IN THE SUPREME COURT OF OHIO

In re: A.B.	:	
	:	On Appeal from the Hamilton County Court of Appeals, First Appellate District
	:	
	:	Court of Appeals Case No. C-150743
	:	

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT CURTIS A. NORFLEET

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EXPLANATION OF WHY A SUBSTANTIAL CONSTITUTIONAL QUESTION IS INVOLVED AND WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND WHY THIS CASE INVOLVES THE TERMINATION OF PARENTAL RIGHTS OF A MINOR CHILD

The Constitutions of both the United States and the state of Ohio afford parents a fundamental right to custody of their children. *In re Hockstok*, 98 Ohio St.3d 238, 2002-Ohio-7208, 781 N.E.2d 971, ¶ 16 (citing *Santosky v. Kramer* (1982), 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 and *In re Murray* (1990), 52 Ohio St.3d 155, 157, 556 N.E.2d 1169). Ohio provides a specific standard in deciding custody disputes between a parent and a nonparent, which this Court delineated in *In re Perales*. In *Perales*, this Court held that when a custody dispute is between a parent and a nonparent, the parent is presumed to be the best custodian, and the parent may only be denied custody of the child if the preponderance of the evidence indicates: (1) the parent abandoned the child; (2) the parent contractually relinquished custody of the child; (3) the parent is totally unable to provide care or support for the child; or (4) there is found to be some other form of parental unsuitability – that is, that an award of custody to the parent "would be detrimental to the child." *In re Perales*, 52 Ohio St.2d 89, 98 (1977).

To the extent that custody proceedings may grant custody in the "best interest" of the child to a nonparent without actual evidence of parental unsuitability, that is – evidence that an award of custody to the parent would be detrimental to the child, the law violates the parent's fundamental right to custody. This case presents precisely this dilemma – Mr. Norfleet's fundamental right to custody of his daughter Annslee was violated when the trial court granted custody of Annslee to nonparent grandparents finding that Mr. Norfleet was unsuitable despite a complete lack of evidence to support an unsuitability finding.

Rather than undertaking a suitability analysis, the trial court substituted a suitability determination with a best interest analysis to determine that Mr. Norfleet was unsuitable simply

because an award of custody would involve moving to a new school and community, which the court concluded was detrimental to the child. In awarding custody of Annslee to nonparent grandparents, the juvenile court found that "uprooting her would be very detrimental to Annslee as well as adverse to her best interests." The ruling of the trial judge, and subsequently affirmed by the First District without explanation, made an unsuitability finding based on the fourth *Perales* factor; however, what the trial court deemed to be "detrimental" to the child was really a balancing of the best interest factors under R.C. 3109.04(F). Such an expansion of the best interest analysis was precisely what this Court sought to prevent in *Perales*.

This concern is particularly significant where, as here, it permits a nonparent, to the detriment of a parent's constitutionally protected right to custody, to obtain legal custody of a child solely on the basis of the child's "best interest." This ruling would allow any nonparent to obtain legal custody over a parent simply because the child would have an adjustment period in moving to a new home, school, or community. Moreover, the ruling would place a nonparent on equal footing before the law with parents, a proposition never upheld until now and one that risks dismantling the traditional family unit. Such an expansion of non-parental rights and custody allocation is a great concern to the citizens of this state, as it should be.

Not only are the district courts not in absolute accord with this Court's upholding of the constitutionally-protected parental right to custody, but the holdings within each district concerning what constitutes a detriment to the child are conflicting. The fourth, seventh, and eighth districts have found that the detrimental effects associated with moving to a new environment, school, or community does not constitute the type of detriment necessary for an unsuitability finding. *See, e.g., In re C.V.M.*, 8th Dist. Cuyahoga No. 98340, 2012-Ohio-5514, 2012 Ohio App. LEXIS 4782 (Nov. 29, 2012), *In re Davis*, 7th Dist. Mahoning No. 02-CA-95,

2003-Ohio-809, 2009 Ohio App. LEXIS 769 (Feb. 20, 2003), *In re Schwendeman*, 4th Dist. Washington Nos. 05CA18 and 05CA25, 2006-Ohio-636, 2006 Ohio App. LEXIS 570 (Feb. 7, 2006). However, like the first district held in this case, the fourth, fifth, and eighth districts have found that transitionary issues are detriments to the child sufficient to deem the parent unsuitable. *See, e.g.*, *In re Z.A.P.*, 177 Ohio App.3d 217, 2008-Ohio-3701, 894 N.E.2d 342 (4th Dist.), *In re G.N.C.*, 5th Dist. Licking No. 13-CA-112, 2014-Ohio-3092, 2014 Ohio App. LEXIS 3025 (July 10, 2014), *In re S.M.*, 160 Ohio App.3d 794, 2005-Ohio-2187, 828 N.E.2d 1044 (8th Dist.).

This case affords this Court the opportunity to remedy a disparity of paramount importance in child custody disputes between parents and nonparents. This Court has clearly articulated that unsuitability will be found when the placement of a child with a parent would be detrimental to the child. Unsuitability, however, should not be construed as a determination of the child's best interest as between two parents on equal footing before the law. This Court pronounced the unsuitability standard in *Perales* as placement that would be detrimental to the child, but because trial courts have conflated "detriment" with a best interest analysis, a critical question remains – what constitutes a detriment to the child? This case presents an opportunity for this Court to provide the answer and minimize the expansion of non-parental rights that has become, and should be, a great concern to the citizens of Ohio.

STATEMENT OF THE CASE AND FACTS

The Plaintiff-Appellant in this case is Curtis A. Norfleet. He is the father of eight-year-old Annslee Braden, whose mother, Kathy, died in 2014. Mr. Norfleet appeals a decision of the First District Court of Appeals, which affirmed an order of the juvenile court awarding custody of Annslee to her maternal grandparents, Roger and Virginia Stanfill (hereinafter the "Stanfills"

or "Grandparents"). The appellate court found that the juvenile court properly applied the *Perales* standard and did not abuse its discretion in awarding custody of Annslee to nonparents, which the magistrate considered to be in the best interest of the child because uprooting her from a known environment would be detrimental to her.

After Kathy's death, Mr. Norfleet and the Stanfills filed competing motions for legal custody of Annslee. Prior to that time, Kathy was granted legal custody of Annslee and Mr. Norfleet was granted parenting time. Their relationship began in 2006 when Kathy and Curtis began dating. Kathy, Curtis, and the Stanfills soon became a closely knit family – Curtis was a part of the family and regularly attended vacations and events with the Stanfills. With the exception of a brief four-month period that Kathy married and moved in with a Mr. McGue, Curtis lived with Kathy and Annslee from the time of Annslee's birth in 2007 to 2011, at 2544 Melrose Avenue in Norwood, Ohio – a home that is immediately next door to the Stanfill residence at 2542 Melrose Avenue. During that time, Curtis and Kathy parented and raised Annslee together. After 2011, and after the termination of Kathy's marriage to Mr. McGue, Curtis resided with Kathy and Annslee every weekend until Kathy passed away in January of 2014.

The attached Magistrate's Decision largely lays out in detail the testimony elicited at trial. Prior to her death, Kathy had significant substance abuse issues, which resulted in both Mr. Norfleet and Grandparents providing care for Annslee when Kathy could not. Grandparents continue to reside in Norwood, Ohio, and also care for twelve-year-old Hunter and sixteen-year-old Chase, Annslee's siblings from Kathy's previous relationships. They are in their seventies and suffer from diabetes, but remain very involved in Annslee's upbringing.

Mr. Norfleet resides in Tipp City with his sister and brother-in-law. The Guardian ad Litem found both homes to be clean, safe, and appropriate. Mr. Norfleet maintains stable employment with Vapor System Technologies and has the means to support Annslee and a family. Although not cited as an explanation for finding Mr. Norfleet unsuitable, the magistrate expressed concern about Mr. Norfleet having a criminal record and his current status as a registered sex offender. Mr. Norfleet was previously convicted of Attempted Rape and Kidnapping and served approximately fifteen years in a state prison. Expert witness testimony confirmed that there are no indications to suggest a sexual interest in children or any other sexual deviancy that would cause concern. The magistrate's decision explicitly found that "the evidence and testimony presented at trial significantly mitigated [concerns that Mr. Norfleet's criminal record and status as a registered sex offender rendered him incapable of supporting or caring for Annslee]" and the court could not make such a finding by a preponderance of the evidence.

The juvenile court magistrate concluded that (1) Mr. Norfleet never abandoned Annslee, but had actually always been involved in her life; (2) Mr. Norfleet never contractually relinquished custody of Annslee; and (3) a preponderance of the evidence did not support the Stanfills's argument that Mr. Norfleet was totally incapable of supporting or caring for Annslee. However, the magistrate concluded that awarding custody of Annslee to Mr. Norfleet would be detrimental to her because it would remove her "from the environment that she has known and loved for most of her life" and "uprooting her would be very detrimental to Annslee as well as adverse to her best interests." The magistrate went on to conclude that Annslee's "best interests are best served by placing her in the custody of her maternal grandparents." In a three-page judgment entry, the First District affirmed the juvenile court decision. The appellate court

indicated that the decision concluding that an award of custody to Mr. Norfleet would be detrimental to the child was not an abuse of discretion because Annslee's transition to a new home and community "would be more than temporarily unpleasant for her" given her difficulty in dealing with her mother's death and the attachment she has with her home environment. Copies of the juvenile court magistrate opinion and the Appellate journal entry are attached in the Appendix. No separate opinion was issued by the First District Court of Appeals. A copy of this memorandum and the notice of appeal were provided to Respondents through ordinary mail.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1: In determining whether a parent is unsuitable in custody disputes between a parent and a nonparent, a preponderance of the evidence must show parental unsuitability, which can only be found where the parent cannot properly care for the child or where evidence presents concerns for the child's safety.

This Court held in *Perales* that when a custody dispute is between a parent and a nonparent, the parent is presumed to be the best custodian, and the parent may only be denied custody of the child if the preponderance of the evidence indicates: (1) the parent abandoned the child; (2) the parent contractually relinquished custody of the child; (3) the parent is totally unable to provide care or support for the child; or (4) there is found to be some other form of parental unsuitability – that is, that an award of custody to the parent "would be detrimental to the child." *In re Perales*, 52 Ohio St.2d 89, 98 (1977). The trial court correctly found that none of the first three *Perales* factors applied in this case – Curtis never abandoned Annslee, he never contractually relinquished custody of Annslee, and he was not unwilling or incapable of caring for Annslee. However, in considering the fourth *Perales* factor – some other form of parental unsuitability – the trial court concluded that Curtis was unfit to raise Annslee because awarding custody to him would remove Annslee "from the environment that she has known and loved for

most of her life" and "uprooting her would be very detrimental to Annslee as well as adverse to her best interests."

The trial judge effectively replaced the fourth *Perales* factor with a best interest analysis, concluding that Annslee's "best interests are best served by placing her in the custody of her maternal grandparents." Such an expansion of the best interest analysis under R.C. 3109.04(F) was precisely what this Court sought to prevent in *Perales*.

Intervention by this Court, however, is not simply triggered because the trial court and the First District got it wrong. The issues are much greater and the implications of allowing this decision to stand involve substantial blows to a parent's constitutionally protected right to custody. Can a suitable mother lose custody of her child because the judge determines the moral character of the grandparents to be more favorable for the child's upbringing? Can a suitable father lose custody of his child simply because the judge determines that an uncle lives in a better school district that would provide the child with a better living situation? Will a parent lose custody because the judge believes that moving the child to a new town will be too difficult for the child? The third hypothetical scenario is Curtis Norfleet's reality and it has absolutely no relation to his fitness to care for and his ability to provide a safe home for his daughter.

This Court has already articulated that unsuitability will be found when the placement of a child with a parent would be detrimental to the child. However, when the custody dispute is between a parent and a nonparent, unsuitability should not be construed as a determination of the child's best interest since such balancing was intended to be considered only as between two parents on equal footing before the law. Ohio trial courts have conflated "detriment" with a best interest analysis, which necessitates a standard for determining what constitutes a detriment to the child.

To protect children, to restore the integrity of the family unit, and to clarify the rights of Ohio parents, this Court – we respectfully submit – needs to fashion a clear pronouncement that in custody disputes between a parent and nonparent, a parent will only be found unsuitable under the fourth *Perales* factor when the parent cannot properly care for the child or where evidence presents concerns for the child's safety.

Proposition of Law No. 2: Where there is no testimony or evidence establishing that a parent is unfit or unsuitable and the only evidence presented concerns common transitionary issues, nonparents are not entitled to an award of legal custody over a parent.

The second proposition of law is simply a consequence of the first. A nonparent may be granted custody of a child only after there has been a demonstration by a preponderance of the evidence that the parent is unsuitable. *In re Perales*, 52 Ohio St.2d 89, 98, 369 N.E.2d 1047 (1977) ("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."). If the scope of suitability is defined by what would be detrimental to the child, it follows that non-detrimental concerns – issues unrelated to the proper care for and safety of the child – would not be a proper basis for an unsuitability finding.

In this case, the concerns raised at the trial level about Mr. Norfleet's suitability involved his criminal history and merely common transitionary issues rather than concerns for Annslee's care or safety. The trial court decision explicitly addressed Mr. Norfleet's criminal history and determined that it could not find by a preponderance of the evidence that Mr. Norfleet is totally incapable of supporting or caring for Annslee. This determination was based in large part on the fact that Mr. Norfleet has not committed any other crimes since being released from prison over ten years ago, that he is gainfully employed, that his employer testified at trial about what a good

and reliable employee he is, that Annslee spent time with her father without any issues both before and after Kathy died, and that the magistrate's in-camera interview with Annslee produced no cause for concern about Mr. Norfleet's suitability. Rather, the magistrate concluded that Annslee "clearly enjoys being able to see and spend time with her father."

The dispositive issue in this case, at least explicitly, was the trial court's determination that Mr. Norfleet was unsuitable because an award of custody to Mr. Norfleet would be detrimental to Annslee since it would involve moving to a different city, to a new school, and further from her grandparents with whom she is closely bonded. Moving to a new community and be removed from a known environment, however, is a common transitionary occurrence, one that children across the country experience on a routine basis. Such concerns are wholly unrelated to the care and safety of a child and cannot be the impetus for a finding of unsuitability based on a detriment. Such a holding would produce absurd results in child custody cases by rendering any parent who moves to a neighboring community for a new job or a better home unsuitable and unfit to care for his or her child.

As a corollary to the first proposition of law, we respectfully submit that this Court must clearly pronounce that where there is no testimony or evidence establishing the unsuitability of a parent and the only evidence presented concerns common transitionary issues, nonparents are not entitled to an award of legal custody over parents.

CONCLUSION

An opportunity exists for this Court to clarify the rights of parents and clearly pronounce what constitutes a detriment to the child when determining the suitability of a parent in a custody dispute between a parent and nonparent. The answer will minimize the expansion of non-parental rights to the erosion and detriment of parental rights, which has become, and should be,

of great concern to the citizens of Ohio. Such a pronouncement will also affirm the necessity of an unsuitability finding when awarding custody to a nonparent in custody disputes between a parent and nonparent.

Respectfully submitted,

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Certificate of Service

I certify that a copy of this Memorandum of Jurisdiction was sent by electronic and ordinary United States mail to counsel for Appellees Roger and Virginia Stanfill, Jon Sinclair, Mt. Lookout Square, 1018 Delta Avenue, Suite 202, Cincinnati, OH 45208, this 14th day of November, 2016.

/s/ Jennifer L. Brogan
Jennifer L. Brogan, Counsel for Appellant

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APPENDICES

- Magistrate's Decision of the Hamilton County Juvenile Court (June 30, 2015)

- Judgment Entry of the Hamilton County Court of Appeals (September 30, 2016)