

ORIGINAL

IN THE SUPREME COURT OF OHIO

:
In re: Adoption of J.A.S. : **Supreme Court No. 09-1695**
In re: Adoption of J.N.S. : **Supreme Court No. 09-1980**
 : **(consolidated)**
 :
 : **On Appeal from the**
 : **Lorain County Court of Appeals,**
 : **Ninth Appellate District**
 :
 : **Court of Appeals**
 : **Case No. 08 CA 009518**
 : **Case No. 08 CA 009519**
 :

Merit Brief of Amicus Curiae
American Academy of Adoption Attorneys
in Support of Appellant

Joel D. Fritz (0053389)
 Rothgery & Associates
 230 Third Street
 Elyria, Ohio 44035
 (440) 323-1203 phone
 (440) 323-1213 fax
 e-mail: rothgery01@msn.com
 Counsel for Appellants,
 R.S. and S.E.S., Prospective Adoptive Parents

Elizabeth I. Cooke (0063873)
 Moritz College of Law
 55 W. 12th Ave., Suite 255
 Columbus, Ohio 43210
 (614) 292-6821 phone
 (614) 292-5511 fax
 e-mail: Cooke.62@osu.edu
 Counsel for Appellee,
 Jennifer Wahl Walker

Michael R. Voorhees (0039293)
 Voorhees & Levy LLC
 11159 Kenwood Road
 Cincinnati, Ohio 45242
 (513) 489-2555 phone
 (513) 489-2556 fax
 e-mail: mike@ohioadoptionlawyer.com
 Counsel for Amicus Curiae,
 American Academy of Adoption Attorneys

Christopher Robinson
 c/o Warden Maggie Bradshaw
 2500 S. Avon Belden Road
 Grafton, Ohio 44044
 Pro se Appellee

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JAN 10 2010

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I. Statement of Amicus Curiae

The American Academy of Adoption Attorneys is a not-for-profit national association of attorneys, judges, and law professors who practice, and have otherwise distinguished themselves, in the field of adoption law, with dedication to the highest standards of practice in adoption. The more than 300 members of the Academy are experts in the complexities of adoption law and all varieties of interstate and intercountry adoption regulations. Members must maintain their practice according to the highest standards of professionalism, competence, and ethics. The Academy's mission is: to support the rights of children to live in safe, permanent homes with loving families; to ensure appropriate consideration of the interests of all parties to adoptions; and to assist in the orderly and legal process of adoption. To this end, the Academy's work includes promoting the reform of adoption laws and disseminating information on ethical adoption practices. As an organization, and through its members and committees, the Academy lends pro bono assistance in worthy cases and actively participates in the drafting and passage of adoption legislation. The Academy publishes a newsletter, holds annual and mid-year conferences, and conducts educational seminars for its members and other interested professionals. Academy members are frequently invited to make presentations as adoption experts for organizations throughout the country. The American Academy of Adoption Attorneys is committed to improving the lives of children by advocating for the benefits and stability provided through adoption.

II. Statement of Case and Facts

Amicus Curiae respectfully adopts and incorporates by reference the Statement of Case and Facts presented by the Appellant.

III. Argument

Proposition of Law

When an Ohio probate court does not accept a legal custody order granted by the juvenile court as placement for the purpose of an adoption proceeding filed in its court, such denial is a violation of equal protection, due process, and res judicata and is contrary to the best interest of the child.

A. A child has a constitutional right to the adjudication of their best interests , including their need for permanency

For children who are not being raised by a biological parent, true and full permanency is only achieved through an adoption. While legal custody may have some of the attributes of permanency and is intended to continue throughout the child's minority, it does not provide the child with everything that an adoption provides, such as: the recognition as a fully legitimate family with common names; rights of inheritance; survivor benefits; and termination of parental rights of unfit parents whose continued involvement with the child could be contrary to the stability, mental health, and general well-being of the child. Indeed, adoption is the most stable and permanent home that can be secured for the child not in the custody of their biological parent.

Traditionally, Ohio Courts have viewed the adoption process as having three components. First, the child must somehow be placed into the custody of the adoptive parents. Second, the required consents are either obtained or excused. Third, the court must find that the

adoption is in the best interest of the child. The issue now before this Supreme Court relates to the first component of custody or placement. Ideally, the best interest of the child should be paramount in each and every phase of any custody or adoption matter. However if legal custody is not recognized as a placement, then the court will not even address the best interest of the child.

By refusing to accept the legal custody as placement, the probate court is denying the prospective adoptive parents an opportunity to be heard on the issue of whether the non-custodial birthparents have in some way already waived or abandoned their parental rights pursuant to R.C. 3107.07 which dispenses with the need for abandoning parents to consent. Further, the probate court is declining to hear evidence relative to the best interest of the child. The probate court is prioritizing the rights of the non-custodial parents and making them absolute rather than balancing the child's rights against the rights of the non-custodial parents.

This Supreme Court has stated that the ultimate goal in the adoption process is to protect the best interests of children. See *In re Adoption of Zschach* (1996), 75 Ohio St. 3d 648, 665 N.E.2d 1070; *In re Adoption of Ridenour* (1991), 61 Ohio St. 3d 319, 574 N.E.2d 1055. This Supreme Court has also held that "adoption matters must be decided on a case-by-case basis through the able exercise of discretion by the trial court giving due consideration to all known factors in determining what is in the best interest of the person to be adopted." *In re Adoption of Charles B.* (1990), 50 Ohio St. 3d 88, 90, 552 N.E. 2d 884, 886. If the legal custody order is not accepted as a placement, the adoption process is foreclosed without hearing the merits of the case, balancing the interests of the various parties or even considering the best interest of the child.

The American Academy of Adoption Attorneys believes that children should be recognized as individuals possessed of their own interests and rights, including the right to be part of a stable and permanent family, and the right to remain part of that family once it is established with an expectation that the status will be permanent. These rights are constitutionally founded and are at the core of all liberties. The child's inalienable right to life and liberty in the family context must be protected. These constitutional interests are both procedural and substantive. Therefore, they should not be disturbed absent a compelling, established competing interest that is entitled to constitutional protection. Even then, if the constitutionally protected interests are in conflict and evenly balanced, the conflict should be resolved in favor of the child.

Courts have increasingly recognized that children have rights under the United States Constitution, and it is unreasonable to remedy any purported breach of a biological parent's rights by curtailing the fundamental rights of the child. By not accepting the legal custody as placement, the rights of the child are violated. A court has already made the decision that the child be in the custody of the prospective adoptive parents. During the court proceeding that granted legal custody, the rights of the parents were fully addressed and protected. The rights of the parents are also fully addressed and protected in the adoption proceeding during the consent and best interest phases. To allow a parent to prevent an adoption from going forward in the probate court, when the child is already in the custody of the petitioners filing for adoption, is to deny the child the possibility of obtaining all the benefits that an adoption would provide to the child. This is a due process violation of the rights of the child. The rights of the parents are in no way violated. If the parent is a responsible parent, who has fulfilled the obligations of support

and has demonstrated some interest in the child by maintaining contact with the child, then the parent will have the opportunity to successfully contest the adoption.

It has long been recognized that children are persons with rights protected by the United States Constitution. A child's status as a minor does not deprive the child of constitutional protections afforded adults. "Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights." *Planned Parenthood of Central Mo. v. Danforth* (1976), 428 U.S. 52, 74; 49 L. Ed. 2d 788; 96 S. Ct. 2831. "[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone." *In re Gault* (1967), 387 U.S. 1, 13; 18 L. Ed. 2d 527, 538; 87 S. Ct. 1428, 1436. The rights and best interests of the child must be considered.

When a dependent child cannot be raised by his or her family of origin, adoption is a positive option. Clearly adoption and a life within a family unit are preferable to long-term foster care or institutional care. Legal custody, without the possibility of adoption, is the same as long-term foster care. In 1997, the Adoption and Safe Families Act ("ASFA") was signed into federal law to improve the safety of children, to promote adoption and other permanent homes for children who need them, and to support families. ASFA, in addition to making available increased federal funding for adoption efforts by state and local child welfare agencies, mandated the active seeking of homes for children in public foster care. Under this federal law, no child is to be considered un-adoptable. Homes for children are to be sought without regard to geographical or jurisdictional boundaries. See 42 U.S.C. § 5111 et seq. The State of Ohio has enacted ASFA provisions and has recognized the need and right of a child to a safe and permanent home. Temporary custody orders cannot be indefinitely extended. See R.C.

2151.415(D)(4). Denying an adoption of a child already in legal custody is a violation of the federal and state ASFA provisions and is clearly contrary to the child's best interest.

The realm of personal family life is a fundamental interest protected by the Fourteenth Amendment to the U.S. Constitution. All equal protection and due process violations noted herein are violations of the Fourteenth Amendment. The U.S. Supreme Court has recognized that a person's interests and rights respecting family relationships do not necessarily depend on the existence of a biological relationship and, in some situations, such interests and rights may outweigh biological relationships. See *Lehr v. Robertson* (1983), 463 U.S. 248, 77 L. Ed. 2d 614, 103 S. Ct. 2985; *Quilloin v. Walcott* (1978), 434 U.S. 246, 54 L. Ed. 2d 511, 98 S. Ct. 549; *Michael H. v. Gerald D.* (1989), 491 U.S. 110, 105 L. Ed. 2d 91, 109 S. Ct. 2333. If courts are permitted to disregard the legal custody order, then the prospective adoptive parents will be prevented from presenting any evidence as to whether or not parental consents are required and as to what is in the child's best interest. This would elevate the rights of the non-custodial parents above the rights of all other parties in the adoption proceeding. This would create an imbalance in the adoption process, which is in contradiction to the balance created by the Ohio legislature. If the statutory adoption process is followed, the rights of all parties can be addressed. If the process is not followed, the whole system breaks down with certain parties being denied access to the statutory process set forth by the Ohio legislature. For the protection of the rights of all parties involved, most importantly the rights of the child, the American Academy of Adoption Attorneys respectfully urges this Supreme Court to find that an adoption can go forward if the child is already in legal custody.

B. An award of legal custody by the juvenile court which is obtainable only with the consent of the biological parent or after a finding of parental unfitness sets aside the parent's absolute constitutional right and opens the door to continuing adjudication of the child's best interests.

Revised Code 5103.16 (the placement statute) the interpretation of which is the gravamen of this case, specifically exempts children "committed" by the juvenile court from its operation. The placement statute is a "home-grown" Ohio law which is not adopted from the model legislation which is the basis of the provisions of R.C. 3107. The placement statute has been amended on a piecemeal basis. Its purpose is to control private placements and "baby-selling" by requiring the involvement of the probate county in placements. However the statute begins and ends with a list of exemptions to the general placement rule of the statute. In-court placement is not required for children placed through an Ohio licensed adoption agency, the Interstate Compact on the Placement of Children Office or through a commitment of the juvenile court, and children being adopted by their stepparents, guardians, or grandparents. The court cases have also created exceptions from time to time which have allowed the adoption to occur without probate court placement. This amicus would contend that making an order of legal custody is a juvenile court commitment. R.C. 5103.16(A). At the time legal custody was granted, the rights of the parents were addressed. There was the requirement that the parents be properly served. The award of legal custody could only have been granted if the parents consented, abandoned the child, or were otherwise unsuitable. See *In re Perales* (1977), 52 Ohio St. 2d. 89, 369N.E.2d1047.

However the probate court below ignored this provision of R.C. 5103.16(A) and required the consent of the noncustodial birthparents to a second "placement" of a child that has already been living in the prospective adoptive home and is a de facto member of the prospective

adoptive family. Requiring prospective adoptive parents to seek the consent of non-custodial parents of a child already placed with them by the juvenile court is a violation of the Fourteenth Amendment. This clearly puts the prospective adoptive parents and the child in jeopardy of emotional and mental harm by disturbing the established psychological parent-child relationship which Ohio law states is intended to last throughout the child's minority. It also violates the doctrine of res judicata by relitigating the same issue as to whether the child should be in the care, custody, and control of the prospective adoptive parents. That issue was already decided by the juvenile court.

This Supreme Court has held that a person must have actual legal custody of a child to have the right to place the child for adoption. *Adoption Link, Inc. v. Suver* (2006), 112 Ohio St. 3d 166, 2006 Ohio 6528, 858 N.E.2d 424. In *Adoption Link, Inc. v. Suver*, this Supreme Court affirmed the Court of Appeals decision that held that a person must have actual custody of the child before that has a right to place the child for adoption. In that case, the Court of Appeals and this Supreme Court denied the right of the biological parents to permanently surrender their baby to a licensed private child placing agency because the baby was already in temporary custody of the Clark County Department of Job and Family Services. This Supreme Court stated that “[w]hen the parents attempted to permanently surrender their rights to T.J. to Adoption Link, they lacked authority to do so because the department had legal custody of the child.” *Id.* At 169.

This Supreme Court’s holding in *Adoption Link, Inc. v. Suver* is on point with the issue presented in this case. If the child is in the legal custody of the prospective adoptive parents, then the parents lack authority to place the child. When legal custody is granted, parental rights are not terminated. The parents still have “residual parental rights” as defined in R.C. 2151.011(B)(46). The “residual parental rights” include the right to “consent to adoption.”

However, this Supreme Court believes that “residual parental rights” do not include the right to place the child for adoption. This Supreme Court cannot affirm the Ninth District in this case without declaring that the holding in *Adoption Link, Inc. v. Suver* was incorrect. However, this Supreme Court can reverse the Ninth District in this case and also declare that the holding in *Adoption Link, Inc. v. Suver* was either correct or incorrect. If the legal custodians of the child are permitted to place the child for adoption, in this case with themselves, then there is no issue. If the probate court insists that the non-custodial parent make the placement, then the court is creating a legal impossibility because this Supreme Court has held that the non-custodial parent has no authority to make a placement. This legal impossibility is a due process violation.

Legal custody is granted in situations where the parents are not meeting their parental obligations. In many cases, the parents are not supporting the child or even having contact with the child. The legal custody process is not intended to improve parental functioning. The parents often continue to be non-functional after the grant of legal custody. After a period of time in legal custody limbo, the de-facto family unit often wishes to cement the relationship by finalizing an adoption.

R.C. 5103.16(E) excuses the placement requirement for guardians, step-parents, and grandparents. Such persons may file their petition for adoption without the additional adoptive placement step. Non-relatives, and even relatives other than grandparents, who already have custody of the child by juvenile court order, should not be treated differently in the adoption proceeding. This disparity is an equal protection violation.

C. It is a violation of the equal protection clause for the state to treat similarly-situated persons differently – in a manner that adversely impacts a person based upon their social class or wealth

or their county of residence. The standard set forth by the court below creates such equal protection problems.

The historical development of the probate and juvenile courts, with their respective duties, has created many jurisdictional issues. Legal authority for non-parents to assume care, custody and control of a minor child may be brought in either the probate division of the court of common pleas as part of a guardianship proceeding or in the juvenile division as a child custody matter. In many Ohio counties, the same judge serves as both the juvenile judge and probate judge. In these Ohio counties, the acceptance of the legal custody order is readily accepted as placement for the adoption proceeding. It is in certain Ohio counties in which the juvenile judge and the probate judge are separate individuals that the legal custody orders are not being accepted by the probate court. Therefore, the issue of whether a legal custody decree serves as an adoptive placement is determined by venue in which the adoption is brought. This is an unequal application of the same Ohio law and is an equal protection violation.

If a child has assets and a guardian of the child's estate is required, generally the child's custody is determined by a guardianship. Likewise if the proposed caregiver has resources for a private attorney, the matter may initially be filed in the probate court because the parties had the resources to retain an attorney who was aware of the issue with a legal custody order.

The child is often in the juvenile court system as part of an abuse, neglect, or dependency matter. It is very common for such matters to be resolved by granting legal custody (commitment) to an individual, rather than make a permanent commitment to an agency. The individual may or may not be a relative. Such awards of legal custody are sometimes favored for reasons that include: to avoid having the child in temporary care of the public agency for beyond the statutory allowable time; it is viewed as a "less restrictive alternative" to the permanent

custody hearing, that can be very time consuming and costly; it removes the involvement of the public agency; and it does maintain the residual rights of the parents for those parents that are truly interested in their parental rights and obligations.

The other group which relies upon juvenile court custody are pro se litigants. Persons not able to afford an attorney are inclined to file in juvenile court rather in probate court. Pro se matters are more common in juvenile court than in probate court. Some probate courts instruct persons to file custody matters in juvenile court and inform such persons that the juvenile court is better suited to handle custody matters. However once legal custody is granted the children and families are blocked from progressing to a future adoption. This creates a wealth/class issue where the law is applied differently depending on the wealth of the child and the caregiver. This is an equal protection violation.

IV. Summation

Permanency for a child is always the goal. National child welfare policy views adoption as an option for providing such permanency. There has been much concern in recent years with providing children with stable, permanent homes. The Ohio legislature has mandated prompt permanency for children in public agency custody. The use of a legal custody award can be very beneficial and it should be interpreted in a way that facilitates, rather than hinders, the ultimate achievement of permanency for the child.

By refusing to accept the legal custody as placement, the probate court is denying the prospective adoptive parents and children a due process right to presenting evidence relating to the birthparent's waiver or abandonment of their parental rights, R.C. 3107.07. Further, the probate court is refusing to hear evidence relating to the best interest of the child. The probate court is instead giving the noncustodial birthparent an absolute right trumping the rights of all other parties.

This case presents a significant equal protection issue that adversely impacts many children in the State of Ohio. Not allowing a legal custody order to serve as a placement in an adoption proceeding creates a separate class of children that violates the constitutional rights of the child and is contrary to law, to public policy, and to the best interest of the child. Many Ohio probate courts currently accept the legal custody order as placement for the adoption. If this Supreme Court affirms the decision of the Ninth District, then the law will change for all Ohio counties and all Ohio children will suffer the indignity of being denied the permanency and stability of an adoptive home.

IV. Conclusion

For the reasons set forth above, the American Academy of Adoption Attorneys respectfully requests this Supreme Court to REVERSE the decision of the lower court and to REMAND the matter for further proceedings consistent with the decision of this Supreme Court.

Respectfully submitted,



Michael R. Voorhees (0039293)
Voorhees & Levy LLC
11159 Kenwood Road
Cincinnati, Ohio 45242
(513) 489-2555 phone
(513) 489-2556 fax
Counsel for Amicus Curiae,
American Academy of Adoption Attorneys

Certificate of Service

I hereby certify that a copy of the foregoing Amicus Curiae's Brief has been served by regular U.S. mail this 19th day of January, 2010 to the following: Joel D. Fritz, Counsel for Appellants, Rothgery & Associates, 230 Third Street, Elyria, Ohio 44035; Elizabeth I. Cooke Counsel for Appellee, Jennifer Wahl Walker, Moritz College of Law, 55 W. 12th Ave., Suite 255, Columbus, Ohio 43210; Christopher Robinson, Pro se Appellee, c/o Warden Maggie Bradshaw, 2500 S. Avon Belden Road, Grafton, Ohio 44044.



Michael R. Voorhees (0039293)