

**UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TENNESSEE  
AT MEMPHIS**

|   |   |                       |
|---|---|-----------------------|
| <b>IN RE: A.M.H. a minor, d/o/b 1/28/99</b>                           | ) |                       |
|   | ) |                       |
| <b>By Next Friends,</b>   | ) |                       |
|   | ) |                       |
| <b>JERRY L. BAKER and wife,</b>                                       | ) |                       |
| <b>LOUISE K. BAKER,</b>   | ) |                       |
|   | ) |                       |
| <b>Petitioners,</b>   | ) |                       |
|   | ) |                       |
| <b>v.</b>   | ) | <b>No. 07-CV-2394</b> |
|   | ) |                       |
| <b>THE HONORABLE ROBERT E. COOPER, JR.,</b>                           | ) |                       |
| <b>The Attorney General &amp; Reporter of the State of Tennessee,</b> | ) |                       |
|   | ) |                       |
| <b>and</b>  | ) |                       |
|   | ) |                       |
| <b>THE HONORABLE CURTIS S. PERSON, JR.,</b>                           | ) |                       |
| <b>Judge, Juvenile Court of Memphis and Shelby County,</b>            | ) |                       |
| <b>Tennessee,</b>   | ) |                       |
|   | ) |                       |
| <b>Respondents.</b>   | ) |                       |

---

**RESPONSE TO MEMORANDUM OF LAW  
IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS**

---

**I. BACKGROUND**

This is a long-running and contentious dispute over the custody of a child, A.M.H., that began shortly after she was born on January 28, 1999. The contestants are her biological parents, Shao-Qiang (“Jack”) He and Qin (“Casey”) He, and her would-be adoptive parents, Jerry L. Baker and Louise K. Baker, on January 28, 1999.

For a case that has consumed so much time, energy, and paper, the determining facts are surprisingly straightforward. The Hes were financially unable to care for A.M.H. even before she was born and consulted with Mid-South Christian Services (“Mid-South”). *In re Adoption of*

*A.M.H.*, 215 S.W.3d 793, 797 (Tenn. 2007). Ms. He told Mid-South she did not want A.M.H. adopted; hospital records from A.M.H.'s birth verify that Ms. He did not want A.M.H. adopted. *Id.*

When A.M.H. was about a month old, the Hes went to juvenile court and explained their predicament. *Id.* A juvenile court officer telephoned Mid-South, which agreed to provide three months care of A.M.H. and placed her in the Bakers' home. *Id.* at 798. The Hes visited A.M.H. regularly in the Baker home. *Id.*

Because of their deteriorating financial condition, the Hes decided to send A.M.H. to China to live in the care of relatives. *Id.* In May 1999, the Bakers and the Hes met and the Bakers expressed their desire to adopt A.M.H.; even the Bakers later conceded that at least Ms. He continued to oppose adoption. *Id.* The Bakers agreed to raise A.M.H. until she was eighteen and leave intact the Hes' parental rights. *Id.*

Following a meeting on June 2, 1999, that involved the Hes, the Bakers, a Mid-South counselor, and Mid-South's attorney, on June 4, 1999, Mid-South's attorney and the Hes went to juvenile court to get a consent order transferring custody from the Hes to the Bakers. *Id.* at 798-99. A juvenile court officer drafted the order transferring custody and later testified that Ms. He was very concerned that the arrangement should be temporary and that the Hes should be allowed open visitation as long as the Bakers had custody. *Id.* at 799. Despite Ms. He's concerns, the juvenile court officer added to the order a guardianship provision so that the Bakers could obtain medical insurance for A.M.H.. *Id.* There had been no previous discussion of guardianship. *Id.* Despite the Bakers' contention that the Hes agreed to the Bakers' raising A.M.H. until she was eighteen, the juvenile court officer later testified that Ms. He was "fairly adamant" that she wanted A.M.H. back. *Id.*

For the year that followed, the Hes visited A.M.H. on a weekly basis despite the deteriorating relationship between them and the Bakers. *Id.* at 800. On May 3, 2000, the Hes filed a petition in juvenile court seeking a change of custody based on changed circumstances. *Id.* The Bakers retained Mid-South's attorney to oppose the Hes' custody petition and to file a petition to terminate the Hes' parental rights. *Id.* at 800-01. The Hes were still unable to afford an attorney. *Id.* at 801. At the June 28, 2000, hearing of the custody petition, a Court Appointed Special Advocate filed a report recommending that the Bakers retain custody and the Hes be permitted twice-weekly four hour visits. *Id.* The juvenile court referee dismissed the custody petition. *Id.*

The relationship between the couples continued unevenly, but the Hes visited regularly until A.M.H.'s second birthday, on January 28, 2001. *Id.* The Hes had asked the Bakers to allow them to take A.M.H. to a photography studio for a family portrait that day, but were told when they arrived at the Bakers' home that A.M.H. was sick and could not go with them. *Id.* There was a quarrel and the Hes refused to leave without A.M.H., inviting the Bakers to call the police. *Id.*

The Bakers obliged the Hes, and the police officer who arrived told the Hes to leave the house or face arrest. *Id.* There was some uncertainty as to exactly what he said: the Bakers in interrogatories stated that the officer told the Hes "not to return to the home of the Bakers," while the officer later testified that he told the He's not to return "that day." *Id.*

Regardless of what the officer told the Hes, it is undisputed that they did not return to the Bakers or otherwise visit A.M.H. for more than four months after he ordered them off the Bakers' property. *Id.* However, they protected their parental rights in other ways. On February 15, 2001, the Hes sent a letter to the juvenile court and the media reciting the foregoing facts stating that they wanted A.M.H. returned to them. *Id.* at 802. Mr. He testified that the Hes went to the juvenile court

between February and April 2001. *Id.* On April 9, the Hes went to juvenile court and as Ms. He sobbed, told the juvenile court officer that they did not understand the ramifications of signing the consent order. *Id.* The juvenile court officer prepared for the Hes a petition seeking to regain custody, of which the Bakers received notice on May 4, 2001. *Id.*

On June 6, 2001, the Hes appeared in juvenile court for a hearing on the custody petition; the hearing was rescheduled to June 22, 2001, to accommodate the Bakers' attorney. *Id.* That hearing never took place because on June 20, 2001, the Bakers filed a petition to terminate the Hes' parental rights and adopt A.M.H.. *Id.*

These essentially undisputable facts frame the real question in the state-court case: Did the Hes' conduct in the four-plus months that passed between when the police officer asked them to leave the Bakers' property constitute abandonment of the child for willful failure to visit the child.

Analyzing the relevant law, the Tennessee Supreme Court answered, "No." In Tennessee, a non-parent may not terminate a parent's rights without showing that the parent is unfit or otherwise presents a substantial risk of harm to the child. *In re Audrey S.*, 182 S.W.3d 838, 881 (Tenn. Ct. App. 2005). By statute, the Legislature has set out a number of grounds that define what constitutes parental unfitness or risk of harm. *Id.* (referring to the termination grounds set out in Tenn. Code Ann. §§ 36-1-113(g)(1) through (9)). The only ground relevant to this case is abandonment, defined as a parent's willful failure to visit or engage in more than token visitation in the four months preceding the petition. *See* Tenn. Code Ann. §§ 36-1-113(g)(1) and 36-1-102(1)(A)(i) and (102)(E).

Noting that the Hes' failure to visit in the four months must have been willful to satisfy the statute, the Court wrote that the "undisputed evidence" set out above "does not support a finding that the parents' failure to visit A.M.H. was willful." *In re A.M.H.*, 215 S.W.3d at 810. The Court held

that there can be no willful failure to visit when enmity between a parent and a non-parent forces the parent to redirect to the courts his or her efforts to preserve the parent-child relationship. *Id.* at 810. The Supreme Court did not, as Petitioners maintain, find that its judgment would cause A.M.H. substantial threat of harm. Addressing the subject of harm, the Court instead wrote:

“[T]he only evidence of substantial harm arises from the delay caused by the protracted litigation and the failure of the court system to protect the parent-child relationship throughout the proceedings. Evidence that A.M.H. will be harmed from a change in custody because she has lived and bonded with the Bakers cannot constitute the substantial harm required to prevent the parents from regaining custody.”

*Id.* at 812. The Supreme Court merely emphasized that any threat of harm emanated not from the Hes but from the system that unlawfully maintained A.M.H. in the Bakers’ custody some six years after she should have been returned to her parents. *Id.* Contrary to Petitioners’ assertion, the Court specifically found a “*lack of evidence of a threat of substantial harm to A.M.H. if she is returned to her parents.*” *Id.* at 813 (emphasis added).

**II. THIS COURT LACKS JURISDICTION TO ENTERTAIN THIS HABEAS CORPUS PETITION PURPORTEDLY BROUGHT ON BEHALF OF A CHILD PURPORTEDLY IN STATE CUSTODY.**

In its previously filed brief, the State brought to the Court’s attention *Lehman v. Lycoming County Children’s Services Agency*, 458 U.S. 502, 516 (1982), in which the United States Supreme Court concluded:

The considerations in a child-custody case are quite different from those present in any prior case in which this Court has sustained federal-court jurisdiction under § 2254. The federal writ of habeas corpus, representing as it does a profound interference with state judicial systems and the finality of state decisions, should be reserved for those instances in which the federal interest in individual liberty is so strong that it outweighs federalism and finality concerns. Congress has indicated no intention that the reach of § 2254 encompass a claim like that of petitioner. We therefore hold that § 2254 does not confer federal-court jurisdiction. The decision below, affirming the denial of a writ of habeas corpus, therefore is affirmed.

*Id.* at 515-16.

Petitioners' most recent memorandum attempts to distinguish *Lehman* by posing not only the facts of this case, but of a number of extreme and horrifying hypotheticals. Leaving aside those irrelevant, albeit distressing, hypotheticals and looking at this case, it is clear that *Lehman* controls and that this Court lacks jurisdiction to entertain this habeas corpus petition. If anything, there is less rationale for jurisdiction here than in *Lehman* for a federal court to exercise habeas corpus jurisdiction, as the child in this case, unlike the child in *Lehman*, is not in state custody. However, the Court in *Lehman* explicitly rejected a suggestion to rest its holding on such distinctions. *Id.* at 513 n.15. The court recognized that habeas corpus petitions have been limited "to challenges to state-court judgments in situations where--as a result of a state-court **criminal conviction**--a petitioner has suffered substantial restraints not shared by the public generally." *Id.* at 510 (emphasis added). This Court should not go where the Supreme Court feared to tread and expand its habeas corpus jurisdiction beyond the Supreme Court's previous limits. A.M.H. has not been convicted of a crime, let alone suffered substantial restraints as the result of such a conviction. Accordingly, this Court lacks jurisdiction to entertain the habeas corpus petition purportedly brought on her behalf, and rearranging the factual deck chairs will not supply jurisdiction.

**III. THE PETITION SHOULD BE DISMISSED BECAUSE THE BAKERS LACK THE AUTHORITY TO ACT AS NEXT FRIENDS OF A.M.H. AND THEIR LAWYER, MR. PARRISH, LACKS THE AUTHORITY TO REPRESENT A.M.H., WHOSE INTERESTS CONFLICT WITH THE HES, WHOSE PARENTAL RIGHTS AND LEGAL POSITIONS ARE LEGALLY INDISTINCT FROM THOSE OF THEIR CHILD, A.M.H.**

It is an obvious and time-honored principle that it is impermissible “to permit one who has an interest antagonistic to a person under a disability to maintain a suit as next friend of such a person.” *Brewer v. Brewer*, 84 S.W.2d 1022, 1041 (Tenn. Ct. App. 1933). It is equally impermissible for a lawyer to represent parties with conflicting interests in a lawsuit. Tenn. Rules of Prof. Conduct R. 1.7. A child’s legal interest is inseparable from that of a parent whose rights to the child are intact. *Cf. Aaby v. Strange*, 924 S.W.2d 623, 627 (Tenn. 1996) (holding that in a contest between a custodial parent and non-custodial parent, the child’s rights are identified with those of the custodial parent).

In this case, the Bakers have unilaterally cloaked themselves with the authority to act as next friends to someone else’s child. The Bakers, however, have interests in conflict with the Hes, the parents of that child. The Hes have full and intact parental rights. The Bakers should not be permitted to usurp those rights.

Moreover, the Bakers’ lawyer, Mr. Parrish, has held himself out as A.M.H.’s lawyer, filing this petition on her behalf. However, because his clients’ interests are antagonistic to those of the Hes, including A.M.H., he may not represent A.M.H.

The Bakers lack authority as legal antagonists to A.M.H.’s parents to act as next friend to A.M.H. For the same reason, their lawyer may not represent A.M.H., a client with interests that are antagonistic to those of his clients. Accordingly, the habeas corpus petition brought by the Bakers through Mr. Parrish should be dismissed.

**IV. CONCLUSION**

For the reasons stated, the petition for writ of habeas corpus should be dismissed.

Respectfully submitted,

ROBERT E. COOPER, JR.  
Attorney General and Reporter

s/ Douglas Earl Dimond  
DOUGLAS EARL DIMOND (BPR #17953)  
Senior Counsel  
General Civil Division  
P.O. Box 20207  
Nashville, TN 37202  
(615) 532-7913



**CERTIFICATE OF SERVICE**

I hereby certify that on June 18, 2007, a copy of the foregoing response to the memorandum of law in support of petition for writ of habeas corpus was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to Parties listed below. Parties may access this filing through the Court's electronic filing system.

David A. Siegel  
Attorney for Shaoqiang (Jack) He  
488 South Mendenhall Road  
Memphis, TN 38117

Richard A. Gordon  
Attorney for Qin (Casey) Luo  
264 Barry Road  
Memphis, TN 38117

Larry E. Parrish  
Attorney for Petitioners  
6075 Poplar Avenue # 420  
Memphis, TN 38119

Larry Scroggs  
General Counsel for Juvenile Court  
Juvenile Court of Memphis  
616 Adams Avenue  
Memphis, TN 38105

s/ Douglas Earl Dimond  
DOUGLAS EARL DIMOND  
Senior Counsel