend and holiday visits to Mr. B.'s home. There is no question that Mr. B. and Charles have established a strong and affectionate bond.

Mr. B.'s household includes Mr. K., with whom Mr. B. shares a long-term, stable homosexual relationship. Neither of them has

ever undertaken a heterosexual marriage nor has any experience in a parenting role. Mr. K.'s interaction with Charles began later in time than with Mr. B.'s and does not include any professional role. It appears that Mr. K. and Charles have a positive relationship.

On January 15, 1988, Mr. B. filed his petition to adopt Charles. His counsel sent a letter to Betsy Cobb, the agency supervisor of adoptions, enclosing a consent to adoption form. On April 13, 1988, nearly three months later, Russell Payne, executive director of the agency, sent a four page notarized "statement of withholding consent to adoption," outlining his reasons for objecting to the adoption. He did not testify at trial. The trial court ruled that this document was not filed within the statutory time and granted Mr. B.'s petition. Betsy Cobb did not testify that she failed promptly to notify Mr. Payne, and he did not testify that he was not timely informed.

The agency appeals, assigning two errors:

- I. THE TRIAL COURT ERRED IN FINDING THAT THE CONSENT OF THE AGENCY IS NOT NECESSARY AS PROVIDED IN O.R.C. 3107.07(F).
- II. THE TRIAL COURT'S FINDING THAT THE ADOPTION OF THE CHILD BY THE APPELLEE IS IN THE BEST INTERESTS OF THE CHILD IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.
 - A. APPELLEE DOES NOT MEET THE CHARACTERISTIC PROFILE OF THE PREFERRED ADOPTIVE PLACEMENT FOR CHARLES.

B. APPELLEE AND MR. K. ARE A HOMOSEXUAL COUPLE AND THERE ARE NO PRACTICAL PRECEDENT, STUDIES, OR OTHER PREDICTORS AS TO ADOPTIONS BY A HOMOSEXUAL COUPLE AND THE VIABILITY OR RISKS ATTENDANT TO SUCH AN ADOPTION.

I

Title 3107 governs adoptions. R.C. 3107.06 states in pertinent part:

Unless consent is not required under section 3107.07 of the Revised Code, a petition to adopt a minor may be granted only if written consent to the adoption has been executed by all of the following:

...

(C) Any person or agency having permanent custody of the minor or authorized by court order to consent.

R.C. 3107.07 states in pertinent part:

Consent to adoption is not required of any of the following:

(F) Any legal guardian or lawful custodian of the person to be adopted, other than a parent, who has failed to respond in writing to a request for consent, for a period of thirty days, or who, after examination of his written reasons for withholding consent, is found by the court to be withholding his consent unreasonably.

The statute does not specify how the request for consent shall be made and served upon the custodian. The agency argues

that Betsy Cobb, to whom the letter and consent form was sent by ordinary mail, is not the person empowered to give or withhold consent. Neither did the letter set forth the consequences of a failure to timely respond. Therefore, the agency suggests, the statutory request for consent was never properly made.

Civ.R. 73(E) specifies the method whereby service may be accomplished in the absence of a statutory directive. The agency asserts that none of those methods were utilized.

Mr. B. responds that the agency never objected at trial to the alleged insufficiency of the request for consent to adoption. In fact, the agency acknowledged that Betsy Cobb received the letter on January 19, 1988, that she accepted it as its agent, and that the original of the letter is currently in the agency's possession. We must presume that the trial court found from Mr. Payne's silence on that subject that Payne had learned of the request within the thirty (30) day period.

A review of the transcript of the proceedings indicates that the agency did argue to the trial court that the letter was not sent to the proper party (T. 2), but Russell Payne has never denied under oath receiving it promptly from Betsy Cobb.

Nevertheless, we find that Betsy Cobb, as admitted by the agency, accepted the letter on its behalf. We must assume, in the absence of evidence to the contrary, that as its employee and charged with supervising adoption proceedings for it, she was familiar with the procedure for consent, and knew that the director and not she was the proper party to give or withhold that consent. Her receipt of the letter and request for consent

establishes notice in fact to the agency. To do otherwise would expose all prior adoptions to the hazard of collateral attack. We conclude with the trial court that the April 13 "statement of withholding consent to adoption" was not filed within the statutory time.

The first assignment of error is overruled.

II

After it correctly, in our opinion, determined that the agency's consent was not necessary under the code, the trial court proceeded to hear testimony regarding whether this adoption would be in Charles' best interest. The agency was represented in that hearing as provided by statute. Charles' court-appointed guardian ad litem was present, as well as Mr. B.'s representative. The guardian ad litem testified that it was Charles' wish to be a permanent part of Mr. B.'s family.

The agency presented two arguments to the trial court, and in turn to us, outlining why it concluded that this adoption was not in Charles' best interest. Because the agency's consent was unnecessary, the trial court did not have to determine whether the consent was unreasonably withheld. Nevertheless, the trial court was required to determine the child's best interest and that included consideration of the issues raised by the agency, by the guardian ad litem, Mr. B. and sua sponte by the trial court itself.

A

The agency has constructed a "characteristic's profile" of the preferred adoptive placement for Charles; the goal is to find a family that most closely approximates:

1. a two parent family with older siblings, at least one of whom is a male;
2. a family with a child-centered lifestyle;
3. a couple with definite parenting experience and preferably with adoption experience;
4. parents with proven ability in dealing with behavior disorder issues;
5. a family that is open to counseling both in the pre-adoptive and post-adoptive stages; and
6. a family that demonstrates an ability to deal with learning disabilities, speech problems, and medical problems.

No one contends that Mr. B.'s family duplicates the above, although it is argued that it reasonably approximates the above.

Both Mr. B. and the guardian ad litem argue that in the three years the agency has sought an adoptive placement for Charles, it has failed to find the ideal family. In the meantime, Charles has drifted through the limbo of foster care homes.

This court has long been aware that for a child awaiting the permanency of adoption, time is of the essence. The trial court presumably agreed with Mr. B. that a search for the perfect home could consume years that Charles cannot spare.

The agency reported at the time of the hearing, it had two prospective families that appear to meet the characteristics

profile. The agency has not actively pursued these possibilities because of the pendency of this petition. Presumably the trial court, as was his exclusive prerogative, disbelieved this testimony.

B

The agency also raises the lack of precedent or reliable predictors as to the successful adoption of children by homosexual couples.

Mr. B. called two witnesses who testified that the present relationship between Mr. B.'s family and Charles was a stable and beneficial one. The witnesses acknowledge that there was, for a variety of reasons, an absence of research studies in this area. The agency inquired of the Department of Health and Human Services, the Child Welfare League of America, the State of California Adoption Policy Bureau, the Northeast Adoption Services, and several others. With the exception of the State of California (whose policy is not to permit adoptions like this one), no reliable information was uncovered. Mr. B. and the guardian ad litem urge that this means that there is no evidence that the court should deny the petition; the agency insists the court has no reason to find this to be in Charles' best interest.

The agency suggests that the choice is between the average risk-taking (implicit in any adoption) and, on the other hand, pure experimentation. The withholding of consent document cites Charles' health problems and expresses his physician's grave concerns. The agency urges us that this child faces too many other obstacles to overcome in his life to warrant the deliberate

inclusion of another substantial and avoidable issue. Absent separate fact findings, we cannot determine this claim.

The record indicates that this might not have been an all or nothing choice for Charles, but absence of trial court's fact findings precludes our review. The agency called a single witness who said that there are other candidate families. Absent fact findings, we do not know if the trial court believed her. Charles' relationship with Mr. B. has continued from prior to and throughout the pendency of these proceedings, and there is no evidence that the agency will change its policy of encouraging Mr. B. to continue. Neither is there any evidence that Mr. B. will abandon his professional and personal interaction with Charles, or that Charles will reject Mr. B.'s family if he does not become a legal part of it. But even Mr. B.'s witnesses encourage long-term family counseling in the event that Mr. B. and Mr. K. become Charles' family, even though they blandly assert that if this were not the problem Charles encountered, it would always be something else. In the Matter of Appeal in Pima Co. Juvenile Action B10489 (1986), 727 P.2d 830, 151 Ariz. 335, dealt with a prospective adoptive father who acknowledged that his bisexuality and other facts could require counseling in the future. The court noted that once the adoption order was final, the court could no longer supervise the situation.

We are mindful of the broad latitude of discretion vested in Ohio trial judges in matters involving the welfare and best interests of children. Miller v. Miller (1988), 37 Ohio St.3d

74. As the Ohio Supreme Court said in Trickey v. Trickey (1952), 158 Ohio St. 9, at page 13:

In proceedings involving the custody and welfare of children the power of the trial court to exercise discretion is peculiarly important. The knowledge obtained through contact with and observation of the parties and through independent investigation can not be conveyed to a reviewing court by printed record.

The Supreme Court further stated at page 14:

This court has repeatedly held that in an appeal on questions of law the Court of Appeals can not substitute its judgment for the judgment of the trial court.

However, we reverse this judgment on a solitary question of law and conclude that the trial court had no discretion to exercise.

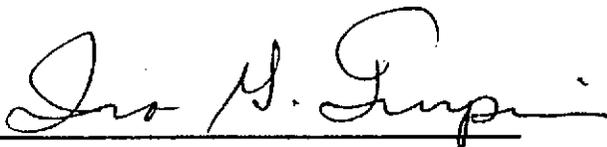
In summary, the polestar that guides this court must be what is best for the child, not what is best for the petitioner. We reverse this placement because, as a matter of law, it is not in the best interest of a seven (7) year old male child to be placed for adoption into the home of a pair of adult male homosexual lovers. The goals of announced homosexuality are hostile to the goals of the adoption statute. Accordingly, we cannot impute to the legislature an intention that announced homosexuals are eligible to adopt. It is not the business of the government to encourage homosexuality. As the appellate court in the Matter of

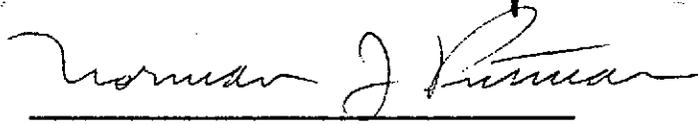
Appeal in Pima Co. Juvenile Action B10489, supra, pointed out, the homosexual relationship is not a legally sanctional union.

For the foregoing reasons, the judgment of the Court of Common Pleas, Probate-Juvenile Division, of Licking County, Ohio, is reversed.

Putman, P.J. concurs.

Wise, J. dissents.





JUDGES

IGT/1a

WISE, J., DISSENTING

I dissent.

The majority cloaks its opinion with what is best for the child, stating that "our focus must be upon what is best for the child." I agree that "the polestar that must guide this court is what is best for the child." However, the majority has been so blinded by the dazzling lights of the antipodal stars of "homosexuality," "gay rights," and "gay lifestyle" that they strayed from the polestar of the welfare of this particular child.

At the outset, let it be abundantly clear that I too hear the siren song of homophobia, and I, too, just as strongly as my colleagues, announce that I do not sanction, encourage, or look with favor on homosexual adoption, and I agree that "[I]t is not the business of the government to encourage homosexuality."

The majority concedes that the "trial court's determination of best interest of the child has been rendered immune from any effective or meaningful appellate review by the failure of the agency (appellant herein) to secure from the trial court separate fact findings from law conclusions," (majority opinion at 3) and therefore that "directs our attention to whether the petitioner is eligible to adopt as a matter of law." The majority concludes that a homosexual may not adopt as a matter of law.

The majority overrules agency's first assignment of error, i.e., consent of agency is not necessary. I agree and cite State, ex rel. Portage County Welfare Dept. v. Summers (1974), 38 Ohio St.2d 144; 67 O.O.2d 151, syllabus 3: "R.C. §3107.06(D) [now R.C. §3107.07(F)] may not operate to divest the probate court of its necessary judicial power to fully hear and determine an adoption proceeding."

The guardian ad litem testified, not only as pointed out by the majority, that it was Charlie's wish to be a permanent part of Mr. B's family, but a reading of the record reveals that the guardian ad litem most strongly and poignantly urged the trial court to grant the petitioner's request for adoption. See transcript of record:

at page 169, ll. 24-25 and page 170, ll. 1-5:

One point that I became concerned about very early on was that we had a child that had been in foster care for approximately three years and the more that I delved into case, I found out that the child had been removed from or moved around from foster care on several occasions. I believe that it is approximately five or six occasions.

at page 170, ll. 17-19:

...the stable factor that I could find when I looked at everything, was the petitioner in this matter, Mr. B.

at page 171, ll. 2-8:

My concern for the child on one hand at this point is that he has been moved around, he has been disrupted. I perceive him to a degree, grieving if you will, over the loss of the foster family a number of months ago. I'm concerned about disrupting him again and removing Mr. B from his life. I feel that there is a very good chance that could be very detrimental to the child.

at page 172, ll. 17-20:

I believe there has been testimony today and there has been ample evidence made available to me regarding the support system that Mr. B and Mr. K have of their immediate family.

at page 173, ll. 1-3:

It would seem to me and would appear to me that the B family would provide ample female role models through the grandmother, both sets of grandparents for that much...

at page 173, l. 16:

Granted, Mr. B does not have extensive prior parenting experience,...but he has extensive experience in parenting issues.

at page 174, ll. 6-10:

...I guess I would be more concerned about the stigmatization that Charlie may have as far as not being as bright as the other children that he is with rather than the sexual orientation of the family with whom he would be placed.

The guardian ad litem, at oral argument to this court, presented a written statement containing the following:

As Guardian Ad Litem, I am charged with the obligation and duty of representing the interests of the child. Separate and apart from what may be in the best interest of the Appellant or the Appellee, I submit that in the child's best interest that the adoption be granted. Charles B. is a bright young child who has survived a fight with leukemia as well as being shifted among at least five (5) foster homes. He is need of permanency and stability....The petitioner has demonstrated the maturity, commitment and love for the child such as is consistent with a parent, and, I submit the child will substantially benefit from such an adoption.

The trial judge was presented with overwhelming evidence of the need of a special uniquely handicapped child - one who had been bounced (and apparently still will\be) between as many as five foster homes in his short life - for an adoption placement that would provide very special care and concern centered around his severe problems.

The record contains no evidence from which the trial court could find that the best interests of this particular child would not be served by granting this adoption. Thus, on the record, by which we are bound, the trial court had little choice. In fact,

if the court had ruled the other way, denying the adoption, we would be constrained that such a decision was against the manifest weight of the evidence. The majority apparently agrees.

The separate issue, and central to the majority's decision, is whether an unmarried, adult homosexual is eligible to adopt as a matter of law. My learned colleagues have concluded that "as an unexceptional matter of absolute per se law, homosexuals are ineligible to adopt in Ohio." (Majority opinion at 4.)

The majority quotes R.C. §3107.03 and states at pages 5 and 6:

To impute to the legislature from that language, an intention to make homosexuals eligible to adopt is, in our opinion, inappropriate and unwanted.

The so-called "gay lifestyle" is patently incompatible with the manifest spirit, purpose and goals of adoption. Homosexuality negates procreation. Announced homosexuality defeats the goals of adoption. It will be impossible for the child to pass as the natural child of the adoptive "family" or to adapt to the community by quietly blending in free from controversy and stigma. A principle inherent to adoption since Roman days is "adoptio naturam imitatur," adoption imitates nature. Id. The fundamental rationale for adoption is to provide a child with the closest approximation to a birth family that is available.

A reading of the Ohio case law and a review of the legislative changes made in 1977, convince me that the majority's insistence that an adoptive child must be able "to pass as the natural child of the adoptive 'family' or to adapt to the

community by quietly blending in free from controversy and stigma," has been relegated to the same status as the laws that prohibited interracial marriage.¹

Prior to 1977, R.C. 3107.05(E) provided that "the next friend" appointed by the court shall make:

...

inquiries as to:

...

(E) The suitability of the adoption of the child by the petitioner, taking into account their respective racial, religious, and cultural backgrounds...

The Cuyahoga County Court of Appeals in In re Adoption of Baker (1962), 117 Ohio App. 26, stated at 28:

Under ordinary circumstances, a child should be placed into a family having the same racial, religious and cultural backgrounds, but a different placement is not precluded. In considering the best interests of the

¹The U.S. Supreme Court in Loving v. Virginia (1967), 388 U.S. 1, struck down the miscegenation statute of Virginia. In that case, the trial court had stated in his opinion that:

Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement, there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.

The Virginia Supreme Court which upheld the trial court had held that the state had a legitimate purpose "to preserve the racial integrity of its citizens" and to prevent "the corruption of blood," "a mongrel breed of citizens" and "the obliteration of racial pride."

subject child, it should not be overlooked that we are dealing here with an unwanted waif whose father is unknown and whose mother is unable to provide a home with the love and affection which might be accorded an illegitimate child. Prior to placing the child with the petitioners, five other couples seeking children declined to receive the child into their homes. As we view it, the only alternative, if the judgment is affirmed, is to have the child remain an illegitimate orphan to be reared in an institution. Orphanages are all well and good but they do not provide a real home with the attendant care, love and affection incident to the relation of parent and child.

The Ohio Supreme Court in 1974, in Portage County Welfare Dept. v. Summers, supra, upheld the trial court's approval of the adoption of a black child by Caucasian petitioners over strenuous opposition by the Welfare Department. The Welfare Department based its opposition to the adoption partly on R.C. 3107.05(E) - the respective racial backgrounds of the parties would cause the child to be unable to pass as the natural child of the adoptive family or to blend in free from controversy and stigma. In overruling the Welfare Department's objection to the adoption, the Supreme court stated at 157:

Permanent placement in a judicially approved home environment through the process of adoption is clearly preferable to confining the child in an institution or relegating the child to a life of transience, from one foster home to another, until such time as the certified organization determines that it is proper to give its consent to an adoption.

In 1977, Chapter 3107 was drastically amended. Prior to January 1, 1977, §3107.02 was designated Persons Who May Adopt. The 1977 amendments changed §3107.02 to designated Persons Who May Be Adopted, a new subject matter not covered in the prior statutes. The old classification of Persons Who May Adopt was expanded - i.e., inter alia, "(B) an unmarried adult" - as set forth in the new §3107.03. The 1977 amendment §3107.02 addressed the issue of the adoption of one adult by another adult and provided that:

(A) Any minor may be adopted.

(B) An adult may be adopted under any of the following conditions:

(1) If he is totally and permanently disabled;

(2) If he is determined to be a mentally retarded person as defined in section 5123.01 of the Revised Code;

(3) If he had established a child-foster parent or child-stepparent relationship with the petitioners as a minor, he consents to the adoption, and the petition for adoption is filed within three years of the date he becomes an adult.

It is my conclusion that by the insertion of .02 - persons who may be adopted - into the 1977 amendments, the legislature was expressing its disapproval of adult homosexuals adopting one another. The legislature was aware of the problem of homosexuality but did not specifically proscribe "an unmarried homosexual adult" from .03 - those who may adopt, the

constitutionality of such a proscription aside. See Portage County Welfare Dept. v. Summers, supra.

Granted that a so-called "gay-lifestyle" is patently incompatible with manifest spirit, purpose, and goals of adoption, all adult male homosexuals do not pursue a "gay-lifestyle" anymore than all adult male heterosexuals pursue a "swingers-lifestyle." The focus in any adoption by "an unmarried adult," whether the unmarried adult is homosexual or heterosexual, must be whether, among other considerations, he or she lives a gay or swinger lifestyle, and further whether that lifestyle is practiced in such a manner so as to be a detriment to or against the best interest of the child.

Granted that homosexuality negates procreation, so also do many physical defects in heterosexuals, but that furnishes one of the reasons for adoption, i.e., the inability to have children by a person or persons who love children and desire to be a parent or parents may fulfill that love and desire by adoption of a child. Therefore, announced homosexuality per se does not defeat the goals of adoption anymore than physical defects in heterosexuals.

Nor do I agree with the majority that the present day "fundamental rationale for adoption is to provide a child with the closest approximation to a birth family that is available." (Majority opinion at 6.) In Ohio, a black child may be adopted by a Caucasian family, Portage v. Summers, supra; also, a Caucasian and Oriental couple may adopt a Puerto Rican child, In re Adoption of Baker, supra, even though "it will be impossible

for the child to pass as the natural child of the 'adoptive family' or to adapt to the community by quietly blending in free from controversy and stigma."

If society through its legislative process decrees that one's sexual orientation is to be considered as a per se bar to adoption, and should such bar pass constitutional muster, then one's homosexuality could preclude one from adopting. In Ohio, there is a law permitting adoption by an unmarried adult; there is no law expressing preference male vs. female in single parent adoptions. Clearly, there is no law prohibiting a homosexual or any other person from adoption based upon personal sexual preference. Appellant cites, and we find, no Ohio law prohibiting adoption simply because a parent has a variant sexual persuasion.

But there is a law now engraved into national policy through the Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C.A. §620, et. seq., requiring states to guarantee to every child the kind of permanency that can only come where the child, at the earliest age possible, knows a parent(s) who will provide the societal necessary ingredients for children of love, emotional and physical care and support, training, discipline. America has declared war on the counterproductive long-term foster care system fostered by federal and state welfare and perpetuated by a powerful administrative bureaucracy. The whole thrust of H.B. 695, as amended, enacted by the Ohio legislature (O.R.C. Chapter 3111), was to put teeth into the child welfare system and the courts with a goal to reuniting biological families

where possible, and where not possible getting on with the business of providing permanence (bonding) for children, i.e., getting them out of long term foster care and squelching the evil of foster care drift already manifested in this case.

Charles, with all his problems, especially deserves a chance to be someone's child forever. The petitioner, Mr. B., offers that chance.

I would end this dissent, hopefully being "constant as the polestar,"² by repeating from the guardian ad litem's statement to this court at oral argument:

The Petitioner has demonstrated the maturity, commitment and love for the child such as is consistent with a parent, and, I submit the child will substantially benefit from such an adoption.

(Emphasis mine.)

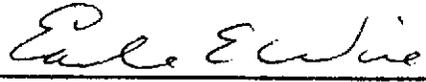
And, repeating the testimony of the expert, Dr. Victoria Blubaugh, at T. 43:

I think that he [the petitioner] is going to be a good parent. He certainly has behavior management down. At this point, I guess, just being real honest about it, my concern isn't so much that Mr. B. gets Charlie, but that Charlie gets Mr. B.

(Emphasis mine.)

²Shakespear: "I am constant as the northern star." Julius Ceasar, Act III, Scene 1, line 60.

I agree with the trial court that Charlie should get Mr. B.



JUDGE EARLE E. WISE

EEW/1a

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IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO

FIFTH APPELLATE DISTRICT

COURT OF APPEALS
LICKING COUNTY, OHIO

IN THE MATTER OF
THE ADOPTION OF:

CHARLES B.

:

:

:

JUDGMENT ENTRY

:

:

CASE NO. CA-3382

For the reasons stated in the Memorandum-Opinion on file, the judgment of the Court of Common Pleas, Probate-Juvenile Division, of Licking County, Ohio, is reversed.

John D. Dyer

Norman J. Putman

JUDGES

IN THE COMMON PLEAS COURT OF LICKING COUNTY, PROBATE-JUVENILE DIVISION
JUDGE ROBERT J. MOORE

In the Matter of
the Adoption of
Charles Lee Balser

FILED

MAY 9 1988

Case No. 87-A-78
Doc. 4 Pg. 209

ENTRY

LICKING COUNTY, OHIO
PROBATE COURT

Based upon the evidence presented, the Court finds that the Licking County Department of Human Services (Agency) was notified by the attorney for the petitioner by letter dated January 18, 1988 of the intention of the petitioner to adopt. The letter was sent to Betsy Cobb, supervisor of adoptions (Plaintiff's Exhibit A). However, the Agency was advised by the petitioner in conversations with Agency staff as early as February, 1987 of his interest in adopting Charles.

The petition for adoption was filed January 15, 1988, and was set for hearing on February 22, 1988. No objection was filed by that date. The hearing was continued at the request of the Agency and rescheduled for April 14, 1988. A statement withholding consent was not filed until April 13, 1988. At no time during the pendency of this case has the Agency complied with the statutory requirement of responding in writing within 30 days to the request by the petitioner for consent.

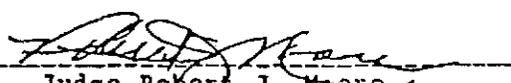
Therefore, the Court finds that the consent of the Agency is not necessary as provided in O.R.C. 3107.07(F).

The Court further finds, and the Guardian ad Litem recommended, that the adoption of the child by the petitioner is in the best interest of the child.

Therefore, the child shall be placed in the physical custody of the petitioner for the prescribed six month period beginning on May 31, 1988.

During this period, the Agency shall retain temporary custody. On December 2, 1988, this case shall come before the Court for the final hearing on the petition for adoption.

In the interim period, the Agency shall maintain medical coverage for the child and provide such medical treatment as is required. At the final hearing, the Agency shall be prepared to present to the Court proof that all documentation has been prepared and submitted to the appropriate federal and state agencies to qualify the child for the federal adoption subsidy and medical card under Title IV(E).



Judge Robert J. Moore

sk

cc: Robin Lyn Green, Attorney at Law
William Swards, Jr., Assistant County Prosecutor
Russ Payne, Director, Licking Co. Dept. of Human Services
Melvin Lee Balser

20 Abs 597 (App, Cuyahoga 1935), *Eastman v Brewer*. By this section, exclusive jurisdiction is conferred upon probate court in proceedings for adoption. (Annotation from former RC 3107.01.)

2 Abs 471, 22 OLR 608 (App, Summit 1924), *State ex rel Scholder v Scholder*. Probate court cannot decree an adoption, unless mother of child files written consent with court, and mother may withdraw such consent any time before decree. (Annotation from former RC 3107.01.)

1920 OAG p 1038. The statutes of Ohio do not require, as a condition of the adoption of a minor child, either that child be a citizen of the United States, or that its natural parents, or either of them, be citizens. (Annotation from former RC 3107.01.)

3107.02 Persons who may be adopted

(A) Any minor may be adopted.

(B) An adult may be adopted under any of the following conditions:

- (1) If he is totally and permanently disabled;
- (2) If he is determined to be a mentally retarded person as defined in section 5123.01 of the Revised Code;
- (3) If he had established a child-foster parent or child-stepparent relationship with the petitioners as a minor, and he consents to the adoption.

(C) When proceedings to adopt a minor are initiated by the filing of a petition, and the eighteenth birthday of the minor occurs prior to the decision of the court, the court shall require the person who is to be adopted to submit a written statement of consent or objection to the adoption. If an objection is submitted, the petition shall be dismissed, and if a consent is submitted, the court shall proceed with the case, and may issue an interlocutory order or final decree of adoption.

HISTORY: 1984 H 71, eff. 9-20-84
1981 H 1; 1976 H 156

Note: Former 3107.02 repealed by 1976 H 156, eff. 1-1-77; 1953 H 1; GC 8004-2; see now 3107.03 for provisions analogous to former 3107.02.

PRACTICE AND STUDY AIDS

Merrick-Rippner, *Ohio Probate Law* (3d Ed.), Text 23.16, 30.07, 297.09

CROSS REFERENCES

Eligibility of child for subsidized adoption, OAC 5101:2-44-02
Special needs children, age requirements for adoption assistance, OAC 5101:2-47-45
Ohio adoption resource exchange, OAC Ch 5101:2-48

Designation of heir-at-law, 2105.15
Placement for adoption of children from other states, 2151.39
Department of human services, division of social administration; care and placement of children; interstate compact on placement of children, 5103.09 to 5103.17, 5103.20 to 5103.28
Department of human services, lists of prospective adoptive children and parents, 5103.152
Powers and duties of county children services board, 5153.16

LEGAL ENCYCLOPEDIAS AND ALR

OJur 3d: 45, Family Law § 1; 46, Family Law § 215, 217 to 219
Am Jur 2d: 2, Adoption § 10, 11, 54
Mental illness and the like of parents as ground for adoption of their children. 45 ALR2d 1379
Adoption of child in absence of statutorily required consent of public or private agency or institution. 83 ALR3d 373

NOTES ON DECISIONS AND OPINIONS

29 App(3d) 222, 29 OBR 267, 504 NE(2d) 1173 (Butler 1985). In re Adoption of Huitzil. Evidence that petitioners and an eighteen-year-old orphan had developed strong emotional ties, mutual affection for each other, and a showing that petitioners' children and the adult orphan had developed a sibling relationship is insufficient to support a petition for the adoption of an adult based upon a child-foster parent or child-stepparent relationship established during the minority of such adult where there is no evidence that petitioners contributed financial support, provided schooling, medical care, or a residence to the adult orphan.

3107.03 Persons who may adopt

The following persons may adopt:

(A) A husband and wife together, at least one of whom is an adult;

(B) An unmarried adult;

(C) The unmarried minor parent of the person to be adopted;

(D) A married adult without the other spouse joining as a petitioner if any of the following apply:

(1) The other spouse is a parent of the person to be adopted and consents to the adoption;

(2) The petitioner and the other spouse are separated under section 3103.06 or 3105.17 of the Revised Code;

(3) The failure of the other spouse to join in the petition or to consent to the adoption is found by the court to be by reason of prolonged unexplained absence, unavailability, incapacity, or circumstances that make it impossible or unreasonably difficult to obtain either the consent or refusal of the other spouse.

HISTORY: 1976 H 156, eff. 1-1-77

Note: 3107.03 is analogous to former 3107.02, repealed by 1976 H 156, eff. 1-1-77.

Note: Former 3107.03 repealed by 1976 H 156, eff. 1-1-77; 1969 S 49; 1953 H 1; GC 8004-3; see now 3107.05 for provisions analogous to former 3107.03.

PRACTICE AND STUDY AIDS

Merrick-Rippner, *Ohio Probate Law* (3d Ed.), Text 31.07, 297.04, 297.07

CROSS REFERENCES

Eligibility of adoptive parents for subsidized adoption, OAC 5101:2-44-03
Special needs children, adoption assistance, OAC 5101:2-47-24 et seq.
Ohio adoption resource exchange, OAC Ch 5101:2-48

Designation of heir-at-law, 2105.15
Parent and child relationship, definition and establishment, 3111.01, 3111.02
Department of human services, lists of prospective adoptive children and parents, 5103.152
Department of human services, placing of children, assumption of responsibility for expenses, 5103.16
Powers and duties of county children services board, 5153.16

LEGAL ENCYCLOPEDIAS AND ALR

OJur 3d: 45, Family Law § 1; 46, Family Law § 215, 217 to 219
Am Jur 2d: 2, Adoption § 10, 11, 54
Race as factor in adoption proceedings. 54 ALR2d 909
Requirements as to residence or domicile of adoptee or adoptive parent for purposes of adoption. 33 ALR3d 176
Religion as factor in adoption proceedings. 48 ALR3d 383

3107.07 Consents not required

Consent to adoption is not required of any of the following:

(A) A parent of a minor, when it is alleged in the adoption petition and the court finds after proper service of notice and hearing, that the parent has failed without justifiable cause to communicate with the minor or to provide for the maintenance and support of the minor as required by law or judicial decree for a period of at least one year immediately preceding either the filing of the adoption petition or the placement of the minor in the home of the petitioner;

(B) The putative father of a minor if the putative father fails to file an objection with the court, the department of human services, or the agency having custody of the minor as provided in division (F)(4) of section 3107.06 of the Revised Code, or files an objection with the court, department, or agency and the court finds, after proper service of notice and hearing, that he is not the father of the minor, or that he has willfully abandoned or failed to care for and support the minor, or abandoned the mother of the minor during her pregnancy and up to the time of her surrender of the minor, or its placement in the home of the petitioner, whichever occurs first;

(C) A parent who has relinquished his right to consent under section 5103.15 of the Revised Code;

(D) A parent whose parental rights have been terminated by order of a juvenile court under Chapter 2151. of the Revised Code;

(E) A legal guardian or guardian ad litem of a parent judicially declared incompetent in a separate court proceeding who has failed to respond in writing to a request for consent, for a period of thirty days, or who, after examination of his written reasons for withholding consent, is found by the court to be withholding his consent unreasonably;

(F) Any legal guardian or lawful custodian of the person to be adopted, other than a parent, who has failed to respond in writing to a request for consent, for a period of thirty days, or who, after examination of his written reasons for withholding consent, is found by the court to be withholding his consent unreasonably;

(G) The spouse of the person to be adopted, if the failure of the spouse to consent to the adoption is found by the court to be by reason of prolonged unexplained absence, unavailability, incapacity, or circumstances that make it impossible or unreasonably difficult to obtain the consent or refusal of the spouse;

(H) Any parent, legal guardian, or other lawful custodian in a foreign country, if the person to be adopted has been released for adoption pursuant to the laws of the country in which the person resides and the release of such person is in a form that satisfies the requirements of the immigration and naturalization service of the United States department of justice for purposes of immigration to the United States pursuant to section 101 (b)(1)(F) of the "Immigration and Nationality Act," 75 Stat. 650 (1961), 8 U.S.C. 1101 (b)(1)(F), as amended or reenacted.

HISTORY: 1986 H 428, eff. 12-23-86
1980 S 205; 1977 H 1; 1976 H 156

tifying data as described in division (D)(2) of that section. When the biological parent has completed the forms to the extent he wishes to provide information, he shall return them to the department. The department shall review the completed forms, and shall determine whether the information included by the biological parent is of a type permissible under divisions (D)(2) and (3) of section 3107.12 of the Revised Code and, to the best of its ability, whether the information is accurate. If it determines that the forms contain accurate, permissible information, the department, after excluding from the forms any impermissible information, shall file them with the court that entered the interlocutory order or final decree of adoption in the adoption case. If the department needs assistance in determining that court, the department of health, upon request, shall assist it.

Upon receiving social and medical history forms pursuant to this section, the clerk of a court shall cause them to be filed in the records pertaining to the adoption case.

Social and medical history forms completed by a biological parent pursuant to this section may be corrected or expanded by the biological parent in accordance with division (D)(4) of section 3107.12 of the Revised Code.

Access to the histories shall be granted in accordance with division (D) of section 3107.17 of the Revised Code.

HISTORY: 1984 H 84, eff. 3-19-85

PRACTICE AND STUDY AIDS

Merrick-Rippner, Ohio Probate Law (3d Ed.), Text 298.02, 298.49

CROSS REFERENCES

Availability of adoption records, 149.43
Registration of adoption, new birth certificate issued, 3705.18
Courts of common pleas, confidentiality of adoption files, C P Sup R 20

LEGAL ENCYCLOPEDIAS AND ALR

OJur 3d: 45, Family Law § 1; 46, Family Law § 215, 228, 234, 338
Am Jur 2d: 2, Adoption § 59

3107.13 Residence in adoptive home

A final decree of adoption shall not be issued and an interlocutory order of adoption does not become final, until the person to be adopted has lived in the adoptive home for at least six months after placement by an agency, or for at least six months after the department of human services or the court has been informed of the placement of the person with the petitioner, and the department or court has had an opportunity to observe or investigate the adoptive home, or in the case of adoption by a stepparent, until at least six months after the filing of the petition, or until the child has lived in the home for at least six months.

HISTORY: 1986 H 428, eff. 12-23-86
1980 S 205; 1976 H 156

Note: Former 3107.13 repealed by 1976 H 156, eff. 1-1-77; 1971 S 267; 132 v S 326; 129 v 1566; 1953 H 1; GC 8004-13; see now 3107.15 for provisions analogous to former 3107.13.

PRACTICE AND STUDY AIDS

Merrick-Rippner, Ohio Probate Law (3d Ed.), Text 298.35, 298.44

CROSS REFERENCES

Change in status or residence for adoption assistance, OAC 5101.2-47-31, 5101.2-47-48

Residency requirements for public school attendance, 3313.64

LEGAL ENCYCLOPEDIAS AND ALR

OJur 3d: 32, Decedents' Estates § 610; 45, Family Law § 1; 46, Family Law § 215, 230

OJur 2d: 53, Trusts § 67

NOTES ON DECISIONS AND OPINIONS

No. 851 (4th Dist Ct App, Ross, 1-4-82), In re Adoption of Davis. An order vacating a final decree of adoption pursuant to Civ R 60(B) is a final appealable order.

181 FSupp 185, 89 Abs 562 (ND Ohio 1960), Spiegel v Fleming. Where a child is placed in a prospective adoptive home but the father dies before the child has resided therein for six months and hence the adoption has not been completed, the child is not entitled to social security benefits. (Annotation from former RC 3107.09.)

3107.14 Court's discretion; final decree or interlocutory order

(A) The petitioner and the person sought to be adopted shall appear at the hearing on the petition, unless the presence of either is excused by the court for good cause shown.

(B) The court may continue the hearing from time to time to permit further observation, investigation, or consideration of any facts or circumstances affecting the granting of the petition, and may examine the petitioners separate and apart from each other.

(C) If, at the conclusion of the hearing, the court finds that the required consents have been obtained or excused and that the adoption is in the best interest of the person sought to be adopted, it may issue, subject to division (D)(6) of section 3107.12 of the Revised Code and any other limitations specified in this chapter, a final decree of adoption or an interlocutory order of adoption, which by its own terms automatically becomes a final decree of adoption on a date specified in the order, which shall not be less than six months or more than one year from the date of issuance of the order, unless sooner vacated by the court for good cause shown.

In an interlocutory order of adoption, the court shall provide for observation, investigation, and a further report on the adoptive home during the interlocutory period.

(D) If the requirements for a decree under division (C) of this section have not been satisfied or the court vacates an interlocutory order of adoption, or if the court finds that a person sought to be adopted was placed in the home of the petitioner in violation of law, the court shall dismiss the petition and may determine the agency or person to have temporary or permanent custody of the person, which may include the agency or person that had custody prior to the filing of the petition or the petitioner, if the court finds it is in the best interest of the person, or if the person is a minor, the court may certify the case to the juvenile court of the county where the minor is then residing for appropriate action and disposition.

HISTORY: 1984 H 84, eff. 3-19-85
1976 H 156

Note: 3107.14 contains provisions analogous to former 3107.10 to 3107.12, repealed by 1976 H 156, eff. 1-1-77.

has become unable to meet such individual's needs; and such determination shall be made by the State agency based upon such criteria as it may specify in the State plan, and upon such documentary evidence as it may therein require. Any such individual, and any other individual who is an alien (as a condition of his or her eligibility for aid under a State plan approved under this part during the period of three years after his or her entry into the United States), shall be required to provide" for "Any individual who is an alien shall, during the period of three years after entry into the United States, in order to be eligible for aid under a State plan approved under this part, be required to provide".

Other provisions:

Effective date and application. Act Aug. 13, 1981, P. L. 97-35, Title XXIII, Subtitle A, ch 1, § 2320(c), 95 Stat. 859, provided: "The amendments made by subsection (a) [amending 42 USCS § 602(a)(31)-(33)] shall be effective on the date of the enactment of this Act [enacted Aug. 13, 1981]. The amendments made by subsection (b) [amending 42 USCS § 602(a)(7) and enacting this section] shall be effective with respect to individuals applying for aid to families with dependent children under any approved State plan for the first time after September 30, 1981."

CROSS REFERENCES

This section is referred to in 42 USCS § 602.

PART B. CHILD WELFARE SERVICES

CROSS REFERENCES

This Part is referred to in 8 USCS § 1522; 25 USCS § 1931; 40 Appx USCS § 202; 42 USCS §§ 300z-5, 602, 671, 672, 674, 675, 676, 5103.

§ 620. Authorization of appropriations

(a) For the purpose of enabling the United States, through the Secretary, to cooperate with State public welfare agencies in establishing, extending, and strengthening child welfare services, there is authorized to be appropriated for each fiscal year the sum of \$266,000,000.

(b) Funds appropriated for any fiscal year pursuant to the authorization contained in subsection (a) shall be included in the appropriation Act (or supplemental appropriation Act) for the fiscal year preceding the fiscal year for which such funds are available for obligation. In order to effect a transition to this method of timing appropriation action, the preceding sentence shall apply notwithstanding the fact that its initial application will result in the enactment in the same year (whether in the same appropriation Act or otherwise) of two separate appropriations, one for the then current fiscal year and one for the succeeding fiscal year.

(Aug. 14, 1935, ch 531, Title IV, Part B, § 420, as added Jan. 2, 1968, P. L. 90-248, Title II, Part 3, § 240(c), 81 Stat. 911; Oct. 30, 1972, P. L. 92-

AMENDMENT XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

I § 16 Redress in courts

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay. Suits may be brought against the state, in such courts and in such manner, as may be provided by law.

I § 2 Where political power vested; special privileges

All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the General Assembly.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing Brief on the Merits of the Guardian Ad Litem of the child, Charles B., was placed in the regular U.S. Mail, postage prepaid, this 14th day of April, 1989, to:

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