

**IN THE SUPREME COURT OF OHIO**

In re: (C.C.S.), (C.L.S.)	:	
	:	Case No. 2016-0395
Petitioner-Appellant,	:	
	:	On Appeal from the
v.	:	Franklin County Court
	:	of Appeals, Tenth
ADOPTION BY GENTLE CARE	:	Appellate District
	:	
Respondent-Appellee	:	Court of Appeals
	:	Case No. 15-AP-884
Appellees.	:	
	:	<b>ADOPTION INVOLVED</b>

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MEMORANDUM IN SUPPORT OF JURISDICTION  
OF AMICUS CURIAE ERIK L. SMITH

(Supporting Appellant/Urging Acceptance)

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**Steven E. Hillman** (02578)  
8581 Crail Court  
Dublin, Ohio 43017  
Tel: (614) 766-6346  
Fax: (614) 766-6418  
law@stevenhillman.com

COUNSEL FOR APPELLANT, C.C.S.

**A. Patrick Hamilton** (13909)  
400 South Fifth Street, Suite 103  
Columbus, Ohio 43215-5430  
Tel: (614) 464-4532  
Fax: (614) 221-7590  
Hamiltonlaw13909@yahoo.com

COUNSELS FOR APPELLEE, ADOPTION BY GENTLE CARE

**Erik L. Smith** (89330)  
62 West Weber Road  
Columbus, Ohio 43202  
Tel: (614) 330-2739  
edenstore@msn.com

AMICUS CURIAE, PRO SE

**Jon W. Oebker** (64255)  
Tucker Ellis LLP  
950 Main Avenue, Suite 1100  
Cleveland, Ohio 44113-7213  
Tel: (216) 592-5000  
Fax: (216) 592-5009  
Jon.oebker@tuckerellis.com

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## **INTEREST OF AMICUS CURIAE**

Erik L. Smith is an attorney licensed by the State of Ohio and admitted to the bar in November 2012. His practice has focused primarily on contested adoptions and custody cases at the appellate level. More importantly, however, Mr. Smith has been a strong advocate for balance in adoption law since at 2003. His advocacy has included writing articles for publication in law reviews and legal journals, being interviewed on domestic and international radio and TV programs; and giving presentations at CLE classes and national conferences on adoption law. Mr. Smith has also assisted attorneys nationally in and outside of Ohio in their contested adoption cases.

Mr. Smith appeared periodically as counsel in the proceedings below. He appeared briefly in the probate court, the post-trial proceedings in juvenile court, and in the appeal from which this appeal came. Mr. Smith participated fully only in the first appeal that ended in a remand order. Although Mr. Smith withdrew from the most recent appeal in the court below, he believes that consideration by this Court is important for the future of adoption in Ohio. He therefore appears as an advocate for balance in adoption law rather than as an attorney.

Mr. Smith recently detected a potential problem regarding subject matter jurisdiction in this case that the parties and courts understandably overlooked. He addresses that issue here as well as one issue on the merits. Both Appellant and her Counsel have read this brief and have approved of its content and filing.

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

This cause presents two critical issues for the future of adoption in Ohio:

- (1) whether the juvenile court has subject matter jurisdiction to determine the validity of a permanent surrender agreement executed without juvenile court approval; and
- (2) whether the agreement for temporary custody option under R.C. 5103.15(A) must be discussed with a parent before an adoption agency can accept a permanent surrender agreement. The importance of subject matter jurisdiction is self-evident. The second issue is crucial because making permanent surrenders without court approval is now the norm when infants are surrendered to private agencies for adoption consideration.

Subject Matter Jurisdiction

. The Court needs to resolve the issue of subject matter jurisdiction now because the case law shows that the bench and bar are confused about it. That confusion will cause delay in future cases and potentially void judgments because permanent surrenders made without court approval are now commonplace regarding the private adoption of infants.

From the start this case was beset with confusion about which court should hear the mother's challenge to the validity of her permanent surrender agreement. The agreement between the mother and Gentle Care was made under Section (B)(2) of R.C. 5103.15, the section that, unlike other sections, lets children less than six months old be permanently surrendered without court approval. (JFS 01666, signed Apr. 4, 2014; Resp's. Trial Exhibit.) Initially, mother's counsel believed that an action to withdraw or set aside a permanent surrender agreement made without juvenile court approval had to be brought in the probate court. That conclusion was based on the

reasoning in *In re E.B.*, 9th Dist. No. 23850, 2008-Ohio-784, which held that a juvenile court lacks jurisdiction to hear challenges to the validity of adoption surrenders under R.C. 5103.15(B)(2). *Id.* at ¶ 15, 20. The Court in *E.B.* concluded that an action to set aside a permanent surrender agreement on the ground of duress should be brought in the probate court. *Id.* at ¶ 26.

Accordingly, the mother in this case filed a “Petition to Withdraw Consent to Permanent Surrender” in Probate Court on May 9, 2014. (See, Court of Appeals Op., (884) ¶ 9.) The petition asked the probate court to declare the permanent surrender “invalid and therefore void” and to “cause the return of [C.C.S.] to petitioner.” The probate court dismissed the petition, finding a lack subject matter jurisdiction. The court suggested that writ of habeas corpus from juvenile court would be proper.

The mother nevertheless filed for habeas corpus relief in the Tenth District Court of Appeals. (10th Dist. Nos. 14AP-471.) (The later appeals were Nos. 14AP-739 and 15AP-884.) At a status conference, however, the Court of Appeals discouraged the mother from pursuing relief in its Court, suggesting instead that she petition the juvenile court. Counsel for the mother agreed to do so and the case proceeded in juvenile court without further question.

Meanwhile, the First District Court of Appeals decided *In re T.J.B.*, 1st Dist. No. C-130725, 2014-Ohio-2028, in which a mother sought to have the permanent surrender agreement she made under R.C. 5103.15(B)(2) voided. The mother’s pleaded basis for jurisdiction in *T.J.B.* was the juvenile court’s power to “determine the custody of any child not a ward of another court of this state” under R.C. 2151.23(A)(2). *Id.* at ¶ 8. The juvenile court dismissed the petition for lack of subject matter jurisdiction, concluding

that jurisdiction lay in the probate court. The Court of Appeals affirmed, reasoning that, because the permanent surrender agreement was made without court approval, any arguments about the agreement's validity fell outside the juvenile court's subject matter jurisdiction. *Id.* at ¶ 11-14. The Court declined to address the parties' question of whether the probate court had jurisdiction. *Id.* at ¶ 15.

Accordingly, when it comes to determining the validity of permanent surrender agreements executed under R.C. 5103.15(B)(2), both the lawyers and the courts stand confused about what action to file and where to file it. Petitioning for habeas corpus in the juvenile court is not an obvious answer because the arguments made and the relief sought in *T.J.B* and *E.B.*, which were "custody" cases, were substantively the same as in this habeas corpus case. All three proceedings featured a mother asking the juvenile court to void a permanent surrender she had executed under R.C. 5103.15(B)(2) so that she could enforce a custody right. The three courts also differed about whether or when the probate court had jurisdiction to decide the validity of a Section (B)(2) surrender. Given the potential for confusion and the risk of void judgments being issued in cases that demand early resolution and finality, this Court should decide the jurisdictional question for the bench, the bar, and the citizens of Ohio now.

#### Agency's Duty to Discuss Options

This Court also needs to clarify the evidentiary standard for deciding whether an adoption agency had authority to accept a permanent surrender agreement. As noted, R.C. 5103.15(B)(2) is becoming the procedure of choice for private agencies when approached by parents who are considering placing their infants for adoption. In those

cases, procedural oversight rests completely in the hands of the entity that stands to benefit financially from the adoption.

To help curb potential conflicts of interest, the Ohio Department of Job & Family Services (ODJFS) promulgated requirements an agency must fulfill before accepting a permanent surrender. The State's concern about informing parents is so strong that ODJFS denies agencies the authority even to make a permanent surrender agreement before fulfilling the requirements. Ohio Admin. Code 5101:2-42-04 and 09.

The relevant requirements here are Sections (B)(1) and (B)(5) of Ohio Admin. Code 5101:2-42-09. Section (B)(1) requires that at least 72 hours before executing the permanent surrender agreement, the agency meet with the parents and “[d]iscuss with the parents . . . other options available in lieu of surrendering the child.” Section (B)(5) requires the agency to “[r]eview, discuss and complete the JFS 01693 “Adoption Law and Materials” acknowledgment form. The separateness of the requirements is crucial because JFS 01693 does not contain the written information pamphlet (JFS 01676) that discusses adoption law and materials. It merely acknowledges that the parent “[has] been provided with a copy of written materials on adoption; [was] able to discuss and ask questions about the materials and the adoption process; and [is] now fully aware of the ramifications of . . . entering into a voluntary permanent custody surrender agreement.” (JFS 01693, Sec. I.)

Unfortunately, a parent can sign the JFS 01693 in the honest belief that she knows about her options when in fact she does not. This is because the pamphlet the parent receives does not describe the parent's option of making an agreement for temporary custody under R.C. 5103.15(A) (known informally as the “30-day

agreement”). A 30-day agreement is a type of foster care that, unlike other foster care options, involves special time frame and counseling opportunities for parents who are considering adoption. (Gentle Care testimony at TR 8/19 at 29.)

In that context, the pamphlet states only “guardianship and foster care options” in a list of other non-foster care alternatives That allows the adoption assessor to discuss foster care superficially with the parent without differentiating it from the 30-day agreement, which is specially designed for parents who feel they have no choice. The parent could then sign the JFS 01693 and the permanent surrender agreement believing that the options discussed at the meeting were the only ones available to her because a 30-day agreement was never discussed. A later attempt by the mother to void the agreement on the ground that her options were not adequately discussed will then be rebutted by the JFS 01693 she signed.

The Court of Appeals’ decision shows how that happened here. The Court of Appeals based its decision about this issue on the mother having received written information about birth parent rights and options and on a couple of responses to leading questions in the surrender “colloquy.” (Op. at ¶¶ 36-38.) Neither the trial court nor the appeals court cited evidence to show that a discussion of substance about the 30-day agreement option actually occurred. The 30-day agreement is of particular relevance because the mother’s primary stressor here was a lack of time to make arrangements for her children and the inability to bring the baby home, which an agreement for temporary custody would have alleviated.

Adoption terminates a fundamental right. With non-court approved surrenders commonplace in infant adoptions, hundreds of new parents will be subject to this

unchecked flaw in adoption procedure. Accordingly, the question of what constitutes competent evidence of the fulfillment of the discussion requirement under Ohio Admin. Code 5101:2-42-09(B)(1) is of great general interest and constitutional import.

### **STATEMENT OF THE CASE AND FACTS**

This Amicus incorporates the background facts and posture described in the previous section of this brief into this section by reference. The Amicus also relies on the statement presented in Appellant's jurisdictional memorandum.

### **ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW**

#### **Proposition of Law No. 1: The juvenile court lacks subject matter jurisdiction to determine the validity of a permanent surrender agreement executed under R.C. 5103.15(B)(2).**

The juvenile court lacked subject matter jurisdiction in this case because the validity of permanent surrender agreements made under R.C. 5103.15(B)(2) are specifically exempted from the juvenile court's power to make custody determinations. That exemption necessarily applies to the juvenile court's jurisdiction to hear habeas corpus petitions because habeas corpus petitions determine custody. When determining the actual nature of an action, one looks to the "substance of the party's arguments" and the "type of relief requested" rather than how the action is labelled. *Lingo v. State*, 138 Ohio St.3d 427, 2014-Ohio-1052, \_\_\_ N.E.2d \_\_\_, ¶ 38 citing *Ketcham v. Miller*, 104 Ohio St. 372, 136 N.E. 145 (1922), syllabus (where the cause of action and request for damages sound in contract, pleadings couched in the vocabulary of torts do not change the actual nature of the action).

The subject matter jurisdiction of the juvenile court is purely statutory. See *In re Gibson*, 61 Ohio St.3d 168, 172-173, 573 N.E.2d 1074 (1991), citing Ohio Constitution,

Article IV, Section 4(B). R.C. 2151.23(A)(3) gives the juvenile court original jurisdiction to “hear and determine any application for a writ of habeas corpus involving the custody of a child.” Prevailing on a petition for a writ of habeas corpus in a child custody case requires showing that (1) the child is being unlawfully detained, and (2) the petitioner has the superior legal right to custody of the child. *Holloway v. Clermont Cty. Dept. of Human Serv.*, 80 Ohio St.3d 128, 130, 684 N.E.2d 1217, 1219 (1997).

R.C. 2151.23(A)(2) gives the juvenile court original jurisdiction to “determine the custody of any child not a ward of another court.” R.C. 2151.23(A)(9) gives the juvenile court exclusive original jurisdiction to hear requests for approval of permanent surrender agreements made under R.C. 5103.15.

Section (B)(1) of R.C. 5103.15 lets a parent, subject to juvenile court approval, surrender her child into the permanent custody of a private adoption agency. Section (B)(2) of that statute eliminates the need for juvenile court approval of the agreement if the child is surrendered to a private adoption agency at less than six months of age and solely for adoption. In that case, the juvenile court merely journalizes the notice it receives from the probate court that the surrender agreement was made.

Ohio courts have ruled that R.C. 5103.15(B)(2) presents an exception to the juvenile court’s subject matter jurisdiction in child custody determinations. See, *In re T.J.B.*, 1st Dist. No. C-130725, 2014-Ohio-2028, ¶ 14 (holding that the juvenile court lacked the power to hear arguments about the validity of permanent surrender agreement made under R.C. 5103.15(B)(2)). In *T.J.B.*, a mother asked the juvenile court to void the permanent surrender agreement she made with a private adoption agency under R.C. 5103.15(B)(2) regarding her three day old child. *Id.* at ¶ 5, 11. The

mother argued that the juvenile court could invalidate her permanent surrender agreement because R.C. 2151.23(A)(2) let the court “determine the custody of any child not a ward of another court of this state.” *Id.* at ¶ 8.

The Court of Appeals disagreed, noting first that Section (B)(2) applied in the specific circumstance where the child was surrendered at less than six months of age to a private adoption agency. *Id.* at ¶ 10. The Court then noted that R.C. 2151.23(A)(9) gave the juvenile court exclusive original jurisdiction to hear requests for approval of permanent surrender agreements filed under R.C. 5103.15. *Id.* at ¶ 11. The Court then found that the mother had surrendered the child under section (B)(2) of R.C. 5103.15, which, unlike other sections of that statute, did not require juvenile court approval. *Id.* Instead, section (B)(2) required the agency only to notify the juvenile court of the permanent surrender agreement, which notice the juvenile court journalized. *Id.*

The Court held that “the juvenile court’s administrative function of journalizing the permanent surrender under R.C. 5103.15(B)(2) did not invoke its jurisdiction to approve or disapprove the grant of permanent custody to [the agency]. Thus, any arguments mother may have relating to the validity of her permanent surrender, which would have consequences for any subsequent adoption proceeding, would not lie within the juvenile court’s jurisdiction.” *T.J.B.*, 2014-Ohio-2028, ¶ 14. *See also In re E.B.*, 9th Dist. No. 23850, 2008-Ohio-784, ¶ 15 (holding that a juvenile court lacks jurisdiction to hear challenges to the validity of adoption consents where infants were surrendered to private agencies under R.C. 5103.15(B)(2)).

*T.J.B.* mirrors this case in its facts, arguments, and requested relief. The mothers in both cases permanently surrendered their three day old infants to private

adoption agencies solely for the purpose of adoption under R.C. 5103.15(B)(2). Before adoptions were ordered, both mothers asked the juvenile court to find their permanent surrenders void so they could enforce a custody right in an adoption proceeding. The lone difference between the two cases was that *T.J.B.* was brought under the custody jurisdictional statute while this mother's case was brought under the habeas corpus jurisdictional statute. Under these facts, however, the subject matter is the same under both jurisdictional statutes.

To illustrate, had the mother in *T.J.B.* brought her case under the habeas corpus statute, nothing of substance in her pleadings would have changed. Just as in her custody claim, her claim to a superior right to custody and the lawfulness of the agency's detention in a habeas case would have depended squarely on the validity of her permanent surrender agreement, just as it did with the mother here. Accordingly, under these facts, the only difference between an action under R.C. 2151.23(A)(2) and an action under R.C. 2151.23(A)(3) would be their labels, "custody" or "habeas corpus." Whichever statute is used, the subject matter remains the same. Thus, just as R.C. 5103.15(B)(2) presents an exception to the juvenile court's jurisdiction in custody matters under R.C. 2151.23(A)(2), R.C. 5103.15(B)(2) presents an exception to the juvenile court's jurisdiction in habeas corpus under R.C. 2151.23(A)(3).

R.C. 2151.23(A)(3) still applies where the alleged wrongful custody was gained some way other than through a permanent surrender agreement under R.C. 5103.15(B)(2). But actions seeking to invalidate permanent surrender agreements made under R.C. 5103.15(B)(2) must be brought as habeas corpus actions in a higher court where original habeas jurisdiction is not statutorily limited. See Ohio Constitution,

Article IV, Sections 2(B)(1)(c) and 3(B)(1)(c) (giving Supreme Court and Courts of Appeals unlimited original jurisdiction in habeas corpus.)

Accordingly, this Court should find the judgment of the juvenile court to be void for lack of subject matter jurisdiction and rule accordingly so that the mother can pursue habeas relief without prejudice in this Court or in an Appeals Court.

**Proposition of Law No. II: [A court’s finding that an adoption agency fulfilled its duty under Ohio Admin. Code 5101:2-42-09(B)(1) must be supported by evidence showing affirmatively that the agency and the parent had a substantive discussion of the temporary custody agreement option under R.C. 5103.15(A).]**

The Court of Appeals erred as a matter of law because nothing in the record showed that a timely and sufficient discussion of the 30-day agreement option actually occurred. An adoption agency cannot accept or execute a permanent surrender agreement until it fulfills its duties under Section (B) of Ohio Admin. Code 5101:2-42-09. See Ohio Admin. Code 5101:2-42-04(B)(3) and 5101:2-42-09(C)(1). Section (B) states in relevant part that “at least seventy-two hours prior to . . . execution of the JFS 01666, the assessor shall meet with the parents . . . to do the following:

(1) Discuss with the parents . . . other options available in lieu of surrendering the child.

(5) Review, discuss and complete the JFS 01693 "Ohio Law and Adoption Materials" (rev. 5/2009) . . . .”

Sections (B)(1) and (5) are assumed to have independent effects. *Montclair v. Ramsdell*, 107 U.S. 147, 152, 2 S.Ct. 391, 27 L.Ed. 431 (1883) (The Rule of Surplusage requires courts to give effect, if possible, to every clause and word of a statute.) The different effects here are that Section (B)(1) requires an actual discussion of the parent’s *options* while Section (B)(5) requires that the assessor review and discuss the

contents of the *pamphlet*. As noted previously, the part of the “Adoption Law and Materials” form relevant here is Section I. (JFS 01693). Section I merely acknowledges that the parent received the informational pamphlet about *adoption* (JFS 01676) and that the parent was able to discuss and ask questions about its contents. The flaw in the Juvenile Court and Court of Appeals reasoning was their assumption that discussing the pamphlet necessarily included discussing the parent’s options. Reviewing the pamphlet shows the fallacy in that belief.

The pamphlet has five informational sections, only one of which (“Ohio Adoption Law”) mentions options. The other four sections are “Other Legalities,” “Types of Adoption,” “Adoption Plan,” and “Other Things to Know.” Regarding options, the “Ohio Adoption Law” section states only that:

“[The Assessor] will give you complete information about services and options you may have. The Assessor can tell you about: Parenting your child yourself \* Placing your child with a friend or relative [or non-relative] temporarily or permanently \* Guardianship and foster care options \* State and federal laws on adoption . . . \* Making an adoption plan.” (JFS 01676)

The pamphlet does not elaborate further. The rest of the “Ohio Adoption Law” section focuses on “community resources.”

Section (B)(1) of the Rule therefore goes beyond Section (B)(5) by requiring that the specific options themselves are discussed beyond just reviewing the pamphlet and having a chance to ask questions and to discuss the adoption law section. The pamphlet contains a plethora of informational topics and mentions only “guardianship and foster care options” in the temporary custody context. That description is insufficient to spark an inquiry from a parent who believes, as many people likely do, that putting a child in foster care means

merely putting a child in a “foster care home” for an indefinite period, . Thus, nothing ensures that the 30-day agreement option was discussed merely because the agency discussed the “written materials” that contained “information about options.” Section (B)(1) ensures that specific options like the 30-day agreement are discussed to a reasonable degree of substantive certainty. Thus, evidence beyond the fulfillment of Section (B)(5) must exist to show that an actual, substantive discussion of the options, particularly of the 30-day agreement choice, occurred before a court can conclude that an agency’s had authority to accept a permanent surrender agreement.

The Court of Appeals therefore erred as a matter of law by basing its affirmance on the juvenile court’s findings that the mother received written information about birth parent rights and options and had given certain conclusory responses in the surrender “colloquy.” (Op. at ¶¶ 36-38.)

### **CONCLUSION**

For the reasons discussed above, this case involves matters of public and great general interest and a question that substantially affects the constitutional right to parent. The Appellant requests that this Court accept jurisdiction so that the important issues presented will be reviewed on the merits.

Respectfully submitted,

/s Erik L. Smith  
Erik L. Smith (89330)  
62 West Weber Road  
Columbus, Ohio 43202  
(614) 330-2739  
edenstore@msn.com

AMICUS CURIAE, PRO SE

## CERTIFICATE OF SERVICE

I certify that a true copy of this Memorandum in Support of Jurisdiction was sent by email to the following counsel on March 24, 2016:

Steven E. Hillman, Counsel for Appellant, at < law@stevenhillman.com >

A. Patrick Hamilton, Counsel for Appellee, at < hamilotnlaw13909@yahoo.com

Jon W. Oebker, Counsel for Appellee, at < jon.oebker@tuckerellis.com >

/s Erik L. Smith

Erik L. Smith (89330)

AMICUS CURIAE, PRO SE