

IN THE SUPREME COURT OF OHIO

THE STATE OF OHIO, ex. Rel.
THE ALLEN COUNTY CHILDREN
SERVICES BOARD

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CASE NO. 16-0723

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Relator,

*

vs.

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RELATOR'S RESPONSE
TO THE RESPONDENTS'
MOTION TO DISMISS

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THE COMMON PLEAS COURT
OF MERCER COUNTY, OHIO
PROBATE DIVISION, ET AL.

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Respondents.

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RELATOR'S RESPONSE TO THE RESPONDENTS' MOTION TO DISMISS

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ATTORNEY FOR RESPONDENT

Now comes Relator, by and through the undersigned assistant prosecuting attorney and hereby responds to the respondents' motion to dismiss as follows.

PROCEDURAL HISTORY¹

1. Allen County Common Pleas Court, Juvenile Division

The Relator currently has temporary custody of the minor child through Allen County Juvenile Court Case No. 2014 JG 31779, *In the Matter of M.S.* The Allen County Juvenile Court exercised jurisdiction over the minor child when M.S. was placed in the Shelter Care of the Relator on August 8, 2014. A Complaint was filed alleging M.S. to be dependent and abused on August 11, 2014, and the Allen County Juvenile Court found M.S. to be a dependent and abused child by entry on October 8, 2014. On November 4, 2014, the minor child was placed in the temporary custody of the Allen County Children Services Board through the dispositional entry. By entry dated September 16, 2015, that order of temporary custody was extended for an additional six months period, consistent with the court's exclusive jurisdiction and has not been modified. The former foster caregivers and petitioners for adoption, Brian and Kelly Anderson, filed a motion to intervene as parties in the proceeding and a motion for legal custody on November 13, 2015. The Andersons objected to the magistrate's decision on February 29, 2016, which denied their Motion to Intervene. On April 1, 2016, the Hon. Glenn Derryberry, the duly elected judge of the Common Pleas Court of Allen County, Ohio, Juvenile Division, adopted a portion of the Magistrate's Decision denying the Motion to Intervene and reiterated this finding in his April 26, 2016 order regarding the Anderson's Renewed Motion to be Made Parties filed

¹ The relevant procedural facts and documentary exhibits in support thereof have previously been provided to this Court in the Complaint, Relator's Memorandum in Support of the Writ of Prohibition, the Answer of Respondents, and the respondents' Motion to Dismiss. Thus, Relator requests that they be incorporated by reference herein, and the exhibits will not be duplicated with this filing.

² Notably, Respondents, through counsel, did not include this information in their answer and/or motion to dismiss, both of which were filed by the Mercer County Probate Court, the Honorable

on April 8, 2016.

Currently, there are three separate legal custody motions pending at the Allen County Juvenile Court regarding the minor child. The Allen County Children Services Board filed a motion on January 4, 2016 for the minor child to be placed in the legal custody of her maternal aunt, Patricia Framak, and for termination of all Court-ordered services by the Allen County Children Services Board. The minor child's mother, Mary Spurlock, filed a motion on January 28, 2016, for the minor child to be placed in the legal custody of Brian and Kelly Anderson, in addition to the legal custody motion previously filed by Brian Anderson and Kelly Anderson, which is also pending. Currently, there is a hearing on all pending motions scheduled for July 13-14, 2016. (See attached "Relator's Exhibit 1.")

On April 1, 2016, the Allen County Juvenile Court issued an entry, finding that the Allen County Children Services Board has the right to the physical care and control of the minor child, Madeline Anne Spurlock (hereinafter referred to as "M.S."), and is entitled to determine where and with whom the child shall live. In so doing, that court noted that it was simply reiterating the effect of its previous temporary custody orders. Further, it was ordered that the child was not to be relocated from the placement made by the Allen County Children Services Board under the statutory authority with which it is vested pending further order of the Allen County Juvenile Court.

2. Mercer County Common Pleas Court, Probate Division

On March 28, 2016, the biological mother of M.S., Mary Angela Spurlock, made application in the Mercer County Probate Court for the placement of her daughter, M.S., for the purpose of adoption. On March 31, 2016, Respondent, the Hon. Mary Pat Zitter, approved the placement of the minor child with the Petitioners and ordered that Allen County Children

Services release the infant to the attorney for the adoptive parents, Susan Garner Eisenman. Relator was not a party to the Application of Placement of M.S. and had no knowledge that said hearing was being held on that date.

On April 5, 2016, after being properly served, Relator filed a Motion to Stay Judgment and Further Proceedings in the Mercer County Probate Court in the *Matter of the Placement of M.S.*, requesting that the execution of the judgment filed March 31, 2016 be stayed and any further proceedings in this matter stayed pending the outcome of *In the Matter of M.S.*, 2014 JG 31799, Allen County Court of Common Pleas, Juvenile Division. On April 11, 2016, a show cause order was issued by the Mercer County Probate Court against Relator for failure to follow the March 31, 2016 order of the Mercer County Probate Court. On April 27, 2016, Respondent, the Hon. James Rapp, concluded that Relator must abide by the March 31, 2016 order of the Mercer County Probate Court, ordered that Relator's Motion to Stay filed April 5, 2016 is overruled, ordered that the April 8, 2016 motion of the Andersons alleging the Relator to be in contempt of that court's Order of March 31, 2016, be set for hearing, and granted the Andersons' motion to set the petition for adoption for final hearing.

Relator filed a notice of appeal with the Third District Court of Appeals of the April 27, 2016 judgment of the Mercer County Probate Court, which appeal was dismissed sua sponte by that court on May 16, 2016, based upon that court's determination that the order appealed was not a final, appealable order. (See attached "Relator's Exhibit 2.") Subsequently, on May 19, 2016, the Mercer County Probate Court issued a notice of hearing on the Andersons' motion for contempt/show cause order, setting a new hearing date for the motion for contempt on June 2,

2016 at 9:00 a.m., an hour before the previously scheduled adoption petition hearing.² (See attached "Relator's Exhibit 3.")

STATEMENT OF FACTS³

M.S. was born on July 24, 2014. The mother of M.S. is Mary Angela Spurlock. Matthew Meddings, who the mother alleged was the father of M.S., was determined through DNA testing to not be the biological father of M.S. At this time, M.S.'s paternity has never been established. On August 7, 2014, Relator was granted an ex parte order of shelter care of M.S. On that same day, August 7, 2014, M.S. was placed by Relator in the home of the Andersons as a foster placement. The concerns Relator had at that time of M.S.'s removal from her mother's care were the mother's ability to care for M.S. due to the minor child testing positive for cocaine at or about the time of her birth, concerns surrounding the mother's mental health, and her illegal substance use. In addition, it was identified that the mother had previously lost custody of an older sibling of M.S. and that sibling was placed in the legal custody of a relative, Patricia Framak, Mary Spurlock's sister.

Relator has provided case plan goals and objectives and worked towards reunification of M.S. with her biological mother. The Allen County Juvenile Court found in its November 4, 2014 and September 16, 2015 decisions that reasonable efforts were made by the Allen County Children Services Board to prevent removal of the minor child from the home prior to removal and to eliminate continued removal of the minor child from the home prior to placement and that

² Notably, Respondents, through counsel, did not include this information in their answer and/or motion to dismiss, both of which were filed by the Mercer County Probate Court, the Honorable James S. Rapp sitting by assignment, the day *after* the hearing was set.

³ The relevant facts and documentary exhibits in support thereof have previously been provided to this Court in the Complaint, Relator's Memorandum in Support of the Writ of Prohibition, the Answer of Respondents, and the respondents' Motion to Dismiss. Thus, Relator requests that they be incorporated by reference herein, and the exhibits will not be duplicated with this filing.

reasonable efforts have been made to make it possible for said minor child to return home.

During the time that the Allen County Children Services Board was working on reunification with M.S.'s mother, the maternal aunt, Patricia Framak, who is the legal custodian of M.S.'s sibling, expressed interest in M.S. being placed in her home. Due to Ms. Framak residing in Elkhart, Indiana, Relator requested pursuant to the Interstate Compact Placement of Children, that the State of Indiana conduct a homestudy of Ms. Framak's residence for placement of M.S. on November 19, 2014. That request was approved on June 3, 2015. In addition, there was an updated homestudy conducted on Ms. Framak's home by the State of Indiana that was approved on February 3, 2016. When it was determined that M.S. could not be safely reunited with her biological mother due to concerns of her illegal substance abuse, mental health, and ability to provide M.S. with a safe, stable and appropriate home, Relator determined placement with Ms. Framak was in M.S.'s best interest.

In November of 2015, Relator began facilitating visitation between M.S. and Ms. Framak and on March 16, 2016, M.S. was physically placed in Ms. Framak's residence while still remaining in the temporary custody of Relator. At the time this action was filed, M.S. continues to reside in the residence of Ms. Framak in Elkhart, Indiana and remains in the temporary legal custody of Relator. Petitioners, Brian Anderson and Kelly Anderson, as well as M.S.'s mother have expressed their objection to the placement of M.S. in the residence of Ms. Framak to Relator and have expressed their wishes that M.S. be adopted and raised by Brian and Kelly Anderson.

ARGUMENT

The Court may grant a writ of prohibition if it is demonstrated that (1) Respondent is about to exercise judicial or quasi-judicial power, (2) the exercise of that power is unauthorized

by law, and (3) denying the writ would result in injury for which no other adequate remedy exists in the ordinary course of law. *Tatman v. Fairfield Cty. Bd. of Elections*, 102 Ohio St.3d 425, 2004-Ohio-3701, 811 N.E.2d 1130 ¶ 14.

Prohibition will not lie to prevent an anticipated erroneous judgment. *State ex rel. Heimann v. George* (1976), 45 Ohio St. 2d 231, 232, 74 Ohio Op. 2d 376, 344 N.E.2d 130, 131. However, we have created a limited exception in cases where there appears to be a total lack of jurisdiction of the lower court to act. Early cases referred to a “total want of jurisdiction” or to the court’s being “without jurisdiction whatsoever to act.” *State ex rel. Adams v. Gusweiler* (1972), 30 Ohio St. 2d 326, 329, 59 Ohio Op. 2d 387, 388, 285 N.E.2d 22, 24, and paragraph two of the syllabus. Later cases defined this exception as a “patent and unambiguous’ lack of jurisdiction to hear a case.” *Ohio Dept. of Adm. Serv., Office of Collective Bargaining v. State Emp. Relations Bd.* (1990), 54 Ohio St. 3d 48, 51, 562 N.E.2d 125, 129; *State ex rel. Tollis v. Cuyahoga Cty. Court of Appeals* (1988), 40 Ohio St. 3d 145, 148, 532 N.E.2d 727, 729. In such circumstances, a writ of prohibition may issue before a lower court has made a determination of its own jurisdiction, even where an adequate remedy in the ordinary course of the law may exist. *Id.*; *Ohio Dept. of Adm. Serv., Office of Collective Bargaining v. State Emp. Relations Bd.*, 54 Ohio St. 3d at 51-52, 562 N.E.2d at 129.

State ex rel. Jones v. Suster, 84 Ohio St.3d 70, 73-74 (1998).

1. The First Element Necessary for a Writ of Prohibition

The first requirement for the issuance of a writ of prohibition is that the respondents are about to exercise judicial or quasi-judicial power. The parties do not dispute that respondents are about to exercise judicial power by conducting an adoption hearing on June 2, 2016. (See Answer of Respondents to Paragraph #9 of the Complaint.) Further, as evidenced by the assignment notice for a contempt hearing to be held before the Mercer County Probate Court on June 2, 2016, Respondent is about to exercise the judicial power of a show cause hearing on a contempt motion. (See attached “Realtor’s Exhibit 3.”) Thus, the first element necessary for a writ of prohibition to issue has been satisfied by Relator.

2. *The Second Element Necessary for a Writ of Prohibition*

The second requirement for the issuance of a writ of prohibition is that the exercise of that judicial or quasi-judicial power is unauthorized by law. Initially, Relator notes that Respondents repeatedly refer to the juvenile court's pending action regarding the minor child as a "custody" matter. As such, they cite to numerous cases that stand for the proposition that a pending custody related-matter and/or the continuing jurisdiction of a court in such matters does not preclude a probate court from exercising its exclusive jurisdiction in adoption proceedings. Relator does not dispute this *general* proposition. Additionally, Relator acknowledges that the original and exclusive jurisdiction over adoption proceedings is vested in the Probate Court. See *State ex rel. Portage Cty. Welfare Dept. v. Summers* (1974), 38 Ohio St.2d 144, 67 O.O.2d 151, 311 N.E.2d 6, paragraph two of the syllabus. However, the matter currently pending in the Allen County Juvenile Court is not merely a custody dispute between parties who have not been divested of the right to determine where and with whom the child resides. Moreover, the juvenile court has not simply retained its continuing jurisdiction over a custody matter. Rather, this is an active, pending case within the exclusive jurisdiction of the juvenile court to determine the long-term fate of M.S., an abused and dependent child, whose biological mother has been divested of the right to determine where and with whom the child resides.⁴

Regarding children who are abused and dependent, the Revised Code states:

⁴ The right to determine where and with whom the child resides is distinctly different from the right to consent to adoption. Because a parent who has lost custody of a child, including the right to determine where and with whom her child resides, has not been completely divested of all rights, that parent's consent to adoption (an action that severs all of the parent's parental rights) remains with that parent and is necessary to sever that relationship. However, this retention of the right to consent (and consequently withhold consent) to adoption does not provide the parent with the right to placement of the child for adoption purposes without the legal custodian also agreeing to placement in someone else's home (which right belongs to the legal custodian pursuant to R.C. 2151.011(B)(21)).

(A) The juvenile court has exclusive original jurisdiction under the Revised Code as follows:

- (1) Concerning any child who on or about the date specified in the complaint, indictment, or information is alleged to have violated section 2151.87 of the Revised Code or an order issued under that section or to be a juvenile traffic offender or a delinquent, unruly, *abused, neglected, or dependent child* and, based on and in relation to the allegation pertaining to the child, concerning the parent, guardian, or other person having care of a child who is alleged to be an unruly or delinquent child for being an habitual or chronic truant[.]

R.C. 2151.23(A)(1) (emphasis added.) The Revised Code further provides for the juvenile court to make a disposition of the matter:

(A) If a child is adjudicated an abused, neglected, or dependent child, the court may make any of the following orders of disposition:

* * *

- (2) Commit the child to the temporary custody of a public children services agency, a private child placing agency, either parent, a relative residing within or outside the state, or a probation officer for placement in a certified foster home, or in any other home approved by the court;
- (3) Award legal custody of the child to either parent or to any other person who, prior to the dispositional hearing, files a motion requesting legal custody of the child or is identified as a proposed legal custodian in a complaint or motion filed prior to the dispositional hearing by any party to the proceedings.

R.C. 2151.353(A)(1), (3) (emphasis added). "As part of its dispositional order, the court shall journalize a case plan for the child. The journalized case plan *shall not be changed* except as provided in section 2151.412 of the Revised Code. R.C. 2151.353(E) (emphasis added.) Subject to certain sections of R.C. 2151, "all dispositional orders made by the court under this chapter shall be temporary and shall continue for a period that is designated by the court in its order, until terminated or modified by the court or until the child attains twenty-one years of age." R.C. 2151.38. In addition, "[t]he court shall retain jurisdiction over any child for whom the court

issues an order of disposition pursuant to division (A) of this section or pursuant to section 2151.414 or 2151.415 of the Revised Code until the child attains the age of eighteen years * * * or the child is adopted and a final decree of adoption is issued.” R.C. 2151.353(F).

This section further provides

(2) Any public children services agency, any private child placing agency, the department of job and family services, or any party, other than any parent whose parental rights with respect to the child have been terminated pursuant to an order issued under division (A)(4) of this section, by filing a motion with the court, may at any time request the court to modify or terminate any order of disposition issued pursuant to division (A) of this section or section 2151.414 or 2151.415 of the Revised Code. The court shall hold a hearing upon the motion *as if the hearing were the original dispositional hearing* and shall give all parties to the action and the guardian ad litem notice of the hearing pursuant to the Juvenile Rules. If applicable, the court shall comply with section 2151.42 of the Revised Code.

(G) Any temporary custody order issued pursuant to division (A) of this section shall terminate one year after the earlier of the date on which the complaint in the case was filed or the child was first placed into shelter care, except that, upon the filing of a motion pursuant to section 2151.415 of the Revised Code, the temporary custody order shall continue and not terminate until the court issues a dispositional order under that section. In resolving the motion, the court shall not order an existing temporary custody order to continue beyond two years after the date on which the complaint was filed or the child was first placed into shelter care, whichever date is earlier, regardless of whether any extensions have been previously ordered pursuant to division (D) of section 2151.415 of the Revised Code.

R.C. 2151.353(F)(2), (G) (emphasis added.) Lastly, “[t]he jurisdiction of the court shall terminate one year after the date of the award * * * if the court awards legal custody of a child to either of the following: (1) A legal custodian who, at the time of the award of legal custody, resides in a county of this state other than the county in which the court is located; * * * The court in the county in which the legal custodian resides then shall have jurisdiction in the matter.” R.C. 2151.353(K).

Throughout this process, reunification with the child’s biological parent(s) is the primary

goal. Recognizing that reunification is indeed a process, the Revised Code provides the juvenile court with guidance and mandates to follow during this process. For instance,

(A) Any court that issues a dispositional order pursuant to section 2151.353, 2151.414, or 2151.415 of the Revised Code may review at any time the child's placement or custody arrangement, the case plan prepared for the child pursuant to section 2151.412 of the Revised Code, the actions of the public children services agency or private child placing agency in implementing that case plan, the child's permanency plan if the child's permanency plan has been approved, and any other aspects of the child's placement or custody arrangement. * * *

(B) If a court issues a dispositional order pursuant to section 2151.353, 2151.414, or 2151.415 of the Revised Code, the court has continuing jurisdiction over the child as set forth in division (F)(1) of section 2151.353 of the Revised Code. The court may amend a dispositional order in accordance with division (F)(2) of section 2151.353 of the Revised Code at any time upon its own motion or upon the motion of any interested party. The court shall comply with section 2151.42 of the Revised Code in amending any dispositional order pursuant to this division.

R.C. 2151.417(A), (B).

To keep the process moving, "a public children services agency * * * that has been given temporary custody of a child" must file a motion with the dispositional court at least 30 days prior to the expiration of the temporary custody order "requesting that any of the following orders of disposition of the child be issued by the court * * * (3) An order that the child be placed in the legal custody of a relative or other interested individual * * * (6) * * * an order for the extension of temporary custody." R.C. 2151.415(A)(3), (6). The juvenile court is *required* to hold a *dispositional* hearing and "in accordance with the best interest of the child as supported by the evidence presented at the dispositional hearing, shall issue an order of disposition[.]" R.C. 2151.415(B). "[T]he court * * * may modify or terminate any order issued pursuant to this section or issue any dispositional order set forth in divisions (A)(1) to (5) of this section." R.C. 2151.415(F).

In reviewing all of these pertinent sections, and others similarly contained within R.C. 2151, *in pari materi*, it becomes apparent that the juvenile court during the pendency of a case involving abused, neglected, and/or dependent children has exclusive jurisdiction to make dispositional orders, *at least and until*, the termination of involvement by the public children services agency that was given temporary custody of that child. One such way that termination can occur is through a disposition that returns custody of the child to his/her parent. See R.C. 2151.415(A)(1). Another is through a disposition of legal custody to a relative of the child or other interested individual. R.C. 2151.415(A)(3). In either event, the juvenile court is deciding the long-term fate of a child, as “[a]n order of disposition issued under division (A)(3) of section 2151.353, division (A)(3) of section 2151.415, or section 2151.417 of the Revised Code granting legal custody of a child to a person is intended to be permanent in nature.” R.C. 2151.42(B). Further, “[a] court shall not modify or terminate an order granting legal custody of a child unless it finds, based on facts that have arisen since the order was issued or that were unknown to the court at that time, that a change has occurred in the circumstances of the child or the person who was granted legal custody, and that modification or termination of the order is necessary to serve the best interest of the child. *Id.* (emphasis added.)

The Allen County Juvenile Court exercised exclusive jurisdiction over M.S. at the Shelter Care Hearing on August 8, 2014, and has continued to exercise jurisdiction over M.S., an adjudicated abused and dependent child, since that date. The Allen County Juvenile Court currently was/is in the active process of exercising that jurisdiction when the Andersons filed their Application of Adoption of M.S. and when Respondent’s orders from March 31, 2016, April 11, 2016 and April 27, 2016 were put into place, some 19 months after the juvenile court first exercised its exclusive jurisdiction over M.S. The Allen County Juvenile Court continues to

have exclusive jurisdiction over M.S.

This Honorable Court has stated in deciding between competing jurisdictions in the determination of custody of a child:

One common thread runs through every statute, every court opinion, and every learned treatise on this matter. The common thread is built on the bedrock proposition that once a court of competent jurisdiction has begun the process of deciding the long-term fate of a child, all other courts are to refrain from exercising jurisdiction over that matter.

In Re Asente, 90 Ohio St. 3d 91 at 92, 2000-Ohio-32; accord *State ex. rel. Otten v. Henderson*, 129 Ohio St.3d 453 at 459, 2011-Ohio-4082. In *In re Adoption of P.A.C.*, 126 Ohio St. 3d 236, 2010-Ohio-3351, this Honorable Court cited favorably its decision in *In Re Pushcar*, 110 Ohio St. 3d 33, 2006-Ohio-4572, stating:

Although the case involved a relatively narrow issue, our holding was more general, as memorialized in the syllabus: "When an issue concerning parenting of a minor is pending in the juvenile court, a probate court must refrain from proceeding with the adoption of that child." It is clear that we did not intend our holding or analysis to be restricted to parenting issues.

126 Ohio St. 3d 236 at 238.

While a probate court is authorized to order placement of a child for purposes of adoption, there is nothing in the Ohio Revised Code that provides the probate court with a mechanism to order someone having legal custody of the child to surrender that child to another.

Pursuant to Ohio Revised Code 2151.011(B)(21) legal custody means:

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. An individual granted legal custody shall exercise the rights and responsibilities personally unless otherwise authorized by any section of the Revised Code or by

the court.

Further, R.C. 2151.011(B)(56) defines temporary custody as follows:

Legal custody of a child who is removed from the child's home, which custody may be terminated at any time at the discretion of the court or, if the legal custody is granted in an agreement for temporary custody, by the person who executed the agreement.

(emphasis added.)

Pursuant to orders issued by the Allen County Juvenile Court, M.S. continues to be placed in the temporary custody of Relator, which pursuant to Ohio law has the right to have physical care and control of M.S. and to determine where and with whom M.S. shall reside. Although M.S.'s mother continues to have residual rights, these rights do not include the right to determine M.S.'s physical care, control or to determine where and with whom M.S. shall live. As long as the Allen County Juvenile Court continues to exercise jurisdiction over M.S. by continuing M.S. in the temporary custody of Relator, Relator continues to have the right to the physical care and control of M.S. and is entitled to determine where and with whom M.S. shall live. This is likewise true for any party to whom the Allen County Juvenile Court may give legal custody of M.S. in the future. Thus, the orders issued by Respondents unlawfully exercise jurisdiction over M.S.

The Revised Code provides that, "[a]fter the filing of a petition to adopt an adult or a minor, the court shall fix a time and place for hearing the petition. The hearing may take place at any time more than thirty days after the date on which the minor is placed in the home of the petitioner." R.C. 3107.11. The minor, M.S., has not been placed *in the home* of the Andersons. Respondents have no authority to thwart the legal rights of Relator and order that M.S. be placed in the home of the Andersons. Therefore, no adoption proceeding should occur.

Additionally, R.C. 3107.07 specifically states that “[c]onsent to adoption is not required of any of the following: * * * [a]ny legal guardian or lawful custodian of the person to be adopted, other than a parent, who has failed to respond in writing to a request for consent, for a period of thirty days, or who, after examination of the written reasons for withholding consent, is found by the court to be withholding consent unreasonably[.]” R.C. 3107.07(H). Currently, Relator is the lawful custodian of M.S. Who the legal custodian will be is yet to be determined in a final disposition of the juvenile court, the court that has the exclusive jurisdiction to make this determination. Until that long-term issue is decided, the probate court should not be permitted to violate the bedrock proposition that once a court of competent jurisdiction has begun the process of deciding the long-term fate of a child, all other courts are to refrain from exercising jurisdiction over that matter. In fact, the determination of that issue is critical to any potential adoption proceeding due to the right of the legal custodian to object to the adoption and to have that objection sustained as long as the legal custodian’s consent is not being withheld unreasonably.

In light of all the foregoing, particularly the statutes governing children who are abused and dependent, and the fact that juvenile court has begun the journey to determine the long-term fate of M.S., the probate court of Mercer County patently and unambiguously lacks jurisdiction over the potential adoption of M.S.

3. The Third Element Necessary for a Writ of Prohibition

The third requirement for a writ of prohibition to issue is that denying the writ would result in injury for which no other adequate remedy exists in the ordinary course of law. As noted by this Court,

the best interest of a child is never served when adults turn to seeming endless litigation to resolve their disputes. * * * In the interim, the life of a

child and two families are left in turmoil and uncertainty to no one's benefit. Litigation of these matters is already difficult when one court in one state is involved in the controversy. It becomes unwieldy when multiple states become embroiled in the dispute and cannot agree on the basic issue of jurisdiction.

In re Adoption of Asente, 90 Ohio St.3d 91, 92, 2000-Ohio-32. The same is true when multiple counties become embroiled in the dispute and cannot agree on the basic issue of jurisdiction, which is precisely what is currently occurring between Allen and Mercer counties.

Placed in the middle of this litigation are a 22-month old little girl, her aunt and brother, and the Andersons, her former foster parents. Even with an expedited calendar, appealing to the intermediate appellate court, and possibly later to this Court, given the time necessary to prepare the transcript, the briefing schedule, and whatever interim filings may be necessary, takes quite some time. Meanwhile, depending on what the probate court decides to rule, including possible incarceration and/or fines against Relator (or the director of the Allen County Children Services Board) if the child is not surrendered to the attorney for the Andersons as directed by the Mercer County Probate Court, this child may be moved to multiple homes for significant periods of time before the adults resolve their dispute or the adults in positions of authority, such as this Court, make the final determination as to which trial court has jurisdiction. Given this potential for irreparable harm to someone of such a tender age, this in no way, shape, or form is an *adequate* remedy in the ordinary course of law.

While Relator readily acknowledges that a writ of prohibition is an *extraordinary* remedy, this case presents an *extraordinary* circumstance. Not only is the fate of this particular child at great issue, the ramifications of a probate court exercising jurisdiction based on a consent to placement of the child for adoption purposes, when that child has been adjudicated abused and dependent due to the actions of this same person, who has consequently lost the right to

determine where and with whom the child resides, are significant state-wide. Until this issue is resolved, public children services agencies and the juvenile courts that adjudicate cases involving abused, neglected, and/or dependent children may very well be subjected to similar attempts to thwart the detailed processes established by the General Assembly in Title 2151.01, et seq.

More specifically, what the biological mother and the Andersons have attempted to do, with the assistance of the respondents, is to engage in what is tantamount to forum shopping. Having received decisions contrary to their desires, the biological mother and the Andersons are attempting to circumvent the exclusive jurisdiction of the juvenile court. Permitting such action would allow a biological parent who has failed to adequately care for his/her children and who does not like the decisions of the public children services agency and the juvenile court (which is often the case) to collude with others to adopt the very same children who the parents have abused, neglected, or caused to be dependent, despite the fact that the juvenile court is actively in the process of determining the ultimate disposition of the child based upon the best interests of that child. Although Relator does not in any way believe this to be the case with the Andersons, the precedent that this could set would open the door once an adoption of a child in similar circumstances is final, for the adoptive parents, who have colluded with the parent for one reason or another, to easily return these children to their parent.⁵ Until this issue is resolved, great havoc, such as what has occurred in this case, could result. This is not an adequate remedy at law either.

In short, if Respondents are permitted to exercise their unlawful jurisdiction in this

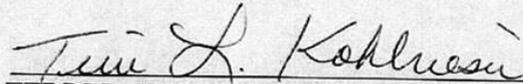
⁵ In Relator's experience, many times friends and/or family will go to great lengths to "fight" a public children services agency, although this often does not include agreeing to be the long-term solution to the problem. Thus, it is not unreasonable to believe that someone would assist in the biological parent's deception as long as that person is not ultimately "stuck with the kid." Additionally, people often do all manner of things for monetary or other personal gain, even deceiving a court.

matter, Relator is subject to a finding of contempt by Respondents pursuant to an unlawful order issued March 31, 2016, faces the risk of financial penalties to the public's expense, and the possibility of incarceration for non-criminal activity. However, most importantly, such jurisdiction exposes M.S., a minor child, to irreparable harm that can and, most likely, will occur while the adults at the trial court level, intermediate appellate level, and possibly the highest appellate level settle their jurisdictional disputes. This minor child's future requires an extraordinary remedy in a short amount of time.

CONCLUSION

For all of the reasons provided herein, Relator respectfully request that the motion to dismiss filed by Respondents be overruled and the matter set for further proceedings in accordance with law.

Respectfully submitted,



TERRI L. KOHLRIESER (0073982)

Assistant Prosecuting Attorney on behalf of
the Allen County Children Services Board
204 N. Main St., Ste. 302

Lima, Ohio 45801

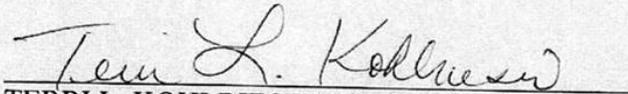
(419) 222-2462; Fax: 419-227-1072

tkohlrieser@allencountyohio.com

ATTORNEY FOR RELATOR

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Relator's Response to Respondents' Motion to Dismiss has been served upon the attorney for Respondents, Matthew K. Fox, 119 N Walnut Street, Celina, Ohio 45822 by regular U.S. mail this 24th day of May, 2016.



TERRI L. KOHLRIESER (0073982)
Assistant Allen County Prosecuting Attorney
on behalf of the Allen County Children
Services Board

ATTACHMENT NOT SCANNED

RECEIVED MAY 19 2016

FILED

MAY 16 2016

MERCER COUNTY
PROBATE COURT
JUDGE MARY PAT ZITTER

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
MERCER COUNTY

IN RE: THE ADOPTION OF:

M.S.A.,

[ALLEN COUNTY CHILDREN
SERVICES BOARD - APPELLANT]

FILED

10:17
MAY 16 2016

MERCER CO. COURT OF APPEALS

Clerk

CASE NO. 10-16-04

JUDGMENT
ENTRY

This cause comes before the Court *sua sponte* to determine whether the appeal should be dismissed for want of jurisdiction.

Appellate courts have jurisdiction to review the final orders or judgments of trial courts in their district. See, generally, Section 3(B)(2), Article IV, Ohio Constitution; R.C. 2505.02. In the event that the jurisdictional issue is not raised by the parties, then the Court of Appeals must raise it *sua sponte*. See *Davison v. Rini* (1996), 115 Ohio App.3d 688.

In the instant case, the trial court filed an Entry on April 27, 2016 overruling the motion of Appellant, Allen County Children Services Board ("ACCSB") to stay further proceedings; overruling Appellee's motion for appointment of a guardian ad litem; setting Appellee's show cause motion seeking to hold ACCSB in contempt for future hearing; and granting Appellee's motion to

RELATOR'S EXHIBIT 2

set their petition for adoption for final hearing. A notice giving intent to appeal the Entry was filed on May 9, 2016 by ACCSB.

Upon consideration the Court finds that there are no orders included in the trial court's Entry that are "final" and subject to immediate appeal under any provision of R.C. 2505.02(B). The order denying ACCSB's motion to stay is based on a finding by the trial court that it has jurisdiction to proceed in this adoption action, notwithstanding the fact that the minor child is in the temporary custody of ACCSB pursuant to an order entered in a dependency case pending in the Allen County Common Pleas Court, Juvenile Division. Regardless of whether this finding is correct, refusing to stay the proceedings does not affect a substantial right of ACCSB nor does it determine the action and prevent further judgment. R.C. 2505.02(B)(2) and (4).

Furthermore, the remaining orders included in the trial court's Entry are merely procedural in nature. Setting a petition for adoption and a motion for contempt for future hearing are ministerial acts of the trial court. There is no substantial right affected or obligation imposed by a scheduling order. *Lewis v. Old Republic Surety Co.*, 10th Dist. No. 06AP-319, 2006-Ohio-5302.

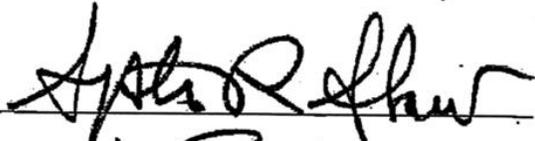
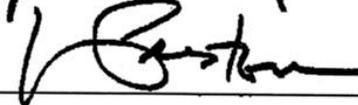
Accordingly, the trial court's Entry is not a final order subject to immediate appeal and the instant appeal must be dismissed for lack of jurisdiction.

It is therefore **ORDERED, ADJUDGED** and **DECREED** that the appeal be, and hereby is, **DISMISSED** at the costs of the Appellant for which judgment

Case No. 10-16-04

FILED
MAY 16 2016
MERCER COUNTY
PROBATE COURT
JUDGE MARY PAT ZITTER

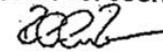
is hereby rendered and that this cause be, and hereby is, remanded to the trial court for execution of the judgment for costs.

JUDGES

DATED: MAY 13, 2016
/hls

FILED

H12 MAY 16 2016
MERCER CO. COURT OF APPEALS
, Clerk

XG: MERCER COUNTY COMMON PLEAS COURT, PROBATE DIVISION, TERRI KOHLRIESER,
MARIAH CUNNINGHAM, SUSAN EISENMAN, ANDREW KING, AMY IKERD, 5/16/16. acf

ATTACHMENT NOT SCANNED