IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

IN RE: ADOPTION OF
AMH, a minor,

JERRY L. BAKER and wife,
LOUISE K. BAKER,

Petitioners/Appellees,

v. W2004-01225-SC-R11-PT

SHAOQIANG (JACK) HE and wife,
QIN (CASEY) LUO,

Respondents/Appellants.

BRIEF OF APPELLANTS

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ORAL ARGUMENT REQUESTED

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Mrs. He." (Vol. 11, T.R. 1505, ¶ 282; emphasis added). Abandonment and unfitness are two distinct concepts, yet the trial court uses the terms as if they are indistinguishable, each from the other. If the abandonment statute truly requires a two-pronged approach to termination, then unfitness must, by definition, be separate and distinct from abandonment. In fact, applying the trial court's reasoning, a finding of abandonment would automatically result in a finding of unfitness in literally every termination case, thereby eliminating any reason to move to step two for an inquiry as to whether termination is in the best interest of the child. This is clearly not what our legislature intended.

Accordingly, review is necessary to establish that, as a matter of both substantive and procedural due process, all termination proceedings should be bifurcated so that all parents and children can be assured that the trier of fact has conducted its grounds-for-termination inquiry without being influenced by a best-interest bias. Failure to require bifurcation will inevitably lead to the termination of parental rights on a best interest or comparative fitness analysis.

7. Whether the Court of Appeals applied the correct standard when it held that the Hes "willfully" failed to visit AMH during the four (4) months next preceding the filing of the Bakers' Petition for Adoption and to Terminate Parental Rights.

The dissent correctly emphasizes that the majority fails to consider the many consecutive weeks of regular visits undertaken by the Hes during the two years prior to the commencement of the operative four-month period. To be precise, the majority ruled that facts which occurred before the four-month period "can have *no bearing* on our

determination of whether the Hes' conduct within the four-month period was willful." (emphasis in original). According to the dissenting opinion, "not only is this inconsistent with the majority's prior statement and previous decisions by this Court, it is plainly wrong." The dissent goes on to state that "common sense tells us that, in evaluating the parent's conduct during the four-month period, their conduct before the four-month period, both good and ill, is relevant as background. In this case, then, the history of the Hes' visits with A.M.H. must be examined in order to evaluate fully whether their failure to visit after the January 28, 2001 incident was willful."

It is undisputed that the Hes engaged in regular, once-a-week visitation with A.M.H. prior to the January 28, 2001 incident when the visitation suddenly ceased. Interestingly, although the trial court characterizes these regular visits as "token", the majority declines to address the issue at all, arguing instead that the four-month period should be considered in isolation. The dissent maintains that in order to put in proper context the Hes' actions *during* the pivotal four-month period, the Court must also analyze their actions *prior* to the four-month period. The Hes agree with this analysis and contend that Supreme Court review is necessary in order to establish this outcome-determinative proposition.

For example, why would the visits suddenly cease on January 28, 2001 if the Hes had been engaging in consecutive weekly visits for the previous two years? Is it not worthy of recognition that the Hes had previously engaged in weekly visits with astonishing regularity?[8] Armed with this information, the pivotal four-month period is

[8] The dissent correctly notes in footnote 2 that when Mid-South set up the initial foster care arrangement, the once per week visitation schedule was implemented, and that when Mid-South "bowed out", the parties continued the same schedule. The dissent also points out that this was a typical visitation

now given its proper context. One must then ask the inevitable question: if the Hes did, in fact, engage in regular visits in the past, what would cause them to suddenly stop visiting the Baker home? This question cannot be asked and will not be asked unless one has an appreciation of the visitation patterns that occurred prior to the four-month period.

The mere asking of this question demonstrates a real search for the truth, for it goes to the very heart of understanding whether the Hes actions during the pivotal four-month period rose to the level of *willful* abandonment. Did the Hes just suddenly and for no apparent reason decide that they no longer wanted to see their daughter? The issue of willfulness cannot be addressed unless this question is answered. Tennessee courts have held that "willfulness" involves an awareness of the duty to support or visit, the capacity to support or visit and no *justifiable excuse* for failing to support or visit. Unless we analyze the actions of the Hes prior to the four-month period, it is impossible to determine whether their failure to visit *during* the four-month period constitutes a justifiable excuse. As the dissent points out, "it is against this backdrop that the majority should evaluate the willfulness of the Hes' failure to visit during the pivotal four-month period."

The dissent has also criticized the majority for its analysis of the "willfulness" of the Hes' actions *during* the four-month period. The Hes' agree with the dissent's analysis and respectfully request Supreme Court review on these issues as well. Of particular importance to the Hes is the fact that both the trial court and the majority opinion give no weight to the fact that the Hes were in Juvenile Court seeking the

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schedule for interim foster care arrangements set up by Mid-South. It is, therefore, not surprising that the dissent has criticized the trial court for concluding that the Hes' visits prior to the pivotal four-month period were "token". It is also not surprising that the dissent has criticized the majority for failing to review that aspect of the trial court's decision.

complete and unconditional return of their daughter *during* the pivotal four-month period. This approach is certainly a civilized alternative, and the only viable alternative, to the notion of dealing with the Bakers directly following the incident of January 28, 2001, irrespective of whether the Hes were intimidated or not. The trial court summarily dismissed these efforts as irrelevant because the Hes did not include a specific request for "visitation" in their Petition to Modify. Instead, they merely asked for custody. Of course, it is beyond dispute that custody is much more than mere visitation, for it encompasses all of visitation and much more. When we ask to borrow $1,000.00, are we not also asking to borrow $500.00? Simply put, custody is qualitatively and quantitatively greater than visitation.

The dissent's view on this issue is quite clear:

> Surprisingly, the trial court determined that the failure of the Hes to seek *visitation* in their petition for custody "evinces [Mother's] willful abandonment of A.M.H." This determination defies logic; the petition did, after all, seek *full custody* of A.M.H., much more than mere visitation. The trial court's finding in this regard is not questioned, nor even discussed, in the majority opinion. This determination should have been rejected by the majority, because it has no basis in law. (emphasis in original).

The dissent further notes that the Hes' pursuit of a legal remedy in Juvenile Court was a "justifiable excuse" for not visiting during that time, particularly since it was clear that the status quo had been affected, "such that the Hes were no longer welcome to visit at the Bakers' home after the January 28, 2001 incident." Supreme Court review is needed to establish that the Hes' actions in seeking legal recourse, coupled with the totality of the circumstances, constitute a "justifiable excuse" for not visiting during the pivotal four-month period.

Other circumstances that should be considered are as follows:

1. The Bakers claimed that although they were no longer willing to continue the visits at their home following the January 28, 2001 incident, they would have been willing to continue the visits at a neutral location. As the dissent correctly observes, "If so, this was never communicated to the Hes."
2. The Hes faxed a letter to the Juvenile Court on February 15, 2001 expressing a desire to regain custody of their daughter. The letter then seeks assistance from the Juvenile Court to "please help us to have our baby return to her own parents." This was only five days prior to the commencement of the pivotal four-month period.
3. According to the uncontradicted testimony of Juvenile Court employee, Sarah Cloud, the Hes repeatedly contacted Juvenile Court in the midst of the pivotal four-month period with requests for assistance in regaining custody of their daughter. Ms. Cloud also testified that the Hes were unrepresented by counsel, that they brought a photo album with several small pictures of AMH and one larger picture, and that they indicated to Ms. Cloud that they thought their arrangement with the Bakers was temporary custody with open visitation.
4. On April 9, 2001, in the midst of the pivotal four-month period, Mr. and Mrs. He met with Candace Brown, a Juvenile Court employee, for purposes of preparing the petition to regain custody. Ms. Brown testified that mother could not stop crying and it was very clear that she wanted her daughter back.

5. On June 6, 2001, in the midst of the pivotal four-month period, both of the Hes actually appeared in Juvenile Court in furtherance of their petition to regain to custody. The Bakers requested and obtained a continuance, stating that their lawyer could not be present. The matter was then reset to June 22, 2001.

6. On June 22, 2001, the Hes appeared at what they thought would be the Court hearing, only to discover that there would be no hearing. Unbeknownst to the Hes, the Bakers had filed two days earlier a Petition to Adopt and to Terminate Parental Rights in Chancery Court, effectively preempting the Hes' efforts to regain custody.

8. Whether the Court of Appeals erroneously applied a preponderance of the evidence standard rather than a clear and convincing evidence standard when it affirmed the termination of parental rights. In other words, does substantive and procedural due process require the Court to be bound by objectively strict guidelines when determining whether evidence rises to the level of "clear and convincing," or is the Court permitted to inject its own subjective impressions of the evidence?

A correct application of this standard will reveal that both the trial court and the majority erred in concluding that there was "clear and convincing" evidence to support grounds for termination on the basis of abandonment and best interests.

It is well established under both the United States and Tennessee Constitutions that the parent's right to the custody and upbringing of his or her child is a fundamental constitutionally protected right. *Stanley v. Illinois*, 405 U.S. 645, 650, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972); *Bond v. McKenzie (In re Adoption of Female Child)*, 896 S.W.2d

546 (Tenn. 1995); *In re Swanson*, 2. S.W.3d 180 (Tenn. 1999). Because of the constitutional rights at stake, parental rights cannot be terminated unless the petitioners can prove by clear and convincing evidence that the Hes willfully abandoned their child. In *Hawk v. Hawk*, 855 S.W.2d 573 (Tenn. 1993), the Supreme Court held that a parent "has a constitutional right to the custody, companionship, and care of a child, and should not be deprived thereof except by due process of law." The burden is on the Bakers to establish abandonment by clear and convincing evidence. *Carr v. Moore*, 1999 WL 820608 (Tenn.App.); *In re: Z.C.G.*, 2001 WL 1262609 (Tenn.App.).

There are numerous cases which have attempted to define the term "clear and convincing evidence." It is the position of the Hes that the term, as presently defined in the context of a termination of parental rights proceeding, is so vague and general that the trier of fact is allowed too much discretion in evaluating the evidence, particularly in the context of a non-bifurcated proceeding in which notions of "best interest" can contaminate the fault-finding analysis. Armed with too much discretion, the trier of fact is permitted to inject too much subjectivity in its findings of fact. This subjectivity, if given too much deference by appellate courts in reviewing the case, invites a clearly erroneous result, particularly when uncontroverted evidence tending to contradict the theories raised by the Bakers, is completely ignored. The Hes respectfully submit that this record contains an abundance of countervailing evidence that was either disregarded or ignored by both the trial court and the appellate court. It is further submitted that if this evidence had been accorded its proper weight, in accordance with the overriding principle of "clear and convincing evidence," then a dismissal of the Bakers' Petition to Terminate Parental Rights would have been inescapable.

In *O'Daniel v. Messier*, 905 S.W.2d 182, 188 (Tenn.App.1995), the Court of Appeals reiterated the traditional and often repeated definition of "clear and convincing evidence":

> The clear and convincing standard imposes a heightened burden on those seeking to terminate the rights of a natural parent. To meet this standard, a party must go beyond the mere threshold of a preponderance of the evidence: Clear and convincing evidence eliminates any serious doubt or substantial doubt concerning the correctness of the conclusions drawn from the evidence. It should produce in the fact-finder's mind a firm belief or conviction with regard to the truth of the allegations sought to be established.

How must an appellate court evaluate the evidence in order to ensure that the trier of fact has gone beyond, as is required, "the mere threshold of a preponderance of the evidence"? What guidelines should be observed by a trial court that will increase the likelihood that the trier of fact has, indeed, reached a result truly supported by "clear and convincing evidence"? The Hes believe that, under the current state of the law, no such guidelines exist. Review is needed to clarify the analysis that should be undertaken by the trier of fact in arriving at the conclusion that the evidence indeed rises to the level of "clear and convincing." The Hes further urge that review is needed in order to ensure that the trier of fact has conducted its analysis in an objective way. The constitutional rights at stake in a termination proceeding, require that some methodology be employed by the trial court, objectively reviewable, that will ensure that evidence is truly "clear and convincing."

The Hes respectfully suggest that there is current authority, both in termination cases and in other areas of the law, that support the view that an objective methodology is indeed possible when analyzing evidence to determine if it rises to the heightened

standard of "clear and convincing." These authorities suggest that the following overriding principles should be observed by a trial court before it can properly conclude that evidence is indeed "clear and convincing":

1. Countervailing evidence from witnesses found to be credible by the trial court should be resolved in a light most favorable to the party defending his or her constitutionally-protected parental rights;
2. The defendants should be given the benefit of every factual dispute raised by credible witnesses; and
3. Any doubts as to the conclusions to be drawn from the evidence should be resolved in favor of the defendants.

The above principles have found support in other areas of the law where the stakes are often much lower than in cases involving fundamental constitutional rights. For example, it is well settled that under Rule 56 of the Tennessee Rules of Civil Procedure, the standard for determining whether summary judgment is appropriate is that, before summary judgment can be granted, the trial court must demonstrate that all countervailing evidence has been viewed in a light most favorable to the opponent of the motion and that all legitimate conclusions of fact have been drawn in favor of the opponent. *Bennett v. Mid-South Terminals Corp.*, 660 S.W.2d 799 (Tenn.App. 1983).

However, unlike a Motion for Summary Judgment, this analysis will in no way divest the trial court of its ability to undertake a determination of witness credibility. Indeed, a trial is the forum for assessment of witness credibility whereas a Motion for Summary Judgment defers the assessment of witness credibility until trial. However, this distinction makes little difference once the trial court has conducted the termination

proceeding and assessed witness credibility. The problem with the trial court's analysis in this case is that it simply ignored or disregarded countervailing evidence in favor of the Hes, ***from witnesses it specifically found to be credible other than the Hes***, and resolved those conflicting positions in favor of the Bakers. Guidance is needed from this Court to establish that conflicting testimony from *credible* witnesses should be resolved in favor of the defendants in a termination of parental rights proceeding.

The Hes have found at least two cases that support this view in the context of a termination proceeding. (*See Fancher v. Mann*, 432 S.W.2d at 66 (Tenn.App. 1968), in which the Court notes that "abandonment may be found ***only when, given the benefit of every controverted fact***, an inference of abandonment follows as a matter of law.") This view was later reiterated by the Western Section Court of Appeals in *Spencer v. Aydlotte*, 2001 WL 1683698 (Tenn.App.), which was decided on December 28, 2001.

The dissent has echoed this position by pointing to the lack of evidentiary support for the trial court's finding that fear of deportation was the *sole* motivation for seeking custody. The dissent correctly recognizes that this finding "is the cornerstone of the trial court's conclusion that the Hes' failure to visit during the four-month period was 'willful,' because it is the basis on which the trial court concludes that the Hes' Juvenile Court petitions and their other efforts to obtain custody were mere window dressing and did not constitute a 'justifiable excuse' for not visiting." Without this nexus, the entire foundation of the trial court's opinion cannot stand.

The dissent's discussion of this issue bears repeating here, as follows:

> ...Nevertheless, even deferring to the trial court's credibility determinations, there must be evidence in the record to support the trial court's sweeping conclusion that all of the Hes' visits with A.M.H. and their efforts to regain

custody of her, particularly during the pivotal four-month period, were done for the *sole* purpose of avoiding deportation.

The Bakers' attorney sought to establish, through repeated and exhaustive questioning, that the Hes' fear of deportation motivated their conduct, and that their claimed desire to parent A.M.H. was insincere. However, questions from lawyers do not constitute evidence. There are no documents in the record or testimony from an immigration official or anyone else showing when Father was contacted by the INS, or what topics were discussed by Father and any INS official. Rather, the record contains only Father's testimony regarding his communications with immigration officials and the Hes' fear of deportation. Therefore, we must examine that testimony.

In his testimony, Father admitted that he had been in the United States illegally since he lost his position with the University of Memphis. He admitted that he and Mother feared deportation after he lost his legal status. Father further admitted that he had told immigration officials that he could not leave the United States because he had felony charges (of sexual assault) pending against him, and because there was a pending civil case relating to his daughter. Father was under the impression that, if the criminal charges were dismissed and the litigation concerning A.M.H. were over, he would be deported. As to Mother, Father said that her right to be in the United States was based on her status as legal guardian of their daughter, a United States citizen. At the conclusion of the three-month foster care period, Father told the Bakers that he and Mother wanted to retain their parental rights because of their perception that it would help them remain in the United States.

Father testified in response to repetitive questioning about whether he was contacted by INS officials and when the contacts were made. With respect to the Hes' May 2000 petition for custody, Father was asked whether, "a month or so before that time when you filed that petition," he was "called to INS . . . to discuss your status . . . ." Father acknowledged that he had been "called by deportation a few times." Then the following colloquy occurred:

[Bakers' Counsel]: But the first time was in the spring of 2000 about a month before you filed the first Petition to Modify, is it not?
[Father]: Uh-huh.

[Bakers' Counsel]: And before that, you did —
[The Court]: I'm sorry. Mr. Parrish, excuse me. What was his answer?
[Attorney ad litem interrupts and interjects]: Yes.
[Father]: My answer is yes, I have been called.

Even assuming that this unclear testimony established the time frame of the INS's call to Father, there is no evidence on the substance of the conversation between Father and the INS official, any issues raised by the official, or how the filing of the petition for custody would have addressed any INS concerns.

As to the Hes' second petition for custody, filed within the pivotal four-month period before the Bakers' petition for termination, Father was questioned by the attorney ad litem, who advocated on behalf of the Bakers' position, consistently pursuing similar lines of questioning as the Bakers' counsel:

[Attorney Ad Litem]: And then you filed the petition, the first one, since you gave custody away, to get custody back; correct? Yes or no?
[Father]: Yes, I filed petition.
[Attorney Ad Litem]: When did you file the second petition?
[Father]: April – April 9, 2001.
[Attorney Ad Litem]: Didn't you hear from I.N.S. in March of 2001?
[Father]: I was not sure about the date.
[Attorney Ad Litem]: What do you think?
[Father]: I think it was between March or April or May – between March and May, let's say.
[Attorney Ad Litem]: It was before April the 9 of 2001, was it not?
[Father]: I'm not sure ma'am.

Again, Father's testimony about the timing of the call was uncertain at best, and no testimony was elicited relating to the substance of any conversation between Father and any INS official or any concerns raised by INS.

That is the sum total of the evidence on any alleged nexus between contacts from the INS and the Hes' petition for custody. From this, the trial court made the finding of fact that "[t]he INS contacted Mr. He about the Hes' immigration status in March, April, or May, 2001." The trial court extrapolated from this evidence that, because the

INS contact with Father occurred "around the time" the Hes filed their second petition for custody, then the Hes' fear of deportation was the *sole* motivation for the May 2001 petition for custody.

The evidence of the "close proximity" between the calls from the INS and the Hes' petition is clearly insufficient. It must be emphasized that the Hes' February 1, 2001 letter to Juvenile Court was faxed *before* any INS contact with Father in March, April, or May 2001. How can the INS call have motivated the Hes' petition for custody if it came *after* the Hes wrote the Juvenile Court asking for assistance in regaining custody? Notably, in its detailed findings of fact, the trial court makes *no* mention of the Hes' February 2001 letter to Juvenile Court. Unfortunately, in reviewing the trial court's expansive conclusion that all of these actions by the Hes were done for the *sole* reason of avoiding deportation, the majority glosses over the evidence, commenting only that the finding is supported because "the Hes' desire to avoid deportation has been a consistent theme throughout the tortured history of this case," and that "the record is replete with instances where the Hes expressed concerns about deportations as it relates to their daughter." Such amorphous description of the evidence does not substitute for analysis. This Court should explicitly set forth the evidence it believes supports the trial court's finding of a nexus between the contacts from the INS and the Hes' petition for custody, to determine if the finding is adequately supported; the majority has failed to do so on this key issue.

Furthermore, it is undisputed that the criminal charges against Father remained pending until well after the Bakers' petition for termination was filed. Therefore, filing the petition for custody was not necessary for the Hes to be allowed to remain in the United States. The birth of their second child, also a United States citizen by birth, made the Hes' retention of parental rights to A.M.H. unnecessary for purposes of remaining in the United States, at least according to the Hes' belief that retaining such parental rights would allow them to stay in the country. These facts undermine any inference that the Hes' filing of a petition for custody of A.M.H. was motivated by their intent to create a legal controversy to serve as a basis on which they could legitimately remain in the United States. There is simply no evidence of how the filing of a petition for custody would have helped the Hes avoid deportation.

From the above quote, seven indisputable concepts emerge which completely shatter any claim that the Hes' alleged fear of deportation was their sole motivation for seeking custody:

- There are no documents in the record or testimony from an immigration official or anyone else showing when Father was contacted by the INS, or what topics were discussed by Father and any INS official. Rather, the record contains only Father's testimony regarding his communications with immigration officials and the Hes' fear of deportation.

- Even assuming that this unclear testimony established the time frame of the INS's call to Father, there is no evidence on the substance of the conversation between Father and the INS official, any issues raised by the official, or how the filing of the petition for custody would have addressed any INS concerns.

- Father's testimony about the timing of the call was uncertain at best, and no testimony was elicited relating to the substance of any conversation between Father and any INS official or any concerns raised by INS.

- The trial court extrapolated from this evidence that, because the INS contact with Father occurred "around the time" the Hes filed their second petition for custody, then the Hes' fear of deportation was the *sole* motivation for the May 2001 petition for custody.

- The Hes' February 1, 2001 letter to Juvenile Court was faxed *before* any INS contact with Father in March, April, or May 2001. How can the INS call have motivated the Hes' petition for custody if it came *after* the Hes wrote the Juvenile Court asking for assistance in regaining custody?

- It is undisputed that the criminal charges against Father remained pending until well after the Bakers' petition for termination was filed. Therefore, filing the petition for custody was not necessary for the Hes to be allowed to remain in the United States.

- The birth of their second child, also a United States citizen by birth, made the Hes' retention of parental rights to A.M.H. unnecessary for purposes of remaining in the United States, at least according to the Hes' belief that retaining such parental rights would allow them to stay in the country.

Several other points worthy of consideration are as follows:

- The trial court found that the Hes willfully failed to appeal their first Juvenile Court petition in May of 2000 after it was denied by Referee Haltom.
- The trial court also found that Mr. He was highly educated and intelligent, implying that he knows how to use the legal system to his advantage.
- If the INS calls caused the Hes to file their petition in order to create a custody battle so they could allegedly avoid deportation, then the Hes would have certainly appealed the adverse ruling from the Juvenile Court referee. This would have allowed the Hes to prolong the battle even more.
- Instead, the Hes continued to work in order to improve their financial situation and continued to visit AMH on a regular basis.

A correct application of the principles governing "clear and convincing" evidence would have mandated that the above evidence be evaluated in a light most favorable to the Hes. Unfortunately, the Bakers were given the benefit of every controverted fact, even in those instances where credibility was not the issue.

Other outcome-determinative examples where conflicting evidence was resolved in favor of the Bakers are as follows:

1. At no time during the June 4, 1999 meeting at Juvenile Court did either of the Hes ever indicate they wanted someone to take care of their child on a permanent basis or until she became an adult. (Sarah Cloud, p. 1210, 1253). The Hes did indicate to Sarah Cloud that they were interested in having someone take care of their child only on a temporary basis. (Sarah Cloud, p. 1252-1253). Specifically, Sarah Cloud recalls that Mrs. He was "very concerned that it was not a permanent situation. She did not want it to be a

permanent situation." She made that very clear to Ms. Cloud. (Sarah Cloud, pp. 1210-1211). According to Sarah Cloud, Mrs. He was "fairly adamant that at some point she wanted her child back." (Sarah Cloud, p. 1263). Sarah Cloud also understood that the Bakers wanted a temporary arrangement. (Sarah Cloud, p. 1252-1253). This evidence is diametrically opposite to the Bakers' theory of this case and yet it comes from Sarah Cloud, a witness the trial court found to be credible. Under principles of "clear and convincing evidence," this issue should have been resolved in favor of the Hes. Had this issue been resolved in favor of the Hes, the Hes would have prevailed under the doctrine of "superior parental rights" because it is clear that two of the exceptions outlined in *Blair v. Badenhope*, 77 S.W.3d 137 (Tenn. 2002) would have been established; i.e., (1) that the order transferring custody from the natural parent is accomplished by fraud or without notice to the parent and (2) that the natural parent ceded only temporary or informal custody to the non-parents. Sarah Cloud was found to be credible by the trial court, but for reasons unexplained, this testimony was accorded no weight.

2. Pastor Kenny Yau, the interpreter during the June 4, 1999 proceeding in Juvenile Court, testified that he was asked to interpret the documents for Mrs. He so she understood what the document was and why she had to sign it. (Pastor Kenny Yau, p. 2008). Pastor Yau was never asked to read the documents word for word in Chinese to Mrs. He, even though it would have been possible for him to do so. (Pastor Kenny Yau, pp. 1997, 2008). According to Pastor Yau, "guardianship" was explained as being the

> Q. So when you say it was assumed to be a short period of time, that is something that you just gleaned from the totality of the circumstances. Is that correct?
>
> A. No. I was born and raised and grew up in the Chinese community. So I know the language of the Chinese, and I've been learning English for the past 30 years. The word "temporary" ***could not be meant indefinite.*** Temporary – to the best of my understanding of the English word, ***temporary means it is a short period*** or - - it is indefinite, but it is a short period of indefinite time....
> (Pastor Kenny Yau, p. 2020; emphasis added).

There are two or three or four different ways to say the English word "temporary." (Pastor Kenny Yau, p. 2018). Pastor Yau made no explanation

willingness of the Bakers to "temporarily take care of the baby." (Pastor Kenny Yau, p. 1994). Because of the need for medical care for the baby, the "guardians or the custodians" need to have medical insurance for the baby. (Pastor Kenny Yau, p. 1995). On June 4, 1999, Pastor Yau explained the following (not word for word) to Mrs. He:

> In summary- - you know, I can't recall the word for word question... I said that because the Hes were unable to [illegible] was willing to take care of their baby on their behalf, but because of the legal procedure that necessitate to buy insurance or to administer medication or whatever to the baby by the custodian, Ms. He needs to give the authority to the custodian by signing a document. (Pastor Kenny Yau, p. 10).

Pastor Yau explained to Mrs. He the meaning of the word "temporary" as "someone was willing to look after or take care of the well-being of the baby for a period of time." (Pastor Kenny Yau, p. 1995). Although Pastor Yau agreed during cross examination that technically the duration of "temporary" lasts until the period is over (meaning it might be one day, one minute or 50 years), the word was used in a very specific way on June 4, 1999. Specifically, as used on June 4, 1999, the word "temporary" was assumed to be "only for a ***short*** period of time." (Pastor Kenny Yau, pp. 2017, 2020; emphasis added).

When Pastor Yau was asked whether he was merely assuming that the word "temporary" meant a short period of time on June 4, 1999, he replied "no." (Pastor Kenny Yau, p. 2018).

in a light most favorable to those persons faced with having to defend their constitutionally-protected parental rights.

9. **Were parental rights terminated by giving recognition to a purported agreement, that even if found to exist, would contravene the public policy of Tennessee.**

At the heart of the Bakers' position, is an attempt to enforce, or convince the court to recognize for purposes of establishing intent, what amounts to an agreement that if found to exist would violate the public policy of Tennessee. The Bakers *contend* that they entered into an agreement with the Hes to raise AMH until she became an adult. In turn, according to the Bakers, the Hes would retain their parental rights. In reaching its decision, the majority has implicitly given recognition to this purported agreement, even if only for purposes of ascertaining intent, in order to achieve the termination of the Hes' parental rights. Review is necessary to establish that agreements of this nature are void as against the public policy of the State of Tennessee, and, as such, cannot be used by trial courts and reviewing appellate courts in any context to buttress a termination of parental rights, even if that context is limited to the sole role of ascertaining the intent of the parties and not for purposes of establishing the illegal contract itself.

It is undisputed, and the testimony of Jerry Baker bears this out, that the Bakers decided to terminate the Hes' parental rights because the Bakers believed that the Hes, by petitioning the juvenile court for the return of AMH, had thereby breached their agreement that AMH be raised by the Bakers until she became an adult. The remedy for this breach, according to Jerry Baker, was to seek the termination of the Hes' parental rights.

It is well settled that private agreements which circumvent the support obligations established by law contravene public policy, and are, therefore, void. *Berryhill v. Rhodes*, 21 S.W.3d 188 Tenn. 2000). In a more recent decision, the Court of Appeals considered whether a father could voluntarily have his parental rights terminated when, by his own admission, he had not seen his daughter since birth, and had, for all practical purposes abandoned his child. *C.J.H. v. A.K.G.*, 2002 WL 1827660 (Tenn. Ct. App. August 9, 2002). The mother and father both agreed to terminate father's parental rights and they, therefore, submitted a joint petition for termination of father's parental rights. The trial court denied the father's request and the Court of Appeals affirmed, citing public policy concerns and the fact that termination was not in the best interest of the child. Thus, even in a case in which the father wanted the termination of his parental rights, the Court refused.

In the instant case, there were certainly other legal avenues the parties could have utilized had they been truly interested in the creation of an agreement which would have had the legal effect of allowing the Bakers to permanently raise AMH while simultaneously excusing the Hes from the payment of child support. For example, Tenn. Code Ann. § 36-1-102(47) allows the parent or guardian of a child to execute a "surrender," whereby the parent or guardian relinquishes all parental or guardianship rights to another person or public child care agency or licensed child-placing agency *for the purposes of making that child available for adoption.*

It is undisputed that not only did this not occur, but the Hes, particularly, Mrs. He, expressed vehement opposition to the idea. Had the parties truly contemplated an agreed abandonment, a surrender should have and would have been executed, thereby making

AMH available for adoption. The fact that a surrender did not occur, is perhaps the best evidence of the parties' intentions. To enforce an agreement which, by its very nature, was designed to circumvent the surrender provisions of Tenn. Code Ann. § 36-1-102(47) is clearly illegal and in violation of public policy. By terminating the parental rights of the Hes, the trial court, in effect, undertook the enforcement of an illegal contract (although no such contract really existed), the breach of which resulted in the remedy of termination.

Similarly, to allow the Bakers to capitalize on their illegal contract by arguing that it somehow proves the Hes "willfulness" is the legal equivalent of giving credence to the illegal contract itself. If the contract is truly void, then it is worthy of no recognition in any context, irrespective of whether one calls it a contract or not.

The transfer of custody that occurred on June 4, 1999, in no way ratifies what was otherwise an illegal contract. Quite the contrary, if the Bakers' contention is correct that such a contract really existed, then such a contract not only circumvents the surrender laws of our state, but it also undermines the legal effect of the custody order, which, by its nature, is subject to modification upon a showing of changed circumstances. If custody orders are subject to modification, how can the Bakers logically or legally enter into a custody arrangement that unconditionally allows them to raise AMH until she becomes an adult? The answer is clear. They cannot. Such an arrangement is nothing less than a legal paradox, an anomaly incapable of enforcement.

Therefore, if we are to believe such a contract existed as claimed by the Bakers, then we must also accept the proposition that the contract was "under the table." It was

designed to accomplish for the Bakers that which they could not accomplish legally: the adoption of AMH.

10. **Whether a trial court should be permitted to find that termination of parental rights is in the best interest of a minor child when it improperly issues a no-contact order without notice, without an evidentiary hearing and without legal justification, thereby preventing the parents from developing a meaningful relationship with their daughter.**

On February 8, 2002, the Court entered an Order Appointing Petitioners Guardians of AMH which contained the following finding:

> **FURTHER ORDERED ADJUDGED AND DECREED** that Shaio-Qiang (Jack) He and Qin (Casey) Luo shall neither have nor attempt to have any contact, direct *or indirect*, in person *or otherwise*, with the ward, Anna Mae He, unless, except and until after this Court enters and files an order mandating otherwise. It is
>
> **FURTHER ORDERED ADJUDGED AND DECREED** that Jerry L. Baker and Louise K. Baker, as co-guardians of the ward, Anna Mae He, shall protect the ward, Anna Mae He, from any contact with Shao-Qiang (Jack) He and Qin (Casey) Luo, and shall report to this Court, immediately, any attempt by Shaio-Qiang (Jack) He and Qin (Casey) Luo to make contact, direct *or indirect*, in person *or otherwise*, with the ward, Anna Mae He.
> (Emphasis added).

At the trial of this cause, the court made the following finding of fact with respect to this order:

> The Court entered the February 8, 2002, "no-contact" order because, on February 7, 2002, the Court had ordered the Hes to deliver AMH's passport to the Clerk & Master by 4:00 P.M. that day. At 4:00 P.M. on February 7, 2002, the Hes' counsel telephoned the Court and advised the Court that the Hes had no intention of complying with the Court's

order, and the Court then entered the "no-contact" order the next day.

The Court's finding here is based exclusively on evidence adduced pursuant to a Motion to Reopen proof that was filed on March 22, 2004, a full 20 days after all trial testimony had been supposedly concluded. (T.R. 1166) However, during the trial, the following testimony had been elicited weeks earlier:

At trial, the Guardian ad litem was unable to explain during cross-examination how the no-contact order was entered. (Ms. Mullins, pp. 2566, L. 24; 2567, L. 1-24; 2568, L. 1-24; 2569, L. 1-24; 2570; L. 1-24; 2571, L. 1-9)

The following exchange then occurred at trial:

Q. All I'm asking you is just to respond to my question. Did you do anything at all to corroborate or conduct any investigation to determine why the no contact order was issued, since we now you don't know why it was issued, my next question is, what did you do to investigate as the guardian ad litem for this child why a no contact order would be issued?

A. I really don't know the answer. Sorry.
(Ms. Mullins, p. 2573, L. 7-14)

Also at trial, counsel for the Bakers took the stand and testified as follows regarding the no-contact order:

> So the hearing ended on February 7th, and the court reporter has winding up and everybody was winding up and headed out of court, and Chancellor Alissandratos had stood up and started to leave the bench. ***And I can tell you exactly where I was standing in chancery court***, and he turned around to me and he said, draft me an order on making this Court the guardian. He didn't ask me what I thought about that or anything else. He just told me that, and he said, I want no contact until I order otherwise. Bring me an order tomorrow. He didn't want this included in any of the other orders. I was taking instructions only.
>
> I went back to my office. I sat down and drafted the order. He told me the provision in the adoption statute that makes

> me the guardian. He couldn't cite the statute, nor could I at that time, but I went and looked it up. I drafted as faithfully as I knew how what he told me to do. I appeared in court. ***He told me not to take the time to get the other attorney's signature because there wasn't another attorney.*** You were not involved. Ms. Holmes was not involved at the time, ***neither Mr. He nor Ms. Luo had an attorney at the time.*** So, that is why he told me to do it, and he told me to do a certificate of service." (Mr. Parrish, p. 2834, L. 17-24; 2835, L. 1-24; 2836, L. 1-8)

In reality, Mr. Sossaman's Motion to Withdraw as attorney for the Hes was not heard until February 14, 2002. (T.R. 229). The no-contact order had been entered six days earlier on February 8, 2002. (T.R. 214).

Under either version, it is clear that the no-contact order was issued without an evidentiary hearing involving the Hes themselves. The trial court found that the no-contact order was issued because Mrs. He was refusing to deliver the passport. However, this does not explain why the no-contact order contained a provision prohibiting even "indirect" contact if risk of flight was the court's only concern. It also fails to address why the phrase "or otherwise" was ordered.

Although the majority did not address this issue, the dissent goes at great length to criticize the issuance of the no-contact order, including the fact that it had a profound impact on the outcome of this case. The dissent correctly explains that the effect of the no-contact order was to prevent the Hes from developing a meaningful relationship with their daughter:

> Here, precluding the Hes from any contact with A.M.H. during the two-year pendency of the case, without ever even affording them an opportunity to be heard, insidiously corrupted the status quo such that a finding that the Hes had not maintained a meaningful relationship with A.M.H. was virtually assured. Thus, even if the Hes' parental rights had not been terminated, the ill-considered

> no-contact order doomed their petition for custody and effectively preordained the outcome of the litigation. This was clear error.

Not only did the no-contact order doom the Hes' petition for custody, it also made it easier for the trial court to terminate parental rights under the best interest prong; i.e., that it was in the best interest of the child to terminate parental rights because the parents had not developed a meaningful relationship with their daughter. In fact, both the trial court and the Court of Appeals, relied heavily on the testimony of the court-appointed psychologist that A.M.H. showed no signs of attachment to the Hes.

Accordingly, there is a vital need for the exercise of the Supreme Court's supervisory authority pursuant to Rule 11(a)(4) of the Tennessee Rules of Appellate Procedure, so that the no-contact order can be declared void. If the no-contact order is declared void and/or set aside, there is no basis for termination of parental rights under the best interest prong; nor is there a basis to deny the Hes' request for custody.

11. **Whether the doctrine of superior parental rights should have been applied so as to award custody to the Hes, thereby rendering moot the Bakers' pending petition to terminate parental rights.**

Perhaps no case has changed the complexion of custody law more in recent years than the Tennessee Supreme Court decision of *Blair v. Badenhope*, 77 S.W.3d 137 (Tenn. 2002). Prior to *Blair*, the only legal standard in custody disputes between parents and non-parents was "substantial harm;" i.e., in an initial custody dispute between parents and non-parents, a natural parent may only be deprived of custody of a child upon a showing of substantial harm to the child. *In re Askew*, 993 S.W.2d 1 (Tenn. 1999). This is also known as the "doctrine of superior parental rights." Thus, biological parents enjoyed