

STATE OF OHIO)
)ss:
COUNTY OF LORAIN)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

IN RE ADOPTION OF J.A.S. AND J.N.S.

C.A. Nos. 08CA009518
 08CA009519

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF LORAIN, OHIO
CASE Nos. 2008AD00062
 2008AD00063

DECISION AND JOURNAL ENTRY

Dated: August 10, 2009

CARR, Judge.

{¶1} Appellants, R.S. and S.E.S. (the “adoptive parents”), appeal the judgment of the Lorain County Court of Common Pleas, Probate Division. This Court affirms.

I.

{¶2} On October 3, 2008, the adoptive parents filed petitions for adoption of the minor children, J.A.S. and J.N.S. The same day, the adoptive parents filed a motion for an order deeming the requirement for adoptive placement pursuant to R.C. 5103.16(D) unnecessary. The adoptive parents asserted that they were granted an award of legal custody of the children from the Lorain County Juvenile Court pursuant to a final dispositional order in a dependency/neglect/abuse case filed by Lorain County Children Services Board. Accordingly, they urged the probate court to adopt the reasoning and holding of the Second District Court of Appeals in *In re Adoption of A.W.K.*, 2d Dist. No. 22248, 2007-Ohio-6341, and dispense with the

statutory requirement for adoptive placement under the circumstances. In an affidavit attached to the motion, the adoptive parents averred, in part, that “this is not a black market or surreptitious request for adoption.” The probate court summarily denied the motion to dispense with placement. The adoptive parents timely appealed, raising one assignment of error for review.

II.

ASSIGNMENT OF ERROR

“THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANTS WHEN THE TRIAL COURT DENIED APPELLANTS’ MOTION FOR AN ORDER THAT ADOPTIVE PLACEMENT UNDER R.C. 5103.16(D) [] BE DEEMED UNNECESSARY.”

{¶3} The adoptive parents argue that the trial court erred by denying their motion for an order deeming adoptive placement pursuant to R.C. 5103.16(D) unnecessary. This Court disagrees.

{¶4} R.C. 5103.16 addresses the placing of children for purposes of adoption. R.C. 5103.16(D) states:

“No child shall be placed or received for adoption or with 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 under section 5103.03 of the Revised Code to place children for adoption, or custodians in another state or foreign country, or unless all of the following criteria are met:

“(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;

“(2) The court ordered an independent home study of the proposed placement to be conducted as provided in section 3107.031 of the Revised Code, and after completion of the home study, the court determined that the proposed placement is in the best interest of the child;

“(3) The court has approved of record the proposed placement.”

R.C. 5103.16(E) provides that “[t]his section does not apply to an adoption by a stepparent, a grandparent, or a guardian.”

{¶5} The Ohio Supreme Court has held:

“Although R.C. 5103.16 is not part and parcel of the adoption statutes, it is in substance an adoption statute. As such, R.C. 5103.16 is necessarily in derogation of the common law and must be strictly construed. Further, because the provisions authorizing adoptions are purely statutory, strict compliance with them is necessary.” (Internal citations omitted.) *Lemley v. Kaiser* (1983), 6 Ohio St.3d 258, 260.

The *Lemley* court further noted that the legislature’s intent 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.” *Id.* The high court reasoned:

“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. The integrity of this [statutory] process is an absolute necessity. Otherwise, children could be sold to the highest bidder and shuffled around like objects on an auction block.” (Internal citations and quotations omitted.) *Id.*

{¶6} Nevertheless, the adoptive parents urge this Court to adopt the reasoning and holding of the Second District Court of Appeals in *In re A.W.K.*, *supra*, wherein our sister district dispensed with strict construction and grafted an additional exception for legal custodians upon the statute. The Second District concluded that adoptive placement pursuant to R.C. 5103.16(D) is unnecessary where the child sought to be adopted has been residing in the prospective adoptive parents’ home pursuant to a prior award of legal custody to the petitioners. *Id.* at ¶19. The appellate court reasoned that its conclusion comports with the legislature’s intent because placement of the child pursuant to an award of legal custody necessarily implicates judicial oversight by the juvenile court. *Id.* at ¶13. This Court is not persuaded by such reasoning.

{¶7} First, the reasoning flies in the face of the Supreme Court’s directive that R.C. 5103.16 requires both strict construction and strict compliance. Second, because the legislature made express exceptions to the placement requirement for stepparents, grandparents and guardians, it could have done so for legal custodians if it so intended.

{¶8} A “custodian” is “a person who has legal custody of a child or a public children services agency or private child placing agency that has permanent, temporary, or legal custody of a child.” R.C. 2151.011(A)(11). “Legal custody” is “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.” R.C. 2151.011(A)(19). “Residual parental rights, privileges, and responsibilities” are “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.” R.C. 2151.011(A)(46). Once a juvenile court issues a final disposition awarding legal custody of a child to a person, judicial (and agency) oversight ceases.

{¶9} A “guardian,” on the other hand, is “a person, association, or corporation that is granted authority by a probate court pursuant to Chapter 2111. of the Revised Code to exercise parental rights over a child to the extent provided in the court’s order and subject to the residual parental rights of the child’s parents.” R.C. 2151.011(A)(16). R.C. 2111.01(A) similarly defines “guardian” as “any person, association, or corporation appointed by the probate court to have the care and management of the person, the estate, or both of an incompetent or minor.” R.C.

2101.24(A)(1)(e) reserves exclusive jurisdiction to the probate court to appoint guardians. The probate court maintains on-going judicial oversight of the ward and guardian during the pendency of the guardianship. In fact, R.C. 2111.50(A)(1) states that the probate court is the “superior guardian of wards who are subject to its jurisdiction, and all guardians who are subject to the jurisdiction of the court shall obey all orders of the court that concern their wards or guardianships.” R.C. 2111.13 enumerates the duties of a guardian of a person, including “[t]o obey all the orders and judgments of the probate court touching the guardianship.” R.C. 2111.13(A)(4). Guardians of a person are also subject to rendering accounts upon order of the probate court. R.C. 2109.302(B)(3).

{¶10} Unlike legal custodians who are no longer subject to oversight by the juvenile court, guardians remain subject to oversight and control by the probate court until the termination of the guardianship. Accordingly, a significant distinction exists between legal custodians and guardians, indicating that the legislature did not “just forg[e]t to add the term legal custodian as an exemption under [R.C. 5103.16(E)]” as the adoptive parents argue. Just as the statutory placement requirement serves to avoid surreptitious placements for adoption by individuals who may be trafficking in children, it arguably further prevents public children services agencies from bypassing the onerous burden of prosecuting a motion for permanent custody, instead seeking an award of legal custody to a third party who can then pursue adoption yet avoid the statutory requirement for adoptive placement and its corresponding investigation and approval. If the legislature wishes to forego the requirement for adoptive placement of children in legal custody as a result of dependency/neglect/abuse actions, it can amend R.C. 5103.16 accordingly. This Court, however, is not free to graft another exception upon the statute. The adoptive parents’ sole assignment of error is overruled.

III.

{¶11} The adoptive parents' assignment of error is overruled. The judgment of the Lorain County Court of Common Pleas, Probate Division, is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellants.

DONNA J. CARR
FOR THE COURT

MOORE, P. J.
DICKINSON, J.
CONCUR

APPEARANCES:

JOEL D. FRITZ, Attorney at Law, for Appellants.

JENNIFER WAHL, pro se, Appellee.

CHRISTOPHER ROBINSON, pro se, Appellee.