

ORIGINAL

IN THE SUPREME COURT OF OHIO

IN RE: ADOPTION OF JAS :
ADOPTION OF JNS :

09-1980

:
: On Appeal from the Lorain County
: Court of Appeals, Ninth Appellate
: District
:
: Court of Appeals
: Case No. 08CA009518
: Case No. 08CA009519

NOTICE OF CERTIFIED CONFLICT

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FILED
OCT 29 2009
CLERK OF COURT
SUPREME COURT OF OHIO

PRO SE APPELLEE

Notice of Certified Conflict

Appellants R.S. and S.E.S., hereby give Notice that the Ninth District Court of Appeals has issued a Journal Entry certifying a conflict in this matter on October 9, 2009.

Respectfully submitted,



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 Filing 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 27th day October, 2009.



Joel D. Fritz

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

STATE OF OHIO

COURT OF APPEALS

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

COUNTY OF LORAIN)

)ss:

IN RE ADOPTION OF J.A. STAND
J.N.S.

2009 OCT -9 A 11:02

C.A. No. 08CA009518
08CA009519

CLERK OF COMMON PLEAS
RON NASAKOWSKI

9th APPELLATE DISTRICT

JOURNAL ENTRY

Appellants, adoptive parents, have moved, pursuant to App.R. 25, to certify a conflict between the judgment in this case, which was journalized on August 10, 2009, and the judgment of the Second District Court of Appeals in *In re Adoption of A.W.K.*, 2d Dist. No. 22248, 2007-Ohio-6341. Appellees have not responded to the motion.

Article IV, Section 3(B)(4) of the Ohio Constitution requires this Court to certify the record of the case to the Ohio Supreme Court whenever the "judgment *** is in conflict with the judgment pronounced upon the same question by any other court of appeals in the state[.]" "[T]he alleged conflict must be on a rule of law -- not facts." *Whitelock v. Gilbane Bldg. Co.* (1993), 66 Ohio St. 3d 594, 596.

Appellants have proposed that a conflict exists between the districts on the following issue:

"The issue proposed for certification is that the decision in the Adoption of AWK, 2007-OH-6341, that pre-adoptive placement under R.C. 5103.16(d) is unnecessary, is in direct conflict with this Court's decision in the above-referenced case numbers issued on August 10, 2009."

This Court rephrases the issue for certification as follows:

"Does R.C. 5103.16(D) require pre-adoptive placement where the prospective adoptive parents have been awarded legal custody of the child pursuant to a

final dispositional order out of the juvenile court, and the child has been living with the prospective adoptive parents since the award of legal custody?"

We find that a conflict of law exists; therefore, the motion to certify is granted.


Judge

Concur:
MOORE, P.J.
DICKINSON, J.

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

COURT OF APPEALS	
IN THE COURT OF APPEALS	
NINTH JUDICIAL DISTRICT	
FILED	
ss: 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.

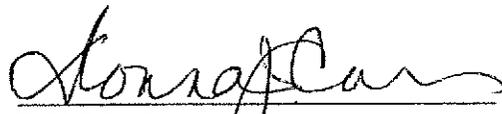
Judgment affirmed.

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.

2007-Ohio-6341
In re adoption of A.W.K.

2007-Ohio-6341

[Cite as In re adoption of A.W.K., 2007-Ohio-6341]

In the Matter of: THE ADOPTION OF A.W.K.

Appellate Case No. 22248

2nd District Court of Appeals of Ohio, Montgomery County
Decided on November 21, 2007

Trial Court Case No. 06-ADP-91

(Civil Appeal from Common Pleas Court, Probate Division)

RICHARD HEMPFLING, Atty. Reg. #0029986, Flanagan, Lieberman, Hoffman & Swaim, 318 West Fourth Street, Dayton, Ohio 45402 Attorney for Appellants

OPINION

BROGAN, J.

{¶1} B.K. and D.K. (The "Ks") appeal from the Montgomery County Probate Court's decision and entry dismissing their petition to adopt a child named A.W.K.1

{¶2} In their sole assignment of error, the Ks contend the trial court erred in dismissing the petition based on a violation of R.C. 5103.16(D), which governs the initial placement of children in the home of prospective adoptive parents. The Ks assert that R.C. 5103.16(D) had no applicability here because A.W.K. already was living in their home under a prior grant of legal custody.

{¶3} The record reflects that Montgomery County Children Services assisted in the placement of A.W.K. in the Ks' home in connection with a dependency action filed in Montgomery County Juvenile Court. On February 7, 2005, the juvenile court adjudicated A.W.K. dependent and granted legal custody to the Ks, who are unrelated to the child. Thereafter, on May 2, 2006, the Ks filed a petition for adoption under R.C. 3107.05.

{¶4} A magistrate ordered dismissal of the petition on January 19, 2007. In so doing, the magistrate interpreted R.C. 5103.16(D) to mean that A.W.K.'s biological parents were required to appear before the probate court and to obtain court approval to have the child placed in the Ks' home for purposes of adoption before the Ks could file a petition to adopt. The Ks objected to the magistrate's ruling. They argued that the purpose of R.C. 5103.16 was to prevent surreptitious, private placements for adoption and that the statute had no applicability where, as here, the child already was living in their home after intervention by Montgomery County Children Services and pursuant to a grant of legal custody by the juvenile court.

{¶5} On June 1, 2007, the Montgomery County Probate Court overruled the Ks' objection and adopted the magistrate's decision. The trial court concluded that R.C. 5103.16(D) required an application for adoptive placement, a placement hearing, and a court-ordered "placement for adoption" before non-relatives such as the Ks could petition for adoption under R.C. 3107.05. On appeal, the Ks contend the trial court erred in imposing the foregoing requirements under R.C. 5103.16(D) and making compliance with them a prerequisite to filing an adoption petition.

{¶6} Upon review, we are persuaded by the Ks' argument. Revised Code section 5103.16(D) states, in part:

{¶7} "(D) No child shall be placed or received for adoption or with the 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 * * *, or custodians in another state or foreign country, or unless all of the following criteria are met:

{¶18} "(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;

{¶19} "(2) The court ordered an independent home study of the proposed placement * * * and after completion of the home study, the court determined that the proposed placement is in the best interest of the child;

{¶10} "(3) The court has approved of record the proposed placement."

{¶11} "Although R.C. 5103.16 is not part and parcel of the adoption statutes, it is in substance an adoption statute." *Lemley v. Kaiser* (1983), 6 Ohio St.3d 258, 260. "The intent of the legislature 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. 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." *Id.* The statute "is part of a legislative response to the perils of black-market transactions occasioned by the limited supply of and great demand for adoptable babies." *In re Adoption of Zschach* (1996), 75 Ohio St.3d 648, 656. "Because the best interest of children is likely to become a subordinate concern where profit-motivated parties become involved in adoptive placement, the legislature enacted R.C. 5103.16 to ensure proper agency or court supervision of private placements." *Id.* In order to combat black-market adoptions, the legislature also enacted R.C. 3107.14(D), which mandates the dismissal of an adoption petition if the child to be adopted was placed in the petitioner's home illegally. *Id.*

{¶12} In *Lemley*, the Ohio Supreme Court found a violation of R.C. 5103.16(D) where the appellants, two attorneys, "were active participants in the private, independent, and surreptitious placement for adoption of [a] minor child without the slightest regard for and in complete contravention of the applicable statutory guidelines for such independent placements." *Lemley*, 6 Ohio St.3d at 259. Despite the trial court's contrary conclusion, the present case bears no similarity to *Lemley*, and the interests sought to be protected by R.C. 5103.16(D) are not implicated here.

{¶13} A.W.K. was not placed in the Ks' home for purposes of adoption surreptitiously and without agency or judicial oversight. To the contrary, the child was placed in the Ks' home in connection with a dependency action filed in Montgomery County Juvenile Court. The placement occurred with assistance from the Montgomery County Children Services agency and with judicial oversight resulting in an award of legal custody. The placement bore no similarity to a black-market transaction.

{¶14} Approximately fifteen months after receiving legal custody of A.W.K., the Ks petitioned the probate court to adopt the child. Because A.W.K. already was living in the Ks' home pursuant to the juvenile court's grant of legal custody, there was no need for agency or judicial involvement in any pre-adoptive placement under R.C. 5103.16. "The purpose behind R.C. 5103.16 generally requiring agency or court involvement is to prevent placement of a child from being a black-market transaction based on a profit motive, rather than upon the child's best interest. If a child is in a prospective adoptive home for reasons other than the expected adoption, there is no violation of R.C. 5103.16."2 *Baldwin's Ohio Practice*, 2 Merrick-Rippner, *Probate Law* (2001) 669, Section 98.2; see also *In re Proposed Adoption* (1998), 131 Ohio App.3d 358, 362 ("The key is not whether the child is in the home of the prospective adoptive parent, but rather why the child is in the home. If the child is already in the prospective adoptive home for reasons other than the expected adoption, R.C. 5103.16 has not been violated."); *In re Wilson* (Feb. 13, 1995), *Jefferson App. No. 93-J-12* (finding that a pre-adoptive placement under R.C. 5103.16(D) is neither necessary nor required where a child is living with prospective adoptive parents under a grant of legal custody at the time of the adoption petition).3

{¶15} In its ruling below, the trial court found that pre-adoptive placement under R.C. 5103.16 remained necessary in the Ks' case to give the child's biological parents notice of the attempted adoption. The trial court explained its concern as follows: "If the requirements of 5103.16(D) were not applied to non-relative adoptions, it is highly likely that natural parents would not be informed of the attempted adoption of their child. This is why prior applications for adoption and a placement hearing are necessary with non-relative adoptions. Without these proceedings and precautions, an adoption by non-relatives could be surreptitious."

{¶16} The trial court's concern about a lack of notice to a child's natural parents is unwarranted. Our conclusion that R.C. 5103.16(D) has no applicability here does not dispense with the need for notice to A.W.K.'s natural parents. In order to adopt a child, a prospective adoptive parent must obtain consent from the child's biological parents or allege and prove that such consent is not required. R.C. 3107.05; R.C. 3107.06; R.C. 3107.07. If, as in the present case, an adoption petition alleges that consent to adoption is not required, the child's biological parents are entitled by statute to notice and a hearing before the petition may be granted. See R.C. 3107.07(A); R.C. 3107.11; *In re Adoption of Walters*, 112 Ohio St.3d 315, 2007-Ohio-7. Therefore, the absence of a pre-adoptive placement under R.C. 5103.16(D) does not prejudice a biological parent's right to notice of the attempted adoption.

{¶17} Finally, the trial court relied largely on *In re Taylor*, Tuscarawas App. No. 04AP040032, 2004-Ohio-5643, to support its dismissal of the Ks' adoption petition. In that case, Jeremy and Michelle Gopp obtained legal custody of a child in 2002. Thereafter, they filed an application for pre-adoptive placement of the child with them pursuant to R.C. 5103.16(D). Without addressing why a placement application under R.C. 5103.16(D) was necessary given that the juvenile court already had placed the child with the Gopps, the Fifth District affirmed dismissal of the application because the biological parents did not consent to the placement.

{¶18} Upon review, we find *Taylor* to be of little assistance. In *Taylor*, the Gopps apparently assumed that a pre-adoptive placement under R.C. 5103.16(D) was necessary even though the child already was living with them under a grant of legal custody. The issue on review was whether the biological parents were required to consent to a pre-adoptive placement under R.C. 5103.16(D), not whether the Gopps were required to seek a pre-adoptive placement in the first place. Unlike the Gopps, the Ks concluded that a pre-adoptive placement under R.C. 5103.16(D) was unnecessary under the circumstances and they filed an adoption petition under R.C. Chapter 3107. The issue before us is whether they acted properly in doing so. Because *Taylor* does not directly address this issue, we find it to be of little persuasive value.

{¶19} Based on the reasoning set forth above, we conclude that the trial court erred in dismissing the Ks' adoption petition based on the lack of a prior placement under R.C. 5103.16. Such a placement for adoption need not precede an adoption petition where, as here, the child is already living in the prospective adoptive parents' home pursuant to a grant of legal custody. The Ks' assignment of error is sustained. The judgment of the Montgomery County Probate Court is reversed, and the cause is remanded for further proceedings consistent with this opinion.

WOLFF, P.J., and GRADY, concur.

Footnotes:

1. For purposes of our analysis, we will identify the parties and the child only by their initials.
2. The adoption provisions of the Revised Code expressly recognize that, as in the present case, prospective adoptive parents may petition to adopt a child who is living with them but who was not originally placed in their home for the purpose of adoption. See R.C. 3107.051(B)(2). Where the initial placement in the home was proper (as in the present case, for example, pursuant to a grant of legal custody in a dependency action), we see nothing in the Revised Code that would require such a child to be removed from the home prior to the filing of the adoption petition only to be immediately placed there again as a pre-adoptive placement under R.C. 5103.16(D). Although R.C. 5103.16(D) must be strictly construed, the Ohio Supreme Court has recognized that the statute should not be interpreted in a way that would produce an unreasonable result. *In re Adoption of Zschach*, 75 Ohio St.3d at 655. Requiring the Ks to obtain a pre-adoptive placement specifically under R.C. 5103.16(D) would serve no purpose and would be unreasonable.
3. The trial court and the magistrate emphasized the fact that the prospective adoptive parents in *Wilson* were the child's grandparents. We note, however, that the existence of this relationship was not a factor in the Seventh District's legal analysis regarding the non-applicability of R.C. 5103.16. While R.C. 5103.16(E) now provides that "[t]his section does not apply to an adoption by * * * a grandparent," the grandparent exception did not exist when *Wilson* was decided. Therefore, *Wilson* plainly turned on the fact that the child already was residing with the prospective adoptive parents under a grant of legal custody, not on the prospective adoptive parents' status as grandparents.

OH