

[Cite as *In re adoption of A.W.K.*, 2007-Ohio-6341.]

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY**

In the Matter of:

THE ADOPTION OF A.W.K.

Appellate Case No. 22248

Trial Court Case No. 06-ADP-91

(Civil Appeal from Common Pleas
Court, Probate Division)

OPINION

Rendered on the 21st day of November, 2007.

RICHARD HEMPFLING, Atty. Reg. #0029986, Flanagan, Lieberman, Hoffman &
Swaim, 318 West Fourth Street, Dayton, Ohio 45402
Attorney for Appellants

BROGAN, J.

{¶ 1} B.K. and D.K. (The “Ks”) appeal from the Montgomery County Probate Court’s decision and entry dismissing their petition to adopt a child named A.W.K.¹

{¶ 2} In their sole assignment of error, the Ks contend the trial court erred in

¹For purposes of our analysis, we will identify the parties and the child only by their initials.

dismissing the petition based on a violation of R.C. 5103.16(D), which governs the initial placement of children in the home of prospective adoptive parents. The Ks assert that R.C. 5103.16(D) had no applicability here because A.W.K. already was living in their home under a prior grant of legal custody.

{¶ 3} The record reflects that Montgomery County Children Services assisted in the placement of A.W.K. in the Ks' home in connection with a dependency action filed in Montgomery County Juvenile Court. On February 7, 2005, the juvenile court adjudicated A.W.K. dependent and granted legal custody to the Ks, who are unrelated to the child. Thereafter, on May 2, 2006, the Ks filed a petition for adoption under R.C. 3107.05.

{¶ 4} A magistrate ordered dismissal of the petition on January 19, 2007. In so doing, the magistrate interpreted R.C. 5103.16(D) to mean that A.W.K.'s biological parents were required to appear before the probate court and to obtain court approval to have the child placed in the Ks' home for purposes of adoption before the Ks could file a petition to adopt. The Ks objected to the magistrate's ruling. They argued that the purpose of R.C. 5103.16 was to prevent surreptitious, private placements for adoption and that the statute had no applicability where, as here, the child already was living in their home after intervention by Montgomery County Children Services and pursuant to a grant of legal custody by the juvenile court.

{¶ 5} On June 1, 2007, the Montgomery County Probate Court overruled the Ks' objection and adopted the magistrate's decision. The trial court concluded that R.C. 5103.16(D) required an application for adoptive placement, a placement hearing, and a court-ordered "placement for adoption" before non-relatives such as the Ks could petition for adoption under R.C. 3107.05. On appeal, the Ks contend the trial court erred

in imposing the foregoing requirements under R.C. 5103.16(D) and making compliance with them a prerequisite to filing an adoption petition.

{¶ 6} Upon review, we are persuaded by the Ks' argument. Revised Code section 5103.16(D) states, in part:

{¶ 7} “(D) No child shall be placed or received for adoption or with the intent to adopt unless placement is made by a public children services agency, an institution or association that is certified by the department of job and family services * * *, or custodians in another state or foreign country, or unless all of the following criteria are met:

{¶ 8} “(1) Prior to the placement and receiving of the child, the parent or parents of the child personally have applied to, and appeared before, the probate court of the county in which the parent or parents reside, or in which the person seeking to adopt the child resides, for approval of the proposed placement specified in the application and have signed and filed with the court a written statement showing that the parent or parents are aware of their right to contest the decree of adoption subject to the limitations of section 3107.16 of the Revised Code;

{¶ 9} “(2) The court ordered an independent home study of the proposed placement * * * and after completion of the home study, the court determined that the proposed placement is in the best interest of the child;

{¶ 10} “(3) The court has approved of record the proposed placement.”

{¶ 11} “Although R.C. 5103.16 is not part and parcel of the adoption statutes, it is in substance an adoption statute.” *Lemley v. Kaiser* (1983), 6 Ohio St.3d 258, 260. “The intent of the legislature in enacting R.C. 5103.16 was to provide some measure of

judicial control over the placement of children for adoption which is not conducted under the auspices of a statutorily recognized and authorized agency. That measure of judicial control is accomplished by having the parents of the child personally appear before the proper probate court for approval of the placement and adoption.” *Id.* The statute “is part of a legislative response to the perils of black-market transactions occasioned by the limited supply of and great demand for adoptable babies.” *In re Adoption of Zschach* (1996), 75 Ohio St.3d 648, 656. “Because the best interest of children is likely to become a subordinate concern where profit-motivated parties become involved in adoptive placement, the legislature enacted R.C. 5103.16 to ensure proper agency or court supervision of private placements.” *Id.* In order to combat black-market adoptions, the legislature also enacted R.C. 3107.14(D), which mandates the dismissal of an adoption petition if the child to be adopted was placed in the petitioner’s home illegally. *Id.*

{¶ 12} In *Lemley*, the Ohio Supreme Court found a violation of R.C. 5103.16(D) where the appellants, two attorneys, “were active participants in the private, independent, and surreptitious placement for adoption of [a] minor child without the slightest regard for and in complete contravention of the applicable statutory guidelines for such independent placements.” *Lemley*, 6 Ohio St.3d at 259. Despite the trial court’s contrary conclusion, the present case bears no similarity to *Lemley*, and the interests sought to be protected by R.C. 5103.16(D) are not implicated here.

{¶ 13} A.W.K. was not placed in the Ks’ home for purposes of adoption surreptitiously and without agency or judicial oversight. To the contrary, the child was placed in the Ks’ home in connection with a dependency action filed in Montgomery

County Juvenile Court. The placement occurred with assistance from the Montgomery County Children Services agency and with judicial oversight resulting in an award of legal custody. The placement bore no similarity to a black-market transaction.

{¶ 14} Approximately fifteen months after receiving legal custody of A.W.K., the Ks petitioned the probate court to adopt the child. Because A.W.K. already was living in the Ks' home pursuant to the juvenile court's grant of legal custody, there was no need for agency or judicial involvement in any pre-adoptive placement under R.C. 5103.16. "The purpose behind R.C. 5103.16 generally requiring agency or court involvement is to prevent placement of a child from being a black-market transaction based on a profit motive, rather than upon the child's best interest. If a child is in a prospective adoptive home for reasons other than the expected adoption, there is no violation of R.C. 5103.16."² Baldwin's Ohio Practice, 2 Merrick-Rippner, Probate Law (2001) 669, Section 98.2; see also *In re Proposed Adoption* (1998), 131 Ohio App.3d 358, 362 ("The key is not whether the child is in the home of the prospective adoptive parent, but rather why the child is in the home. If the child is already in the prospective adoptive

²The adoption provisions of the Revised Code expressly recognize that, as in the present case, prospective adoptive parents may petition to adopt a child who is living with them but who was not originally placed in their home for the purpose of adoption. See R.C. 3107.051(B)(2). Where the initial placement in the home was proper (as in the present case, for example, pursuant to a grant of legal custody in a dependency action), we see nothing in the Revised Code that would require such a child to be removed from the home prior to the filing of the adoption petition only to be immediately placed there again as a pre-adoptive placement under R.C. 5103.16(D). Although R.C. 5103.16(D) must be strictly construed, the Ohio Supreme Court has recognized that the statute should not be interpreted in a way that would produce an unreasonable result. *In re Adoption of Zschach*, 75 Ohio St.3d at 655. Requiring the Ks to obtain a pre-adoptive placement specifically under R.C. 5103.16(D) would serve no purpose and would be unreasonable.

home for reasons other than the expected adoption, R.C. 5103.16 has not been violated.”); *In re Wilson* (Feb. 13, 1995), Jefferson App. No. 93-J-12 (finding that a pre-adoptive placement under R.C. 5103.16(D) is neither necessary nor required where a child is living with prospective adoptive parents under a grant of legal custody at the time of the adoption petition).³

{¶ 15} In its ruling below, the trial court found that pre-adoptive placement under R.C. 5103.16 remained necessary in the Ks’ case to give the child’s biological parents notice of the attempted adoption. The trial court explained its concern as follows: “If the requirements of 5103.16(D) were not applied to non-relative adoptions, it is highly likely that natural parents would not be informed of the attempted adoption of their child. This is why prior applications for adoption and a placement hearing are necessary with non-relative adoptions. Without these proceedings and precautions, an adoption by non-relatives could be surreptitious.”

{¶ 16} The trial court’s concern about a lack of notice to a child’s natural parents is unwarranted. Our conclusion that R.C. 5103.16(D) has no applicability here does not dispense with the need for notice to A.W.K.’s natural parents. In order to adopt a child, a prospective adoptive parent must obtain consent from the child’s biological parents or

³The trial court and the magistrate emphasized the fact that the prospective adoptive parents in *Wilson* were the child’s grandparents. We note, however, that the existence of this relationship was not a factor in the Seventh District’s legal analysis regarding the non-applicability of R.C. 5103.16. While R.C. 5103.16(E) now provides that “[t]his section does not apply to an adoption by * * * a grandparent,” the grandparent exception did not exist when *Wilson* was decided. Therefore, *Wilson* plainly turned on the fact that the child already was residing with the prospective adoptive parents under a grant of legal custody, not on the prospective adoptive parents’ status as grandparents.

allege and prove that such consent is not required. R.C. 3107.05; R.C. 3107.06; R.C. 3107.07. If, as in the present case, an adoption petition alleges that consent to adoption is not required, the child's biological parents are entitled by statute to notice and a hearing before the petition may be granted. See R.C. 3107.07(A); R.C. 3107.11; *In re Adoption of Walters*, 112 Ohio St.3d 315, 2007-Ohio-7. Therefore, the absence of a pre-adoptive placement under R.C. 5103.16(D) does not prejudice a biological parent's right to notice of the attempted adoption.

{¶ 17} Finally, the trial court relied largely on *In re Taylor*, Tuscarawas App. No. 04AP040032, 2004-Ohio-5643, to support its dismissal of the Ks' adoption petition. In that case, Jeremy and Michelle Gopp obtained legal custody of a child in 2002. Thereafter, they filed an application for pre-adoptive placement of the child with them pursuant to R.C. 5103.16(D). Without addressing why a placement application under R.C. 5103.16(D) was necessary given that the juvenile court already had placed the child with the Gopps, the Fifth District affirmed dismissal of the application because the biological parents did not consent to the placement.

{¶ 18} Upon review, we find *Taylor* to be of little assistance. In *Taylor*, the Gopps apparently assumed that a pre-adoptive placement under R.C. 5103.16(D) was necessary even though the child already was living with them under a grant of legal custody. The issue on review was whether the biological parents were required to consent to a pre-adoptive placement under R.C. 5103.16(D), not whether the Gopps were required to seek a pre-adoptive placement in the first place. Unlike the Gopps, the Ks concluded that a pre-adoptive placement under R.C. 5103.16(D) was unnecessary under the circumstances and they filed an adoption petition under R.C. Chapter 3107.

The issue before us is whether they acted properly in doing so. Because *Taylor* does not directly address this issue, we find it to be of little persuasive value.

{¶ 19} Based on the reasoning set forth above, we conclude that the trial court erred in dismissing the Ks' adoption petition based on the lack of a prior placement under R.C. 5103.16. Such a placement for adoption need not precede an adoption petition where, as here, the child is already living in the prospective adoptive parents' home pursuant to a grant of legal custody. The Ks' assignment of error is sustained. The judgment of the Montgomery County Probate Court is reversed, and the cause is remanded for further proceedings consistent with this opinion.

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WOLFF, P.J., and GRADY, concur.

Copies mailed to:

Richard Hempfling
H.V. (c/o Clerk of Courts)
J.K. (c/o Clerk of Courts)
Hon. Alice O. McCollum