IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI ex rel.
DAVID WOMACK
Relator

v.

THE HONORABLE DENNIS A. ROLF,
Respondent

Case No. SC86547

RELATOR'S REPLY BRIEF

Submitted by:

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REPLY AS TO RESPONDENT

I.

CHILD IS NOW OVER EIGHTEEN

Relator asserts on page 3 of Respondent's brief that the issue in the above matter is moot because the child in question is now eighteen years old. Relator makes further reference to the child's age on page 14 of Respondent's brief in the conclusion. The Amicus makes reference to the child's age on page 9 of the Amicus brief. Relator would point out that the adoptive parents in the case at bar filed their initial petition for adoption on April 19, 2004. (Appendix to Relator's original brief, pp. 29 through 31). This filing was well over one year prior to the time that the child in question, J.A.W., turned eighteen. By their own election, the prospective adoptive parents chose to violate the provisions of R.S.Mo. 211.093.

Missouri recognizes two narrow exceptions to the mootness doctrine. McNeil-Terry v. Roling 142 S.W.3d 828, 832 (Mo.App. E.D. 2004). An exception occurs if a case becomes moot after argument and submission. A second exception occurs if the case at hand "presents an issue that (1) is of general public interest, (2) will recur, and (3) will evade appellate review in future live controversies." Id. If the Court finds that an exception applies, then whether or not to dismiss is within the discretion of the appellate court. Id.

In the Roling case, supra., the Eastern District held that the case in question fell within the public interest exception to the mootness doctrine. Id. The Court seemed to be impressed that the ruling in that case could affect a large number of people (about 300,000) who were trying to receive dental benefits from Medicaid. Id.

The Amicus brief, on page 5, indicates that any ruling made in the above matter by this Court could impact thousands of children and, consequently, thousands of parents.

II.

ADOPTION OF CHILDREN IN FOSTER CARE

Respondent asserts that if Relator's position as to R.S.Mo. 211.093 is correct then no child currently in foster care pursuant to Chapter 211 could be adopted. (Respondent's brief, p.3). Respondent's logic is flawed.

This Court, in In the Matter of J.F.K, 863 S.W.2d 932 (Mo.banc 1993) interpreted R.S.Mo. 211.093 to mean that prospective adoptive parents could not proceed with an adoption petition they had filed seeking the involuntary termination of parental rights in violation of the provisions of R.S.Mo. 211.093. Id. at 934. This Court further held that "an obvious prerequisite to any adoption is the consent of the natural parents or the involuntary termination of their parental rights."

This Court, in the J.F.K. case, held that there are two means to terminate parental rights involuntarily. In the first instance the juvenile officer (and now, presumably, the children's division) can file an involuntary termination proceeding. In the second instance, a request for the termination of parental rights can be pleaded as an incident to an adoption action filed by prospective adoptive parents. The Court further held,

however, that the rights of prospective adoptive parents to proceed independently concerning any action to terminate parental rights is qualified by the provisions of R.S.Mo. 211.093. Id. at 934.

In an earlier part of the J.F.K. case, this Court emphasized that the parental rights of the mother had not been terminated and that no termination proceeding was pending. Id. at 933. This indicates that when a chapter 211 case is pending and the juvenile officer (and, currently, the children's division) files a petition to terminate parental rights involuntarily, and if said action is successful, that an adoption petition can be filed subsequent to the Court's order terminating parental rights. The prospective adoptive parents cannot, however, take action on their own to terminate involuntarily the parental rights of natural parents through an adoption proceeding while a case concerning the child in question is pending pursuant to chapter 210 or chapter 211 of the Missouri Revised Statutes.

Relator would further point out that the provisions of R.S.Mo. 211.093 dictate that any judgment entered by the Court pursuant to chapter 210 or chapter 211 shall take precedence over any order or judgment entered pursuant to chapters 452, 453, 454, or 455. The statute makes no reference to Chapter 475 of the Missouri statutes, the chapter governing guardianship proceedings for minors.

Many times a guardianship proceeding pursuant to R.S.Mo. 475 is instituted in a Missouri Probate Court while a Chapter 211 case concerning the same child is pending. Once the guardianship is granted by the Probate Court, the juvenile court can terminate jurisdiction in the Chapter 211 proceeding. This action frees the child who was formerly

the subject of a Chapter 211 proceeding for adoption without violating the terms of R.S.Mo. 211.093.

III.

R.S.MO 211.093 AND MISSOURI LAW

Respondent states that Relator's position with regard to R.S.Mo. 211.093 is contradictory to Missouri law. (Respondent's brief, p. 6). Respondent makes reference to certain Missouri statutes such as R.S.Mo. 453.010 (last amended in 2001), R.S.Mo. 453.040 (last amended in 1998), R.S.Mo. 211.447 (last amended in 1998), R.S.Mo. 453.070 (last amended in 2001), R.S.Mo. 453.073 (last amended in 2001), and R.S.Mo. 453.080 (last amended in 2001). These statutes contain references to adoption cases being filed while a chapter 211 case concerning the same child is pending. Relator would point out that all the above cited statutes were passed or amended since 1993, the year the J.F.K. decision was handed down by this Court. R.S.Mo. 211.093 was enacted into law in 1990 and has not been amended since that time.

The law presumes that the General Assembly of Missouri is aware of existing declarations of case law when it enacts statutes pertaining to the same subject matter. In Interest of M.V., 775 S.W.2d 262, 265 (Mo.App. W.D. 1989). If the legislature has not been in agreement with the conclusions reached in J.F.K., supra., concerning this Court's interpretation of R.S.Mo. 211.093, it has had the opportunity to adopt new language expressing the true legislative purpose of the statute. This could have been done when the legislature was passing, amending, or modifying the statutes listed above. When the legislature does not amend or modify a statute when it is amending or modifying other

statutes dealing with the same subject matter, this is indicative that the legislature agrees with the Court's construction of the statute. In the Interest of M.V., at 265.

As Respondent's brief indicates, the legislature has been very busy passing and amending statutes dealing with the adoption of foster children who are the subjects of a Chapter 211 case but the legislature has not seen fit to readdress the provisions of R.S.Mo. 211.093 since 1990 for purposes of clarification or reconstruction.

Relator would further point out that this Court's holding in J.F.K. concentrated on the fact that DFS (now the Children's Division) had custody of J.F.K., Id. at 933, and that granting custody of J.F.K. to the prospective adoptive parents would violate R.S.Mo. 211.093 in that such an award would be patently inconsistent with the 211 order concerning J.F.K. that was already in place. In the case at bar, the relief sought in the First Amended Petition for Termination of Parental Rights and Adoption (Appendix to Relator's original brief, pp. A-45 through A-49) filed by the prospective adoptive parents would be patently inconsistent with the provisions of the juvenile court's order entered April 28, 2005 (Appendix to Relator's Reply brief, pp. A-16 through A-19) wherein the Court awarded legal and physical custody of the minor child to the Children's Division.

IV.

IMPLICATIONS OF BLACKBURN V. MACKEY

Respondent's brief, on pages 9 and 10, discusses at length the Western District decision in the case of Blackburn v. Mackey, 131 S.W.3d 392 (Mo.App. W.D. 2004). This case sought subtly to reinterpret this Court's holding in J.F.K., supra. The Blackburn decision fails to follow the dictates of the J.F.K. case. The Western District, in

Blackburn, supra., criticizes the Eastern District Court of Appeals for its well reasoned decision in the case of Ogle v. Blankenship, 113 S.W.3d 290 (Mo.App. E.D. 2003).

The Eastern District, in Ogle, rightly held that the trial court had no jurisdiction to consolidate a Chapter 452 case and a Chapter 211 case under the facts of that case and, in fact, should have dismissed the Chapter 452 case for lack of jurisdiction. Id. at 292.

Lower Courts are without authority or jurisdiction to overrule the holdings of superior courts. District appellate courts have a "superior obligation to follow decisions of the Missouri Supreme Court." In the Interest of M.V., supra., at p. 265.

V.

IMPLICATIONS OF IN RE M.O.

Respondent's brief, on page 10, makes reference to the case of In re M.O., 70 S.W.3d 579 (Mo.App. W.D. 2002). The only pertinent reference that the Western District makes concerning the fact situation in the above cause occurs in footnote 1 of said case. The entire footnote reads as follows:

> Our review of the decision of the Missouri Supreme Court in In re J.F.K., 853 S.W.2d 932 (Mo.banc 1993) raises in our minds the issue of whether it was proper for the trial court to allow the action under Chapter 453 to proceed. Here, however, unlike in J.F.K., this action was brought with the original concurrence and encouragement of DFS. Thus, there was apparently no conflict between the ongoing 211 proceeding and the Chapter 453 action.

The above quoted footnote deals with matters that were not before the Appellate Court for determination and which can most properly be characterized as dicta. This Court, in 1952, discussed the significance of dicta in the case of Muench v. Southside National Bank, 251 S.W.2d 1(Mo. Sup. Div. 2, 1952). On page 6 of said decision this Court, borrowing language from Courts in other jurisdictions, defined the true meaning of obiter dictum as follows:

> "An obiter dictum, in the language of the law, is a gratuitous opinion—an individual impertinence—which, whether it be wise or foolish, right or wrong, bindeth none, not even the lips that utter it." Hart v. Stribbling, 25 Fla. 433, 435, 6 So. 455. Or as classically expressed by Judge Caskie Collet, it is "That useless chatter of judges, indulged in for reasons known only to them, to be printed at public expense." United States v. Certain Land in City of St. Louis, D.C., 29-F. Supp. 92, loc.cit 95.

Lower court tribunals are without authority to overrule the decisions of superior courts. In the Interest of M.V., supra., at 265. This is even more true of lower court dicta.

VI.

BLACKBURN V. MACKEY V. THE CASE AT BAR

Respondent states on page 11 of Respondent's brief that the facts in the case at bar in this matter are similar to the facts in Blackburn v. Mackey, supra. Relator disputes this allegation.

The Blackburn case dealt with a legal action between the two natural parents of the child in question. The Blackburn case dealt with a 452 action concerning custody and

visitation. There was no proceeding against either parent to terminate parental rights. The case at bar involves the involuntary termination of parental rights through an adoption proceeding. This Court has held that "statutes that provide for the termination of parental rights are strictly construed in favor of the parent and preservation of the natural parent-child relationship." In re K.A.W., 133 S.W.3d 1, 12 (Mo.banc 2004). This Court, in K.A.W., also held that terminating parental rights is tantamount to a "civil death penalty" and is a "drastic intrusion into the sacred parent-child relationship." Id. at 12. Relator submits that the stakes are much higher in the case at bar than was the case in Blackburn v. Mackey, supra.

VII.

CUSTODY

Respondent's brief (p. 12) indicates that the foster parents in the case at bar already have physical custody of the child they are trying to adopt. Pages A-16 through A-19 of the appendix to Relator's Reply brief contain the most recent order of the Juvenile Court of Saline County, Missouri concerning the child in question. This Order was signed by the Court on April 28, 2005. On page A-18 of said appendix, the Court orders that legal custody and physical custody of said juvenile is to be continued with the Saline County Children's Division. At no time has the Court ever placed physical or legal custody of the child with the foster parents. The Children's Division has given the foster parents physical placement of the child but no one has given the foster parents legal or physical custody.

As to Respondent's allegation that the foster parents have not requested an award of custody, Relator points out that this is not because the foster parents already have custody but rather because of the dictates of R.S.Mo. 453.080.1(1) which provide that the six month period of actual custody "may be waived if the person sought to be adopted is a child who is under the prior and continuing jurisdiction of a court pursuant to chapter 211, R.S.Mo. and the person desiring to adopt the child is the child's current foster parent."

REPLY AS TO AMICUS CURIAE

VIII.

EXPENSE ANALYSIS

The Amicus brief, on page 7, discusses the expense the State of Missouri pays to keep a child in foster care and the savings which can be accomplished by promoting the adoption of foster children. The figures used in the Amicus brief were not presented or proved at trial but assuming, arguendo, that the figures are accurate, the figures fail to tell the complete story.

The Amicus assumes that once a child in foster care is adopted that all costs to the state cease and this is simply not the case. R.S.Mo. 453.070 provides legal authorization for what is commonly called a "subsidized adoption." Said statute provides that assistance can be provided by the state to parents who adopt foster children and further provides that "the subsidy amount shall not exceed the expenses of foster care and medical care for foster children paid under the homeless, dependent and neglected foster care program."

Relator searched the internet and found the web address of www.dss.mo.gov/cd/adopt/masp.htm and found a copy of an outline of subsidies potentially available to persons wanting to adopt foster children. A copy of said outline, published by the Missouri Department of Social Services, and entitled Missouri Adoption Subsidy and Subsidized Guardianship Programs, is located in the appendix to Relator's reply brief at pages A-14 through A-15. This Social Services outline indicates that adoptive parents can be eligible for monthly cash payments which can be as high as what foster parents would receive. The adoptive parents can also be eligible for Medicaid benefits for the children, for daycare assistance, and for other support services.

IX.

ADOPTION OF CHILDREN IN FOSTER CARE

The Amicus also discusses the theory that if Relator's request for relief is granted that no foster child would ever be able to be adopted. Relator discussed in this assertion in Section I of his reply brief.

REPLY AS TO RESPONDENT

AND AMICUS CURIAE

X.

CONVENIENCE V. INCONVENIENCE

Both the Respondent and the Amicus indicate that granting the relief Relator has requested would cause inconvenience to the Department of Social Services and related agencies in performing their duties. Relator submits that inconvenience is the price that a free society often must pay to secure justice for all its citizens, including natural parents.

R.S.Mo. 211.443 provides for "the recognition and protection of the constitutional rights of all parties in the proceedings" concerning termination of parental rights. This would include the rights of natural parents.

This Court has held steadfastly that, whenever termination of parental rights is at issue, "strict and literal compliance with the statutory requirements is necessary…" K.A.W., supra., at 16.

Throughout history the courts in the United States have had to face difficult challenges and hand down hard decisions to uphold the legal and constitutional rights of citizens.

The United States Supreme Court, in the case of Brown v. Board of Education, 349 U.S. 294 (1955) held that racial discrimination in public education is unconstitutional and further held that any provisions of federal, state, or local law requiring or permitting such discrimination must yield to this principle. Id. at 298. This decision seems very logical by today's standards but we can be certain that in 1955 this holding inconvenienced a lot of segregated communities that had set up second rate Jim Crow schools and suddenly had to enlarge their main school facilities to accommodate minority students and decide what to do with the second rate schools that had been declared unconstitutional.

The United States Supreme Court in Gideon v. Wainwright, 372 U.S. 335 (1963) and in Miranda v. Arizona, 384 U.S. 436 (1966) expanded the rights of indigent criminal defendants to have legal counsel appointed for them at trial and at critical pretrial proceedings and also established exclusionary rules concerning evidence obtained in

violation of a defendant's constitutional rights. In the early to mid 1960's, this expansion of the rights of those accused of criminal acts was deemed by many to be an inconvenience to the efforts of law enforcement officers performing their duties.

Throughout the country our appellate courts hand down decisions frequently to protect the statutory and constitutional rights of citizens. The Maryland Court of Appeals held in the decision of Baker v. State, 367 Md. 648 (2002) on page 688 of said decision that "the basic right of a criminal defendant to fair notice must not be sacrificed on the altar of convenience or simplicity."

The Court of Appeals of Ohio, in upholding freedom of speech and press, held in State ex rel. Dispatch Printing Co. v. Golden, 2 Ohio App. 3d 370 (1982) on page 375 of said decision that "the First Amendment rights of freedom of speech and the press are too important to be sacrificed on the altar of expediency."

Relator submits to this Honorable Court that the rights of natural parents are as vital and important as any other rights and must not be sacrificed on the altar of convenience, simplicity, or expediency.

CONCLUSION

Despite the arguments that Respondent and the Amicus make in their responsive briefs filed herein, the trial court in the case at bar is attempting to proceed with an adoption case under 453 which would result in a custody order that would be inconsistent with the underlying 211 case concerning the minor child. Such an action would be patently inconsistent, in violation of R.S.Mo. 211.093, as construed by this Court in J.F.K., supra. Accordingly, Relator renews his prayer to this Honorable Court to make

the preliminary writ of prohibition which was issued on March 1, 2005, absolute and to order the Respondent to take no further action concerning 04SA-JU00033, the petition for adoption, other than to sustain Relator's motion to dismiss.

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The Honorable Dennis A. Rolf,

Respondent.

CERTIFICATE

George L. Stafford, attorney for relator, does hereby certify that the foregoing brief complies with the limitations set forth in Rule 84.06(b), that said brief contains 3,384 words, and further certifies that the floppy disk filed with this brief has been scanned for virus and is virus free.

The undersigned further certifies that one copy of relator's brief in this cause and one copy of the floppy disk of said brief were forwarded by U.S. mail, postage prepaid, on this _____ day of July, 2005, to: Edward B. McInteer, guardian ad litem, 21 West North, Marshall, MO 65340; Mr. James A. Waits, Attorney at Law, 401 W. 89th Street, Kansas City, MO 64114-35801; The Honorable Dennis A. Rolf, 548 Main Street, P.O. Box 751, Concordia, MO 64020-0751; and to Mr. Sanford P. Krigel, Attorney at Law,

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APPENDIX