

ORIGINAL

IN THE SUPREME COURT OF OHIO

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

CASE NO. 2009 - 1695

AND

2009 - 1980

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

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

RICHARD HEMPFLING (0029986)  
Flanagan, Lieberman, Hoffman & Swaim  
15 W. Fourth Street, Suite 100  
Dayton, Ohio 45402  
(937) 223-5200 - Telephone  
(937) 223-3335 - Facsimile  
[rhempfling@flhslaw.com](mailto:rhempfling@flhslaw.com)

*Counsel for Amicus Curiae,*  
Ohio Adoption Law Roundtable

ELIZABETH I. COOKE (0063873)  
Moritz College of Law  
55 W. 12<sup>th</sup> Avenue, Suite 255  
Columbus, Ohio 43210  
(614) 292-6821 - Telephone  
(614) 292-5511 - Facsimile  
[Cooke.62@osu.edu](mailto:Cooke.62@osu.edu)

*Counsel for Appellee,*  
Jennifer (Wahl) Walker

JOEL D. FRITZ (53389)  
Rothgery & Associates  
230 Third Street  
Elyria, Ohio 44035  
(440) 323-1203 - Telephone  
(440) 323-1213 - Facsimile  
[rothgery01@msr.com](mailto:rothgery01@msr.com)

*Counsel for Appellants*

CHRISTOPHER ROBINSON  
316 9<sup>th</sup> Street  
Elyria, Ohio 44035

*Pro se Appellee*

MICHAEL R. VOORHESS (0039293)  
Voorhees & Levy, LLC  
11159 Kenwood Road  
Cincinnati, Ohio 45242  
(513) 489-2555 - Telephone  
(513) 489-2556 - Facsimile  
[mike@ohioadoptionlawyer.com](mailto:mike@ohioadoptionlawyer.com)

*Counsel for Amicus Curiae*  
Amer. Academy of Adoption Attnys.

Flanagan  
Lieberman  
& Hoffman  
& Swaim

Attorneys at Law  
15 West Fourth Street  
Dayton, Ohio 45402  
937/223-5200

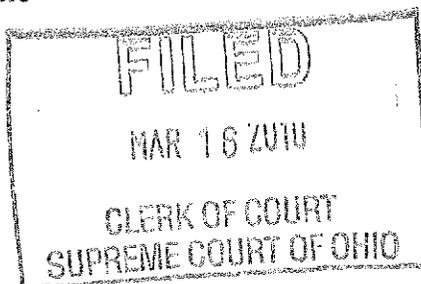


TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES .....	ii
ARGUMENT .....	1
 <u>Certified Question:</u>	
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?.....	
1	
 <u>Proposition of Law:</u>	
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. ....	
1	
 CONCLUSION .....	4
CERTIFICATE OF SERVICE .....	4

Flanagan  
Lieberman  
& Hoffman  
Swaim  
Attorneys at Law  
15 West Fourth Street  
Dayton, Ohio 45402  
937/223-5200

**TABLE OF AUTHORITIES**

<b><u>CASES</u></b>	<b><u>Page</u></b>
<u>In re Adoption of Zschach</u> (1996), 75 Ohio St. 3d 648. ....	2
<u>In re Krystal Lyn Wilson</u> , 1995 Ohio App. LEXIS 572. ....	2
<u>Lemley v. Kaiser</u> (1983), 6 Ohio St. 3d 258. ....	2

**OTHER AUTHORITIES**

	<b><u>Page(s)</u></b>
O.R.C. §3107.07 .....	2
O.R.C. §4107.14(C) .....	3
O.R.C. §5103.16 .....	PASSIM

Flanagan  
Lieberman  
& Hoffman  
& Swaim  
Attorneys at Law  
15 West Fourth Street  
Dayton, Ohio 45402  
937/223-5200

## 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.

In her Merit Brief, Appellee urges the Court to strictly construe R.C. 5103.16(D), but never directly addresses the argument raised by Amicus, i.e., that when strictly construed, R.C. 5103.16(D) does not apply to the facts of this case. The plain words used by the General Assembly are that "[n]o child shall be placed or received for adoption or, with intent to adopt unless" certain conditions are met. R.C. 5103.16(D)(emphasis added). Here, it is undisputed and indisputable that these children were not placed or received in the home of R.S. and S.E.S. for purposes of adoption. Appellee admits as much in her Brief, at page 9, wherein she states that "[i]n this case, the only placement that has occurred is for legal custody." (emphasis sic). She further admits that "the plain language of R.C. 5103.16(D) requires pre-adoptive placement whenever someone other than a certified agency, institution, association, or foreign custodian places a child for purposes of adoption . . ." Id. (emphasis added). Thus, the argument for "strict construction" of R.C. 5103.16(D) actually supports

Flanagan  
Lieberman  
& Hoffman  
Swaim

Attorneys at Law  
15 West Fourth Street  
Dayton, Ohio 45402  
937/223-5200

the position of Appellants rather than the Appellee.

Apparently, Appellee wants this Court to declare that an absolute prerequisite to adoption by non-relative legal custodians is an additional placement specifically for purposes of adoption. This, however, is an extra step that the law does not require. As was recognized by the Seventh District Court of Appeals in In re Krystal Lyn Wilson, 1995 Ohio App. LEXIS 572, \*6, "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 purpose of R.C. 5103.16 is, as this Court has stated "to ensure proper agency or court supervision of private placements." In re Adoption of Zschach (1996), 75 Ohio St. 3d 648. (emphasis added). In other words, R.C. 5103.16 is a "procedure for independently placing a child for adoption. Lemley v. Kaiser (1983), 6 Ohio St. 3d 258, 259. (emphasis added). Indeed, Appellee herself, at page 8 of her Merit Brief, acknowledges that "R.C. 5103.16(D) addresses the independent placement of children," and that the goal of such statute is "preventing surreptitious adoptions." Clearly then, the evil sought to be prevented is the giving away (or worse, selling) of children by their biological parents without Court intervention. Only then is the initial intervention and approval of the Probate Court required to ensure that the transfer of custody for purposes of adoption is not motivated by mercenary concerns, and is, ultimately, in the best interest of the child.

Such is emphatically not the situation in the present case. Instead, the children are, and have been, living with R.S. and S.E.S. only after careful scrutiny by the Juvenile Court of the birth parents' situations, the children's need for stability, the suitability of R.S. and S.E.S., and the overall best interest of the children.

Finally, Appellee's arguments almost imply that the adoption of these children is already a done deal. To the contrary, the procedures in R.C. 3107.07 with regard to the possibility of

Flanagan  
Lieberman  
& Hoffman  
Swaim

Attorneys at Law  
15 West Fourth Street  
Dayton, Ohio 45402  
937/223-5200

dispensing with parental consent must still be followed, including notice, and a hearing in which the adoption petitioners bear the burden, by clear and convincing evidence, that parental consent can be dispensed with. And, even if the Probate Court determines that such consent is unnecessary, it must still take the further step of determining whether the adoption is in the best interest of the child. R.C. 4107.14(C). These procedures provide ample protection for the residual rights of biological parents, while also taking into account the rights of the children themselves to a stable, permanent home.

All that R.S. and S.E.S. seek is the opportunity to be heard on whether the biological parents have forfeited their residual rights. Neither Appellants nor any other non-relative legal custodians will ever be afforded such opportunity, however, if, as Appellee argues, the biological parents always have an absolute veto over adoption through the placement process of R.C. 5103(D). Such a result is not warranted by the plain language of R.C. 5103.16(D) and, in any event, is completely unreasonable. As a result, it is respectfully urged that this Court answer the certified question in the negative, and reverse the decision of the Court of Appeals.

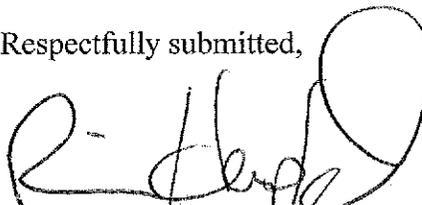
Flanagan  
Lieberman  
& Hoffman  
Swaim

Attorneys at Law  
15 West Fourth Street  
Dayton, Ohio 45402  
937/223-5200

CONCLUSION

For all 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,

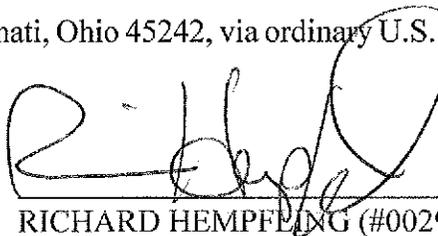


---

RICHARD HEMPFLING (#0029986)  
Flanagan, Lieberman, Hoffman & Swaim  
15 W. Fourth Street, Suite 100  
Dayton, Ohio 45402  
(937) 223-5200 - Telephone  
(937) 223-3335 - Facsimile  
[rhempfling@flhslaw.com](mailto:rhempfling@flhslaw.com)  
*Counsel for Amicus Curiae,*  
Ohio Adoption Law Roundtable

CERTIFICATE OF SERVICE

I hereby certify, by signing below, that a copy of the foregoing has been served upon Joel D. Fritz, Esq., Rothgery & Associates, 230 Third Street, Elyria, Ohio 44035; Elizabeth I. Cooke, Esq., Moritz College of Law, 55 W. 12<sup>th</sup> Avenue, Suite 255, Columbus, Ohio 43210; Christopher Robinson, 316 9<sup>th</sup> Street, Elyria, Ohio 44035; and Michael R. Voorhees, Esq., Voorhees & Levy, LLC, 11159 Kenwood Road, Cincinnati, Ohio 45242, via ordinary U.S. Mail on this 16<sup>th</sup> day March, 2010.



---

RICHARD HEMPFLING (#0029986)

Flanagan  
Lieberman  
& Hoffman  
& Swaim

Attorneys at Law  
15 West Fourth Street  
Dayton, Ohio 45402  
937/223-5200