IN THE SUPREME COURT OF OHIO

CASE NOS. 2018-181, 2018-182, 2018-0350, 2018-0351

APPEAL FROM THE COURT OF APPEALS
FIRST APPELLATE DISTRICT
HAMILTON COUNTY, OHIO
CASE NO. CA-17-105426

IN RE ADOPTION OF B.I.

BRIEF OF AMICUS CURIAE A.G.
IN SUPPORT OF APPELLEE

MARY CATHERINE BARRETT
(0047469)
700 W. St. Clair Ave., Ste. 200
Cleveland, Ohio 44113
(440) 356-4604
barrett@ohioadoptionlaw.com
Attorney for Amicus Curiae A.G.

BRADLEY D. MCPEEK (0071137)
LINDHORST & DREIDAME CO., LPA
312 Walnut Street, Ste. 3100
Cincinnati, OH 45202
(513) 421-6630
(513) 421-0212 (fax)
bmcpeek@lindhorstlaw.com
Attorneys for Appellant G.I.

SUSAN MINEER (0067919)
60 N. Second Street, Suite 200
Batavia, OH 45103
(513) 735-0800
(513) 735-2250 (fax)
smineer@fuse.net
Attorneys for Appellee G.B.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

I. STATEMENT OF INTEREST OF AMICUS CURIAE A.G.

A.G. is the paternal grandmother of two minor children whose maternal grandparents seek to adopt them without the consent her son, the children's natural father. She files this amicus brief to urge the Court, in construing R.C. 3107.07(A), to bear in mind the effect the Court's decision will have on the grandparent relationship. In Ohio, that relationship enjoys no legal protection following an adoption. So permitting an adoption over the objection of a natural parent irrevocably severs the important bond between children and their grandparents.

A.G.'s circumstances bear out her concern. The Cuyahoga County probate court found that the maternal grandparents did not need her son's consent to adopt her grandchildren because he lacked "justifiable cause," under R.C. 3107.07(A), for not contacting them in the year before the petition. But her son's lack of contact was not for lack of desire; he refrained from contact in obedience to a court order that precluded contact. *See In re A.K.*, 8th Dist. Cuyahoga No. 105426, 2017-Ohio-9165, ¶ 25, appeal not allowed, 152 Ohio St.3d 146, 2018-Ohio-1795, 897 N.E.3d 502; *see also id*. at ¶ 39 (Gallagher, Eileen A., P.J., dissenting). Despite her son's lack of contact, A.G. maintained a relationship with her grandchildren and visited with

them regularly. *Id.* at ¶ 5 (majority opinion).

The Eighth District Court of Appeals—in a split decision—affirmed. *See generally* 2017-Ohio-9165. That appellate decision opens the door for the maternal grandparents to proceed with their adoption petition, potentially severing A.G.'s ability to maintain a relationship with her grandchildren. The children have lost their mother (who is deceased) and their father (who is incarcerated), and they are now at risk for losing all connection to their paternal grandmother.

A.G.'s son appealed to this Court (Case No. 2018-0400), which declined jurisdiction. He has moved the Court for reconsideration, and his motion is still pending as of the time of this filing. A.G. urges the Court to affirm the First District's decision in the instant case, grant her son's motion for reconsideration in Case No. 2018-0400, and remand his case to the Eighth District to reconsider its decision in light of the decision herein.

II. ARGUMENT

PROPOSITION OF LAW: When a natural parent's conduct in relation to a minor child complies with a court order, he has "justifiable cause" for that conduct for purposes of R.C. 3107.07(A).

A. Under the Plain Language of R.C. 3107.07(A), Compliance with a Court Order Is Justifiable Cause for Lack of Financial Support of a Minor Child.

The First District properly concluded that the natural father's consent in this case was required because he had "justifiable cause" for not supporting his child under R.C. 3107.07(A). Specifically, the First District held that a prior court order of "zero support" constitutes justifiable cause. *In re Adoption of B.I.*, 1st Dist. Hamilton Nos. C–170064 and C–170080, 2017-Ohio-9116, ¶ 1.

In general, a natural parent has the right to withhold consent to a third party's adoption of his children unless a statutory exception applies. *In re Adoption of Greer*, 70 Ohio St.3d 293, 299, 638 N.E.2d 999 (1994). In this case, the statutory exception in dispute is found in R.C. 3107.07(A), which provides that a natural parent's consent is not required when "the parent has failed without justifiable cause*** 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 * * *." The essence of the dispute in this case is whether a zero-support order constitutes "justifiable case." It does.

Termination of parental rights involves the "end" of a "fundamental liberty interest" that is "far more precious than any property right." *Santosky v. Kramer*, 455 U.S. 745, 758, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982); *see also In re Adoption of Masa*, 23 Ohio St.3d 163, 165, 492 N.E.2d 140 (1986). Parental rights are so fundamental that "[p]ermanent termination of [them] has been described as " 'the family law equivalent of the death penalty in a criminal case.' " *Id.*, quoting *In re Smith*, 77 Ohio App.3d 1, 16, 601 N.E.2d 45 (6th Dist.1991). "Therefore, parents 'must be afforded every procedural and substantive protection the law allows.' " *Id.*, quoting *Smith* at 16. As such, courts "must ***construe strictly any exception*** to the requirement of parental consent to adoption." (Emphasis added.) *In re Adoption of P.L.H.*, 151 Ohio St.3d 554, 2017-Ohio-5824, 91 N.E.3d 698, ¶ 23, citing *In re Adoption of Schoeppner*, 46 Ohio St.2d 21, 24, 345 N.E.2d 608 (1976).

This Court emphasized the strict-construction requirement in *Schoeppner*. There, the Court rejected an interpretation of R.C. 3107.07(A) that permitted a biological parent's imprisonment to serve as the sole basis for concluding that he lacked justifiable cause for not supporting his children.

See id. at syllabus. The Court reached that conclusion by construing the plain language of the statute, which nowhere "specif[ies] imprisonment as an exception to the requirement of consent, nor does it equate imprisonment with the willful failure" to support. *See id*. at 24.

In this case, Appellant relies on a construction of R.C. 3107.07(A) that differentiates between support required by "law" and support required by "judicial decree." He concedes that the zero-support order is a judicial decree but insists that the decree does not alter the natural father's "independent obligation" to support his child as a matter of "law." (Brief of Appellant at 15.) He urges that the phrase "required by law or judicial decree" in R.C. 3107.07(A) embraces two separate bases for a child-support obligation and that the zero-support order in this case does not relieve the natural father of the "required by law" obligation.

The wrinkle in that argument is that it violates the strict-construction rule established in *Schoeppner* and conflicts with the vast preponderance of case law under R.C. 3107.07(A) holding that a judicial decree addressing child support "supersedes" any other support obligation that law might otherwise impose. *In re Adoption of W.K.M.*, 166 Ohio App.3d 684, 2006-Ohio-2326, 852 N.E.2d 1264, ¶ 10 (2d Dist.). Or, put another way, a support decree

"***incorporates*** the common-law duty of support," as this Court has held. (Emphasis added.) *In re Adoption of McDermitt*, 63 Ohio St.2d 301, 305, 408 N.E.2d 680 (1980).[1] Ohio appellate decisions thus overwhelmingly recognize that a natural parent has the requisite "justifiable cause" for not contributing to his child's support under R.C. 3107.07(A) if a court has previously relieved that parent of a support obligation. *See In re Adoption of A.N.W.*, 7th Dist. Belmont No. 15-BE-0071, 2016-Ohio-463, ¶ 28, appeal not allowed, 145 Ohio St.3d 1461, 2016-Ohio-2807, 49 N.E.3d 322; *In re Adoption of K.A.H.*, 10th Dist. Franklin No. 14AP–831, 2015–Ohio–1971, ¶ 21; *In re Adoption of Collene*, 3d Dist. Crawford No. 3-08-08, 2008-Ohio-5827, ¶ 13; *In re Adoption of Way*, 4th

[1] The language of *McDermitt* is somewhat inconsistent, because the Court elsewhere suggests that the legal duty of support is independent of any judicially decreed obligation. But in context, it is clear that the result in *McDermitt* was premised on the natural parent's failure to provide even the judicially decreed support in the year preceding the adoption petition. *See* 68 Ohio St.2d at 306 ("The record is replete with the fact that appellant was financially able to make support payments, but yet he failed to do so."); *see also In re Adoption of Thiel*, 3d Dist. Hardin No. 6-98-12, 1999 WL 152902, at *2 (Feb. 23, 1999) (natural father in *McDermitt* "violated the court order of support"). Indeed, the *McDermitt* Court suggested that a natural parent may "seek relief from his judicially created responsibilities if he felt a justifiable cause for non-support," *McDermitt* at 306, thus indicating that a judicial decree of zero support would have established justifiable cause under R.C. 3107.07(A).

Dist. Washington No. 01CA23, 2002-Ohio-117, p. 9; *In re Adoption of Jarvis*, 9th Dist. Summit No. 17761, 1996 WL 724748, *4 (Dec. 11, 1996). Any other result would be abhorrent to "notions of fundamental fairness," because a natural parent would have no way to know that the support obligation extends beyond the amount a court has ordered the parent to provide—and that the parent could lose his or her child even when complying with that order. *Way* at p. 9.

Appellant nevertheless urges that Ohio law imposes duties of support above and beyond the contents of a judicial support decree. He cites R.C. 2919.21(A)(2), which criminalizes the failure to support one's child, as a source of such an extra-judicial support obligation. (Brief of Appellant at 16.) Under Appellant's view of the law, the natural father in this case could be subject to criminal liability for conduct that satisfies his obligations under the judicial decree. The law cannot permit such an absurd result. Indeed, the better-reasoned Ohio appellate cases recognize that it would be "anomalous" for a natural parent, "while complying with one court order for support, * * * [to] be found guilty of nonsupport in another court." *State v. Holl*, 25 Ohio App.2d 75, 76, 266 N.E.2d 587 (3d Dist.1971); *see also Harker v. Wolff*, 42 Ohio App. 540, 542–543, 182 N.E. 592 (2d Dist.1931) (father is not

"obliged to pay a greater sum for support for his children than that fixed by the divorce decree where the court has expressly considered and adjudged the amount he shall pay for such support"); *Dodge v. Keller*, 29 Ohio App. 114, 116, 162 N.E. 750 (8th Dist.1927) (third party's suit for child's funeral expenses "could not be predicated against the father" where his child-support obligations had been settled in divorce proceedings); *Rowland v. State*, 14 Ohio App. 238, 239 (3d Dist.1921) (father relieved of child-support obligations in divorce proceedings is "no longer charged with the duty of maintenance" by operation of general support law).

Reading the apposite language of R.C. 3107.07(A) in keeping with this basic principle, the General Assembly presumably recognized that in some cases a support obligation is set by "judicial decree," while in others there is no judicial decree, so the obligation of support must be determined under the applicable "law." But under the plain language of the statute, a natural parent need comply with one "or" the other, not both. *See Jarvis*, 1996 WL 724748, at *5 (holding that imposition of support obligation at law "when there is already a valid judicial order in existence would be to incorrectly interpret R.C. 3107.07 to mean: 'as required by law ***in addition to*** a judicial decree' ") (emphasis in original). By definition, if a natural parent complies

with a judicial decree that addresses a support obligation (as Appellee did here), then that parent has no further obligation under the "law." And, to the extent there could be such an additional obligation, the natural parent *a fortiori* has justifiable cause (the judicial decree) for not satisfying it. There is no other reasonable way to construe R.C. 3107.07(A), particularly in keeping with the requirement that the statute be interpreted strictly in favor of the natural parent. *See P.L.H.*, 151 Ohio St.3d 554, 2017-Ohio-5824, 91 N.E.3d 698, at ¶ 23.

B. To the Extent R.C. 3107.07(A) Is at All Ambiguous, the Court Should Adopt an Interpretation That Preserves the Grandparent-Grandchild Relationship.

A.G. understands that the Court is not in the business of effectuating policy if it can derive legislative intent from the language of the statute. And, as explained above, she urges the Court to find that, according to the plain language of R.C. 3107.07(A), a judicial decree of nonsupport supersedes any support obligation a natural parent would otherwise have at law. But in the event the Court believes that the statutory language is at all ambiguous on that point, it should take into account "the consequences" of holding that a zero-support decree is not enough to constitute justifiable cause. *See State v. Gonzales*, 150 Ohio St.3d 276, 2017-Ohio-777, 81 N.E.3d 419, ¶ 6 ("If a statute

is ambiguous, the court may consider * * * the consequences of a particular construction * * *."). In that event, the Court should consider the consequences its interpretation of R.C. 3107.07(A) will have for the grandparent-grandchild relationship.

In *In re Whitaker*, 36 Ohio St.3d 213, 522 N.E.2d 563 (1988), the Court "recognize[d] the importance of a grandchild-grandparent relationship * * *." *Id*. at 216. The Court quoted extensively from the New Jersey Supreme Court's seminal decision on the " 'very special relationship' " that " 'often arises and continues between grandparents and grandchildren' ":

> "The tensions and conflicts which commonly mar relations between parents and children are often absent between those very same parents and their grandchildren. Visits with a grandparent are often a precious part of a child's experience and there are benefits which devolve upon the grandchild from the relationship with his grandparents which he cannot derive from any other relationship. Neither the Legislature nor this Court is blind to human truths which grandparents and grandchildren have always known."

Id. at 216, quoting *Mimkon v. Ford*, 66 N.J. 426, 437, 332 A.2d 199 (1975). As self-evident as the benefits of the grandchild-grandparent relationship are, research has also confirmed them. *See*, *e.g.*, Albernaz, *Study: Close Grandparent-Grandchild Relationships Have Healthy Benefits*, Boston Globe (Dec. 14, 2015), https://bit.ly/1QPN3U8 (accessed July 5, 2018); Thomaselli, American Grandparents Association, *Study: Grandparents Make Grandchildren Happier*, https://bit.ly/2MLfp4d (accessed July 5, 2018).

But Ohio does not legally recognize the grandparent-grandchild relationship except in narrowly prescribed circumstances. "[I]f grandparents are to have visitation rights, they must be provided for by statute." *In re Martin*, 68 Ohio St.3d 250, 252, 626 N.E.2d 82 (1994). And there is no statutory provision that bestows visitation rights on grandparents after an adoption; in fact, the opposite is true. R.C. 3107.15(A)(1) explicitly provides that "the adopted person * * * is ***a stranger*** to the adopted person's former relatives for all purposes" (emphasis added). *See also Martin* at 252 ("[G]randchildren's relationships with their biological grandparents ***'must be terminated*** once they are adopted.' ") (emphasis added), quoting *In re Adoption of Ridenour*, 61 Ohio St.3d 319, 325, 574 N.E.2d 1055 (1991).

The Court in *Martin* expressed its disapproval of this harsh result, explaining it was "mindful of the compelling public policy reasons favoring grandparent visitation rights after adoptions by relatives * * *." *Id*. at 254. Of course, the Court cannot impose its own policy objectives to the frustration of clear statutory language. But if the Court determines that R.C. 3107.07(A) allows for multiple interpretations, it should hew to the interpretation that promotes the sound policy of preserving the bond between the child and grandparent. In short, R.C. 3107.07(A) should not permit strangers to adopt a minor child without the natural parent's consent—thus cutting off the grandparent-grandchild relationship—based on a lack of financial support that a court has previously authorized.

III. CONCLUSION

The Court should affirm the decision of the First District, requiring Appellee's consent to the adoption of his child, and should clarify that conduct previously authorized by a court will always constitute "justifiable cause" for the natural parent's conduct under R.C. 3107.07(A).

Respectfully submitted,

/s Mary Catherine Barrett
MARY CATHERINE BARRETT
(0047469) (Counsel of Record)
700 W. St. Clair Ave., Ste. 200
Cleveland, Ohio 44113
(440) 356-4604
barrett@ohioadoptionlaw.com

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief of Amicus Curaie A.G. in Support of Appellee was sent by email this 5th day of July, 2018, to:

BRADLEY D. MCPEEK
LINDHORST & DREIDAME CO., LPA
312 Walnut Street, Ste. 3100
Cincinnati, OH 45202
bmcpeek@lindhorstlaw.com
Attorneys for Appellant G.I.

SUSAN MINEER (0067919)
60 N. Second Street, Suite 200
Batavia, OH 45103
smineer@fuse.net
Attorney for Appellee G.B.

/s Mary Catherine Barrett
MARY CATHERINE BARRETT