The Supreme Court of Ohio

Ohio State Bar Association,
Relator,
v.
Gary Allan Heath,
Respondent.

Case No. 2009-0966

ORDER

This matter is pending before the court upon the filing of a report and recommendation by the Board on the Unauthorized Practice of Law recommending that respondent be enjoined from the unauthorized practice of law. Oral argument was held in this matter on August 11, 2009. Respondent, Gary Allan Heath, filed on August 11, 2009, a Motion to Dismiss with Prejudice. Upon consideration thereof,

It is ordered by this court that respondent's motion is denied.

THOMAS J. MOYER
Chief Justice

BTF

ORIGINAL

IN THE SUPREME COURT OF OHIO

ON COMPUTER

IN THE MATTER OF	*	
THE ADOPTION OF	*	CASE NO. 88-2163
CHARLES B.	*	

APPEAL FROM THE COURT OF APPEALS OF LICKING COUNTY, OHIO, FIFTH APPELLATE DISTRICT, FROM A JUDGMENT ENTRY IN CASE NO. CA-3382, DATED OCTOBER 28, 1988

BRIEF ON THE MERITS OF THE GUARDIAN AD LITEM OF THE CHILD, CHARLES B.

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THE AMERICAN CIVIL LIBERTIES UNION

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entry, the Trial Court found that the Agency's consent was not necessary under Section 3107.07, (F), O.R.C., in light of its failure to file a timely objection to the petition once having been notified of its pendency. The Trial Court further found that the adoption of Charles B. by the Petitioner was in the child's best interests.

The Agency then filed its Notice of Appeal in this matter on May 25, 1988. On June 10, 1988, the Fifth District Court of Appeals issued a judgment entry staying placement of the child pending the disposition of the appeal. Charles B. thereafter remained in a foster home in Licking County, Ohio. On October 28, 1988, the Fifth District Court of Appeals filed its opinion and judgment entry in which it reversed, by a 2-1 vote, the decision of the Trial Court. In its decision, the majority of the Court of Appeals found that the Agency's consent to the adoption was not required but that homosexuals as a matter of law are ineligible to adopt in Ohio. On November 21, 1988, then, the Petitioner and Charles B., by and through his Guardian Ad Litem, filed a combined Notice of Appeal with the Clerk of the Fifth District Court of Appeals. A copy of this Notice of Appeal together with the Memorandum in Support of Jurisdiction of the Guardian Ad Litem was filed with the Ohio Supreme Court on December 20, 1988. On February 15, 1989, the Ohio Supreme Court allowed the Appellants' motion for an order directing the Court of Appeals for Licking County, Ohio, to certify its record and the claimed appeal as of right from said Court. On the same date, this Court denied the motion to expedite which had been

filed by the Guardian Ad Litem. On February 21, 1989, the original papers and transcript of proceedings in this case were filed with the Clerk's Office of the Ohio Supreme Court.

STATEMENT OF THE CASE

For the purpose of this Brief on the Merits and as set forth in the Memorandum in Support of Jurisdiction, the parties shall be referred to as follows:

(a) Mr. B., the Petitioner for the adoption of Charles B., the Appellee at the Court of Appeals and Appellant in this action before the Supreme Court shall be referred to as "Petitioner";

(b) The Licking County Department of Human Services, the Appellant at the Court of Appeals and Appellee in this action before the Supreme Court shall be referred to as "Agency"; and

(c) Charles B., the child who is the subject of the Petitioner's adoption petition, who has filed his Notice of Appeal and who is an Appellant in this proceeding before the Supreme Court shall be referred to as "Charles B." or "the child".

(d) References to the transcript of the proceedings shall be cited as follows, for example: T.100. This reference would note a quotation from page 100 of the transcript of the trial.

The Petitioner filed his application for the pre-placement of Charles B. during the summer of 1987. On January 15, 1988, the Petitioner filed his petition for the adoption of Charles B. The Agency filed its Statement of Withholding Consent to Adoption on April 13, 1988. T.2 Prior to that, on January 19, 1988, an employee of the Agency, one Betsy Cobb, had received the Petitioner's letter in which the Agency's consent to his petition for adoption of Charles B. was requested. T.1 The hearing on Petitioner's petition for adoption of Charles B. was held in the Licking County Common Pleas Court, Probate-Juvenile Division, on April 14, 1988, before the Honorable Robert J. Moore. Thereafter, on May 9, 1988, the Trial Court issued its judgment entry in which it ruled in favor of the Petitioner. In this

STATEMENT OF FACTS

Charles B., was born on June 17, 1981. On April 2, 1985, and April 23, 1985, respectively, his biological mother and father surrendered permanent custody of him to the Agency. T.156. In August of 1985, Charles B. was registered for adoption by the Agency. T. 151. Since 1985, the child has been placed in five (5) different foster homes. T.140.

Charles B. has not had an easy life in his seven short years. He has suffered from a bout with leukemia which is presently in remission. T.167. In 1987, he was assessed to be suffering from a speech impediment, to have a low average range of intelligence, and to exhibit some stigmata (facial features) which may be suggestive of fetal alcohol syndrome, although a diagnosis of such malady has not been made. T. 27. During the past two years, Charles B. has been seen by at least two counselors who have worked with him to address his behavioral and social skill problems. T.79. One of his counselors was Mr. B., the Petitioner in this case. T.79. Charles B. and Mr. B. were introduced into a counseling relationship in July of 1986. T.79. The relationship between these two grew from that of counselor-patient into one in which the Petitioner, with the complete knowledge and consent of the Agency, was afforded every other weekend visitation with Charles B. T.79-80. The relationship involving visitations, has gone on for the past two and one-half years. T.80. During this time, the Petitioner has fulfilled one of the important goals which was identified for Charles B. by his other counselor, namely Mr. B. has served as the only consistent

adult positive role model in Charles B.'s life during the past two years. T.39-40.

Mr. B. first approached the Agency regarding the possibility of adopting Charles B. in February of 1987. T.80. During the subsequent months, the Petitioner was frustrated in his repeated and persistent efforts to obtain a placement for Charles B. in his home and to obtain a home study by the Agency due to the Agency's persistent refusal or failure to honor his requests. T.82-83. Mr. B.'s petition for adoption of Charles B. was filed on January 15, 1988. The Petitioner served upon the Agency on January 19, 1988, a letter by which he requested the consent of the Agency to the adoption. T.1. (Plaintiff's Exhibit "A") The Agency failed to respond until April 13, 1988, when, less than twenty-four hours prior to the hearing on the petition, it filed a statement withholding consent to the proposed adoption.

At the hearing on the Petitioner's petition for adoption of Charles B. which was held on April 14, 1988, the Petitioner presented the verbal testimony of seven (7) witnesses who testified in favor of the adoption. Dr. Joseph Shannon who holds a Ph.D. in psychology and is licensed to practice psychology in the State of Ohio testified that he was acquainted with the Petitioner and found his reputation to be "beyond reproach, both professionally and personally." T. 6-7; 21-22. He further testified that the Petitioner is a stable individual. Dr. Shannon indicated that a significant portion of his work was with "gay or lesbian couples" who have children and that the problems encountered by such couples are no different than those met by

heterosexual couples. T.19-20. He further indicated that it was his experience that children of a "gay or lesbian" couple did not experience a stigmatization due to the sexual orientation of their parents. T.19-20.

Dr. Victoria Blubaugh testified that she holds a doctorate in psychology and is likewise licensed to practice in Ohio. She described her extensive professional experience with Charles B. and opined that the child was in need of consistency, a stable adult who will be available for him, a parent who will not be intimidated by the health care system and one who can manage his behavior. T.27-28. She is acquainted with the Petitioner and, in fact, the Petitioner often acts as a baby-sitter for the doctor. Dr. Blubaugh, in her counseling role, testified that she had observed a bonding develop over the years between Charles B. and the Petitioner. T.33-34. She also testified that it was in the best interests of Charles B. to be placed with the Petitioner for adoption. T.35. When asked by the Agency's attorney whether she really meant this, Dr. Blubaugh replied:

> I think that to disrupt an attachment that he has reached out and made would be extremely harmful to the child. T. 38-39.

Mrs. B. and Miss B., the mother and sister, respectively, of the Petitioner also testified. The essence of these ladies' testimony was that Charles B. had become integrated into their family. This was, they opined, beneficial to Charles B. as well as to them and the Petitioner. Further, both ladies indicated they had developed grandmother-grandson and aunt-nephew, respectively, type relationships with Charles B. T.48-58.

Carol Menge, an adoptive parent herself and vice-president of Lutheran Social Services testified of the requirements of special needs children such as Charles B. and of the general need of the prospective adoptive party to be stable and flexible, factors which were noted to be characteristic of the Petitioner. T.62-65. Mrs. Menge testified that the best interests of each child, not one's sexual orientation, is the determinative factor to control in an adoption. T.68.

The Petitioner, Mr. B., testified and described his occupation (psychologist assistant), income (approximately $36,000.00 per annum), debts, assets, educational background, parenting experience (that of a former foster parent), the fact that he is homosexual and is engaged in a monogamous relationship with Mr. K. T.75-78. Mr. K. testified as to his professional background and employment and his commitment to Mr. B. T.121-123. Both Mr. B. and Mr. K. testified as to their commitment to Charles B. as a son, their expectations and hopes for the child and the eagerness to finalize the adoption. T.124-125. Mr. B. testified that he had spent much time with children. He had not only baby-sat on many occasions, but had also served as a foster parent for nine months for the Muskingum County Juvenile Court. T.84-85. Mr. B. had approached the Agency in February of 1986 about his adopting Charles B. T.80. The Agency, at that time, allowed Mr. B. to have regular visitation with Charles B. T.91. The visits began as daytime ones and subsequently lengthened into weekend and holiday visits, all with the consent of the Agency. T-91. Both Mr. B. and Mr. K., his life partner, are experienced

in caring for children. T.124. Both testified that they love Charles B. T.124. The child's Guardian Ad Litem presented to the Trial Court a detailed report of his investigation into the Petitioner, his home, and his ability to parent the child. T.163-175. The Guardian Ad Litem also expressed the wishes of Charles B., namely to be adopted by Mr. B., and made his recommendation in favor of the proposed adoption. T.169.

The Agency offered in rebuttal to the petition the testimony of one witness, Miss Handley, who is the Administrator of Social Services of the Agency T.131. She has no formal education in either social work or psychology, T.131. Miss Handley's testimony consisted almost entirely of opinions formed as a result of her review of the Agency's home study and that she was aware of the existence of no guidelines or policies in Ohio regarding the consideration of a homosexual as an adoptive parent. T.142. No documentary evidence (such as the homestudy, medical records, or memoranda of the Agency) were adduced into evidence, to advance Miss Handley's testimony. The gist of the Agency's position, as reflected in its assignments of error later filed with the Fifth District Court of Appeals was that Mr. B. did not meet the Agency's so-called "characteristic profile of preferred adoptive placement" and that there was no practical precedent, studies or other predictors as to adoption by a homosexual. Miss Handley testified, describing the characteristics of the "ideal profile" that the Agency was searching for in a family for Charles B. T.134. These characteristics included: a two parent family (Id.); a family

with a child-centered lifestyle (T.135); a family with parenting experience (Id.); parents with proven abilities to deal with behavioral disorders (Id.); and a family open to counseling (T.136).

Miss Handley testified further that she had met Charles B. only once for an hour. T.133, 147-148. She also testified that she had not observed Charles B. with Mr. B. T.133. The Agency presented no testimony or other evidence that it was not in the best interests of Charles B. to be adopted by Mr. B.

The Trial Court, at the conclusion of the hearing, entered its judgment granting the adoption. The Agency filed its timely notice of appeal with the Fifth District Court of Appeals which subsequently reversed the Trial Court by a vote of 2-1 with a strong and well-reasoned dissent by Judge Wise.

ARGUMENT

WHERE, AT THE CONCLUSION OF A HEARING UPON A PETITION FOR ADOPTION UNDER SECTION 3107.14 (A), OHIO REVISED CODE, THE TRIAL COURT FINDS THAT THE REQUIRED CONSENT IS UNNECESSARY UNDER SECTION 3107.07 (F), OHIO REVISED CODE, AND THAT THE ADOPTION IS IN THE BEST INTERESTS OF THE PERSON SOUGHT TO BE ADOPTED, IT IS A PROPER EXERCISE OF THE TRIAL COURT'S DISCRETION TO GRANT SUCH PETITION.

A. INTRODUCTORY STATEMENT - A BRIEF OVERVIEW OF OHIO STATUTES PERTAINING TO ADOPTION.

The right of adoption was unknown at common law and exists in Ohio today only by virtue of those statutes which have been enacted by the General Assembly. Re Adoption of Sargent, 28 Ohio Misc. 261, 57 Ohio Ops. 2d 135, 272 NE 2d 206 (Preble County Common Pleas Court, 1970). Since adoption proceedings are wholly statutory, then, it has been held under Ohio law that such statutes must be strictly construed and clearly followed in order to give a court jurisdiction to grant an adoption In Re Privette 45 Ohio App. 51, 185 NE 435 (Court of Appeals of Franklin County, 1932); Belden v. Armstrong, 93 Ohio App. 307, 113 NE 2d 693 (Count of Appeals, Summit County, 1951).

Two statutes exist which describe persons who may be adopted and those who may adopt. Section 3107.02, O.R.C., which addresses the former, reads as follows:

> (A) Any minor may be adopted.
>
> (B) An adult may be adopted under any of the following conditions:
>
> (1) If he is totally and permanently disabled;
>
> (2) If he is determined to be a mentally retarded person as defined in section 5123.01 of the Revised Code;

(3) If he had established a child-foster parent or child-stepparent relationship with the petitioners as a minor, and he consents to the adoption.

(C) When proceedings to adopt a minor are initiated by the filing of a petition, and the eighteenth birthday of the minor occurs prior to the decision of the court, the court shall require the person who is to be adopted to submit a written statement of consent or objection to the adoption. If an objection is submitted, the petition shall be dismissed, and if a consent is submitted, the court shall proceed with the case, and may issue an interlocutory order or final decree of adoption.

Section 3107.03, O.R.C. which pertains to the latter, has the following text:

The following persons may adopt:

(A) A husband and wife together, at least one of whom is an adult;

(B) An unmarried adult;

(C) The unmarried minor parent of the person to be adopted;

(D) A married adult without the other spouse joining as a petitioner if any of the following apply:

(1) The other spouse is a parent of the person to be adopted and consents to the adoption;

(2) The petitioner and the other spouse are separated under section 3103.06 or 3105.17 of the Revised Code;

(3) The failure of the other spouse to join in the petition or to consent to the adoption is found by the court to be by reason of prolonged unexplained absence, unavailability, incapacity, or circumstances that make it impossible or unreasonably difficult to obtain either the consent or refusal of the other spouse.

The inclusion of the word "may" in Sections 3107.02 and 3107.03, O.R.C., indicates that while such persons might be able to adopt or to be adopted, there is no such person as one who "shall" have the absolute right to adopt or to be adopted. Such

language certainly lends itself to emphasize that the underlying and fundamental nature of Ohio adoption proceedings is such that those actions are to be determined by the able exercise of discretion by the trial court on a case-by-case basis.

This grant of discretion has been codified in Section 3107.14, O.R.C. which reads as follows:

> (A) The petitioner and the person sought to be adopted shall appear at the hearing on the petition, unless the presence of either is excused by the court for good cause shown.
>
> (B) The court may continue the hearing from time to time to permit further observation, investigation, or consideration of any facts or circumstances affecting the granting of the petition, and may examine the petitioners separate and apart from each other.
>
> (C) If, at the conclusion of the hearing, the court finds that the required consents have been obtained or excused and that the adoption is in the best interest of the person sought to be adopted, it may issue, subject to division (D)(6) of section 3107.12 of the Revised Code and any other limitations specified in this chapter, a final decree of adoption or an interlocutory order of adoption, which by its own terms automatically becomes a final decree of adoption on a date specified in the order, which shall not be less than six months or more than one year from the date of issuance of the order, unless sooner vacated by the court for good cause shown.
>
> In an interlocutory order of adoption, the court shall provide for observation, investigation, and a further report on the adoptive home during the interlocutory period.
>
> (D) If the requirements for a decree under division (C) of this section have not been satisfied or the court vacates an interlocutory order of adoption, or if the court finds that a person sought to be adopted was placed in the home of the petitioner in violation of law, the court shall dismiss the petition and may determine the agency or person to have temporary or permanent custody of the person, which may include the agency or person that had custody prior to the filing of the petition or the petitioner, if the court finds it is in the best interest of the person, or if the person is a minor, the court may certify the case to the juvenile court

of the county where the minor is then residing for appropriate action and disposition.

B. OHIO STATUTES PERTAINING TO ADOPTION MANDATE THAT A PROSPECTIVE ADOPTION BE DETERMINED ON THE BASIS OF THE BEST INTERESTS OF THE PERSON TO BE ADOPTED.

As noted at page 8 of Judge Wise's dissenting opinion, the language of Section 3107.02, O.R.C., as amended in 1977, clearly indicates that any minor may be adopted. Likewise, it is significant to note that the 1977 amendment which resulted in the enactment of Section 3107.03, O.R.C., expanded the scope of its precursor, the former Section 3107.02, O.R.C., to permit any "unmarried adult" to adopt. Neither statute contains any prohibition, either expressly or by implication, against an adoption by a homosexual male or female. Very simply and straightforwardly, it is submitted that had the General Assembly intended to exclude male or female homosexuals from adopting a child, it would have done so by express language.

Ohio law, however, contains no such prohibition. Rather, the plain language of Section 3107.14 (C), O.R.C., preserves the right of a trial court to exercise its discretion on a case-by-case basis and to grant or deny a petition for adoption on the basis of the evidence unique to each case.

As noted in In Re Harshey, 45 Ohio App. 2d 97, 341 N.E. 2d 616 (Court of Appeals of Cuyahoga County, 1975), the primary purpose of adoption is to find suitable homes for children rather than to find children for families. Each adoption petition must be examined upon its own particular merits. When conducting a hearing on an adoption petition pursuant to Section 3107.14, Ohio

Revised Code, a trial court must decide two basic issues:

> First, is the petitioner suitably qualified to care for and to rear the child?
>
> Second, will the best interests and welfare of the child be promoted by the proposed adoption?

In accord: State, ex rel. Portage County Welfare Department v. Summers, 38 Ohio St. 2d 144, 67 Ohio Ops. 2d 151, 311 N.E. 2d 6 (1974).

The proper test to be applied is, then, whether the Court abused its discretion in the context of the factors recognized in Summers, supra. The Appellate Court holding, as set forth at Page 15 of the majority opinion, ignores the discretion accorded the Trial Court and Charles B. by ruling as follows:

> However, we reverse this judgment on a solitary question of law and conclude that the trial court had no discretion to exercise.

This holding ignores the evidence at trial as well as the language of the statutes cited in the foregoing paragraphs in part "A". It also constitutes a situation which is contrary to the holding and rationales advanced in Summers, supra.

C. UNDER PERTINENT OHIO CASE LAW, A TRIAL COURT'S ALLOWANCE OF A PETITION FOR ADOPTION MAY BE SET ASIDE ONLY UPON A SHOWING OF ABUSE OF DISCRETION.

This Court recently held in Miller v. Miller, 37 Ohio St. 3d 71, 523 N.E. 2d 846 (1988) that the time-honored standard as to what is in the best interest of the child

> should be the overriding concern in any child custody case. See Gishwiler v. Dodez (1855), 4 Ohio St. 615; In re Cunningham (1979), 59 Ohio St. 2d 100, 13 O.O. 3d 78, 391 N.E. 2d 1034; Pruitt v. Jones (1980), 62 Ohio St. 2d 237, 16 O.O. 3d 276, 405 N.E. 2d 276; In re Palmer (1984), 12 Ohio St. 3d 194, 12 OBR 259, 465 N.E. 2d

1312. Given the plain language of R.C. 3109.04 and the precedents cited above, it is clear that the Appellate Court's observation in this regard was clearly erroneous. 523 N.E. 2d 846, at 850.

This Court also observed, at page 849 of 523 N.E. 2d 846:

> The discretion which a trial court enjoys in custody matters should be accorded the utmost respect, given the nature of the proceeding and the impact the court's determination will have on the lives of the parties concerned. The knowledge a trial court gains through observing the witnesses and the parties in a custody proceeding cannot be conveyed to a reviewing court by a printed record. Trickey v. Trickey (1952), 158 Ohio st. 9, 13 O.O. 481, 483, 106 N.E. 2d 772, 774.

Such reasoning, it is submitted, is no less appropriate in and applicable to adoption proceedings under Section 3107.14 (C), O.R.C. The court in either an adoption proceeding or a custody motion hearing is charged with determining the best interests of the child. These interests are no lesser or greater in one proceeding than the other.

If, then, the proper standard by which to judge the Trial Court's decision is that of "abuse of discretion", it is first necessary to examine as to how Ohio court's have chosen to define this critical phrase.

In Miller, supra, this Court made reference to the definition employed in Blakemore v. Blakemore (1983), 5 Ohio St. 3d 217, 219, 5 OBR 481, 482, 450 N.E. 2d 1140, 1142, noting:

> The term "abuse of discretion" connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. Steiner v. Custer (1940), 137 Ohio St. 448 [31 N.E. 2d 855] [19 O.O. 148]; Conner v. Conner (1959), 170 Ohio St. 85 [162 N.E. 2d 852 [9 O.O. 2d 480]; Chester Township v. Geauga County Budget Commission (1976), 48 Ohio St. 2d 372 [358 N.E. 2d 610] [2 O.O. 2d 484]. 450 N.E. 2d 1140, at 1142.

With the evidence before it, it is manifestly clear that the Trial Court did not abuse the discretion accorded it under Section 3107.14 (C), Ohio Revised Code. The following are examples of evidence gleaned from the trial transcript which support the Trial Court's decision that the adoption of Charles B. by Mr. B. is in the child's best interests:

A. Mr. B. loves Charles B., has a "very close relationship" with him, and wants what is best for him. T.91.

B. Mr. B. recognizes Charles B.'s special needs and is committed to providing him with therapy, counseling and proper medical care. T.96, ff.

C. Charles B. wishes for Mr. B. to adopt him. T.169.

D. Charles B. has adopted Mr. B. T.45.

E. Charles B. and Mr. B. have bonded. T.34.

F. Charles B. and Mr. B. have a "very good" relationship. T.55.

G. Charles B. has been in at least four or five foster homes, which placements have been stressful for him. T.97-101.

H. Mr. B. and Mr. K. are committed to providing a secure, loving, stable home for Charles B. T.97.

I. Charles B. has a good relationship with the families of Mr. B. and Mr. K. T.94-95.

J. Mr. B.'s family and Mr. K.'s family contain several female members who would be suitable female role models for Charles B. T.173.

K. Mr. B. has had experience as a foster father. T.102.

L. Mr. B. is familiar with child care issues which apply to children in general and Charles B. in particular. T.102-103.

M. Mr. B. and Mr. K. have a life commitment to each other and have maintained this stable relationship for more than two years. T.105.

The Agency and the Appellate Court in its majority opinion place great emphasis upon the "gay lifestyle" of Mr. B. which is "patently incompatible with the manifest spirit, purpose and goals of adoption". (Majority opinion at page 5). However, the evidence before the Trial Court overwhelmingly established a close-knit and devoted relationship built upon commitment. There is no evidence whatsoever in the record of this case which would support the conclusion that anything which Mr. B. has done or will do would be injurious or otherwise harmful to Charles B.

An analogous situation which warrants scrutiny was brought before this Court in In re Burrell, 58 Ohio St. 3d 37, 388 N.E. 2d 738 (1979). In Burrell, supra, this Court considered a case in which the two minor daughters of a woman were found to be neglected under Section 2151.03 (B), O.R.C., essentially because their mother had her boyfriend living with her in the presence of the girls. In reversing this finding, this Court wrote that absent evidence showing a detrimental impact upon the children as a result of the children's' mother's relationship, there was insufficient evidence to warrant state intervention. "The impact cannot be inferred in general, but must be specifically demonstrated in a clear and convincing manner." 388 N.E. 2d 738, 739.

In a like manner, it appears that the Court of Appeals has made an erroneous, improper and unfounded inference that simply because Mr. B. is a homosexual, there must be a profound, detrimental effect to be vested upon Charles B. Such a conclusion, however, is neither supported by nor warranted by the

record.

The Guardian Ad Litem respectfully contends that it is manifestly clear, in light of the evidence contained in the trial transcript (and as set forth in further detail on page 16 of this Brief) that the Trial Court did not abuse its discretion in this case.

D. CHARLES B. MAY NOT BE DENIED THE STATUTORY MANDATE OF SECTION 3107.14 (C), OHIO REVISED CODE, IN AN ARBITRARY AND CAPRICIOUS MANNER.

The decision of the Appellate Court, as applied to this child, constitutes a violation of both the Due Process Clause of the Fourteenth Amendment of the Ohio Constitution and the United States Constitution as well as a denial of Equal Protection under the laws of the State of Ohio and the United States Constitution.

The Appellate Court's decision completely disregards the evidence of what is in the best interests of Charles B. By ignoring or disregarding this evidence and denying the Trial Court its statutorily granted discretion, the result is to afford Charles B. disparate treatment separate and apart from other children who seek to be adopted under Section 3107.14, O.R.C. Similar instances of singling out children and the ensuing detrimental effects were struck down by the United States Supreme Court in Trimble v. Gordon 430 U.S. 762 (1977) (the Court invalidated an intestacy statute under which illegitimate children were denied inheritances unless they were legitimated by subsequent legal action) and Plyler v. Doe, 457 U.S. 202 (1982) in which the Court struck down a statute which prohibited the children of illegal aliens from attending public schools.

In the case at bar the Court of Appeals decision virtually directs that the best interests of the child not be considered. By absolutely prohibiting the Petitioner from adopting, the Appellate Court has mandated that Charles B's best interests not even be examined. The child is thus deprived of a right accorded by statute and is afforded a separate and distinct treatment from other persons who are the subjects of adoption proceedings in Ohio.

The decision of the Appellate Court also clearly denied Charles B. a finding of his best interests - guaranteed by statute - based on the evidence at trial. Such a result is contrary to holdings of the United States Supreme Court which has held that a statutorily entitled right may not be denied on an arbitrary basis. See, e.g., Goldberg v. Kelly, 397 U.S. 254, 262.63 (1970); and Thompson v. Louisville, 362 U.S. 199 (1960).

Such a decision, as submitted by The American Civil Liberties Union in its Brief, leads to an inescapable conclusion that the child has been denied a fair hearing in this case and thus denied the protection guaranteed by the Constitutions of the United States and State of Ohio.

Finally, as previously noted by the Guardian Ad Litem in his Memorandum in Support of Jurisdiction, Judge Wise in his dissenting opinion in the Appellate case and The American Civil Liberties Union in its Brief, the basic thrust of House Bill 695, as amended, which was adopted by the General Assembly in 1980, was to

> "put back into the child welfare system and the courts with a goal to reuniting biological families where

possible, and where not possible getting on with the business of providing permanence (bonding) for children, i.e. getting them out of long term foster care and squelching the evil of foster care drift already manifested in this case." Dissenting opinion at pages 10 and 11.

This is precisely the goal which was embodied in the Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C.A. Section 620, et seq. The permanency which is the goal of these two statutory plans and which has been sought - justifiably so - in this case, has been utterly frustrated by the Appellate Court's decision.[1]

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[1]The proposition that the child's interest should be of paramount concern has been afforded an excellent, insightful treatment in Beyond the Best Interests of the Child, Joseph Goldstein, Anna Frued and Albert J. Solnit; Macmillan Publishing Company, 1973. At pages 31 though 52, the authors propose three component guidelines for decision makers determining the placement process for children. These guidelines are based upon the belief that a child whose placement becomes the subject of controversy should be provided with an opportunity to be placed with adults who are or are likely to become his or her psychological parents. These guidelines are:

A. Placement decisions should safeguard the child's need for continuity of relationships.

B. Placement decisions should reflect the child's, not the adult's, sense of time.

C. Child placement decisions must take into account the law's incapacity to supervise interpersonal relationships and the limits of knowledge to make long-range predictions.

The record at trial is replete with evidence that these factors were clearly before the Trial Court judge when rendering his decision.

CONCLUSION

The overwhelming weight of the evidence adduced at trial in this case supports the finding that the proposed adoption is in the best interests of the child, Charles B. Mr. B. and Charles B. have bonded together. There is no question that a close, loving and nurturing relationship has developed between them. One of the expert witnesses, Dr. Victoria Blubaugh, testified poignantly that "Mr. B. hasn't adopted Charlie yet, but it sounds like Charlie has adopted Mr. B." T.45.

In contrast to the plethora of evidence in manifest support of the proposed adoption, the Agency has failed to set forth any specific rationale as to why the adoption is not in the child's best interests.

Ohio law guarantees Charles B's. right to have his best interests accorded great weight and consideration. The decision of the majority of the Appellate Court, however, strikes down and virtually ignores not only the evidence but also the very clear and unambiguous mandate of Section 3107.14 (C), Ohio Revised Code under which Charles B's best interests must be considered. Contrary to the finding of the Appellate Court below, there is no statutory basis for concluding that a homosexual is ineligible to adopt in Ohio. This case, however, is not a case of "gay rights". It is a case, rather, in which the best interests of the child, based upon the evidence unique to this matter, have been arbitrarily ignored.

In conclusion, then, I agree with Judge Wise as he expressed his opinion at Page 12 of his dissent: Charles B. should get Mr.

B. for his father.

Respectfully submitted,

RADABAUGH, HIGGINS AND RICKRICH

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A P P E N D I X

IN THE COURT OF APPEALS, LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

FILED
1988 NOV 21 PM 3:13
COURT OF APPEALS
LICKING COUNTY, OHIO

IN THE MATTER OF

THE ADOPTION OF:

CHARLES B. Case No. CA-3382

NOTICE OF APPEAL

The petitioner-appellee, Mr. B., and the minor child, Charles B., hereby give notice of appeal to the Supreme Court of Ohio from the judgment of the Court of Appeals of Licking County, Ohio entered on October 28, 1988 reversing the judgment of the Court of Common Pleas of Licking County, Ohio for appellees.

This case involves substantial constitutional questions.

This case presents a question of public or great general interest.

Robin Lyn Green

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The undersigned, attorney for Licking County Department of Human Services, Appellant, hereby acknowledges receipt of a copy of the foregoing

notice of appeal on the 21st day of November, 1988.

William B. Sewards, Jr.

Robert Becker, Prosecuting
Attorney for Licking County, Ohio
By: William B. Sewards, Jr.
Registration Number 0037287
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The undersigned, attorneys for appellees, certify that a copy of the foregoing notice of appeal was served on William B. Sewards, Jr., attorney for appellant, by personally delivering him a copy on the 21st day of November, 1988.

Robin Lyn Green

Robin Lyn Green
Attorney for petitioner-appellee,
Mr. B.

C. William Rickrich

C. William Rickrich
Attorney and guardian ad litem
for Charles B., appellee

STATEMENT OF ASSIGNMENT OF ERRORS

I. THE TRIAL COURT ERRED IN FINDING THAT THE CONSENT OF THE AGENCY IS NOT NECESSARY AS PROVIDED IN O.R.C. 3107.07(F).

II. THE TRIAL COURT'S FINDING THAT THE ADOPTION OF THE CHILD BY THE APPELLEE IS IN THE BEST INTERESTS OF THE CHILD IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

A. APPELLEE DOES NOT MEET THE CHARACTERISTIC PROFILE OF THE PREFERRED ADOPTIVE PLACEMENT FOR CHARLES.

B. APPELLEE AND MR. K. ARE A HOMOSEXUAL COUPLE AND THERE ARE NO PRACTICAL PRECEDENT, STUDIES, OR OTHER PREDICTORS AS TO ADOPTIONS BY A HOMOSEXUAL COUPLE AND THE VIABILITY OR RISKS ATTENDANT TO SUCH AN ADOPTION.

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN THE MATTER OF THE ADOPTION OF:	:	JUDGES:
	:	Hon. Norman J. Putman, P.J.
	:	Hon. Earle E. Wise, J.
CHARLES B.	:	Hon. Ira G. Turpin, J.
	:	
	:	Case No. CA-3382
	:	
	:	
	:	O P I N I O N
	:	

CHARACTER OF PROCEEDING: Civil Appeal from Common Pleas Court, Probate-Juvenile Division, Case No. 87-A-78

JUDGMENT: Reversed

DATE OF JUDGMENT ENTRY:

APPEARANCES:

For Appellant

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TURPIN, J.

This is an appeal from a judgment in an adoption case that places a seven year-old boy into the home of an announced homosexual male and his announced life partner. We reverse. Our reason is that the goals of announced homosexuality are hostile to the goals of the adoption statute. The polestar that must guide this court is what is best for the child, not what is best for the petitioner. In this context, so-called "gay rights" are irrelevant. Our focus must be upon what is best for the child.

As a matter of law, it is not in the best interest of a seven (7) year old male child to be placed for adoption into the home of a pair of adult male homosexual lovers. It will be impossible for the child to pass as the natural child of the adoptive "family" or to adapt to the community by quietly blending in free from controversy and stigma.

In our opinion, the concepts of homosexuality and adoption are so inherently mutually exclusive and inconsistent, if not hostile, that the legislature never considered it necessary to enact an express ineligibility provision.

Accordingly, we cannot impute to the legislature an intention that announced homosexuals are eligible to adopt. It is not the business of the government to encourage homosexuality.

A more detailed explanation follows.

This is an appeal from a judgment of the Court of Common Pleas allowing a placement of a seven year-old boy, Charles B., into the home of a Mr. B. (appellee herein), a petitioner for

Charles' adoption, a preliminary step leading to the ultimate granting of the adoption petition. The Licking County Department of Human Services (hereinafter called the agency or appellant) objected and appeals, having secured a stay from this court.

This case has been handled in such a way as to make it reversal proof once the threshhold issue of legal eligibility to adopt has been established.

The trial court's determination of best interest of the child has been rendered immune from any effective or meaningful appellate review by the failure of the agency (appellant herein) to secure from the trial court separate fact findings from law conclusions.

Our governmental authority in this appeal is sharply reduced by the absence of separate written fact findings by the trial court. See Civ.R. 52(B) and Cherry v. Cherry (1981), 66 Ohio St.2d 348.

This directs our attention to whether the petitioner is eligible to adopt as a matter of law. We conclude he is not and reverse.

No one requested and the trial court did not furnish separate written findings of fact separate from conclusions of law (Civ.R. 52(B)). The agency offers no reason why it made no such request.

Because of the limited nature of the power of reviewing courts in Ohio, we must, from the general judgment of the trial court, presume that the facts that were actually found by the trial court are those most favorable in support of his judgment.

Credibility of the witnesses is not appealable. Failure to request from the trial court separate fact findings greatly reduces the power of the reviewing court of appeals. Cherry v. Cherry, supra. That means as a practical matter we must conclude that the trial court in this case did not believe the testimony of the agency that other adoptive homes were available after three years of nationwide searching. The trial court must be presumed to have concluded that this child needed a loving home and that this one was the only one he would ever get. We have no de novo jurisdiction in this case. That means we cannot "re-decide" the facts.

Driven as we are to those fact conclusions, if the trial court had any discretion to exercise in this case, no gross abuse of discretion, as that term is defined by the Ohio Supreme Court, can be said to appear. Blakemore v. Blakemore (1983), 5 Ohio St.3d 217. "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." Therefore, the judgment must be affirmed unless, as an unexceptional matter of absolute per se law, homosexuals are ineligible to adopt in Ohio. See, Matter of Adoption of Robert Paul P. (1984), 481 N.Y.S.2d 652, 63 N.Y.2d 233, 471 N.E.2d 424 (a court cannot assume from the absence of restrictions that the legislature intended a given result, but must review it).

In Ohio, as elsewhere, adoption is a statutory concept, a creature of the legislature. There is no such thing as a common law adoption. There is no right to adopt except as it is

conferred by the legislature. Who may adopt has been made the subject of expressly enacted law. R.C. 3107.03:

> The following persons may adopt:
>
> (A) A husband and wife together, at least one of whom is an adult;
>
> (B) An unmarried adult;
>
> (C) The unmarried minor parent of the person to be adopted;
>
> (D) A married adult without the other spouse joining as a petitioner if any of the following apply:
>
> (1) The other spouse is a parent of the person to be adopted and consents to the adoption;
>
> (2) The petitioner and the other spouse are separated under section 3103.06 or 3105.17 of the Revised Code;
>
> (3) The failure of the other spouse to join in the petition or to consent to the adoption is found by the court to be by reason of prolonged unexplained absence, unavailability, incapacity, or circumstances that make it impossible or unreasonably difficult to obtain either the consent or refusal of the other spouse.

To impute to the legislature from that language, an intention to make homosexuals eligible to adopt is, in our opinion, inappropriate and unwarranted.

The so-called "gay lifestyle" is patently incompatible with the manifest spirit, purpose and goals of adoption. Homosexuality negates procreation. Announced homosexuality defeats the goals of adoption. It will be impossible for the

child to pass as the natural child of the adoptive "family" or to adapt to the community by quietly blending in free from controversy and stigma. A principle inherent in adoption since Roman days is "adoptio naturam imitatur," adoption imitates nature. Id. The fundamental rationale for adoption is to provide a child with the closest approximation to a birth family that is available.

There is evidence that at the present time, this child desires this home. How will he adapt to his community and respond positively to its government when he matures, understands and fully comprehends what it has done to him by this adoption? On the other hand, what will be his reaction if and when he discovers the law did not permit him to be adopted by the only person who was willing to take him with all his problems?

In our view, this apparent dilemma actually reinforces the conclusion that homosexuals must be ineligible to adopt in any case. This flows inescapably from the manifest spirit and purpose of the adoption statute. See Holy Trinity Church v. U.S. (1891), 143 U.S. 457; McBoyle v. U.S. (1931), 283 U.S. 25; U.S. v. Alpers (1950), 338 U.S. 680; Towne v. Eisner (1918), 245 U.S. 418.

We proceed now to comply with App.R. 12(A) requiring our written response to each assigned error.

As previously stated, this is an appeal from a judgment of the Court of Common Pleas, Probate-Juvenile Division, of Licking County, Ohio, that granted a placement, a step leading to the granting the petition of Mr. B., to adopt Charles B. In deciding

to grant the petition, the trial court determined that the consent of the Licking County Department of Human Services (hereinafter the agency), the legal custodian of Charles B. since 1985, was not necessary under R.C. 3107.07(F).

Charles B. is a special needs child who was diagnosed as having acute lymphocytic leukemia in January, 1984. He was treated with radiation and chemotherapy, and is presently in remission. The radiation and chemotherapy may result in growth and developmental delays. It can cause learning disabilities, attention deficit disorders, and language and speech disorders. Charles has not been diagnosed as having fetal alcohol syndrome, but has certain characteristics of that disorder. The agency reports that he had a history of neglect by his biological parents. Since 1985, he has been in several foster homes. In August of 1985, he was registered for adoption with several different exchanges (one nationwide) without result prior to this petition being filed.

Mr. B. is not a relative of Charles B. He is a psychological assistant who began work with Charles over two years ago, because the agency assigned him to do so. They developed a personal as well as a professional relationship, and the agency permitted Mr. B. to have frequent, unsupervised visitation, including weekend and holiday visits to Mr. B.'s home. There is no question that Mr. B. and Charles have established a strong and affectionate bond.

Mr. B.'s household includes Mr. K., with whom Mr. B. shares a long-term, stable homosexual relationship. Neither of them has

ever undertaken a heterosexual marriage nor has any experience in a parenting role. Mr. K.'s interaction with Charles began later in time than with Mr. B.'s and does not include any professional role. It appears that Mr. K. and Charles have a positive relationship.

On January 15, 1988, Mr. B. filed his petition to adopt Charles. His counsel sent a letter to Betsy Cobb, the agency supervisor of adoptions, enclosing a consent to adoption form. On April 13, 1988, nearly three months later, Russell Payne, executive director of the agency, sent a four page notarized "statement of withholding consent to adoption," outlining his reasons for objecting to the adoption. He did not testify at trial. The trial court ruled that this document was not filed within the statutory time and granted Mr. B.'s petition. Betsy Cobb did not testify that she failed promptly to notify Mr. Payne, and he did not testify that he was not timely informed.

The agency appeals, assigning two errors:

I. THE TRIAL COURT ERRED IN FINDING THAT THE CONSENT OF THE AGENCY IS NOT NECESSARY AS PROVIDED IN O.R.C. 3107.07(F).

II. THE TRIAL COURT'S FINDING THAT THE ADOPTION OF THE CHILD BY THE APPELLEE IS IN THE BEST INTERESTS OF THE CHILD IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

A. APPELLEE DOES NOT MEET THE CHARACTERISTIC PROFILE OF THE PREFERRED ADOPTIVE PLACEMENT FOR CHARLES.

B. APPELLEE AND MR. K. ARE A HOMOSEXUAL COUPLE AND THERE ARE NO PRACTICAL PRECEDENT, STUDIES, OR OTHER PREDICTORS AS TO ADOPTIONS BY A HOMOSEXUAL COUPLE AND THE VIABILITY OR RISKS ATTENDANT TO SUCH AN ADOPTION.

I

Title 3107 governs adoptions. R.C. 3107.06 states in pertinent part:

> Unless consent is not required under section 3107.07 of the Revised Code, a petition to adopt a minor may be granted only if written consent to the adoption has been executed by all of the following:
>
> ...
>
> (C) Any person or agency having permanent custody of the minor or authorized by court order to consent.

R.C. 3107.07 states in pertinent part:

> Consent to adoption is not required of any of the following:
>
> (F) Any 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 his written reasons for withholding consent, is found by the court to be withholding his consent unreasonably.

The statute does not specify how the request for consent shall be made and served upon the custodian. The agency argues

that Betsy Cobb, to whom the letter and consent form was sent by ordinary mail, is not the person empowered to give or withhold consent. Neither did the letter set forth the consequences of a failure to timely respond. Therefore, the agency suggests, the statutory request for consent was never properly made.

Civ.R. 73(E) specifies the method whereby service may be accomplished in the absence of a statutory directive. The agency asserts that none of those methods were utilized.

Mr. B. responds that the agency never objected at trial to the alleged insufficiency of the request for consent to adoption. In fact, the agency acknowledged that Betsy Cobb received the letter on January 19, 1988, that she accepted it as its agent, and that the original of the letter is currently in the agency's possession. We must presume that the trial court found from Mr. Payne's silence on that subject that Payne had learned of the request within the thirty (30) day period.

A review of the transcript of the proceedings indicates that the agency did argue to the trial court that the letter was not sent to the proper party (T. 2), but Russell Payne has never denied under oath receiving it promptly from Betsy Cobb.

Nevertheless, we find that Betsy Cobb, as admitted by the agency, accepted the letter on its behalf. We must assume, in the absence of evidence to the contrary, that as its employee and charged with supervising adoption proceedings for it, she was familiar with the procedure for consent, and knew that the director and not she was the proper party to give or withhold that consent. Her receipt of the letter and request for consent

establishes notice in fact to the agency. To do otherwise would expose all prior adoptions to the hazard of collateral attack. We conclude with the trial court that the April 13 "statement of withholding consent to adoption" was not filed within the statutory time.

The first assignment of error is overruled.

II

After it correctly, in our opinion, determined that the agency's consent was not necessary under the code, the trial court proceeded to hear testimony regarding whether this adoption would be in Charles' best interest. The agency was represented in that hearing as provided by statute. Charles' court-appointed guardian ad litem was present, as well as Mr. B.'s representative. The guardian ad litem testified that it was Charles' wish to be a permanent part of Mr. B.'s family.

The agency presented two arguments to the trial court, and in turn to us, outlining why it concluded that this adoption was not in Charles' best interest. Because the agency's consent was unnecessary, the trial court did not have to determine whether the consent was unreasonably withheld. Nevertheless, the trial court was required to determine the child's best interest and that included consideration of the issues raised by the agency, by the guardian ad litem, Mr. B. and sua sponte by the trial court itself.

A

The agency has constructed a "characteristic's profile" of the preferred adoptive placement for Charles; the goal is to find a family that most closely approximates:

1. a two parent family with older siblings, at least one of whom is a male;

2. a family with a child-centered lifestyle;

3. a couple with definite parenting experience and preferably with adoption experience;

4. parents with proven ability in dealing with behavior disorder issues;

5. a family that is open to counseling both in the pre-adoptive and post-adoptive stages; and

6. a family that demonstrates an ability to deal with learning disabilities, speech problems, and medical problems.

No one contends that Mr. B.'s family duplicates the above, although it is argued that it reasonably approximates the above.

Both Mr. B. and the guardian ad litem argue that in the three years the agency has sought an adoptive placement for Charles, it has failed to find the ideal family. In the meantime, Charles has drifted through the limbo of foster care homes.

This court has long been aware that for a child awaiting the permanency of adoption, time is of the essence. The trial court presumably agreed with Mr. B. that a search for the perfect home could consume years that Charles cannot spare.

The agency reported at the time of the hearing, it had two prospective families that appear to meet the characteristics

profile. The agency has not actively pursued these possibilities because of the pendency of this petition. Presumably the trial court, as was his exclusive prerogative, disbelieved this testimony.

B

The agency also raises the lack of precedent or reliable predictors as to the successful adoption of children by homosexual couples.

Mr. B. called two witnesses who testified that the present relationship between Mr. B.'s family and Charles was a stable and beneficial one. The witnesses acknowledge that there was, for a variety of reasons, an absence of research studies in this area. The agency inquired of the Department of Health and Human Services, the Child Welfare League of America, the State of California Adoption Policy Bureau, the Northeast Adoption Services, and several others. With the exception of the State of California (whose policy is not to permit adoptions like this one), no reliable information was uncovered. Mr. B. and the guardian ad litem urge that this means that there is no evidence that the court should deny the petition; the agency insists the court has no reason to find this to be in Charles' best interest.

The agency suggests that the choice is between the average risk-taking (implicit in any adoption) and, on the other hand, pure experimentation. The withholding of consent document cites Charles' health problems and expresses his physician's grave concerns. The agency urges us that this child faces too many other obstacles to overcome in his life to warrant the deliberate

inclusion of another substantial and avoidable issue. Absent separate fact findings, we cannot determine this claim.

The record indicates that this might not have been an all or nothing choice for Charles, but absence of trial court's fact findings precludes our review. The agency called a single witness who said that there are other candidate families. Absent fact findings, we do not know if the trial court believed her. Charles' relationship with Mr. B. has continued from prior to and throughout the pendency of these proceedings, and there is no evidence that the agency will change its policy of encouraging Mr. B. to continue. Neither is there any evidence that Mr. B. will abandon his professional and personal interaction with Charles, or that Charles will reject Mr. B.'s family if he does not become a legal part of it. But even Mr. B.'s witnesses encourage long-term family counseling in the event that Mr. B. and Mr. K. become Charles' family, even though they blandly assert that if this were not the problem Charles encountered, it would always be something else. In the Matter of Appeal in Pima Co. Juvenile Action B10489 (1986), 727 P.2d 830, 151 Ariz. 335, dealt with a prospective adoptive father who acknowledged that his bisexuality and other facts could require counseling in the future. The court noted that once the adoption order was final, the court could no longer supervise the situation.

We are mindful of the broad latitude of discretion vested in Ohio trial judges in matters involving the welfare and best interests of children. Miller v. Miller (1988), 37 Ohio St.3d

74. As the Ohio Supreme Court said in Trickey v. Trickey (1952), 158 Ohio St. 9, at page 13:

> In proceedings involving the custody and welfare of children the power of the trial court to exercise discretion is peculiarly important. The knowledge obtained through contact with and observation of the parties and through independent investigation can not be conveyed to a reviewing court by printed record.

The Supreme Court further stated at page 14:

> This court has repeatedly held that in an appeal on questions of law the Court of Appeals can not substitute its judgment for the judgment of the trial court.

However, we reverse this judgment on a solitary question of law and conclude that the trial court had no discretion to exercise.

In summary, the polestar that guides this court must be what is best for the child, not what is best for the petitioner. We reverse this placement because, as a matter of law, it is not in the best interest of a seven (7) year old male child to be placed for adoption into the home of a pair of adult male homosexual lovers. The goals of announced homosexuality are hostile to the goals of the adoption statute. Accordingly, we cannot impute to the legislature an intention that announced homosexuals are eligible to adopt. It is not the business of the government to encourage homosexuality. As the appellate court in the Matter of

Appeal in Pima Co. Juvenile Action B10489, supra, pointed out, the homosexual relationship is not a legally sanctional union.

For the foregoing reasons, the judgment of the Court of Common Pleas, Probate-Juvenile Division, of Licking County, Ohio, is reversed.

Putman, P.J. concurs.

Wise, J. dissents.

JUDGES

IGT/la

WISE, J., DISSENTING

I dissent.

The majority cloaks its opinion with what is best for the child, stating that "our focus must be upon what is best for the child." I agree that "the polestar that must guide this court is what is best for the child." However, the majority has been so blinded by the dazzling lights of the antipodal stars of "homosexuality," "gay rights," and "gay lifestyle" that they strayed from the polestar of the welfare of this particular child.

At the outset, let it be abundantly clear that I too hear the siren song of homophobia, and I, too, just as strongly as my colleagues, announce that I do not sanction, encourage, or look with favor on homosexual adoption, and I agree that "[I]t is not the business of the government to encourage homosexuality."

The majority concedes that the "trial court's determination of best interest of the child has been rendered immune from any effective or meaningful appellate review by the failure of the agency (appellant herein) to secure from the trial court separate fact findings from law conclusions," (majority opinion at 3) and therefore that "directs our attention to whether the petitioner is eligible to adopt as a matter of law." The majority concludes that a homosexual may not adopt as a matter of law.

The majority overrules agency's first assignment of error, i.e., consent of agency is not necessary. I agree and cite State, ex rel. Portage County Welfare Dept. v. Summers (1974), 38 Ohio St.2d 144; 67 O.O.2d 151, syllabus 3: "R.C. §3107.06(D) [now R.C. §3107.07(F)] may not operate to divest the probate court of its necessary judicial power to fully hear and determine an adoption proceeding."

The guardian ad litem testified, not only as pointed out by the majority, that it was Charlie's wish to be a permanent part of Mr. B's family, but a reading of the record reveals that the guardian ad litem most strongly and poignantly urged the trial court to grant the petitioner's request for adoption. See transcript of record:

at page 169, ll. 24-25 and page 170, ll. 1-5:

> One point that I became concerned about very early on was that we had a child that had been in foster care for approximately three years and the more that I delved into case, I found out that the child had been removed from or moved around from foster care on several occasions. I believe that it is approximately five or six occasions.

at page 170, ll. 17-19:

> ...the stable factor that I could find when I looked at everything, was the petitioner in this matter, Mr. B.

at page 171, ll. 2-8:

My concern for the child on one hand at this point is that he has been moved around, he has been disrupted. I perceive him to a degree, grieving if you will, over the loss of the foster family a number of months ago. I'm concerned about disrupting him again and removing Mr. B from his life. I feel that there is a very good chance that could be very detrimental to the child.

at page 172, ll. 17-20:

I believe there has been testimony today and there has been ample evidence made available to me regarding the support system that Mr. B and Mr. K have of their immediate family.

at page 173, ll. 1-3:

It would seem to me and would appear to me that the B family would provide ample female role models through the grandmother, both sets of grandparents for that much...

at page 173, l. 16:

Granted, Mr. B does not have extensive prior parenting experience,...but he has extensive experience in parenting issues.

at page 174, ll. 6-10:

> ...I guess I would be more concerned about the stigmatization that Charlie may have as far as not being as bright as the other children that he is with rather than the sexual orientation of the family with whom he would be placed.

The guardian ad litem, at oral argument to this court, presented a written statement containing the following:

> As Guardian Ad Litem, I am charged with the obligation and duty of representing the interests of the child. Separate and apart from what may be in the best interest of the Appellant or the Appellee, I submit that in the child's best interest that the adoption be granted. Charles B. is a bright young child who has survived a fight with leukemia as well as being shifted among at least five (5) foster homes. He is need of permanency and stability....The petitioner has demonstrated the maturity, commitment and love for the child such as is consistent with a parent, and, I submit the child will substantially benefit from such an adoption.

The trial judge was presented with overwhelming evidence of the need of a special uniquely handicapped child - one who had been bounced (and apparently still will be) between as many as five foster homes in his short life - for an adoption placement that would provide very special care and concern centered around his severe problems.

The record contains no evidence from which the trial court could find that the best interests of this particular child would not be served by granting this adoption. Thus, on the record, by which we are bound, the trial court had little choice. In fact,

if the court had ruled the other way, denying the adoption, we would be constrained that such a decision was against the manifest weight of the evidence. The majority apparently agrees.

The separate issue, and central to the majority's decision, is whether an unmarried, adult homosexual is eligible to adopt as a matter of law. My learned colleagues have concluded that "as an unexceptional matter of absolute per se law, homosexuals are ineligible to adopt in Ohio." (Majority opinion at 4.)

The majority quotes R.C. §3107.03 and states at pages 5 and 6:

> To impute to the legislature from that language, an intention to make homosexuals eligible to adopt is, in our opinion, inappropriate and unwanted.
>
> The so-called "gay lifestyle" is patently incompatible with the manifest spirit, purpose and goals of adoption. Homosexuality negates procreation. Announced homosexuality defeats the goals of adoption. It will be impossible for the child to pass as the natural child of the adoptive "family" or to adapt to the community by quietly blending in free from controversy and stigma. A principle inherent to adoption since Roman days is "adoptio naturam imitatur," adoption imitates nature. Id. The fundamental rationale for adoption is to provide a child with the closest approximation to a birth family that is available.

A reading of the Ohio case law and a review of the legislative changes made in 1977, convince me that the majority's insistence that an adoptive child must be able "to pass as the natural child of the adoptive 'family' or to adapt to the

community by quietly blending in free from controversy and stigma," has been relegated to the same status as the laws that prohibited interracial marriage.[1]

Prior to 1977, R.C. 3107.05(E) provided that "the next friend" appointed by the court shall make:

> ...
>
> inquiries as to:
>
> ...
>
> (E) The suitability of the adoption of the child by the petitioner, taking into account their respective racial, religious, and cultural backgrounds...

The Cuyahoga County Court of Appeals in In re Adoption of Baker (1962), 117 Ohio App. 26, stated at 28:

> Under ordinary circumstances, a child should be placed into a family having the same racial, religious and cultural backgrounds, but a different placement is not precluded. In considering the best interests of the

[1]The U.S. Supreme Court in Loving v. Virginia (1967), 388 U.S. 1, struck down the miscegenation statute of Virginia. In that case, the trial court had stated in his opinion that:

> Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement, there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.

The Virginia Supreme Court which upheld the trial court had held that the state had a legitimate purpose "to preserve the racial integrity of its citizens" and to prevent "the corruption of blood," "a mongrel breed of citizens" and "the obliteration of racial pride."

> subject child, it should not be overlooked that we are dealing here with an unwanted waif whose father is unknown and whose mother is unable to provide a home with the love and affection which might be accorded an illegitimate child. Prior to placing the child with the petitioners, five other couples seeking children declined to receive the child into their homes. As we view it, the only alternative, if the judgment is affirmed, is to have the child remain an illegitimate orphan to be reared in an institution. Orphanages are all well and good but they do not provide a real home with the attendant care, love and affection incident to the relation of parent and child.

The Ohio Supreme Court in 1974, in Portage County Welfare Dept. v. Summers, supra, upheld the trial court's approval of the adoption of a black child by Caucasian petitioners over strenuous opposition by the Welfare Department. The Welfare Department based its opposition to the adoption partly on R.C. 3107.05(E) - the respective racial backgrounds of the parties would cause the child to be unable to pass as the natural child of the adoptive family or to blend in free from controversy and stigma. In overruling the Welfare Department's objection to the adoption, the Supreme court stated at 157:

> Permanent placement in a judicially approved home environment through the process of adoption is clearly preferable to confining the child in an institution or relegating the child to a life of transience, from one foster home to another, until such time as the certified organization determines that it is proper to give its consent to an adoption.

In 1977, Chapter 3107 was drastically amended. Prior to January 1, 1977, §3107.02 was designated Persons Who May Adopt. The 1977 amendments changed §3107.02 to designated Persons Who May Be Adopted, a new subject matter not covered in the prior statutes. The old classification of Persons Who May Adopt was expanded - i.e., inter alia, "(B) an unmarried adult" - as set forth in the new §3107.03. The 1977 amendment §3107.02 addressed the issue of the adoption of one adult by another adult and provided that:

> (A) Any minor may be adopted.
>
> (B) An adult may be adopted under any of the following conditions:
>
> (1) If he is totally and permanently disabled;
>
> (2) If he is determined to be a mentally retarded person as defined in section 5123.01 of the Revised Code;
>
> (3) If he had established a child-foster parent or child-stepparent relationship with the petitioners as a minor, he consents to the adoption, and the petition for adoption is filed within three years of the date he becomes an adult.

It is my conclusion that by the insertion of .02 - persons who may be adopted - into the 1977 amendments, the legislature was expressing its disapproval of adult homosexuals adopting one another. The legislature was aware of the problem of homosexuality but did not specifically proscribe "an unmarried homosexual adult" from .03 - those who may adopt, the

constitutionality of such a proscription aside. See Portage County Welfare Dept. v. Summers, supra.

Granted that a so-called "gay-lifestyle" is patently incompatible with manifest spirit, purpose, and goals of adoption, all adult male homosexuals do not pursue a "gay-lifestyle" anymore than all adult male heterosexuals pursue a "swingers-lifestyle." The focus in any adoption by "an unmarried adult," whether the unmarried adult is homosexual or heterosexual, must be whether, among other considerations, he or she lives a gay or swinger lifestyle, and further whether that lifestyle is practiced in such a manner so as to be a detriment to or against the best interest of the child.

Granted that homosexuality negates procreation, so also do many physical defects in heterosexuals, but that furnishes one of the reasons for adoption, i.e., the inability to have children by a person or persons who love children and desire to be a parent or parents may fulfill that love and desire by adoption of a child. Therefore, announced homosexuality per se does not defeat the goals of adoption anymore than physical defects in heterosexuals.

Nor do I agree with the majority that the present day "fundamental rationale for adoption is to provide a child with the closest approximation to a birth family that is available." (Majority opinion at 6.) In Ohio, a black child may be adopted by a Caucasian family, Portage v. Summers, supra; also, a Caucasian and Oriental couple may adopt a Puerto Rican child, In re Adoption of Baker, supra, even though "it will be impossible

for the child to pass as the natural child of the 'adoptive family' or to adapt to the community by quietly blending in free from controversy and stigma."

If society through its legislative process decrees that one's sexual orientation is to be considered as a per se bar to adoption, and should such bar pass constitutional muster, then one's homosexuality could preclude one from adopting. In Ohio, there is a law permitting adoption by an unmarried adult; there is no law expressing preference male vs. female in single parent adoptions. Clearly, there is no law prohibiting a homosexual or any other person from adoption based upon personal sexual preference. Appellant cites, and we find, no Ohio law prohibiting adoption simply because a parent has a variant sexual persuasion.

But there is a law now engraved into national policy through the Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C.A. §620, et. seq., requiring states to guarantee to every child the kind of permanency that can only come where the child, at the earliest age possible, knows a parent(s) who will provide the societal necessary ingredients for children of love, emotional and physical care and support, training, discipline. America has declared war on the counterproductive long-term foster care system fostered by federal and state welfare and perpetuated by a powerful administrative bureaucracy. The whole thrust of H.B. 695, as amended, enacted by the Ohio legislature (O.R.C. Chapter 3111), was to put teeth into the child welfare system and the courts with a goal to reuniting biological famlies

where possible, and where not possible getting on with the business of providing permanence (bonding) for children, i.e., getting them out of long term foster care and squelching the evil of foster care drift already manifested in this case.

Charles, with all his problems, especially deserves a chance to be someone's child forever. The petitioner, Mr. B., offers that chance.

I would end this dissent, hopefully being "constant as the polestar,"[2] by repeating from the guardian ad litem's statement to this court at oral argument:

> The Petitioner has demonstrated the maturity, commitment and love for the child such as is consistent with a parent, and, I submit the child will substantially benefit from such an adoption.
>
> (Emphasis mine.)

And, repeating the testimony of the expert, Dr. Victoria Blubaugh, at T. 43:

> I think that he [the petitioner] is going to be a good parent. He certainly has behavior management down. At this point, I guess, just being real honest about it, my concern isn't so much that Mr. B. gets Charlie, but that Charlie gets Mr. B.
>
> (Emphasis mine.)

[2]Shakespear: "I am constant as the northern star." Julius Ceasar, Act III, Scene 1, line 60.

I agree with the trial court that Charlie should get Mr. B.

Earle E Wise

JUDGE EARLE E. WISE

EEW/la

1025

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO

FIFTH APPELLATE DISTRICT

IN THE MATTER OF THE ADOPTION OF:	:	
CHARLES B.	:	
	:	JUDGMENT ENTRY
	:	
	:	CASE NO. CA-3382

For the reasons stated in the Memorandum-Opinion on file, the judgment of the Court of Common Pleas, Probate-Juvenile Division, of Licking County, Ohio, is reversed.

JUDGES

IN THE COMMON PLEAS COURT OF LICKING COUNTY, PROBATE-JUVENILE DIVISION
JUDGE ROBERT J. MOORE

In the Matter of

the Adoption of

Charles Lee Balser

FILED

MAY 9 1988

LICKING COUNTY, OHIO
PROBATE COURT

Case No. 87-A-78
Doc. 4 Pg. 209

ENTRY

Based upon the evidence presented, the Court finds that the Licking County Department of Human Services (Agency) was notified by the attorney for the petitioner by letter dated January 18, 1988 of the intention of the petitioner to adopt. The letter was sent to Betsy Cobb, supervisor of adoptions (Plaintiff's Exhibit A). However, the Agency was advised by the petitioner in conversations with Agency staff as early as February, 1987 of his interest in adopting Charles.

The petition for adoption was filed January 15, 1988, and was set for hearing on February 22, 1988. No objection was filed by that date. The hearing was continued at the request of the Agency and rescheduled for April 14, 1988. A statement withholding consent was not filed until April 13, 1988. At no time during the pendency of this case has the Agency complied with the statutory requirement of responding in writing within 30 days to the request by the petitioner for consent.

Therefore, the Court finds that the consent of the Agency is not necessary as provided in O.R.C. 3107.07(F).

The Court further finds, and the Guardian ad Litem recommended, that the adoption of the child by the petitioner is in the best interest of the child.

Therefore, the child shall be placed in the physical custody of the petitioner for the prescribed six month period beginning on May 31, 1988,

Courthouse, Newark, Ohio 43055 Telephone No. (614) 349-6125

During this period, the Agency shall retain temporary custody. On December 2, 1988, this case shall come before the Court for the final hearing on the petition for adoption.

In the interim period, the Agency shall maintain medical coverage for the child and provide such medical treatment as is required. At the final hearing, the Agency shall be prepared to present to the Court proof that all documentation has been prepared and submitted to the appropriate federal and state agencies to qualify the child for the federal adoption subsidy and medical card under Title IV(E).

Judge Robert J. Moore

sk
cc: Robin Lyn Green, Attorney at Law
William Sewards, Jr., Assistant County Prosecutor
Russ Payne, Director, Licking Co. Dept. of Human Services
Melvin Lee Balser

20 Abs 597 (App, Cuyahoga 1935), Eastman v Brewer. By this section, exclusive jurisdiction is conferred upon probate court in proceedings for adoption. (Annotation from former RC 3107.01.)

2 Abs 471, 22 OLR 608 (App, Summit 1924), State ex rel Scholder v Scholder. Probate court cannot decree an adoption, unless mother of child files written consent with court, and mother may withdraw such consent any time before decree. (Annotation from former RC 3107.01.)

1920 OAG p 1038. The statutes of Ohio do not require, as a condition of the adoption of a minor child, either that child be a citizen of the United States, or that its natural parents, or either of them, be citizens. (Annotation from former RC 3107.01.)

3107.02 Persons who may be adopted

(A) Any minor may be adopted.

(B) An adult may be adopted under any of the following conditions:

(1) If he is totally and permanently disabled;

(2) If he is determined to be a mentally retarded person as defined in section 5123.01 of the Revised Code;

(3) If he had established a child-foster parent or child-stepparent relationship with the petitioners as a minor, and he consents to the adoption.

(C) When proceedings to adopt a minor are initiated by the filing of a petition, and the eighteenth birthday of the minor occurs prior to the decision of the court, the court shall require the person who is to be adopted to submit a written statement of consent or objection to the adoption. If an objection is submitted, the petition shall be dismissed, and if a consent is submitted, the court shall proceed with the case, and may issue an interlocutory order or final decree of adoption.

HISTORY: 1984 H 71, eff. 9-20-84
1981 H 1; 1976 H 156

Note: Former 3107.02 repealed by 1976 H 156, eff. 1-1-77; 1953 H 1; GC 8004-2; see now 3107.03 for provisions analogous to former 3107.02.

PRACTICE AND STUDY AIDS

Merrick-Rippner, Ohio Probate Law (3d Ed.), Text 23.16, 30.07, 297.09

CROSS REFERENCES

Eligibility of child for subsidized adoption, OAC 5101:2-44-02
Special needs children, age requirements for adoption assistance, OAC 5101:2-47-45
Ohio adoption resource exchange, OAC Ch 5101:2-48

Designation of heir-at-law, 2105.15
Placement for adoption of children from other states, 2151.39
Department of human services, division of social administration; care and placement of children; interstate compact on placement of children, 5103.09 to 5103.17, 5103.20 to 5103.28
Department of human services, lists of prospective adoptive children and parents, 5103.152
Powers and duties of county children services board, 5153.16

LEGAL ENCYCLOPEDIAS AND ALR

OJur 3d: 45, Family Law § 1; 46, Family Law § 215, 217 to 219
Am Jur 2d: 2, Adoption § 10, 11, 54
Mental illness and the like of parents as ground for adoption of their children. 45 ALR2d 1379
Adoption of child in absence of statutorily required consent of public or private agency or institution. 83 ALR3d 373

NOTES ON DECISIONS AND OPINIONS

29 App(3d) 222, 29 OBR 267, 504 NE(2d) 1173 (Butler 1985), In re Adoption of Huitzil. Evidence that petitioners and an eighteen-year-old orphan had developed strong emotional ties, mutual affection for each other, and a showing that petitioners' children and the adult orphan had developed a sibling relationship is insufficient to support a petition for the adoption of an adult based upon a child-foster parent or child-stepparent relationship established during the minority of such adult where there is no evidence that petitioners contributed financial support, provided schooling, medical care, or a residence to the adult orphan.

3107.03 Persons who may adopt

The following persons may adopt:

(A) A husband and wife together, at least one of whom is an adult;

(B) An unmarried adult;

(C) The unmarried minor parent of the person to be adopted;

(D) A married adult without the other spouse joining as a petitioner if any of the following apply:

(1) The other spouse is a parent of the person to be adopted and consents to the adoption;

(2) The petitioner and the other spouse are separated under section 3103.06 or 3105.17 of the Revised Code;

(3) The failure of the other spouse to join in the petition or to consent to the adoption is found by the court to be by reason of prolonged unexplained absence, unavailability, incapacity, or circumstances that make it impossible or unreasonably difficult to obtain either the consent or refusal of the other spouse.

HISTORY: 1976 H 156, eff. 1-1-77

Note: 3107.03 is analogous to former 3107.02, repealed by 1976 H 156, eff. 1-1-77.

Note: Former 3107.03 repealed by 1976 H 156, eff. 1-1-77; 1969 S 49; 1953 H 1; GC 8004-3; see now 3107.05 for provisions analogous to former 3107.03.

PRACTICE AND STUDY AIDS

Merrick-Rippner, Ohio Probate Law (3d Ed.), Text 31.07, 297.04, 297.07

CROSS REFERENCES

Eligibility of adoptive parents for subsidized adoption, OAC 5101:2-44-03
Special needs children, adoption assistance, OAC 5101:2-47-24 et seq.
Ohio adoption resource exchange, OAC Ch 5101:2-48

Designation of heir-at-law, 2105.15
Parent and child relationship, definition and establishment, 3111.01, 3111.02
Department of human services, lists of prospective adoptive children and parents, 5103.152
Department of human services, placing of children, assumption of responsibility for expenses, 5103.16
Powers and duties of county children services board, 5153.16

LEGAL ENCYCLOPEDIAS AND ALR

OJur 3d: 45, Family Law § 1; 46, Family Law § 215, 217 to 219
Am Jur 2d: 2, Adoption § 10, 11, 54
Race as factor in adoption proceedings. 54 ALR2d 909
Requirements as to residence or domicil of adoptee or adoptive parent for purposes of adoption. 33 ALR3d 176
Religion as factor in adoption proceedings. 48 ALR3d 383

3107.07 Consents not required

Consent to adoption is not required of any of the following:

(A) A parent of a minor, when it is alleged in the adoption petition and the court finds after proper service of notice and hearing, that the parent has failed without justifiable cause to communicate with the minor or to provide for the maintenance and support of the minor as required by law or judicial decree for a period of at least one year immediately preceding either the filing of the adoption petition or the placement of the minor in the home of the petitioner;

(B) The putative father of a minor if the putative father fails to file an objection with the court, the department of human services, or the agency having custody of the minor as provided in division (F)(4) of section 3107.06 of the Revised Code, or files an objection with the court, department, or agency and the court finds, after proper service of notice and hearing, that he is not the father of the minor, or that he has willfully abandoned or failed to care for and support the minor, or abandoned the mother of the minor during her pregnancy and up to the time of her surrender of the minor, or its placement in the home of the petitioner, whichever occurs first;

(C) A parent who has relinquished his right to consent under section 5103.15 of the Revised Code;

(D) A parent whose parental rights have been terminated by order of a juvenile court under Chapter 2151. of the Revised Code;

(E) A legal guardian or guardian ad litem of a parent judicially declared incompetent in a separate court proceeding who has failed to respond in writing to a request for consent, for a period of thirty days, or who, after examination of his written reasons for withholding consent, is found by the court to be withholding his consent unreasonably;

(F) Any 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 his written reasons for withholding consent, is found by the court to be withholding his consent unreasonably;

(G) The spouse of the person to be adopted, if the failure of the spouse to consent to the adoption is found by the court to be by reason of prolonged unexplained absence, unavailability, incapacity, or circumstances that make it impossible or unreasonably difficult to obtain the consent or refusal of the spouse;

(H) Any parent, legal guardian, or other lawful custodian in a foreign country, if the person to be adopted has been released for adoption pursuant to the laws of the country in which the person resides and the release of such person is in a form that satisfies the requirements of the immigration and naturalization service of the United States department of justice for purposes of immigration to the United States pursuant to section 101 (b)(1)(F) of the "Immigration and Nationality Act," 75 Stat. 650 (1961), 8 U.S.C. 1101 (b)(1)(F), as amended or reenacted.

HISTORY: 1986 H 428, eff. 12-23-86
1980 S 205; 1977 H 1; 1976 H 156

tifying data as described in division (D)(2) of that section. When the biological parent has completed the forms to the extent he wishes to provide information, he shall return them to the department. The department shall review the completed forms, and shall determine whether the information included by the biological parent is of a type permissible under divisions (D)(2) and (3) of section 3107.12 of the Revised Code and, to the best of its ability, whether the information is accurate. If it determines that the forms contain accurate, permissible information, the department, after excluding from the forms any impermissible information, shall file them with the court that entered the interlocutory order or final decree of adoption in the adoption case. If the department needs assistance in determining that court, the department of health, upon request, shall assist it.

Upon receiving social and medical history forms pursuant to this section, the clerk of a court shall cause them to be filed in the records pertaining to the adoption case.

Social and medical history forms completed by a biological parent pursuant to this section may be corrected or expanded by the biological parent in accordance with division (D)(4) of section 3107.12 of the Revised Code.

Access to the histories shall be granted in accordance with division (D) of section 3107.17 of the Revised Code.

HISTORY: 1984 H 84, eff. 3-19-85

PRACTICE AND STUDY AIDS

Merrick-Rippner, Ohio Probate Law (3d Ed.), Text 298.02, 298.49

CROSS REFERENCES

Availability of adoption records, 149.43
Registration of adoption, new birth certificate issued, 3705.18
Courts of common pleas, confidentiality of adoption files, C P Sup R 20

LEGAL ENCYCLOPEDIAS AND ALR

OJur 3d: 45, Family Law § 1; 46, Family Law § 215, 228, 234, 338
Am Jur 2d: 2, Adoption § 59

3107.13 Residence in adoptive home

A final decree of adoption shall not be issued and an interlocutory order of adoption does not become final, until the person to be adopted has lived in the adoptive home for at least six months after placement by an agency, or for at least six months after the department of human services or the court has been informed of the placement of the person with the petitioner, and the department or court has had an opportunity to observe or investigate the adoptive home, or in the case of adoption by a stepparent, until at least six months after the filing of the petition, or until the child has lived in the home for at least six months.

HISTORY: 1986 H 428, eff. 12-23-86
1980 S 205; 1976 H 156

Note: Former 3107.13 repealed by 1976 H 156, eff. 1-1-77; 1971 S 267; 132 v S 326; 129 v 1566; 1953 H 1; GC 8004-13; see now 3107.15 for provisions analogous to former 3107.13.

PRACTICE AND STUDY AIDS

Merrick-Rippner, Ohio Probate Law (3d Ed.), Text 298.35, 298.44

CROSS REFERENCES

Change in status or residence for adoption assistance, OAC 5101:2-47-31, 5101:2-47-48

Residency requirements for public school attendance, 3313.64

LEGAL ENCYCLOPEDIAS AND ALR

OJur 3d: 32, Decedents' Estates § 610; 45, Family Law § 1; 46, Family Law § 215, 230
OJur 2d: 53, Trusts § 67

NOTES ON DECISIONS AND OPINIONS

No. 851 (4th Dist Ct App, Ross, 1-4-82), In re Adoption of Davis. An order vacating a final decree of adoption pursuant to Civ R 60(B) is a final appealable order.

181 FSupp 185, 89 Abs 562 (ND Ohio 1960), Spiegel v Flemming. Where a child is placed in a prospective adoptive home but the father dies before the child has resided therein for six months and hence the adoption has not been completed, the child is not entitled to social security benefits. (Annotation from former RC 3107.09.)

3107.14 Court's discretion; final decree or interlocutory order

(A) The petitioner and the person sought to be adopted shall appear at the hearing on the petition, unless the presence of either is excused by the court for good cause shown.

(B) The court may continue the hearing from time to time to permit further observation, investigation, or consideration of any facts or circumstances affecting the granting of the petition, and may examine the petitioners separate and apart from each other.

(C) If, at the conclusion of the hearing, the court finds that the required consents have been obtained or excused and that the adoption is in the best interest of the person sought to be adopted, it may issue, subject to division (D)(6) of section 3107.12 of the Revised Code and any other limitations specified in this chapter, a final decree of adoption or an interlocutory order of adoption, which by its own terms automatically becomes a final decree of adoption on a date specified in the order, which shall not be less than six months or more than one year from the date of issuance of the order, unless sooner vacated by the court for good cause shown.

In an interlocutory order of adoption, the court shall provide for observation, investigation, and a further report on the adoptive home during the interlocutory period.

(D) If the requirements for a decree under division (C) of this section have not been satisfied or the court vacates an interlocutory order of adoption, or if the court finds that a person sought to be adopted was placed in the home of the petitioner in violation of law, the court shall dismiss the petition and may determine the agency or person to have temporary or permanent custody of the person, which may include the agency or person that had custody prior to the filing of the petition or the petitioner, if the court finds it is in the best interest of the person, or if the person is a minor, the court may certify the case to the juvenile court of the county where the minor is then residing for appropriate action and disposition.

HISTORY: 1984 H 84, eff. 3-19-85
1976 H 156

Note: 3107.14 contains provisions analogous to former 3107.10 to 3107.12, repealed by 1976 H 156, eff. 1-1-77.

has become unable to meet such individual's needs; and such determination shall be made by the State agency based upon such criteria as it may specify in the State plan, and upon such documentary evidence as it may therein require. Any such individual, and any other individual who is an alien (as a condition of his or her eligibility for aid under a State plan approved under this part during the period of three years after his or her entry into the United States), shall be required to provide" for "Any individual who is an alien shall, during the period of three years after entry into the United States, in order to be eligible for aid under a State plan approved under this part, be required to provide".

Other provisions:

Effective date and application. Act Aug. 13, 1981, P. L. 97-35, Title XXIII, Subtitle A, ch 1, § 2320(c), 95 Stat. 859, provided: "The amendments made by subsection (a) [amending 42 USCS § 602(a)(31)–(33)] shall be effective on the date of the enactment of this Act [enacted Aug. 13, 1981]. The amendments made by subsection (b) [amending 42 USCS § 602(a)(7) and enacting this section] shall be effective with respect to individuals applying for aid to families with dependent children under any approved State plan for the first time after September 30, 1981.".

CROSS REFERENCES

This section is referred to in 42 USCS § 602.

PART B. CHILD WELFARE SERVICES

CROSS REFERENCES

This Part is referred to in 8 USCS § 1522; 25 USCS § 1931; 40 Appx USCS § 202; 42 USCS §§ 300z-5, 602, 671, 672, 674, 675, 676, 5103.

§ 620. Authorization of appropriations

(a) For the purpose of enabling the United States, through the Secretary, to cooperate with State public welfare agencies in establishing, extending, and strengthening child welfare services, there is authorized to be appropriated for each fiscal year the sum of $266,000,000.

(b) Funds appropriated for any fiscal year pursuant to the authorization contained in subsection (a) shall be included in the appropriation Act (or supplemental appropriation Act) for the fiscal year preceding the fiscal year for which such funds are available for obligation. In order to effect a transition to this method of timing appropriation action, the preceding sentence shall apply notwithstanding the fact that its initial application will result in the enactment in the same year (whether in the same appropriation Act or otherwise) of two separate appropriations, one for the then current fiscal year and one for the succeeding fiscal year.

(Aug. 14, 1935, ch 531, Title IV, Part B, § 420, as added Jan. 2, 1968, P. L. 90-248, Title II, Part 3, § 240(c), 81 Stat. 911; Oct. 30, 1972, P. L. 92-

AMENDMENT XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. 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.

I § 16 Redress in courts

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay. Suits may be brought against the state, in such courts and in such manner, as may be provided by law.

I § 2 Where political power vested; special privileges

All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the General Assembly.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing Brief on the Merits of the Guardian Ad Litem of the child, Charles B., was placed in the regular U.S. Mail, postage prepaid, this 14th day of April, 1989, to:

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