IN THE SUPREME COURT OF OHIO

ORIGINAL

In re: Adoption of J.A.S.	:	**Supreme Court No. 09-1695**
In re: Adoption of J.N.S.	:	**Supreme Court No. 09-1980**
	:	**(consolidated)**
	:	
	:	**On Appeal from the**
	:	**Lorain County Court of Appeals,**
	:	**Ninth Appellate District**
	:	
	:	**Court of Appeals**
	:	**Case No. 08 CA 009518**
	:	**Case No. 08 CA 009519**

Reply Brief of Amicus Curiae American Academy of Adoption Attorneys in Support of Appellants

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Argument in Reply

In reply to the arguments presented by Appellee Jennifer Wahl, the American Academy of Adoption Attorneys respectfully submits the following:

Appellee essentially argues that the parental rights of the biological parent are fundamental and must prevail over all other rights. This argument is flawed and misses the point. The point of the holdings from *Stanley v. Illinois* (1972), 405 U.S. 645, 31 L. Ed. 2d 551, 92 S. Ct. 1208, *Santosky v. Kramer* (1982), 455 U.S. 745, 71 L. Ed. 2d 599, 102 S.Ct. 1388, and similar cases is that there must be due process protection when parental rights are involved. Although a parent has certain rights that may be constitutionally protected, these rights are not without limits. The United States Supreme Court addressed the limitations on the rights of a parent as follows:

> A parent's rights with respect to her child have thus never been regarded as absolute, but rather are limited by the existence of an actual, developed relationship with a child, and are tied to the presence or absence of some embodiment of family. These limitations have arisen, not simply out of the definition of parenthood itself, but because of this Court's assumption that a parent's interests in a child must be balanced against the State's long-recognized interests as *parens patriae*, see, *e.g.*, *Reno v. Flores, 507 U.S. 292, 303-304, 123 L. Ed. 2d 1, 113 S. Ct. 1439 (1993); Santosky v. Kramer, 455 U.S. at 766; Parham, 442 U.S. at 605; Prince v. Massachusetts, 321 U.S. 158, 166, 88 L. Ed. 645, 64 S. Ct. 438 (1944),* and, critically, the child's own complementary interest in preserving relationships that serve her welfare and protection, *Santosky, 455 U.S. at 760.*
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> *Troxel v. Granville* (2000), 530 U.S. 57, 88; 147 L. Ed. 2d 49; 120 S.Ct. 2054.

This Ohio Supreme Court has stated:

> In *Clark* v. *Bayer* (1877), *32 Ohio St. 299*, this court recognized that parents who are 'suitable' persons have a paramount right to the custody of their minor children. One hundred years later, in *In re Perales* (1977), *52 Ohio St. 2d 89, 98*, we found that 'based on the concern displayed in the *Clark* opinion for balancing the interests of both parent and child, that parents may be denied custody only if a preponderance of the evidence indicates abandonment, contractual relinquishment of custody, total inability to provide care or support, or that the parent is otherwise unsuitable -- that is, that an award of custody would be detrimental to the child.'
>
> *In re Young* (1979), 58 Ohio St. 2d 90, 91; 388 N.E.2d 1235, 1236.

Therefore, the Ohio cases of *Young* and *Perales* are in accord with *Troxel*, in that the rights of a parent are not absolute. A parent may be denied custody if the court finds that the evidence indicates abandonment, contractual relinquishment of custody, total inability to provide care or support, or that she is otherwise unsuitable -- that is, that an award of custody would be detrimental to the child. In this situation where an award of legal custody has been previously granted, due process has already been given to the parent relating to the issue of custody.

In the practical sense, guardianship, custody, and placement all have the same result, which is that the child is in the care of a non-parent. The seasoned practitioner in this area knows that there is very little difference, if any, in the appointment of a guardian of a minor by the probate court and the award of legal custody by the juvenile court. Once the appointment or award is made, there is normally no continuing judicial oversight. The attempts by Appellee to make a meaningful distinction between the two are not relevant to the issues before this Court. The primary concerns must be due process and the best interest of the child. To require the consent of a non-custodial parent to a second "placement" of the child for the adoption to proceed is contrary to Ohio law, as set forth in the various briefs filed in this case, and violates the due process rights of both the custodian and the child, by denying the right to even have the adoption heard.

If the adoption proceeds from a guardianship in probate court or from a legal custody order in juvenile court, the adoption process is exactly the same. The due process rights of even the irresponsible parent are protected in the adoption process. R.C. 3107.11 requires notice to all non-consenting parents. The parent always has an opportunity to object to the adoption. The burden of proof is on the petitioner, not the non-consenting parent, to prove by clear and convincing evidence that the consent of the parent is not required. *In re Adoption of Holcomb* (1985), 18 Ohio St. 3d 361, 481 N.E. 2d 613; *In re Adoption of Masa* (1986), 23 Ohio St. 3d 163,

492 N.E. 2d 140. *In re Adoption of Bovett* (1987), 33 Ohio St. 3d 102, 515 N.E. 2d 919.

All arguments by Appellee relating to concerns over inadequate notice and procedures are unfounded. The petition for adoption can only be filed after the child is in the custody of the petitioner. The petition must state that the consent of the parent has been obtained or must allege that the consent of the parent is not required based upon certain stated grounds. The most typical grounds are that the parent failed without justifiable cause to have at least de minimis contact with the minor or to provide for the maintenance and support of the minor for the preceding one-year period. The one-year period regularly applied in probate court under R.C. 3107.07(A) is far more stringent that the 90-day period for abandonment regularly applied in juvenile court under R.C. 2151.011(C). Therefore, it is typical that a petition can only be filed when the parent has failed for over a year. It is quite disturbing that Appellee considers the filing of an adoption petition to be a "wake-up call" for the parent. It is only the disinterested parent, who has failed to have contact or to support, whose rights will be terminated by an adoption. It is good policy for this Supreme Court to recognize the right of the legal custodian to have the issues of consent and best interests hear in an adoption proceeding.

Appellee argues that the "residual parental rights" defined in R.C. 2151.011(B)(46), which includes the right to "consent to adoption," gives parents the absolute right to veto any adoption by refusing to "place" the child. Appellee discusses "residual parental rights," but fails to address the continuing parental obligations. Parental rights and parental obligations cannot be separated and cannot stand alone. The parent's rights under R.C. 2151.011(B)(46) are important because the interested parent is permitted to maintain a relationship with the child. However, the child should not be denied a permanent adoptive home when the parent fails in exercising parental rights and obligations for the requisite statutory period.

It is significant that Appellee argues "residual parental rights," but failed to addressed the case of *Adoption Link, Inc. v. Suver* (2006), 112 Ohio St. 3d 166, 2006 Ohio 6528, 858 N.E.2d 424. In *Adoption Link, Inc. v. Suver,* this Supreme Court held that a person must have actual legal custody of a child to have the right to place the child for adoption. Under that holding, if the child is in the legal custody of the prospective adoptive parents, then the parents lack authority to place the child. This Supreme Court held in *Adoption Link, Inc. v. Suver* that "residual parental rights" do not include the right to place the child for adoption. Requiring a "placement" by non-custodial parents under R.C. 5103.16 is a legal impossibility because this Supreme Court has held that the non-custodial parent has no authority to make such a "placement." Appellee failed to address this legal impossibility.

It is a fundamental right in western society to parent one's children. This right is rooted in nature. However, experience demonstrates that not all parents are ready and willing to parent and that for the sake of the child, the society must intervene. Ohio law and federal constitutional law reflect these realities. The rights of a functioning parent to the care, custody, and control of her child is protected. However, when a parent alienates that right contractually or through proven abuse, neglect, or dependency, the parental right loses its special status and state intervention is permitted.

When a child is in legal custody, the child lacks a functioning custodial parent. The parent has already been a party to a juvenile court action concerning her parental rights. Prior to the granting of an order of legal custody, the parent must receive notice and an opportunity to be heard. The parent is entitled to appointed legal counsel. If the parent is not in agreement, the state must prove by clear and convincing evidence that the statutorily defined criteria for abuse, neglect, or dependency have been met. The parent is on notice that her parental rights have been impacted.

Often at such hearings, the parent's future rights and obligations are specifically addressed in the court entry. Thus, the legal custody proceeding—with its notice, clearly defined standards, burden of proof, appointed counsel, and opportunity for hearing—puts the parent on notice that she has been divested of her absolute right to parent her child.

Before the probate court can divest a parent of her residual rights as a parent, including the right to consent to the adoption, an additional hearing requiring notice and an opportunity to be heard must be afforded to the parent. At this hearing, the failure to support or maintain contact must be demonstrated by clear and convincing evidence and the parent is permitted to introduce mitigating evidence demonstrating that there was justifiable cause for the omission. The one-year standard in these hearings far exceeds the juvenile court's 90-day time frame for a finding of parental abandonment, which would allow for termination in juvenile court. In addition, the non-consenting parent also has an opportunity to demonstrate that, despite her consent being legally unnecessary, the adoption should not be granted based upon the best interest of the child. Thus, the non-custodial parent has abundant options to participate in the decision-making/adjudicating process, even in the absence of a "placement" hearing. These opportunities alone have been deemed appropriate and sufficient to protect the due process rights of non-custodial parents in grandparent or step-parent adoption, which often lack a prior juvenile or domestic adjudication.

What Appellee is insisting upon with her interpretation of R.C. 5103.16(D) is not due process. Even without a "placement" hearing, the process is replete with due process. What Appellee is demanding is an absolute veto right to the consideration of adoption for the child. The probate court would not be able to consider a non-guardian, non-grandparent independent adoption.

The juvenile court cannot terminate parental rights on a reconsideration of legal custody because only an agency or a guardian ad litem can bring a motion for permanent custody. If an agency was ever involved, their involvement terminated at the time the order of custody was granted. Likewise, the involvement of the GAL is terminated by a grant of legal custody. Under Ohio law, the legal custodian has no right or procedure to bring a termination of parental rights action. The legal custody award can only be modified due to a change of circumstances to the custodian or to the child. Therefore, if the parent was non-supporting and non-communicating prior to the grant of legal custody, a continuation of this behavior would not justify a change of legal custody status.

R.C. 5103.16 is a unique provision of Ohio law created through a piecemeal amendment process. A careful reading is necessary to discern and implement its provisions. Properly read, R.C. 5103.16 does not require a "placement" hearing for children placed for custody through the juvenile court. R.C. 5103.16 has been amended nearly twenty times in the past fifty years. Its provisions defy many of the rules of statutory drafting. At times, the provisions almost have to be diagrammed in order for the reader to make sense of the statute. It is therefore understandable that Appellee failed to properly correlate the provisions of R.C. 5103.16(D) with the provisions of R.C. 5103.16(A), which limits (D)'s application. Subsection A exempts associations and institutions certified by a commitment of a juvenile court from the provisions of subsection (D). R.C. 5103.02(A) states that the term "association" can refer to an individual. The term "commitment" means vesting custody. Thus, subsection (A) exempts individuals who have received custody from the juvenile court from the operation of R.C. 5103.16(D). This subsection (A) provision resolves the primary issues in this case and specifically authorizes the placements of J.A.S. and J.N.S.

Appellee's interpretation of R.C. 5103.16 will result in thousands of Ohio children remaining in unsupervised, non-parental placements, unable to progress to full familial status. Such a result is anathema of the stated Ohio and national child welfare policy mandating full permanency for children. The decision to place a child in legal custody rather than obtaining a termination of the rights of the parent by motion for permanent custody may be made for a variety of reasons, including the custodial agencies desire to avoid and protracted permanent custody trial. Such a decision must not later be used to deny full permanency and the right to address the best interest of the child.

Conclusion

For the reasons set forth above and in prior filings, the American Academy of Adoption Attorneys respectfully requests this Supreme Court to REVERSE the decision of the lower court and to REMAND the matter for further proceedings consistent with the decision of this Supreme Court.

Respectfully submitted,

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Certificate of Service

I hereby certify that a copy of the foregoing Amicus Curiae's Reply Brief has been served by regular U.S. mail this 15th day of March, 2010 to the following: Joel D. Fritz, Counsel for Appellants, Rothgery & Associates, 230 Third Street, Elyria, Ohio 44035; Elizabeth I. Cooke Counsel for Appellee Jennifer Wahl, Moritz College of Law, 55 W. 12th Ave., Suite 255, Columbus, Ohio 43210; Christopher Robinson, Pro se Appellee, 316 Ninth Street, Elyria, Ohio 44035; Richard Hempfling, Counsel for Amicus Curiae Ohio Adoption Roundtable, Flanagan Lieberman Hoffman Swaim, 15 West Fourth Street, Suite 100, Dayton, Ohio 45402.

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