State of Michigan
Supreme Court

In the Matter of: Aidan Jay Roustan.	Supreme Court No. 147522 Court of Appeals No. 312100 Trial Court No. 2012-24817-AY Kent County Circuit Court Hon. Kathleen A. Feeney

Scott Bassett (P33231)
Attorney for Petitioners-Appellants,
Steven and Susan Merrill
2407 89th Street NW
Bradenton, FL 34209-9443
941-794-2904

Cynthia S. Harmon (P35197)
Foster & Harmon, P.C.
Attorney for Petitioners-Appellants,
Steven and Susan Merrill
903 East Grand River Avenue
East Lansing, MI48823
517-337-4600

Trish Oleksa Haas (P65863)
Attorney for Respondent-Appellee,
Pierre Roustan
21 Kercheval Avenue, Suite 270
Grosse Pointe Farms, MI 48236
313-417-2200

Vivek S. Sankaran (68538)
Attorney for Respondent-Appellee,
Pierre Roustan
701 South State Street, South Hall
Ann Arbor, MI 48109
734-763-5000

Petitioners-Appellants' Reply Brief on Appeal

Oral Argument Requested

Submitted by:
Scott Bassett (P33231)
Cynthia S. Harmon (P35197)
Attorneys for Petitioners-Appellants

February 21, 2014

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Reply to Introduction

Appellee in his *Introduction* focuses on the "plain language" of MCL 710.51(6). He asserts that this Court should not ignore that language. What he fails to accept is that the words "legal custody" used by the Legislature when it enacted the stepparent adoption statute in 1980 is different from the informal usage of those words today. Over a period of decades, judges and lawyers created out of whole cloth the term "legal custody" as a shorthand reference for shared parental decision making authorized by MCL 722.26a(7)(b). No statute or rule defines "legal custody" to mean what the Court of Appeals thought it meant.

When the Legislature debated and passed MCL 710.51(6), the term "legal custody" meant a legally authorized right to physical custody of a child. The Legislature intended to allow the parent with an order for physical custody of a child to seek termination of the parent rights of the parent who did not have physical custody. The concept of legal custody as we informally know it today (properly called shared decision making) did not exist in 1980.

We live in a rapidly changing world. The meaning of words and phrases change over time. Many of these changes are due to advances in technology. Others are result from societal evolution. For example, the often used term "husband" originally had nothing to do with marital status. It is a joining of two ancient words that, when combined, refer to a person

who is a homeowner.[1] Until modern times, the word "broadcast" meant to sow seeds with a sweeping movement of the arm and hand.[2] Does this mean that the intent behind laws regulating agriculture that use the term "broadcast" in its original sense are to be ignored? Changes in the usage of terms, particularly where that usage is little more than an informal shorthand for a different concept, cannot be allowed to alter our view of Legislative intent.

Appellee understandably first addresses the "a" versus "the" issue. However, that issue is not essential to appellants' case. Even if this Court determines that only ***the*** parent with "legal custody" may seek termination of the other parent's rights, "legal custody" was intended by the Legislature to mean the legal right to physical custody. Appellant Susan Merrill is ***the*** parent with legally sanctioned physical custody of AJR. Appellee does not share physical custody with Ms. Merrill.

Moreover, appellee's reliance on *Paige v City of Sterling Heights*, 476 Mich 495, 720 NW2d 219 (2006), is not helpful to his position. This Court in *Paige* emphasized that its "fundamental obligation" is to correctly "ascertain the legislative intent." *Id*, at 476 Mich 504 [citing *Koontz v Ameritech Services, Inc*, 466 Mich 304, 312, 645 NW2d 34 (2002)]. Reliance on the definite article is appropriate only if it supports the Court's effort to accurately determine the intent of the Legislature in the context of the

[1] http://www.merriam-webster.com/dictionary/husband.
[2] http://www.merriam-webster.com/dictionary/broadcast.

specific statute being examined. Rigid reliance on the difference between the definite and indefinite article should be avoided where it leads to an absurd result. *Detroit Int'l Bridge Co v Commodities Export Co*, 279 Mich App 662, 674, 760 NW2d 565 (2008).

This is not a case where the absurd results rule in "an invitation to judicial lawmaking" as cautioned by this Court in *Twp of Casco v Secretary of State*, 472 Mich 566, 603, 701 NW2d 102 (2005). Here, the entire purpose of the 1980 amendment to the Adoption Code was to expand, not curtail, the availability of stepparent adoption. It was the Court of Appeals that engaged in "judicial lawmaking" when it substituted the informal (and not legally authorized) understanding of the term "legal custody" for the meaning of the term as it existing in 1980.

The term legal custody in its current informal usage as a shorthand for shared decision making pursuant to MCL 722.26a(7)(b) did not first appear in Michigan jurisprudence until Court of Appeals' 1982 decision in *Longhi v Longhi*, 119 Mich App 41, 325 NW2d 617 (1982).[3] This was two years after the Legislature enacted the statute in question here. Michigan appellate decisions predating the enactment of MCL 710.51(6) consistently used the

[3]One earlier case referenced legal custody as the right to participate in decision-making, but it was decided on September 15, 1980, and was not released for publication until December 9, 1980, after work on the legislation (HB 5791) that became MCL 710.51(6) was completed. Further, that decision cited no authority for its use of the term legal custody as shorthand for shared decision making. See *Wilcox v Wilcox*, 100 Mich App 75, 298 NW2d 667 (1980).

term legal custody to mean a legal right, usually by court order, to physical custody of a child.[4] There is no support for the view that the term legal custody meant anything other than a legal right to physical custody at the time the Legislature passed the stepparent adoption statute.

Reply to Counter-Statement of Facts

At p 3, appellee overstates the nature and extent of his "bond" with Aidan. Appellee was granted reasonable parenting time with Aidan in the Judgment of Divorce.[5] However, only about six months after the divorce, appellee ceased exercising parenting time in accordance with the Judgment. The parties agreed that there were only two visits in 2010.[6] Appellee did not dispute Ms. Merrill's testimony that there were only six visits in the two years preceding the filing of the petition for stepparent adoption.[7] Appellee's Brief, p 3.

Appellee also overstates his efforts to remain current in his obligation to assist with Aidan's support. He claims to have paid half of his support obligation, or approximately $4,500. In fact, he made only five support payments, just one of which was voluntary.[8] At best, those payments amount to one-third of his support obligation, not half. His arrearage at the

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[4] See, for example, *Bowler v Bowler*, 351 Mich 398, 88 NW2d 505 (1958).
[5] App 29a-30a.
[6] App 58a-59a, 105a.
[7] App 78a.
[8] App 80a, 83a.

time of the lower court proceedings was $9,000.[9]

Appellee at p 4 of his brief asserts that Ms. Merrill incorrectly claimed to have legal custody of Aidan when the Merrills filed their stepparent adoption petition. This is picking nits. It is undisputed that Ms. Merrill had decision-making authority over Aidan. It is also undisputed that appellee had the right to share in decision making pursuant to the divorce judgment. However, there is no evidence that he attempted to exercise that authority at any point subsequent to entry of the judgment.

Reply to Argument

Both appellee in his *Argument A* and the Court of Appeals in its decision seem fixated on the meaning of the words "the" and "a" in the statute. Neither adequately addressed the purpose and historical context of the stepparent adoption statute. The primary goal of statutory interpretation is to ascertain the legislative intent that may reasonably be inferred from the statutory language. The first step in that determination is to review the language of the statute itself. Unless statutorily defined, every word or phrase of a statute should be accorded its plain and ordinary meaning, **taking into account the context in which the words are used**.

Given the purpose of the statute, the Court of Appeals should not have presumed that the Legislature intentionally omitted the indefinite article "a". There is no indication that the Legislature preferred the more limiting

[9] App 79a, 99a.

definite article over the indefinite article when modifying the noun "parent". It is more plausible to infer that the Legislature's omission of the indefinite article was **not** intentional, particularly where the statute is read in light of its stated purpose.

The Court of Appeals used legislative silence to resolve the conflict and thereby substituted its own policy preference for the Legislature's intent. The language of the statute demonstrates that MCL 710.51(6) was not meant to limited such adoptions to sole decision making cases

MCL 710.51(5) and (6) states as follows [emphasis added]:

> (5) If **a** parent having legal custody of the child is married to the petitioner for adoption, the judge shall not enter an order terminating the rights of that parent.
>
> (6) If the parents of a child are divorced, or if the parents are unmarried but the father has acknowledged paternity or is a putative father who meets the conditions in section 39(2) of this chapter, and if **the** parent having legal custody of the child subsequently marries and that parent's spouse petitions to adopt the child, the court upon notice and hearing may issue an order terminating the rights of the other parent if both of the following occur...

Paragraphs (5) and (6) refer to the same person; the parent who is married to a stepparent and is seeking to terminate the other parent's rights in a stepparent adoption proceeding. Appellee wants this Court to believe that the Legislature intended paragraph (5) to refer to **either** of the child's parents. Then, however, the Legislature immediately reversed course and in paragraph (6) intended to reference only to the parent who has remarried. Such a conclusion when construing consecutive sections of statute with a

singular purpose is a legal absurdity. It is not possible for "either" parent to be married to the petitioning stepparent. Because the parent referred to in both paragraphs (5) and (6) are the same person, different interpretations should not apply.

Appellee is his *Argument B* attempts to rewrite history. He claims that it was the Legislature's intent to require, "as a condition precedent to terminating a parent's rights, to first strip that parent of legal custody." This ignores how the term "legal custody" was understood at the time Legislature debated and enacted the stepparent adoption statute. In 1980 when the stepparent adoption legislation was debated and passed, no Michigan court had yet adopted "legal custody" as an informal shorthand for the concept of shared decision making. The concept of shared decision making was not authorized by statute until early 1981. Therefore, when HB 5791 was moving through the Legislature, the term "legal custody" could not have meant what appellee asserts.

Appellee's argument relating to termination of parental rights under the Juvenile Code verifies the correctness of appellants' position. The focus of both the Juvenile Code and the Adoption Code is to provide a mechanism to terminate the rights of a parent who has abrogated his or her parental responsibilities and "abandoned" the physical and emotional needs of the child. The abandonment specified in both Codes has nothing to do with shared decision making. It is a lack of contact and financial support that

leads to termination of parent rights under either statutory scheme.

Furthermore, appellee's argument referencing the Juvenile Code mentions the term "legal custody" several times. However, he fails to acknowledge that the term appears only once in Juvenile Code. MCL 712a.19a(15). That provision allows the court to return "legal custody" of a child to the department of human services upon termination of a guardianship. Given the context in which the term is used, it means a legal right to physical custody. It has nothing to do with shared decision making under MCL 722.26a(7)(b).

Also in relation to the Juvenile Code, appellee at p 12 of his brief cites MCR 3.977, the rule governing termination of parental rights proceedings. That rule uses the term "legal custody" in a context that could only mean a legal right to physical custody of a child. MCR 3.977(B)(2).[10]

There is no support for appellee's insistence that termination of parental rights always involves a two-step process whereby "legal custody" (aka shared decision making) is first "stripped" from a parent, then rights are terminated. In many termination of parental rights cases, a parent facing termination of his or her rights does not have, and has never had, shared decision making authority. For example, the mother a child born out

[10]MCR 3.977(B)(2): "'Respondent' does not include other persons to whom **legal custody** has been given by court order, persons who are acting in the place of the mother or father, or other persons responsible for the control, care, and welfare of the child." [Emphasis added.]

of wedlock has sole decision making authority to the exclusion of the father, unless otherwise ordered by a court. MCL 722.1006. Furthermore, in proceedings under the Juvenile Code, termination of parental rights may occur at the initial disposition, making it a one step process. MCL 712A.19b(4); MCR 3.977(E).

Appellee asserts that he was awarded legal custody pursuant to the Child Custody Act in the divorce judgment, therefore he has legal custody for purposes of the Adoption Code. He compares apples to oranges. The joint custody provision of the Child Custody Act does not define, nor even mention, the term "legal custody." When a court in a divorce case awards "legal custody," it is using a shorthand term for "shared decision making" under MCL 722.26a(7).

Contrary to appellee's claim at p 19, a decision by this Court in favor of appellants would not create confusion if courts awarding joint custody under the Child Custody Act are instructed to use the terms given to them by the Legislature in MCL 722.26a(7)(a) and (b). There is no "physical custody" or "legal custody" in that statute. Instead, there is "alternating residences" and "shared decision making." While those terms are not as abbreviated as legal and physical custody, they are the proper, precise, and accurate statutory terms. In the context of stepparent adoption, leave "legal custody" to mean what it historically meant, a legal right to physical custody of a child.

Reply to Conclusion

The choice facing this Court is to construe the term "legal custody" in MCL 710.51(6) using its meaning when the legislation was debated and enacted, or, in the alternative, give it a new meaning developed informally over the years by lawyers and judges, but which did not yet exist when the provision became law.

Appellee urges this Court to be activist in adopting the judge-made construction of the term "legal custody" used by the Court of Appeals. Instead, the Court should take a textual approach. If the meaning of words used in a law have changed since it was passed, then textual analysis must be of the words as understood by the legislative body at the time of enactment. Do not rewrite history. Honor the words in their historical context and, in so doing, honor the intent of the Legislature.

The Court of Appeals should be reversed, legal custody as used in MCL 710.51(6) should be held to mean a legal right to physical custody, and this matter should be remanded to the Court of Appeals to address the unaddressed issues in Mr. Roustan's original appeal to that court.

Respectfully submitted,

By:_____ By:_____

Scott Bassett (P33231) Cynthia S. Harmon (P35197)
Attorneys for Petitioners-Appellants, Steven and Susan Merrill

Dated: February 21, 2014