

ORIGINAL

IN THE SUPREME COURT OF OHIO

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

CASE NOS. 2009 - 1695
AND 2009 - 1980

ON APPEAL FROM THE COURT OF
APPEALS OF LORAIN COUNTY,
NINTH APPELLATE DISTRICT

BRIEF OF AMICUS CURIAE, OHIO ADOPTION LAW ROUNDTABLE,
IN SUPPORT OF APPELLANTS

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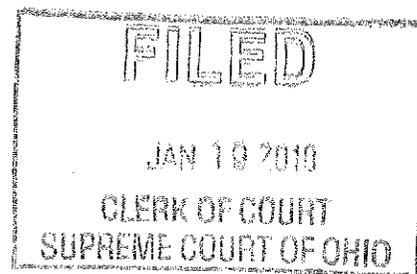


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STATEMENT OF INTEREST OF
AMICUS CURIAE, OHIO ADOPTION
LAW ROUNDTABLE

The Ohio Adoption Law Roundtable is an association of attorneys who are nationally recognized for their competence in, and dedication to, the field of adoption law. The Roundtable meets regularly to discuss the complexities of Ohio adoption law, to promote adoption law reform, and to support the highest standards of ethical practice.

The Ohio Adoption Law Roundtable offers an ongoing program of continuing legal education, not only for its own members, but for the bench and the general bar as well. Its members testify regarding pending legislation, and submit amicus briefs for consideration by courts.

Founded in 1998, the Ohio Adoption Law Roundtable subscribes to the code of ethics and membership rules of the American Academy of Adoption Attorneys, although it is a separate and distinct organization. The ultimate goal of the Roundtable is to promote the best interests of children and families.

STATEMENT OF FACTS

On January 5, 2006, the Juvenile Court of Lorain County, Ohio, determined that the minor children at issue herein, J.A.S. and J.N.S., were Neglected and Dependent children. At that time, the Court awarded temporary custody to S.E.S. and R.S., the Appellants herein. Such temporary custody was eventually converted to legal custody by an order of the Juvenile Court filed on October 6, 2006.

Two years later, on October 3, 2008, Appellants filed Petitions to adopt the children in the Probate Court of Lorain County, Ohio. The Petitions alleged that the consent of the biological parents to such adoptions was not required because, as to each parent and each child, “[t]he parent has failed without justifiable cause to communicate with the minor for a period of at least one year immediately preceding the filing of the adoption petition or the placement of the minor in the home of the petitioner,” and “[t]he parent has failed without justifiable cause 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 the filing of the adoption petition or the placement of the minor in the home of the petitioner.”

Along with the adoption Petitions, Appellants also filed, in each case, a “Motion For Order From This Court That The Requirement For Adoptive Placement Under R.C. 5103.16(D) To (sic) Be Deemed Unnecessary.” As support for such Motions, Appellants cited the decision of the Montgomery County Court of Appeals, Second Appellate District, in In re Adoption of A.W.K., 2007-Ohio-6341. On November 26, 2008, in each case, the Probate Court, without explanation, overruled such Motions.

On December 26, 2008, Appellants filed a Notice of Appeal in each case to the Court of Appeals of Lorain County, Ninth Appellate District. Such appeals were subsequently consolidated by the Court. On August 10, 2009, the Court of Appeals filed its “Decision and Journal Entry,” affirming the judgment of the Probate Court. In re Adoption of J.A.S., 2009-Ohio-3927. On September 1, 2009, Appellants filed a Motion in the Court of Appeals seeking certification of a conflict with the decision in A.W.K., *supra*. Such certification was granted on October 9, 2009.

Appellants timely filed a Notice of Appeal and Memorandum in Support of Jurisdiction in this Court on September 21, 2009 (Case No. 2009-1695). On October 29, 2009, Appellants filed a copy of the order Certifying a Conflict (Case No. 2009-1980). On November 18, 2009, this Court determined that a conflict exists, accepted jurisdiction in the discretionary appeals, and consolidated both cases.

ARGUMENT

CERTIFIED QUESTION

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?

PROPOSITION OF LAW

(As proposed by Amicus Curiae, Ohio Adoption Law Roundtable)

Compliance with R.C. 5103.16(D) is not a jurisdictional prerequisite to adoption by legal custodians where the child was not originally placed with the custodians/petitioners for purpose of adoption.

For the reasons which follow, Amicus Curiae, Ohio Adoption Law Roundtable, urges the Court to answer the certified question in the negative. For those same reasons, Amicus submits that its proposed Proposition of Law should form the basis of the Court's ultimate decision herein.

The starting point for analysis of the issue in this case is, of course, the words of the statute itself. Pursuant to R.C. 5103.16(D):

- (D) 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.

This Court has previously held that:

"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.

In the proceedings below, the Ninth District Court of Appeals opined that because of such requirement for strict construction, to dispense with the need for a pre-adoption "placement" under R.C. 5103.16(D) under the circumstances presented herein would be akin to "graft[ing] another exception upon the statute." In re Adoption of J.A.S., 2009 - Ohio - 3927, at Paragraph 10. Amicus respectfully disagrees.

First, it must be said that Amicus has no quarrel with the notion that adoption statutes must, for the protection of children and families, be strictly construed. Indeed,

Amicus wholeheartedly supports such proposition. It is the application of such concept to the circumstances herein with which Amicus disagrees.

It is axiomatic that a court must adhere to the plain and unambiguous language of a statute, giving effect to the words used, and may not delete words used or add words not used. Wray v. Wymer (1991), 77 Ohio App. 3d 122,132; Cline v. Bur. of Motor Vehicles (1991), 61 Ohio St. 3d 93, 97. Here, strict construction of R.C. 5103.16(D), by adherence to the words used by the General Assembly, actually supports Appellants' position. The plain wording of R.C. 5103.16(D) only prohibits the placing or receiving of a child "for adoption or with the intent to adopt" unless certain criteria are met. Here, on the other hand, these children were not originally placed in the home of Appellants for purposes of adoption. Rather, the children came to Appellants' home by way of a Juvenile Court adjudication of neglect and dependency, with an eventual grant of legal custody to Appellants.

Moreover, the need for strict construction does not mandate that compliance with R.C. 5103.16(D) is a jurisdictional prerequisite to adoption by nonrelative legal custodians. For example, in the case of In re Krystal Lyn Wilson, 1995 Ohio App. LEXIS 572, 15 *7, the Seventh District court of Appeals upheld an adoption under circumstances similar to those herein. Wilson, like the present case, involved adoption petitioners that had previously been granted legal custody of the child at issue. The natural mother challenged the adoption by arguing that there had not been any actual R.C. 5103.16 "placement for adoption." The Wilson Court rejected such argument, and upheld the adoption. In doing so, the Court of Appeals noted that "R.C. 5103.16 does not state that placement under its terms is a jurisdictional prerequisite for adoption and nowhere else in the Revised Code is it so stated."

The *Wilson* Court also stated that "[i]ndeed, the Supreme Court and other Ohio courts have recognized that legal placement other than pursuant to O.R.C. §5103.16, or its predecessors, may nonetheless lead to legal adoption." *Id.* (Citing: *In re Biddle* (1958) 168 Ohio St. 209; *In re Tilton* (1954), 161 Ohio St. 571; *In re Howell* (1991), 77 Ohio App. 3d 80). The same result, of course, also occurred in *In re Adoption of A.W.K.*, 2007-Ohio-6341, the Second District Court of Appeals case that led to the instant certification of a conflict. In that case, the child at issue had been adjudicated a dependent child by the Juvenile Court, and legal custody of the child was granted to the non-relative couple who later filed a petition to adopt the child. *Id.*, ¶3. The *A.W.K.* Court eventually reversed the Probate Court's determination that compliance with R.C. 5103.16(D) was necessary in spite of the Juvenile Court's grant of legal custody.

In doing so, the Court noted that its ruling was in accord with at least one commentator as well as cases from other Courts of Appeals. *Id.*, ¶14. The *A.W.K.* Court further noted that "[t]he 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 purposes of adoption." *Id.*, ¶14, n. 2 (citing R.C. 3107.051(B)(2)).

Finally, this Court itself has expressed the view that R.C. 5103.16 is a "procedure for independently placing a child for adoption . . ." *Lemley, supra*, 6 Ohio St. 3d 258, 259 (emphasis added). Such view was reiterated by the Court in *In re Adoption of Zschach* (1996), 75 Ohio St. 3d 648:

"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." (Emphasis added).

It its decision below, the Ninth District Court of Appeals expressed concern that, absent compliance with R.C. 5103.16(D), judicial oversight would be lacking. What the Court failed to properly take into consideration is the fact that here, as in all other grants of legal custody, judicial oversight and review, prior to placing the children in the home of Appellants, has already occurred. And, before any adoption can actually occur, additional oversight will be conducted by the Probate Court in the form of a home study, an inquiry into the necessity of consent by the birth parents, and, most importantly, a determination of whether adoption by the legal custodians is in the best interest of the children. Thus, the fears expressed by the Court below are unwarranted.

It must also be remembered that the notion of "strict construction" of adoption statutes does not require an interpretation "that would mandate an unjust or unreasonable result." *Zschach, supra*, at 655. As the *A.W.K.* Court recognized, removing children from the home of their legal custodians to pursue placement back in the same home under R.C. 5103.16 would be unreasonable. *A.W.K., supra*, ¶14, n. 2. It would also be manifestly unjust. Under R.C. 3107.07, the consent of the natural parents to the adoption itself can be dispensed with upon proof of an unjustifiable failure to support or communicate for the requisite one year period. Under the Ninth District's interpretation of R.C. 5103.16(D), however, the natural parents would, in reality, have an absolute veto power, inasmuch as their consent to pre-adoptive placement would be required. Thus, absent parental consent to

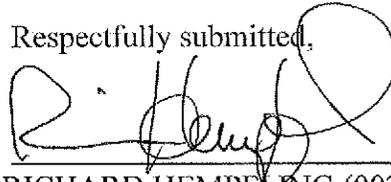
placement for purposes of adoption, legal custodians would never have the opportunity to show that consent to the actual adoption can and should be dispensed with.

When all is said and done, "[u]ltimately, the goal of adoption statutes is to protect the best interests of children. In cases where adoption is necessary, this is best accomplished by providing the child with a permanent and stable home, . . . and ensuring that the adoption process is completed in an expeditious manner. . . . If these goals are met, the parent-child relationship will have the best opportunity to develop fully. "Zschach, supra." The Ninth District's interpretation of R.C. 5103.16(D) in this case frustrates such goals. The Second District's decision in A.W.K. promotes such goals. As a result, the certified question should be answered in the negative, and the judgment of the Court below must be reversed.

CONCLUSION

For all of the foregoing reasons, Amicus Curiae, Ohio Adoption Law Roundtable, submits that the certified question must be answered in the negative. As a result, the judgment of the Court of Appeals herein must be reversed.

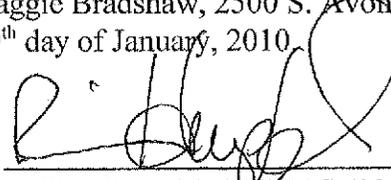
Respectfully submitted,



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Certificate of Service

I hereby certify, by signing below, that a copy of the foregoing has been served upon Joel D. Fritz, Esq., Rothbery & Associates, 230 Third St., Elyria, Ohio 44035; Elizabeth I. Cooke, Esq., Moritz College of Law, 55 W. 12th Ave., Ste. 255, Columbus, OH 43210; and Christopher robinson, c/o Warden Maggie Bradshaw, 2500 S. Avon Belden Rd., Grafton, OH 44044, via ordinary U.S. Mail this 19th day of January, 2010.



RICHARD HEMPFLING (0029986)