

IN THE SUPREME COURT OF OHIO

09-1695

IN RE: ADOPTION OF JAS :
ADOPTION OF JNS :

:
: On Appeal from the Lorain County
: Court of Appeals, Ninth Appellate
: District

:
: Court of Appeals
: Case No. 08CA009518
: Case No. 08CA009519

MEMORANDUM IN SUPPORT OF JURISDICTION OF
APPELLANTS R.S. AND S.E.S., PROSPECTIVE ADOPTIVE PARENTS

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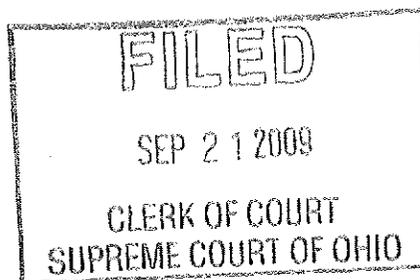


TABLE OF CONTENTS

	<u>Page</u>
EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTIONS.	1
STATEMENT OF THE CASE AND THE FACTS.	5
ARGUMENT IN SUPPORT OF PROPOSITION OF LAW.	5
<u>Proposition of Law No. I:</u> The requirement for adoptive placement under R.C.5103.16(D), where the prospective adoptive parents have been awarded legal custody of a minor child or children, is unnecessary	5
CONCLUSION.	9
CERTIFICATE OF SERVICE.	10
APPENDIX	<u>Appx. Page</u>
Opinion and Journal Entry of the Lorain County Court of Appeals (Aug. 10, 2009).	1

**EXPLANATION OF WHY THIS CASE IS A CASE OF
PUBLIC OR GREAT GENERAL INTEREST AND
INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION**

This cause presents one critical issue: whether adoptive placement under R.C. 5103.16(D) is necessary in a case where the prospective adoptive parents have been awarded legal custody of a minor child or children by the juvenile court.

In this case, the Ninth District Court of Appeals overruled the adoptive parents' sole assignment of error, to wit: the trial court erred to the prejudice of Appellants when the trial court denied Appellant's motion for an order that adoptive placement under R.C. 5103.16(D) be deemed unnecessary.

In fact, the decision of the Ninth District Court of Appeals is in conflict with the Second District Court of Appeals in *In re: Adoption of A.W.K.*, Second Dist. No. 22248, 2007-Ohio-6341. Instead, the Court of Appeals relied on this Court's prior decision in *Lemley v. Kaiser* (1983), 6 Ohio St. 3d 258, wherein this Court stated at pg. 60...

"...Although R.C. 5103.16 is not part and parcel of the adoption statutes, it is in substance an adoption statute. As a result, R.C. 5103.16 is necessarily in derogation of the common law and must be strictly construed. Further, because the provisions authorizing adoptions are purely statutory, strict compliance with them is necessary." *Id.* 260

This Court, in *Lemley*, further reasoned:

"...That measure of judicial control is accomplished by having the parents of the child personally appear before the proper probate court for approval of the placement and adoption. The integrity of this process is an absolute necessity. Otherwise, children could be sold to the highest bidder and shuffled around like objects on an auction block". (Internal citations and quotations omitted). (*Id.*)

Appellants here urged the Ninth District Court of Appeals to follow and adopt the reasoning of the Second District Court of Appeals in *In re: A.W.K.*, supra. *In re: A.W.K.*

distinguished this Court's decision in *Lemley*. In the case at bar, the facts are arguably on all four corners of the decision in *In re: A.W.K.*, supra.

This is a matter of public or great general interest because the Ninth District Court of Appeals is in direct conflict with the Second District Court of Appeals.

More importantly, this matter is of public or great general interest in that this Court has the opportunity to distinguish this Court's prior decision in *Lemley* with the facts that surround the case at bar and *In re: A.W.K.* The basic premise of the Ninth District Court of Appeals was that under Appellants' theory, there would be no judicial oversight pursuant to this Court's decision in *Lemley*. However, it was pointed out that the adoption statute at issue, R.C. 5103.16(D), was effective September 21, 2006. Under (E) of that section, the legislature made 5103.16(D) inapplicable to adoptions by a step-parent, a grandparent or a guardian.

It is important for this Court to distinguish its decision in *Lemley*, as persons who are awarded legal custody of minor children must have some remedy for adoption without placement by the natural parents when situations arise where natural parents do not exercise their rights given to them under the award of legal custody. According to the Ninth District Court of Appeals, albeit relying on this Court's decision in *Lemley*, supra., minor children would never be able to be adopted by a legal custodian but for the natural parents placing the children for adoption.

The issue is further confusing when taking into consideration the Court's concern for judicial oversight. It is axiomatic that the legislature as well as this Court should be concerned with regard to adoptions and children being sold to the highest bidder and shuffled around like objects on an auction block.

Unfortunately, this Court in *Lemley* found that facts were such that it appeared that two

attorneys were actively participating in a private, independent and surreptitious placement for adoption. The case at bar and the case in conflict with the Ninth District Court of Appeals, *In re: A.W.K.*, bear no resemblance to the issues and fears that were stated by this Court and enacted by the legislature. There are cases where good, honest, hard-working and willing people wish to provide security for children. The term placement is just that. Placement infers that the children be taken from one place and placed in another place for, in this case, the purpose of adoption. In the case at bar and for legal custodians in the future, the children will have already been placed, i.e: in the possession of the legal custodian.

The issue of judicial oversight is unwarranted. In cases where legal custodians of minor children wish to adopt, judicial oversight is abundant. Juvenile courts always retain jurisdiction for matters involving children. Further, the issue of placement not being necessary still requires significant judicial oversight. In cases of adoption, there are two prongs that adoptive parents must meet. The first is whether consent of the biological parents is necessary. The second is whether the prong court deems the adoption in the best interests of the minor child or children. The second prong requires a report by a disinterested third party approved by the court.

Under the current state of the law where placement is not necessary for a step-parent, a grandparent or a guardian, two of those three have far less judicial oversight. A step-parent or a grandparent are able to pursue an adoption without placement with the possibility that they have never had any form of judicial oversight. But, by virtue of that status, they can proceed with an adoption. It does not make sense that a step-parent or a grandparent may proceed with an adoption having had no judicial oversight and never having been a party to any case while preventing a legal custodian, who may have been in possession of the child for far longer than the other two with extensive litigation to get to the point where a juvenile court awards them

legal custody, from proceeding.

In sum this Court made a decision in 1983 in *Lemley*, supra. with certain requirements for placement and strict statutory compliance. The legislature, however, in 2006, removed the requirement of placement for certain individuals with certain status. However, in relying on the theory of *Lemley*, supra. and R.C. 5103.16, it does not make sense where a legal custodian who has had possession of a child or children by judicial order needs to satisfy placement for adoption when people with other status and no judicial oversight do not. It is important for children to be able to have some finality and the potential to know whom their parents are, whether that be biological or adoptive.

This matter of public or great general interest in that this Court has the opportunity to cure the above by accepting this case and allowing it to be argued on its merits.

STATEMENT OF THE CASE AND FACTS

On October 6, 2006, Appellants were granted legal custody of JAS and JNS. On October 3, 2008, Appellants petitioned the Probate Court of Lorain County, Ohio, to adopt JAS and JNS. Accompanying the petition was a motion for an order from the probate court that the requirement for adoptive placement under R.C. 5103.16(D) be deemed unnecessary. On November 26, 2008, the probate judge denied Appellant's motion to dispense with placement.

Appellants timely filed their appeal to the Court of Appeals, Ninth Judicial District for the State of Ohio on March 2, 2009. On September 1, 2009, Appellants also filed a request in the Ninth Judicial District to certify this matter as it is in direct conflict with the Court of Appeals in the Second Judicial District, *In re: A.W.K.*, 2007-OH-6341. This matter is now before this Court in accordance with Rule II Section 1(A)(3) and Section 2(A)(1)(a).

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: The requirement for adoptive placement under R.C. 5103.16(D), where the prospective adoptive parents have been awarded legal custody of a minor child or children, is unnecessary.

The parties rely on *In re: Adoption of A.W.K.*, 2007-OH-6341 App. Case No. 22248, Sec. Dist. Ct. of Appeals of Ohio, Montgomery County, decided on Nov. 21, 2007. In the aforementioned case, the facts were identical to the facts in this case. The prospective adoptive parents received assistance from the Montgomery County Children's Services Agency and were granted legal custody in the Juvenile Court. The lower court dismissed the Petition for Adoption in that the court interpreted R.C. 5103.16(D) to mean that the biological parents are required to appear before the Probate Court and to obtain court approval to have the child placed in the prospective adoptive parents' home for purposes of adoption. The prospective adoptive parents objected and argued that the purpose of R.C. 5103.16 was to prevent surreptitious, private

placements for adoptions and that the statute had no applicability where, as here, the child already was living in the home after intervention by Montgomery County Children's Services pursuant to a grant of legal custody by the Juvenile Court. See *A.W.K.*, supra. at pg. 1, para. 4)

Although the magistrate and lower court did not agree with the prospective adoptive parents' argument, the Court of Appeals was persuaded by their argument. The Court relied on *Lemley v. Kaiser* (1983), 6 Ohio St. 3d, 258 at 260 (App. C, p. 11). where it stated:

"...although R.C. 5103.16 is not part and parcel of the adoption statutes, it is in substance an adoption statute."

The Court in *Lemley* also went on to discuss the intent of the Legislature in enacting R.C. 5103.16. Once again, the Court was concerned and felt the intent of the statute was to prevent black market transactions and have some judicial control before a proper probate court.

Both in *In re: A.W.K.* and the case at bar, the minor children have not been placed in the home surreptitiously for adoption or without any judicial oversight. In the case at bar as in *A.W.K.*, the child was placed in the prospective adoptive parents' home in connection with a neglect, dependency and abuse action filed by Lorain County Children's Services and ordered through the Lorain County Juvenile Court. The placement in the case at bar in Case No. 05JC10948 and 49 was not done surreptitiously and bears no similarity to a black market transaction. Also, the concern that the natural parents will not be informed is not present. Notice is still required to be given to the parents for purposes of whether or not their consent is necessary under R.C. 3107.05, 06 and 07.

The Ninth District Court of Appeals was concerned by the lack of judicial oversight that they believe is present if prospective adoptive parents file for an adoption without complying with R.C. 5103.16(D) (adoptive placement).

There is more judicial oversight in the case at bar where the adoptive parents are legal custodians than step-parents and grandparents. There is at least as much judicial oversight in the case at bar as legal guardians.

The juvenile court has continuing jurisdiction over the children, the biological parents and the legal custodians. If the parents wished to exercise their rights or moved the court for the legal custodians to show cause why their rights were being denied, the juvenile court would have continuing jurisdiction to hear same.

Furthermore, if R.S. and S.E.S.'s appeal is sustained, R.S. and S.E.S. will still be subject to judicial oversight. R.S. and S.E.S. must still satisfy the two-pronged test in order to adopt; all with notice to the biological parents with the right to be heard. They must first show that the biological parents' consent is not necessary and, secondly, must satisfy the court that the adoption is in the best interests of the minor children. The latter must be done through a study and report by a disinterested third party, approved by the court.

Moreover, the effective date of R.C. 5103.16 was September 21, 2006. Under 5103.16(E), the statute states:

“this section does not apply to an adoption by a step-parent, a grandparent, or a guardian”.

This section should also apply to legal custodians.

The definition of legal guardian means:

“A person, association or corporation that is granted authority by the probate court pursuant to Chapter 2111 of the Revised Code to exercise parental rights over a child to the extent provided in the Court's order and subject to the residual parental rights of the child's parents. R.C. 2151.011(B)(16)

The definition of Legal Custody means:

“A legal status that vests in the custodian the right to have physical care and control of the child and determine where and with whom the child should live and the right and duty to protect, train, and discipline the child and to provide the child food, shelter, education, and medical care, all subject to any residual parental rights, privileges, and responsibilities. An individual granted legal custody shall exercise the rights and responsibilities personally unless otherwise authorized by any section of the Revised Code or by the Court. “ R.C. 2151.011(B)(19).

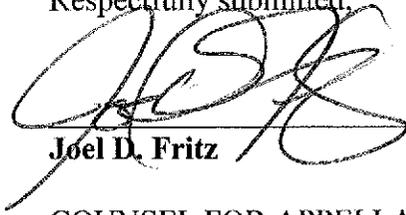
The definitions of those two legal statutes are similar. One could argue that the legislature overlooked the term legal custodian as an exemption under Div. E of 5103.16.

Appellants herein were granted legal custody of JAS on October 6, 2006. Appellants subsequently filed a petition to adopt JAS on October 3, 2008. Accompanying their Petition was a motion for an order from the Probate Court that the requirement for adoptive placement pursuant to R.C. 5103.16 to be deemed unnecessary. The purpose of R.C. 5103.16(D) was to prevent black market transactions. Appellants petition is not remotely close to a black market transaction. Moreover, the minor child, JAS, has been in the home of Appellants since at least October 2006. JAS has been in the physical possession of Appellants since legal custody was granted in October 2006. Although Appellants assert that placement for purposes of adoption are not necessary, there will be no judicial oversight and the parents of JAS will have the opportunity to be heard, in court, on two occasions. The first occasion will be at the hearing to determine whether their consent is necessary and the second will be at the hearing to determine whether it is in the best interests of the minor child to be adopted by Appellants.

CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interest. The appellants request that this court accept jurisdiction in this case so that the important issues presented will be reviewed on the merits.

Respectfully submitted,

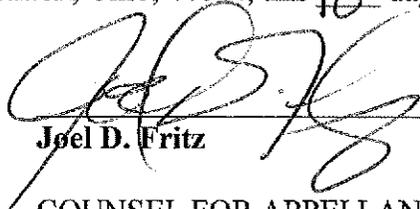
A handwritten signature in black ink, appearing to read "JDF", is written over a horizontal line. The signature is stylized and cursive.

Joel D. Fritz

COUNSEL FOR APPELLANTS R.S. AND S.E.S.
Prospective Adoptive Parents

Certificate of Service

I certify that a copy of this Notice of Appeal was sent by ordinary U.S. mail to Pro Se Appellee, Jennifer L. Wahl, 1628 Dunbar Road, Madison, Ohio, 44057 and Pro Se Appellee, Christopher B. Robinson, #A521955, Grafton Correctional Institution, c/o Warden Maggie Bradshaw, 2500 S. Avon Belden Road, Grafton, Ohio, 44044, this 18th day of September, 2009.



Joel D. Fritz

COUNSEL FOR APPELLANTS R.S. AND S.E.S.,
Prospective Adoptive Parents

STATE OF OHIO
COUNTY OF LORAIN
IN RE ADOPTION OF J.A.S. AND J.N.S.

COURT OF APPEALS
IN THE NINTH JUDICIAL DISTRICT
FILED LORAIN COUNTY
2009 AUG 10 A 9:58
C.A. Nos. 08CA009518
08CA009519
CLERK OF COMMON PLEAS
RON NABAKOWSKI
9th APPELLATE DISTRICT
APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF LORAIN, OHIO
CASE Nos. 2008AD00062
2008AD00063

DECISION AND JOURNAL ENTRY

Dated: August 10, 2009

CARR, Judge.

{¶1} Appellants, R.S. and S.E.S. (the “adoptive parents”), appeal the judgment of the Lorain County Court of Common Pleas, Probate Division. This Court affirms.

I.

{¶2} On October 3, 2008, the adoptive parents filed petitions for adoption of the minor children, J.A.S. and J.N.S. The same day, the adoptive parents filed a motion for an order deeming the requirement for adoptive placement pursuant to R.C. 5103.16(D) unnecessary. The adoptive parents asserted that they were granted an award of legal custody of the children from the Lorain County Juvenile Court pursuant to a final dispositional order in a dependency/neglect/abuse case filed by Lorain County Children Services Board. Accordingly, they urged the probate court to adopt the reasoning and holding of the Second District Court of Appeals in *In re Adoption of A.W.K.*, 2d Dist. No. 22248, 2007-Ohio-6341, and dispense with the

statutory requirement for adoptive placement under the circumstances. In an affidavit attached to the motion, the adoptive parents averred, in part, that “this is not a black market or surreptitious request for adoption.” The probate court summarily denied the motion to dispense with placement. The adoptive parents timely appealed, raising one assignment of error for review.

II.

ASSIGNMENT OF ERROR

“THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANTS WHEN THE TRIAL COURT DENIED APPELLANTS’ MOTION FOR AN ORDER THAT ADOPTIVE PLACEMENT UNDER R.C. 5103.16(D) [] BE DEEMED UNNECESSARY.”

{¶3} The adoptive parents argue that the trial court erred by denying their motion for an order deeming adoptive placement pursuant to R.C. 5103.16(D) unnecessary. This Court disagrees.

{¶4} R.C. 5103.16 addresses the placing of children for purposes of adoption. R.C. 5103.16(D) states:

“No child shall be placed or received for adoption or with intent to adopt unless placement is made by a public children services agency, an institution or association that is certified by the department of job and family services under section 5103.03 of the Revised Code to place children for adoption, or custodians in another state or foreign country, or unless all of the following criteria are met:

“(1) Prior to the placement and receiving of the child, the parent or parents of the child personally have applied to, and appeared before, the probate court of the county in which the parent or parents reside, or in which the person seeking to adopt the child resides, for approval of the proposed placement specified in the application and have signed and filed with the court a written statement showing that the parent or parents are aware of their right to contest the decree of adoption subject to the limitations of section 3107.16 of the Revised Code;

“(2) The court ordered an independent home study of the proposed placement to be conducted as provided in section 3107.031 of the Revised Code, and after completion of the home study, the court determined that the proposed placement is in the best interest of the child;

“(3) The court has approved of record the proposed placement.”

R.C. 5103.16(E) provides that “[t]his section does not apply to an adoption by a stepparent, a grandparent, or a guardian.”

{¶5} The Ohio Supreme Court has held:

“Although R.C. 5103.16 is not part and parcel of the adoption statutes, it is in substance an adoption statute. As such, R.C. 5103.16 is necessarily in derogation of the common law and must be strictly construed. Further, because the provisions authorizing adoptions are purely statutory, strict compliance with them is necessary.” (Internal citations omitted.) *Lemley v. Kaiser* (1983), 6 Ohio St.3d 258, 260.

The *Lemley* court further noted that the legislature’s intent in enacting R.C. 5103.16 was “to provide some measure of judicial control over the placement of children for adoption which is not conducted under the auspices of a statutorily recognized and authorized agency.” *Id.* The high court reasoned:

“That measure of judicial control is accomplished by having the parents of the child personally appear before the proper probate court for approval of the placement and adoption. The integrity of this [statutory] process is an absolute necessity. Otherwise, children could be sold to the highest bidder and shuffled around like objects on an auction block.” (Internal citations and quotations omitted.) *Id.*

{¶6} Nevertheless, the adoptive parents urge this Court to adopt the reasoning and holding of the Second District Court of Appeals in *In re A.W.K.*, supra, wherein our sister district dispensed with strict construction and grafted an additional exception for legal custodians upon the statute. The Second District concluded that adoptive placement pursuant to R.C. 5103.16(D) is unnecessary where the child sought to be adopted has been residing in the prospective adoptive parents’ home pursuant to a prior award of legal custody to the petitioners. *Id.* at ¶19. The appellate court reasoned that its conclusion comports with the legislature’s intent because placement of the child pursuant to an award of legal custody necessarily implicates judicial oversight by the juvenile court. *Id.* at ¶13. This Court is not persuaded by such reasoning.

{¶7} First, the reasoning flies in the face of the Supreme Court's directive that R.C. 5103.16 requires both strict construction and strict compliance. Second, because the legislature made express exceptions to the placement requirement for stepparents, grandparents and guardians, it could have done so for legal custodians if it so intended.

{¶8} A "custodian" is "a person who has legal custody of a child or a public children services agency or private child placing agency that has permanent, temporary, or legal custody of a child." R.C. 2151.011(A)(11). "Legal custody" is "a legal status that vests in the custodian the right to have physical care and control of the child and to determine where and with whom the child shall live, and the right and duty to protect, train, and discipline the child and to provide the child with food, shelter, education, and medical care, all subject to any residual parental rights, privileges, and responsibilities." R.C. 2151.011(A)(19). "Residual parental rights, privileges, and responsibilities" are "those rights, privileges, and responsibilities remaining with the natural parent after the transfer of legal custody of the child, including, but not necessarily limited to, the privilege of reasonable visitation, consent to adoption, the privilege to determine the child's religious affiliation, and the responsibility for support." R.C. 2151.011(A)(46). Once a juvenile court issues a final disposition awarding legal custody of a child to a person, judicial (and agency) oversight ceases.

{¶9} A "guardian," on the other hand, is "a person, association, or corporation that is granted authority by a probate court pursuant to Chapter 2111. of the Revised Code to exercise parental rights over a child to the extent provided in the court's order and subject to the residual parental rights of the child's parents." R.C. 2151.011(A)(16). R.C. 2111.01(A) similarly defines "guardian" as "any person, association, or corporation appointed by the probate court to have the care and management of the person, the estate, or both of an incompetent or minor." R.C.

2101.24(A)(1)(e) reserves exclusive jurisdiction to the probate court to appoint guardians. The probate court maintains on-going judicial oversight of the ward and guardian during the pendency of the guardianship. In fact, R.C. 2111.50(A)(1) states that the probate court is the “superior guardian of wards who are subject to its jurisdiction, and all guardians who are subject to the jurisdiction of the court shall obey all orders of the court that concern their wards or guardianships.” R.C. 2111.13 enumerates the duties of a guardian of a person, including “[t]o obey all the orders and judgments of the probate court touching the guardianship.” R.C. 2111.13(A)(4). Guardians of a person are also subject to rendering accounts upon order of the probate court. R.C. 2109.302(B)(3).

{¶10} Unlike legal custodians who are no longer subject to oversight by the juvenile court, guardians remain subject to oversight and control by the probate court until the termination of the guardianship. Accordingly, a significant distinction exists between legal custodians and guardians, indicating that the legislature did not “just forg[e]t to add the term legal custodian as an exemption under [R.C. 5103.16(E)]” as the adoptive parents argue. Just as the statutory placement requirement serves to avoid surreptitious placements for adoption by individuals who may be trafficking in children, it arguably further prevents public children services agencies from bypassing the onerous burden of prosecuting a motion for permanent custody, instead seeking an award of legal custody to a third party who can then pursue adoption yet avoid the statutory requirement for adoptive placement and its corresponding investigation and approval. If the legislature wishes to forego the requirement for adoptive placement of children in legal custody as a result of dependency/neglect/abuse actions, it can amend R.C. 5103.16 accordingly. This Court, however, is not free to graft another exception upon the statute. The adoptive parents’ sole assignment of error is overruled.

III.

{¶11} The adoptive parents' assignment of error is overruled. The judgment of the Lorain County Court of Common Pleas, Probate Division, is affirmed.

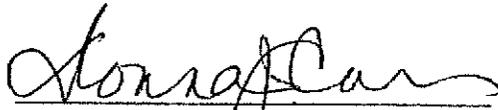
Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellants.


DONNA J. CARR
FOR THE COURT

MOORE, P. J.
DICKINSON, J.
CONCUR

APPEARANCES:

JOEL D. FRITZ, Attorney at Law, for Appellants.

JENNIFER WAHL, pro se, Appellee.

CHRISTOPHER ROBINSON, pro se, Appellee.