

ORIGINAL

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.

* Case No: 16-0723
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BRIEF OF AMICUS CURIAE PUBLIC CHILDREN SERVICES ASSOCIATION OF
OHIO
IN SUPPORT OF RELATORS

Attorney Terri Kohlrieser (#0073982)
Counsel for Relator
Allen County Prosecutor's Office
204 N. Main St., Suite 302
Lima, OH 45801
Phone: (419) 222-2462
Fax: (419) 227-1072

Attorney Matthew K. Fox (#0056112)
Counsel for Respondent
Mercer County Prosecuting Attorney
119 N. Walnut St.
Celina, OH 45822
Phone: (419) 586-8677
Fax: (419) 586-8747

Attorney David W. Haverfield (#0065088)
Counsel for Amicus Curiae, Public Children
Services Association of Ohio
389 Sixteenth St. S.W.
New Philadelphia, OH 44663
Phone: (330) 339-7791
Fax: (330) 339-6388

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PROPOSITIONS OF LAW

PROPOSITION OF LAW I

THE DUE PROCESS RIGHTS OF ALL PARTIES ARE ADEQUATELY PROTECTED BY THE ACTIONS TAKING PLACE IN THE ALLEN COUNTY JUVENILE COURT.

PROPOSITION OF LAW II

M.S. WILL NOT BE DEPRIVED OF THE EQUAL PROTECTION OF THE LAW IF THE ALLEN COUNTY JUVENILE COURT RETAINS JURISDICTION TO DECIDE THIS MATTER.

PROPOSITION OF LAW III

RECONSIDERATION OF THE WRIT WILL CREATE UNCERTAINTY AND INSTABILITY FOR ABUSED, NEGLECTED AND DEPENDENT CHILDREN WHO ARE ENTITLED TO SAFETY, STABILITY AND PERMANENCY AND ENCOURAGES FORUM SHOPPING AND COLLUSION.

STATEMENT OF INTEREST OF AMICUS CURIAE

The Public Children Services Association of Ohio (“PCSAO”) is a private, non-profit coalition of Public Children Services Agencies that promotes the development of sound public policy and program excellence for safe children, families and communities. To that end, PCSAO advocates on behalf of Children Services Agencies, conducts research, training and consultation, as well as provides technical assistance to its member agencies.

As part of its mission, PCSAO seeks to assist Public Children Services Agencies in insuring timely permanency by promoting kinship care as the least restrictive placement for children who cannot be safely maintained in their homes. PCSAO further advocates for sound public policy which seeks to maintain and support family connections by seeking to preserve sibling and extended family relationships.

STATEMENT OF THE CASE AND FACTS

Amicus Curiae respectfully adopts and incorporates by reference the facts and procedural history set forth in multiple filings and the response to the motion for reconsideration filed by Relators in this matter.

PROPOSITION OF LAW I

THE DUE PROCESS RIGHTS OF ALL PARTIES ARE ADEQUATELY PROTECTED BY THE ACTIONS TAKING PLACE IN THE ALLEN COUNTY JUVENILE COURT.

In their Motion for Reconsideration, Respondents assert that the decision of this court to grant Relator's Writ of Prohibition will deprive the mother of her due process rights, including the right to consent to the adoption of M.S. PCSAO would assert that there is a distinct difference between the right to *consent* to adoption and the right to *place* a child for adoption. Respondents correctly assert that one of the residual parental rights that the mother retains in this matter is the right to "consent" to adoption. R.C. §2151.011(49). Consequently, and as noted by all parties to this action, the Allen County Children Services Board could not presently place M.S. for adoption without the consent of the mother.

It is important to note that the residual parental rights maintained by parents in juvenile court cases are the right to *consent* not the right to *place* a child for adoption. The intent of a disposition which places a child into the temporary or legal custody of a public child welfare agency or third party is not to permanently deprive a parent of their rights. Permanent custody as defined in R.C. §2151.011(A)(32) has that effect. This distinction is important as it recognizes the rights of those who have been given custody and parents whose residual rights remain intact. In fact, if a parent always retains the right to place their child for adoption, then the judgment of a juvenile court short of permanent custody becomes meaningless. If a parent is deemed unfit and legal custody of a child is given to a grandparent or other relative, may the parent continue to be able to place the child for adoption with anyone of their choosing? Such a result will lead to ongoing uncertainty and is patently unfair to both children and those who step forward to care for them.

The right of a parent regarding adoption is defined as the right to “consent.” R.C. §2151.011(49). Had the legislature intended to give residual rights to place for adoption, it could have chosen to use those words. It did not. Rather, for children in the custody of another person or entity, that person or entity retains the right to determine where the child will reside and with whom the child will be placed.

R.C. §2151.011 (B)(21) defines legal custody as:

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 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.

Additionally, temporary custody is defined to differentiate the temporary status of the legal right in R.C. §2151.011(B)(56) 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 legal custody is granted in an agreement for temporary custody, by the person who executed the agreement.

As the Ohio Revised Code clearly vests the right to make placement decisions with the custodian, be it temporary or legal, the Probate Court lacked the ability to order M.S. placed with the Andersons. The residual rights of Mary Spurlock to consent to the adoption are only implicated if the child can be placed in the home of the Andersons for purposes of adoption. As the temporary legal custodian did not consent to the same, the Mercer County Probate Court lacked the ability to make such a placement.

In cases involving real property, owners or tenants thereon have a certain “bundle of rights” associated with the same. *McNamara, et al v. City of Rittman, et al*, 225-Ohio-6433 ¶23. Those may include the right to possession, mineral rights, or the right to fully sell and dispose of

the property. The sticks in the bundle in property cases are defined by the legal documents conveying those rights. In this case, parental rights may be viewed similarly as a “bundle of rights.” Those rights, which are controlled by courts and to a lesser extent written agreements, are comprised of rights like the right to custody, visitation, child support and many others. In this case, the determination by the Allen County Juvenile Court that Mary Spurlock was an unfit mother deprived her, at least temporarily, of the right to have physical custody of her child. R.C. §2151.353. Consequently, she could only grant to the Andersons those sticks in her “bundle of rights” that she properly possessed. And the right to transfer custody was not one of them.

In the present case, there are multiple motions pending in the Allen County Juvenile Court that must be litigated in order to determine the relative positions of the parties and non-parties to this action. The Allen County Juvenile Court must decide if M.S. will be placed in the legal custody of her aunt in the State of Indiana. Also pending are motions filed by both the mother and former foster parents, Brian and Kelly Anderson, for legal custody of M.S. to be placed with them. The resolution of these cases in Allen County Juvenile Court will provide adequate due process to the mother. Part of the decision regarding placement of M.S. requires the court to consider her best interest. R.C. §2151.353.

Additionally, if it is ultimately the mother’s goal to have M.S. adopted by the Andersons, she can achieve that end by convincing the Allen County Juvenile Court that a grant of legal custody of M.S. to the Andersons is in her best interest. If that is accomplished, and Andersons, having actual custody of the child are in a position to file an adoption petition. And mother, consistent with her intact residual parental rights, is free to consent to said adoption.

It is interesting that the Mercer County Probate Court’s Motion for Reconsideration cites to the case of *Lassiter v. Department of Social Services*, 452 U.S. 18 at 37 for the proposition

that the state intervention to terminate a relationship between a parent and a child must be accomplished by procedures meeting the requisites of the Due Process Clause. But the Allen County Juvenile Court is not attempting to terminate mother's parental rights at all. She is the one attempting to permanently divest herself of all of her residual parental rights.

PROPOSITION OF LAW II

M.S. WILL NOT BE DEPRIVED OF THE EQUAL PROTECTION OF THE LAW IF THE ALLEN COUNTY JUVENILE COURT RETAINS JURISDICTION TO DECIDE THIS MATTER.

ARGUMENT

With regard to Respondent's Equal Protection argument, M.S. is not similarly situated to all children in Ohio that may be placed for adoption. Her mother has been deemed unfit as a parent by virtue of the findings that M.S. is an Abused, Neglected and Dependent child. As a disposition in that case, the Allen County Juvenile Court made a determination that said unfitness rendered her unable to make the day to day decisions for M.S. and that oversight of her parenting by both the agency and the court were necessary.

The Equal Protection Clause of the United States Constitution, found in Amendment 14, §1 provides that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." However, in determining if a person has received equal protection, it is important to determine if similarly situated persons are being treated equally. The Equal Protection Clause of the Fourteenth Amendment commands that no State shall "deny to any person within its jurisdiction the equal protection of the laws," which is essentially a direction that all persons similarly situated should be treated alike. *Plyler v. Doe*, 457 U.S. 202, 216, 102 S.Ct. 2382, 2394, 72 L.Ed.2d 786 (1982).

In this case, M.S. is not similarly situated to all children whose parent or parents have full custodial rights. She has been determined to be a ward of the Allen County Juvenile Court

which has consequently determined that her mother is unfit and not able to have custody of her at the present time. Therefore, she is similarly situated to all children who are already wards of another court. Any attempt to differentiate her treatment based upon all other children who are not subject to orders regarding custody and placement is misplaced. As Respondents have not demonstrated that M.S. is being treated any differently than other children in her situation by the court which has legally obtained jurisdiction over her retaining such jurisdiction, the Equal Protection argument must fail.

PROPOSITION OF LAW III

RECONSIDERATION OF THE WRIT WILL CREATE UNCERTAINTY AND INSTABILITY FOR ABUSED, NEGLECTED AND DEPENDENT CHILDREN WHO ARE ENTITLED TO SAFETY, STABILITY AND PERMANENCY AND ENCOURAGES FORUM SHOPPING AND COLLUSION.

ARGUMENT

Ohio's foster children represent our most vulnerable population. They are victims of physical and sexual abuse; unimaginable home conditions; and as M.S. herself, victims of prenatal drug use by their mothers. As of January 1, 2014, the last date for which published statewide data is available, there were 12,679 children in the custody of one of Ohio's 88 county public child welfare agencies. Of those, 8,744 were in the temporary custody of an agency; 2,745 were in the permanent custody of an agency; and 1,190 were in an agency's planned permanent living arrangement.¹ If this court were to reconsider and ultimately grant the writ requested by relators, any sense of stability or possible permanency for these children is at risk.

Ohio's juvenile courts are best equipped to make decisions for these children. These courts have at their disposal the best available information in order to consider the child's best interest, the guiding principal in all of these cases. The court also has information at its disposal including mental health and treatment records for parents; completed home study reports for relative or kinship placements; and in most cases, the informed, independent opinion of a Guardian ad Litem who is charged with advocating for the child's best interest.

Ohio's public child welfare agencies are tasked with placing children in the least restrictive placement setting, which is with a relative or family member prior to placement into foster care. Ohio Adm. Code §5101: 2-42-05. The requirement for the juvenile court to consider

¹ PCSAO 12th edition Factbook (2015-2016), <http://www.pcsao.org/pdf/factbook/2015/StateOfOhioProfile.pdf>.

available relative placements is codified in R.C. §2151.314 which requires the court to determine if any relative exists prior to the placement of the child into the temporary custody of a Public Children Services Agency, and R.C. §2151.28(B)(1) which requires the court to determine if any appropriate relative exists at the time of adjudication. The Ohio Revised Code further directs the Public Children Services Agency to attempt to place siblings together whenever possible. R.C. §2151.411.

In the present case, the Allen County Juvenile Court is in the process of making just those important decision regarding long term care of M.S. There are competing motions for allocation of custody, and the Allen County Court is best equipped to make those decisions based upon all the available information. In the event this matter is reconsidered and the requested writ is granted, the ability of juvenile courts across Ohio to make these determinations will be nullified. Each time a parent is unhappy with a placement decision made by a juvenile court, they can just go to the probate court in another county, surrender their rights and obtain a placement decision more to their liking.

It may seem counterintuitive that a parent would surrender all rights as opposed to tolerating a placement that does not meet their wishes in order to maintain their residual parental rights. And in many ways it is. Unless some other arrangement is made between the biological and adoptive parents to circumvent the jurisdiction of the court. PCSAO has no knowledge as to whether the motives of Mary Spurlock in this matter are truly altruistic. She may simply believe that her child will do better in a home with former foster parents with all of her rights extinguished than in the home of a family member with all of her residual rights intact. But apart from this case, granting the requested writ in this case will open the door to forum shopping in cases where the parent and another person not a party to the case wish a different result than

what the juvenile court may entertain. And even worse, collusion between biological parents unhappy with a placement decision and those persons who a court has determined are not the best placement option for a particular child or children.

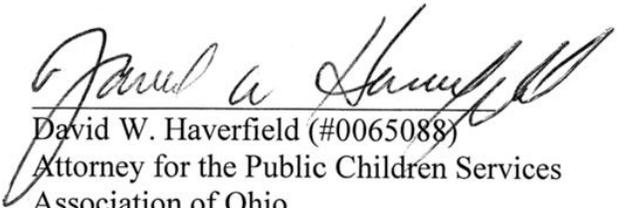
Uncertainty will also complicate the lives of these already vulnerable children. R.C. §2151.353 authorizes a disposition of legal custody to a third party as one alternative to terminate a case. For many children who are abused, neglected, or dependent, a status of “legal custody” allows them to remain with a family member or person known to them and provides them the stability of knowing that they have a place to remain long term. This stability will be illusory if a parent can show up at any time and surrender their rights to allow another person to adopt them. Granting of the requested writ will place the probate court of another county in the position of overruling the decision of the juvenile court. This will create instability, confusion and the potential for fraud and collusion in these cases.

Respondents in this matter also make the argument that the current state of this case will have a negative impact on adoption in Ohio by rendering a certain class of children not able to be adopted. But as noted above, this is simply not true. If both Mary Spurlock and the Andersons wish to have the Andersons adopt M.S., there are two straightforward ways to accomplish that goal. Firstly, there are two motions pending in the Allen County Juvenile Court to grant legal custody of M.S. to the Andersons. If theirs is successful, the Andersons will be granted legal custody. At that juncture, if Mary Spurlock is willing to consent and all other statutory procedures are met, they may adopt without the consent of anyone else as no other agency or person will hold custody. Alternatively, Mary Spurlock can complete the services required of her on her case plan and potentially have custody of M.S. returned to her. Then she is free to place the child for adoption with Andersons without the consent of anyone else.

The stated goals in juvenile court child protection actions are to reunify children with parents. If that is not possible, placement with a suitable relative or other kinship provider is the next less restrictive option. Only when neither of these options are available is permanent custody and adoption the preferred method of securing permanency. If relators are arguing that the entire scheme of reunification and kinship placement has a negative impact on adoption, then PCSAO would assert that such a policy decision rests with the legislature, and not the court system.

CONCLUSION

Wherefore, Amicus Curiae urges the court to deny the requested reconsideration and leave the granting of the requested writ intact.


David W. Haverfield (#0065088)
Attorney for the Public Children Services
Association of Ohio
389 16th Street, SW
New Philadelphia, Ohio 44663-6401
330-339-7791

PROOF OF SERVICE

A copy of the foregoing was served upon Attorney Terri Kohlrieser, 204 N. Main St., Ste. 302, Lima, Ohio 45801; and Attorney Matthew Fox, 119 N. Walnut St., Celina, Ohio 45822 by regular U.S. mail this 22nd day of June 2016.



David W. Haverfield
Counsel for Amicus Curiae, Public Children
Services Association of Ohio