

IN THE SUPREME COURT OF OHIO

**THE STATE OF OHIO, EX REL. THE
ALLEN COUNTY CHILDREN SERVICES
BOARD,**

RELATOR,

vs.

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

RESPONDENTS.

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* **CASE NO.: 2016-0723**
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* **ORIGINAL ACTION IN**
* **PROHIBITION**
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MOTION FOR RECONSIDERAION

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INTRODUCTION

Now come the Common Pleas Court of Mercer County, Ohio, Probate Division, the Honorable Mary Pat Zitter, a Judge of the Court of Common Pleas, and the Honorable James Rapp, a Judge by Assignment of the Court of Common Pleas (the “Respondents”), and pursuant to S.Ct.Prac.R.18.02 request this Court reconsider the June 1, 2016, order granting a Peremptory Writ of Prohibition and denying Respondents’ Motion to Dismiss.

RELATOR'S REQUESTED RELIEF

On June 1, 2016 this Court issued an order granting a Peremptory Writ of Prohibition prohibiting Respondents “from exercising jurisdiction . . . consistent with the opinion to follow.”¹ This Court also denied Respondents’ Motion to Dismiss. It is from the June 1, 2016, Order granting the Peremptory Writ of Prohibition and Denying the Motion to Dismiss that Respondents seek reconsideration.

By granting the Writ, this Court chose to elevate the statutorily created jurisdiction of Juvenile Courts while trumping the original and exclusive jurisdiction of Probate Courts to handle adoptions. This creates a litany of constitutional and other legal issues. Respondents respectfully request this Court reconsider its decision granting the Writ for the reasons set forth below.

¹ As of the time of the filing of this Motion for Reconsideration, this Court has not issued its opinion, and Respondents are unable to formulate arguments for reconsideration specific to the basis of the majority opinion of this Court. Accordingly, by separate filing this same date, Respondents have requested leave of this Court to file any supplemental arguments in support of reconsideration within ten (10) days from the filing of the opinion of this Court.

First, by prohibiting the Probate Court from exercising its original and exclusive jurisdiction to handle adoption matters, the effect of the prohibition is to deprive Mary A. Spurlock, the natural mother of M.S, of due process of law in violation of her federal and state constitutional rights and also deprives the natural mother of her statutory and residual rights.

Second, by prohibiting the Probate Court from exercising its original and exclusive jurisdiction to handle adoption matters, the effect of the prohibition is to deprive M.S. of due process of law and equal protection of law in violation of her federal and state constitutional rights.

Third, the effect of granting the Writ is inconsistent with the legislatively and judicially expressed philosophy that the state has an “interest in facilitation the adoption of children and having the adoption proceedings completed expeditiously.” In re Adoption of Zschach, 75 Ohio St.3d 648, 653 (1996).

Fourth, by prohibiting the Probate Court from exercising its original and exclusive jurisdiction to handle adoption matters, the court legislates from the bench, which violates the separation of powers doctrine. This creates a precedent that Juvenile Courts can improperly divest all Ohio Probate Courts of the statutorily granted original and exclusive jurisdiction over any adoption proceedings whenever there is any prior matter related to the “parenting” of the child in any Juvenile Court in Ohio, or in any other state.

Fifth, reconsideration and dismissal of the Writ would permit the case to proceed through the normal process of litigation, allowing the Mercer County Probate Court to hear evidence regarding the best interest of M.S. The parties could appeal any adverse, final appealable order therein.

Wherefore, Respondents pray this Court reconsider its decision granting the Writ of Prohibition and grant Respondents' Motion to Dismiss. Alternatively, Respondents pray this Court reconsider its decision granting the Writ of Prohibition and instead grant an Alternative Writ, staying the proceedings below until final determination, and issue a schedule for the presentation of evidence and the filing and service of briefs or other pleadings herein.

Finally, pursuant to S.Ct.Prac.R. 12.10., Respondents request this Court refer the matter to a master commissioner for the presentation of evidence, hearings, and oral argument.

LAW AND ARGUMENT

I. THIS COURT SHOULD RECONSIDER ITS DECISION BECAUSE PROHIBITING THE PROBATE COURT FROM EXERCISING ITS ORIGINAL AND EXCLUSIVE JURISDICTION TO HANDLE ADOPTION MATTERS DEPRIVES THE NATURAL MOTHER OF DUE PROCESS OF LAW IN VIOLATION OF HER CONSTITUTIONAL RIGHTS.

A. THE NATURAL MOTHER, MARY A. SPURLOCK, RETAINS HER FUNDAMENTAL RIGHTS, INCLUDING HER RIGHT TO CONSENT TO ADOPTION BECAUSE RELATOR HAS FAILED TO OBTAIN PERMANENT CUSTODY OF M.S.

Mary A. Spurlock, the natural mother of M.S., has a fundamental liberty interest in the care, custody and management of M.S. and by prohibiting the Probate Court from exercising its original and exclusive jurisdiction to handle adoption matters, the effect of the prohibition in this case creates a due process claim for the natural mother.

Ohio courts have long recognized the right to raise a child is an "essential" and "basic" civil right. In re Murray, 52 Ohio St. 3d 155, 157 (1990), quoting Stanley v. Illinois, 405 U.S. 645, 651 (1972). A parent's right to the custody of their child has been described as "paramount." In re Perales, 52 Ohio St.2d 89, 97 (1997). Accordingly, biological parents "must be afforded every procedural and substantive protection the law allows." Id.

The right to raise a child is an essential basic civil right. In re Green, 2005 Ohio 330 (5th Dist. June 23, 2005) citing In Re: Hayes, 79 Ohio St. 3d 46 (1997). “The right of a natural parent to the care and custody of his children is one of the most precious and fundamental in law.” In re G.V., 126 Ohio St. 3d 249 (2010) citing In re Adoption of Masa, 23 Ohio St.3d 163 (1986), and Santosky v. Kramer, 455 U.S. 745, 753 (1982).

The Allen County Juvenile Court’s previous orders granting **temporary custody** of M.S. to the Allen County Children’s Services Board and the pending motions for **legal custody** do not terminate or obfuscate these fundamental rights. As the U.S. Supreme Court previously stated:

The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life.

Santosky v. Kramer, 455 U.S. 745, 753 (1982).

B. TERMINATION OF THE NATURAL MOTHER’S FUNDAMENTAL RIGHTS REQUIRES DUE PROCESS OF LAW THAT THE NATURAL MOTHER HAS NEVER BEEN PROVIDED.

The U.S. Supreme Court recognized that the protections afforded to a parent facing state action that terminates parental rights are more critical when state actions is involved in less critical family issues. The Court stated:

If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.

Id. at 753-54.

This Court has cited Santosky v. Kramer for these basic propositions many times. Recently, in In re. G.V., 126 Ohio St. 3d 249 (2010), this Court cited Santosky v. Kramer stating:

Santosky has been characterized as "requiring a clear and convincing evidence standard for termination of parental rights because the parent's interest is fundamental but the State has no legitimate interest in termination unless the parent is unfit, and finding that the State's interest in finding the best home for the child does not arise until the parent has been found unfit." Cruzan v. Director, Missouri Dept. of Health, (1990) 497 U.S. 261, 319, 110 S. Ct. 2841, 111 L. Ed. 2d 224 (Brennan, J., dissenting).

Id. at 250.

In Lassiter v. Department of Social Services, 452 U.S. 18 (1981), the Court stated that ". . . freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment. Santosky at 747-78, citing Quilloin v. Walcott, 434 U.S. 246, 255 (1978); Smith v. Organization of Foster Families, 431 U.S. 816, 845 (1977); Moore v. East Cleveland, 431 U.S. 494, 499 (1977) (plurality opinion); Cleveland Board of Education v. LaFleur, 414 U.S. 632, 639-640 (1974); Stanley v. Illinois, 405 U.S. 645, 651-652 (1972); Prince v. Massachusetts, 321 U.S. 158, 166 (1944); Pierce v. Society of Sisters, 268 U.S. 510, 534-535 (1925); Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

Courts have described the permanent termination of parental rights as the family law equivalent of the death penalty in a criminal case. In re Green, 2005 Ohio 330 (5th Dist. June 23, 2005) citing In Re: Smith, 77 Ohio App. 3d 1 (1991). Thus, a trial court should not terminate parental rights unless there is clear and convincing evidence presented that it is in the child's best interest. Id.

When states attempt to intervene in the parent/child relationship, their actions receive Constitutional scrutiny. Therefore, state intervention to terminate the relationship between a parent and a child must be accomplished by procedures meeting the requisites of the Due Process Clause. Lassiter v. Department of Social Services, 452 U.S. 18 at 37 (1981) (first dissenting

opinion); see id. at 24-32 (opinion of the Court); Id. at 59-60 (STEVENS, J., dissenting). See also Little v. Streater, 452 U.S. 1, 13 (1981).

Because these parenting rights are so fundamental, Ohio has a statutory scheme for state interference with these rights, including in certain situations where a child is determined to be abuse as defined in Ohio Revised Code 2151.031, neglected as defined in Ohio Revised Code 2151.03, or dependent as defined in Ohio Revised Code 2151.04. The process includes the filing of a complaint pursuant to Ohio Revised Code 2151.27. After a finding of abuse, neglect or dependent, the court proceeds to disposition pursuant to Ohio Revised Code. 2151.353 which provides the following placement options for the child :

- (1) protective supervision,
- (2) temporary custody,
- (3) legal custody,
- (4) permanent custody,
- (5) planned permanent living arrangement, and
- (6) removal from the child's home until further order of the court.

Ohio Revised Code 2151.353(A). Three of these Five placement options are relevant to this case and have been defined by the legislature in Ohio Revised Code 2151.011 as follows²:

² "Protective supervision" means an order of disposition pursuant to which the court permits an abused, neglected, dependent, or unruly child to remain in the custody of the child's parents, guardian, or custodian and stay in the child's home, subject to any conditions and limitations upon the child, the child's parents, guardian, or custodian, or any other person that the court prescribes, including supervision as directed by the court for the protection of the child. Ohio Revised Code 2151.011(A)(43).

"Planned permanent living arrangement" means an order of a juvenile court pursuant to which both of the following apply:

- (a) The court gives legal custody of a child to a public children services agency or a private child placing agency without the termination of parental rights.
- (b) The order permits the agency to make an appropriate placement of the child and to enter into a Written agreement with a foster care provider or with another

“Temporary custody” means 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. Ohio Revised Code 2151.011(A)(56).

“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. Ohio Revised Code 2151.011(A)(21). (emphasis added)

“Permanent custody” means a legal status that vests in a public children services agency or a private child placing agency, all parental rights, duties, and obligations, including the right to consent to adoption, and divests the natural parents or adoptive parents of all parental rights, privileges, and obligations, including all residual rights and obligations. Ohio Revised Code 2151.011(A)(32). (emphasis added)

In this case, the Allen County Juvenile Court has previously issued orders regarding the temporary custody of M.S. Currently pending before the Allen County Juvenile Court is a request for legal custody. By reference to the clear and unambiguous language in the statutory definitions, the granting of either temporary or legal custody to a third party **does not interfere with or terminate a parent’s residual rights - these same constitutionally protected rights.**

Ohio Revised Code 2151.011 defines residual rights as follows:

“Residual parental rights, privileges, and responsibilities” means those rights, privileges, and responsibilities remaining with the natural parent after the transfer of legal custody of the child, including, but not necessarily limited to, the privilege of reasonable visitation, **consent to adoption**, the privilege to determine the child’s religious affiliation, and the responsibility for support. Ohio Revised Code 2151.011(A)(49) (emphasis added)

person or agency with whom the child is placed. Ohio Revised Code 2151(A)(39).

By statutory definitions, neither temporary custody nor legal custody terminate the natural mother's residual rights which specifically includes the right to consent to adoption.

The natural mother has a fundamental liberty interest in the care, custody and management of M.S. By prohibiting the Probate Court from exercising its original and exclusive jurisdiction to handle adoption matters, this Court creates a cause of action for the natural mother to challenge the deprivation of her rights was without due process of law.

In this case, the Writ has the effect of barring the natural mother from exercising her right to consent to adoption. If the Allen County Juvenile Court had granted permanent custody of M.S. to the agency, then the residual rights of the mother, including consent to adopt, would terminate. But the process for vesting permanent custody with the Board requires additional proceedings to ensure the natural mother is afforded due process of law, and the Allen County Board has chosen not to seek permanent custody. Instead, they are seeking to convert their temporary custody to legal custody with M.S.'s Aunt in Indiana. **By granting the Writ, this Court has effectively converted the pending action into a permanent custody action without requiring the Allen County Juvenile Court to safeguard the natural mother's constitutional rights. This deprives her of due process of law.** This creates an action for the natural mother to claim that the Juvenile Court jurisdiction statutes codified at Ohio Revised Codes 2151.07, 2151.23 and 2151.353 are unconstitutional as applied to her.

C. THE PROBATE COURT AND STATUTORY ADOPTION PROCESS PROVIDES THE NEEDED CONSTITUTIONAL SAFEGUARDS

In Ohio, exclusive jurisdiction over adoption proceedings is vested in the Probate Court State ex Rel. Portage County Welfare Dept v. Summers, 38 Ohio State 2d 144 (1974), citing In re Adoption of Biddle, 168 Ohio St. 209 (1958). This Court in Portage stated that:

adoption is a function which requires the exercise of the judicial power which is constitutionally vested in the courts of this state, and that original and exclusive jurisdiction over adoption proceedings is vested specifically in the Probate Court pursuant to Chapter 3107.

Id. at 151. Matters of adoption are of such compelling public interest that any statutory encroachment upon the power of the courts to exercise the discretion granted them by statutory and constitutional provisions must be carefully scrutinized.

Ohio Revised Code 2151 governs Juvenile Courts. Ohio Revised Code 2151.07 establishes that the Juvenile Court has and shall exercise the powers and jurisdiction conferred in Chapters 2151 and 2152 of the Revised Code. Ohio Revised Code 2151.23 states in part as follows:

(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; (emphasis added)

As stated, Ohio Revised Code 2151.353 lists dispositional options for the Juvenile Court in abuse, neglect and dependency cases. Ohio law states that when a child is adjudicated to be an abused, neglected, or dependent child, the juvenile court retains jurisdiction.

R.C. 2151.353 (F)(1) states:

The 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** if the child is not mentally retarded, developmentally disabled, or physically impaired, the child attains the age of twenty-one years if the child is mentally retarded, developmentally disabled, or physically impaired, **or the child is adopted and a final decree of adoption is issued,** except that the court may retain jurisdiction

over the child and continue any order of disposition under division (A) of this section or under section 2151.414 or 2151.415 of the Revised Code for a specified period of time to enable the child to graduate from high school or vocational school. The court shall make an entry continuing its jurisdiction under this division in the journal. (emphasis added)

Thus, the same statute that recognizes the continuing jurisdiction of the Juvenile Court also recognizes the circumstance when that jurisdiction will end, specifically including adoption of the child. Further, the plain language clearly anticipates a Juvenile Court **and** a Probate Court having simultaneous appropriate jurisdiction, with the jurisdiction of the Juvenile Court only terminating upon final decree of adoption.

Failing to allow the Probate Court to exercise jurisdiction over the natural mother's choice regarding adoption leads to constitutional violations. The Fourteenth Amendment to the United States Constitution provides that the state shall not deprive any person of life, liberty, or property without due process of law and although Article I, Section 16 of the Ohio Constitution uses slightly different language, it provides the same guarantee. In re Adoption of H.N.R., 145 Ohio St. 3d 144, 151 (2015), citing Direct Plumbing Supply Co. v. Dayton, 138 Ohio St. 540, 544-45 (1941). "Due process demands that the state provide meaningful standards in its laws," and due process requires, at its most basic level, protection against arbitrary laws. Id. Citing Norwood v. Horney, 110 Ohio St.3d 353 (2006); Sacramento Cty. v. Lewis, 523 U.S. 833, 845-846 (1998).

To satisfy the requirements of procedural due process, "the means employed by a statute must have a real and substantial relation to the object to be obtained, and its methods must not be unreasonable, arbitrary, or capricious." Id. Citing Nebbia v. New York, 291 U.S. 502, 525 (1934).

Determining whether a particular procedure is constitutionally adequate generally requires a court to analyze and balance three different factors:

1. The private interest that will be affected by the official action;
2. The risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and
3. The Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

In Groch v. GMC, 117 Ohio St. 3d 192 (2008), this Court reviewed the grounds for claiming a statute is unconstitutional as applied. This Court stated:

"[W]here statutes are challenged on the ground that they are unconstitutional as applied to a particular set of facts, the party making the challenge bears the burden of presenting clear and convincing evidence of a presently existing set of facts that make the statutes unconstitutional and void when applied to those facts." *Harrold v. Collier*, supra, 107 Ohio St.3d 44, 2005 Ohio 5334, 836 N.E.2d 1165, P 38, citing *Belden v. Union Cent. Life Ins. Co.* (1944), 143 Ohio St. 329, 28 O.O. 295, 55 N.E.2d 629, paragraph six of the syllabus.

Id. at 224.

Under an "as-applied" due process challenge, the challenger must demonstrate that there was an actual, not hypothetical, violation of his constitutional rights. The constitutionality of a state statute "may not be brought into question by one who is not within the class against whom the operation of the statute is alleged to have been unconstitutionally applied and who has not been injured by its alleged unconstitutional provision." In re A.J., 2010 Ohio 4553 (11th Dist, Sept. 24, 2010) citing Palazzi v. Estate of Gardner, 32 Ohio St.3d 169, (1987) at syllabus.

The party claiming a state statute violates the Federal Constitution must show that "he is within the class with respect to whom the act is unconstitutional, and must show that the alleged

unconstitutional feature injures him, and so operates as to deprive him of rights protected by the Federal Constitution" Plymouth Coal Co. v. Pennsylvania, 232 U.S. 531, 544-545 (1914).

In this case, the granting of the Writ without question impacts the natural mother's protected interest. It has direct impact on her ability to exercise her constitutional, statutory, and residual rights, including the right to consent to adoption. The natural mother suffers actual injury by depriving her of her right to exercise one of her fundamental and residual parenting rights, the right to consent to adoption. Thus, when this Court granted the Writ, the effect was to deprive the natural mother of due process of law.

The Probate Court offers all necessary procedural safeguards in this case. Permitting the Probate Court to exercise its original and exclusive jurisdiction in adoption cases requires no additional or substitute procedures. The Writ blocks the exercise of all of these procedural safeguards.

As stated in In re Adoption of H.N.R.:

The state's interest is determined through its intent in enacting the legislation at issue. *See State ex rel. Evans v. Moore*, 69 Ohio St.2d 88, 91, 431 N.E.2d 311 (1982); *see also Brock v. Roadway Express, Inc.*, 481 U.S. 252, 258-259, 262, 107 S.Ct. 1740, 95 L.Ed.2d 239 (1987) (ascertaining the government's interest through the legislative history of a statute); *Lehr* at 263-265, fn. 20 (identifying the state's interest from a legislative drafting report describing the purpose of the statutory amendments in question); *Hamdi v. Rumsfeld*, 542 U.S. 507, 517, 531, 124 S.Ct. 2633, 159 L.Ed.2d 578 (2004) (identifying governmental interests from the language of the statute in question).

Id. at 152.

The government has an interest in the disposition of cases involving minors who have been adjudicated abused, neglected or dependent, and also has an interest in streamlining and expediting the finalizations of adoptions. Juvenile Courts, however, do not, **and should not**

have an interest in extending a child's uncertain and unstable future, when the child is entitled to finality, stability and a permanent adoptive home.

II. THIS COURT SHOULD RECONSIDER ITS DECISION BECAUSE BY PROHIBITING THE PROBATE COURT FROM EXERCISING ITS ORIGINAL AND EXCLUSIVE JURISDICTION TO HANDLE ADOPTION MATTERS, THE PROHIBITION DEPRIVES M.S. OF DUE PROCESS OF LAW AND OF THE EQUAL PROTECTION OF LAW IN VIOLATION OF HER CONSTITUTIONAL RIGHTS.

A child is a person with rights protected by the United States Constitution. A child's status as a minor does not deprive the child of constitutional protections afforded adults.

"Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights." Planned Parenthood of Central Mo. v. Danforth, 428 U.S. 52, 74 (1976). The Supreme Court of the United States held in In re Gault, 387 U.S. 1 (1967), that neither the Fourteenth Amendment to the Constitution of the United States nor the Bill of Rights is for adults only. See also In re Agler, 15 Ohio App. 2d 240 (1968).

Therefore, the granting of this Writ also impacts the constitutional rights of M.S, and divests her of the same due process of which her natural mother is deprived as more fully demonstrated above. Respondent incorporates the argument in the previous section of this motion as if fully restated herein.

As previously stated, the Juvenile Court retains continuing jurisdiction over a child for whom it has previously issued dispositional orders pursuant to Ohio Revised Code 2151.353(F)(1). Because the Juvenile Court can always claim a "parenting issue" is before the Court, the Juvenile Court can forever block adoption actions. This result creates a class of children who cannot be adopted. There is no doubt that this is what Allen County intends to do.

They seek a permanent bar from Probate Court adoptive jurisdiction.³ This effectively permanently vests all choice for adoption in persons merely having “legal custody” at the expense of the natural mother’s fundamental constitutional and statutory rights.

All legislative enactments enjoy a presumption of validity and constitutionality. Adamsky v. Buckeye Loc. Sch. Dist., 73 Ohio St. 3d 360, 361 (1995); Sedar v. Knowlton Constr. Co., 49 Ohio St. 3d 193, 199 (1990). Unless it is shown beyond a reasonable doubt that a statute violates a constitutional provision, that statute will be presumed to be constitutional. State ex rel. Herman v. Klopfleisch, 72 Ohio St. 3d 581, 585 (1995), citing Fabrey v. McDonald Police Dept., 70 Ohio St. 3d 351, 352 (1994). The limits placed upon governmental action by the Equal Protection clauses of the Ohio and United States Constitutions are nearly identical. Sorrell v. Thevenir, 69 Ohio St. 3d 415 (1994).

Granting the Writ creates two classes of children for adoption purposes, those who have ever been adjudicated abused, neglected, or dependent in a Juvenile Court and placed in temporary or legal custody, and those who have not. The effect of precluding Probate Court adoptive jurisdiction is that these similarly situated children are treated differently, since one class of children can never be adopted and the other class can be adopted.

³ In the Complaint, Relator requested this Court immediately issue a peremptory Writ of Prohibition, or at a minimum an alternative Writ of Prohibition forbidding Respondents from exercising judicial jurisdiction in the adoption case and a final Writ of Prohibition forbidding Respondents from exercising jurisdiction to find Relator in contempt, to vacate orders of March 31, 2016, April 11, 2016, and April 27, 2016, and to forbid Respondents from exercising jurisdiction to proceed with the adoption hearing.

In Relator’s Memorandum in Support, Relator extended the prayer for relief for a peremptory or alternative Writ, by adding the request that the Writ should also forbid Respondents from exercising judicial jurisdiction “unless and until legal custody of M.S. is placed with someone who then lawfully agrees that the child may reside with Petitioners for adoption placement purposes.”

Although, equal protection does not prevent the state from distinguishing between classes of persons, it does prevent the state from invidiously discriminating against one classification in favor of a similarly situated classification. Andres v. Perrysburg, 47 Ohio App. 3d 51 (1988). If a fundamental right or suspect classification is at issue, equal protection is violated unless the distinction is necessary to promote a compelling governmental interest. Sorrell at 424.

As stated above, the effect of precluding Probate Court adoptive jurisdiction affects the natural mother's fundamental rights and also M.S's fundamental rights.

There is no legitimate public purpose to be served by the classification that is created by this interpretation of Ohio Revised Codes 2151.07, 2151.23 and 2151.353 if these statutes are used to preclude the original and exclusive jurisdiction of the Probate Court to handle adoptions. Therefore, the effect of granting the Writ creates a cause of action for M.S. to claim that she is deprived of the equal protection of law in violation of her constitutional rights. And there is no compelling governmental interest.

The state does have an interest in establishing the parentage of a child. This creates opportunity for the state to seek recoupment of state paid benefits from fathers who do not support their children. The state even has an interest appropriately managing children who have been adjudicated abused, neglected, or dependent. But the state agency must complete that disposition with two years of its involvement. During that time, and depending upon what evidence the state has, it must restore the family relationship, if possible, or follow one of the available dispositions discussed above. Absent permanently terminating a parent's rights through a grant of permanent custody, the Board has no interest in the child's disposition after two years. The involvement of the board must end by operation of law. Ohio Revised Code 2151.353(H). The state has no interest, compelling or otherwise, thereafter. **The effect of**

granting the Writ permits the Board to remain involved in blocking adoptive jurisdiction even after the legal authority of the Board terminates.

III. THIS COURT SHOULD RECONSIDER ITS DECISION BECAUSE THE EFFECT OF GRANTING THE WRIT IS INCONSISTENT WITH THE LEGISLATIVELY AND JUDICIALLY EXPRESSED PHILOSOPHY THAT THE STATE HAS AN INTEREST IN FACILITATING “THE ADOPTION OF CHILDREN AND HAVING THE ADOPTION PROCEEDINGS COMPLETED EXPEDITIOUSLY.” IN RE ADOPTION OF ZSCHACH, 75 OHIO ST.3D 648, 653, (1996).

The express goal of an adoption statute 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. See In re Adoption of Ridenour, 61 Ohio St. 3d 319, 328, (1991) and ensuring that the adoption process is completed in an expeditious manner. See In re Adoption of Baby Girl Hudnall, 71 Ohio App. 3d 376, 380 (1991). If these goals are met, the new parent-child relationship will have the best opportunity to develop fully.

By prohibiting the Probate Court from exercising its original and exclusive jurisdiction to handle adoption matters, this court judicially ends decades of legislative support in favor of adoption as the best means to provide a child with a stable and permanent home.

IV. THIS COURT SHOULD RECONSIDER ITS DECISION BECAUSE THE EFFECT OF GRANTING THE WRIT DIVESTS THE MERCER COUNTY PROBATE COURT OF THE STATUTORILY GRANTED ORIGINAL AND EXCLUSIVE JURISDICTION AND CREATES A PRECEDENT THAT JUVENILE COURTS CAN IMPROPERLY DIVEST ALL PROBATE COURTS OF THE STATUTORILY GRANTED ORIGINAL AND EXCLUSIVE JURISDICTION OVER ANY ADOPTION PROCEEDINGS WHENEVER THERE IS ANY MATTER RELATED TO THE “PARENTING” OF THE CHILD IN ANY JUVENILE COURT IN OHIO OR IN ANY OTHER STATE, LEGISLATING FROM IN BENCH IN VIOLATION OF THE SEPARATION OF POWERS DOCTRINE.

Application of the jurisdictional-priority rule in this case is inappropriate. In general, the state jurisdictional priority rule applies when the claims or causes of action are the same in both cases, and "[i]f the second case is not for the same cause of action, nor between the same parties, the former suit will not prevent the latter." State ex rel. Sellers v. Gerken, 72 Ohio St. 3d 115 (1995), citing State ex rel. Judson v. Spahr, 33 Ohio St.3d 111, 113, (1987).

Moreover, this case demonstrates the proper distinction between “parenting” issues and “parentage” issues. Many appellate courts recognized the significance of the distinction. When there is an issue of parentage pending in the Juvenile Court at the time of the filing of the adoption, the Probate Court must wait until that parentage issue is resolved. This makes logical sense. Parentage is exclusively determined by the Juvenile Court. In fact, parentage is specifically addressed in Chapter 3111 of the Ohio Revised Code. Once that occurs, the Probate Court can exercise its original and exclusive jurisdiction over adoptions and determine whether or not consent to adopt by a recently determined father is necessary for the adoptions. But when parentage is not an issue, there is no reason to preclude jurisdiction. Precluding the exercise of jurisdiction to proceed serves no valid purpose. But the delay does do one thing. The delay adds facts that will need to be considered by the Probate Court to determine if the adoption is in the child’s best interest. The delay changes the evidence. This permits Relator to expand its

statutory authority beyond its statutorily expressed mission. In fact, unless Relator has obtained permanent custody and terminated the mother's residual rights, Relator has no role in choosing the adoptive family for the child. This preclusion of jurisdiction gives Relator the power to alter the facts and have a voice not given to Relator under the law.

This Court seemed to recognize the distinction between "parenting" and "parentage" in Vaughn v. Wyrembek (In re G.T.B), 128 Ohio St 3d 502 (2011). In Wyrembek, this Court clarified Pushcar and P.A.C. stating as follows:

Third, as we held in the Vaughns' appeal from a judgment of the Lucas County Court of Appeals affirming the Lucas County Probate Court's dismissal of their petition to adopt the child, "[w]hen an issue concerning parenting² of a minor is pending in the juvenile court, a probate court must refrain from proceeding with the adoption of that child." In re Adoption of G.V., 126 Ohio St.3d 249, 2010 Ohio 3349, 933 N.E.2d 245, ¶ 8, certiorari denied, Vaughn v. Wyrembek (2011), 79 USLW 3512, 131 S. Ct.1610 , 179 L. Ed. 2d 501, quoting In re Adoption of Pushcar, 110 Ohio St.3d 332, 2006 Ohio 4572, 853 N.E.2d 647, syllabus. (Emphasis added).

² The context manifestly indicates that the court intended "parentage."

Id. at 503.

Based on the clarification by this Court, Respondents advocated that Probate Courts must refrain from proceeding with an adoption if the issue regarding the "parentage" of the child was still pending in the Juvenile Court, not merely an issue of "parenting." But every action that relates to the minor child that involves a parent is a parenting issue. The placing of a child for adoption is a parenting issue. Respondent still believes that this Court's clarification in Wyrembek refocuses courts on the proper test to determine when a Probate Court can exercise jurisdiction and when it cannot.

The original pronouncements in In re Adoption of Pushcar, and the cases that followed have been expanded to created a real crisis in determining competing jurisdictional issues between Juvenile and Probate Courts. This effect of granting this Writ is to legislate from the

bench and rewrite the juvenile and probate court jurisdiction statutes, a job better left to the legislature.

V. THIS COURT SHOULD RECONSIDER ITS DECISION BECAUSE DISMISSAL OF THE WRIT WOULD PERMIT THE CASE TO PROCEED THROUGH THE NORMAL PROCESS OF LITIGATION, PERMITTING THE MERCER COUNTY PROBATE COURT TO HEAR EVIDENCE REGARDING THE BEST INTEREST OF M.S., AND THE PARTIES CAN APPEAL ANY ADVERSE, FINAL APPEALABLE ORDER THEREIN.

This Court has stated that the ultimate goal in the adoption process is to protect the best interests of children. See In re Adoption of Zschach, 75 Ohio St. 3d 648 (1996); In re Adoption of Ridenour, 61 Ohio St. 3d 319 (1991). This Court has also held that "adoption matters must be decided on a case-by-case basis through the able exercise of discretion by the trial court giving due consideration to all known factors in determining what is in the best interest of the person to be adopted." In re Adoption of Charles B., 50 Ohio St. 3d 88, 90 (1990).

Reconsideration of the Writ and permitting the Probate Court to proceed permits the Probate Court to sooner, rather than later, determine if the adoption is in the child's best interest. All remedies including appeal of final, appealable order would be available to the parties should any party be dissatisfied with the Probate Court's decision. Instead, appeal is an adequate remedy.

A party challenging a court's jurisdiction has an adequate remedy through the appeal process and need not resort to an extraordinary Writ. Weenink & Sons Co. v. Court of Common Pleas, 150 Ohio St. 349, 355 (1948). "In the absence of a patent and unambiguous lack of jurisdiction, a court having general subject-matter jurisdiction can determine its own jurisdiction, and a party contesting that jurisdiction has an adequate remedy by appeal." State ex rel. Furnas

v. Monnin, 120 Ohio St.3d 279, 281 (2008), quoting ex rel. Plant v. Cosgrove, 119 Ohio St.3d 264 (2008).

CONCLUSION

A Writ of Prohibition is an extreme Writ to be used with great caution and only when there is no other adequate remedy at law. State Ex. Rel. Stark vs. Summit County Court of C.P., 31 Ohio St.3d 324, 325 (1987). The purpose of a Writ of Prohibition is to keep inferior courts within the confines of their own jurisdiction and to prevent the court from impinging on the jurisdiction of another tribunal. Weenink & Sons Co. v. Court of Common Pleas, 150 Ohio St. 349, 355 (1948). In order to be entitled to a Writ of Prohibition, Relator must demonstrate the following:

- (1) that the court or officer against whom the Writ is sought is about to exercise judicial or quasi judicial power,
- (2) that the exercise of that power is unauthorized by law, and
- (3) that denying a Writ will result in injury for which no other adequate remedy exists in the ordinary course of law.

Goldstein v. Christiansen, 70 Ohio St.3d 232, 234-35 (1994) citing State ex rel. Koren v. Grogan, 68 Ohio St.3d 590 (1994).

When the petitioner claims lack of jurisdiction, a Writ of Prohibition will not issue “absent a patent and unambiguous lack of jurisdiction.” State Ex. Rel. Pearson vs. Moore, 48 Ohio St.3d 37, 38 (1990); see, e.g., State Ex. Rel. Rice vs. McGrath, 62 Ohio St.3d 70 (1991) (determining that Writ of prohibition *will* issue to prevent further action in a case that the court had unconditionally dismissed). Only where the inferior court patently and unambiguously lacks jurisdiction to act does the existence of an adequate remedy not preclude prohibition. State ex rel. Columbus S. Power Co. v. Fais, 117 Ohio St.3d 340 (2008).

Respondents request this Court reconsider the granting of the Writ in this case.

When this Court granted the Writ on June 1, 2016, it did so by a vote of 5 to 2. Respondent urges this Court consider that when two probate court judges believe they have jurisdiction, and when two justices dissent from granting a Writ, then there cannot be a patent and unambiguous lack of jurisdiction mandating the granting of a peremptory Writ.

The consequences that follow from the granting of the Writ are numerous. The granting of the Writ highlights that the natural mother may have been deprived of due process of law because the jurisdictional statutes, as now applied to her, effect her fundamental parenting rights.

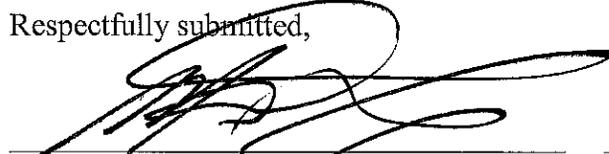
The child is also deprived of due process of law and the granting of the Writ further illuminates an equal protection problem because it can be argued that it creates a second class of children who can never be adopted.

Delaying the Original and Exclusive Probate Court jurisdiction is inconsistent with the judicial and statutory expressed policies in favor of adoption. Only the Probate Court can address the long-term issue of the adoption of a child.

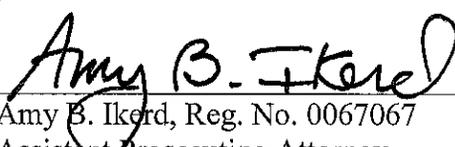
Finally, there are appellate remedies available after the Probate Court proceeds.

For the foregoing reasons, this Court should reconsider the granting of the Writ, grant an alternative Writ and permit further arguments herein, and/or consider referring the matter to a master commissioner for further argument.

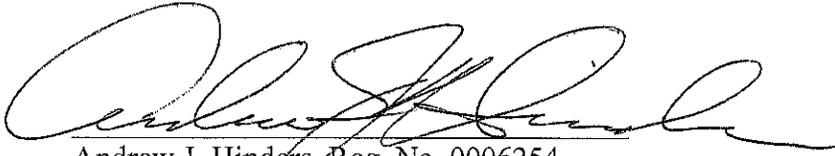
Respectfully submitted,



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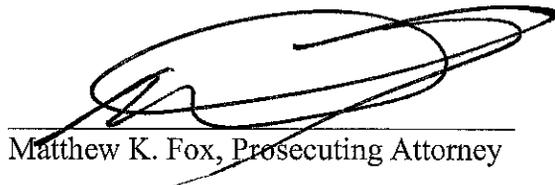
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent to Terri L. Kohlrieser,
Assistant Prosecutor, attorney for the Allen County Children Services Board, on this 13th day of
June, 2016.



Matthew K. Fox, Prosecuting Attorney