IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

In Re: Adoption of A.M. H., A Minor

JERRY L. BAKER and wife,
LOUISE K. BAKER,
Petitioners/Appellees,

W2004-01225-SC-R11-PT
(Trial Ct.#Ch-01-1302-3, Chancery Court Thirtieth Judicial District at Memphis)

v.

SHAO-QIANG {JACK} HE and wife,
QIN (CASEY) LUO,
Respondents/Appellants.

BRIEF OF AMICUS CURIAE: DONGXIAO YUE, A CITIZEN OF PEOPLE'S REPUBLIC OF CHINA

Dongxiao Yue

Amicus Curiae Pro Se

ORAL ARGUMENT REQUESTED

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ISSUES PRESENTED FOR REVIEW

Amicus will address the following issues:

1. The factors for determining whether willful failure to visit has occurred.
2. Whether the each of the four factors is a necessary element in finding willful failure.
3. Whether the facts support the Appellate Court's finding that the Hes willfully failed to visit A.M.H.
    a) Whether the Hes had the capacity to visit
    b) Whether the Hes attempted to visit
        b.1) Whether Hes' April 2001 petition for custody was an attempt to visit
        b.2) Whether Hes' April 2001 petition for custody was for avoiding deportation
    c) Whether the Hes were aware of their Tennessee statutory duty to visit
    d) Whether the Hes had excuses for failing to visit.
4. How title 36 and title 37 of the Tennessee code can be brought into a coherent state in compliance with the Fourteenth Amendment of United States Constitution
5. Whether the Court has applied the clear and convincing standard of evidence.
6. Whether the Majority's correctly interpreted the word "factor" in case law.

STATEMENT OF THE FACTS

Mr. He legally entered the US as a graduate student in 1995 with an F-1 student visa. Mrs. He legally entered US in 1998 with an F-2 visa (for spouse of students).

A.M.H was the first child of the Hes. She was born on January 28, 1999.

Soon after A.M.H's birth, due to financial and legal trouble, the Hes arranged to put A.M.H into a three month interim foster care by the Bakers, through the assistance of the Juvenile Court.

On June 4, 1999, the Hes signed a consent order to award the custody to the Bakers. Kevin Weaver, a lawyer specialized in adoption matters, explained the custody order to the Hes. Mr. Weaver took a payment from the Bakers for his service. There were no orders regarding financial support or visitation[1] by the Hes. The Bakers stated that they did not expect financial

1 Examination of Sara Cloud of Juvenile Court by MS. HOMLES regarding the June 4, 1999 consent order:
Q. And did anybody ask any questions about visitation being put in that order?
A. No.
Q. Okay, did you say anything to them about visitation?
A. We don't put visitation in the orders. I do remember verbally the Bakers telling the Hes that they could have visitation, and they appeared to be in agreement on that, and we did not take it any further than that.
Q. Did you hear any conversation about child support?

support from the Hes. Various credible witnesses testified that the Hes understood that the June 4th, 1999 arrangement was "temporary".

The Bakers started to keep a journal for Hes' visits. They documented some contentious incidents when the Hes requested to visit A.M.H more frequently and stay with her longer but the Bakers refused. The October 3, 1999 entry showed that the Bakers devised a plan to restrict and reduce Hes visits, one rule the Bakers made and insisted was to disallow the Hes from taking A.M.H out of the Bakers' home.[2]

In November 1999, the Hes told the Bakers that they wanted A.M.H back.

At the time, Mr. He had a pending criminal charge against him and could not leave the U.S.[3]. Mr. He testified that he was contacted by INS regarding his immigration status around May 2000.

On May 3, 2000, the Hes went to the Juvenile Court and filed a petition to regain custody of A.M.H, alleging that there was a change in situation.

On May 4, 2000, after learning about Hes' petition in Juvenile Court, Mr. Baker called Mr. He. . Mr. Baker and Mr. He had a private meeting to discuss alternative options, but they failed to reach any agreement. The three options recorded were[4]:

> OPTION # 1
>
> That the Bakers and the He's [sic] agree to give [A.M.H.] back to the Hes without disputing custody in court. The Hes agree that in the event the Hes must leave the United States for China they will let the Bakers adopt [A.M.H.] forever.
>
> * The Bakers must agree not to cause the Hes to leave the United States by reporting to the U.S. Government.
>
> OPTION # 2
>
> The Hes agree to stay in Memphis as long as they stay in United States. The Hes will allow the Bakers to have [A.M.H.] for a visit no less than two days per week. * Option 1 and 2 go together.
>
> OPTION # 3
>
> The Bakers and the Hes agree to continue their current agreement with one supplement: the Hes may take [A.M.H.] back home one day every other week. Such agreement will continue for 18 years. The Hes agree to leave [A.M.H.'s] passport to the care of the Bakers.

A. I don't recall.

2 The trial court omitted this evidence and reached a conclusion that the Bakers did not hinder Hes' visits. The Majority on appeal held that such hindrance was irrelevant as it happened out of the four month period.

3 Mr. He was acquitted of all charges by a unanimous jury in 2003.

4 The first two options were proposed by Mr. He, the third was proposed by Mr. Baker.

After Hes' May 3, 2000 petition, the Bakers hired Kevin Weaver to represent them in the custody hearing at the Juvenile Court. Unknown to the Hes, Kevin Weaver explained to the Bakers that they could file a petition to terminate the Hes' parental rights.

The juvenile court appointed a Court Appointed Special Advocate ("CASA") to investigate the Hes' May 2000 petition and determine if they were able to provide for A.M.H. The "CASA" report on Bakers read in part: "They (the Bakers) stated that they believe Mr. He and Mrs. Luo want custody of [A.M.H.] reinstated in order to become citizens and stay in the United States. Mr. Baker stated that Mr. He would do anything to remain in this country."

The CSAA "recommended that the Bakers retain custody of A.M.H. and that the juvenile court grant the Hes supervised visitation with A.M.H. twice a week for four hours each day."[5] In June 2000, the juvenile court denied Hes' petition to regain custody of A.M.H.

The Hes did not appeal the Juvenile Court's denial of their petition to regain custody of A.M.H.

Shortly after the juvenile court hearing, Mr. He went to Macon, Georgia to work. Mrs. He remained in Memphis and continued to visit A.M.H at Bakers' home.

On August 1, 2000, Mrs. He arrived at Bakers' home at 10:45AM, at 12:15PM, Mrs. Baker asked Mrs. He to leave. Mrs. He refused. Mrs. Baker called Mr. Baker. Mr. Baker called Mr. He in Macon, Georgia and informed him of the situation, and Mr. He advised Mr. Baker to call the police. According to the Bakers, Mr. He apologized for Mrs. He's behavior. After the police arrived, Mrs. He agreed to leave.

The Bakers told Mr. He that Mrs. He would not be allowed back in Bakers' home unless Mr. He accompanied her. In order to visit A.M.H under the new rules set by the Bakers, Mr. He quit his job in Macon, Georgia and returned to Memphis, so he could accompany Mrs. He to visit A.M.H. The Hes *together* continued to visit A.M.H, in full compliance of the Bakers' new rules.

On January 28, 2001, the Hes arrived at the Bakers' home to visit A.M.H. on the child's second birthday. The Hes insisted on taking A.M.H to a studio for a family portrait and Bakers refused[6]. An argument ensued. The Bakers called the police. Two sheriff's deputies came to Bakers' home. One of the police spoke to the Hes. The Hes left the Bakers home, the time was 4:45pm, 35 minutes before sunset.[7]

On or immediately after January 28, 2001, the Bakers decided that they would not allow the Hes to visit A.M.H at the Bakers home any more. [8]

The Hes consistently maintained that on January 28, 2001, the police told them to leave and not to come back to Bakers' home.

According to Mrs. Baker's sworn interrogatory response made in 2002:

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5 Quoted from the Majority opinion on appeal.

6 This was a violation of the rule to not allow the Hes to take A.M.H out, which the Bakers documented in their Oct 3, 1999 journal entry.

7 According to U.S. Naval Observatory, the sunset time on January 28, 2001 at Memphis is 5:25PM. http://aa.usno.navy.mil/data/docs/RS_OneDay.html

8 See trial court ruling

> "Deputy Blankenship was called to the home of the petitioners[9]…"and "instructed Mr. He and Ms. Luo not to return to the home of the petitioners,"
>
> (T.R. Vol 2, p. 290; Louise Baker, p. 477, L. 7-24)

In his sworn answer to interrogatory number 3, Mr. Baker also stated that during the incident of January 28, 2001, the Hes were instructed not to return to the home of the Bakers. (Jerry Baker, pp. 879-881)

On February 15 2001, the Hes faxed a letter dated February 1, 2001 to the Juvenile Court complaining about the Bakers' interference with their visits with A.M.H and requested help[10]. The Hes wrote in the fax: "We have decided to take our child back and go back to China. Please help us to have our baby return to her own parents."

The Hes called and visited the Juvenile Court multiple times to complain about Bakers' interference of their visitation and express their desire to regain custody of A.M.H.

On April 2, 2001, Mrs. He called the Bakers and left on their voice mail a message which requested Bakers' response, the Bakers did not return the call.

On April 9, 2001, both Mr. He and Mrs. He went to juvenile court where they met with Candice Brown ("Ms. Brown"), a probation counselor. Ms. Brown prepared a petition for regaining custody of A.M.H for the Hes. Ms. Brown stated that she was new to the position and only had Mrs. He sign the petition.

The Hes appeared in juvenile court on June 6, 2001 for the hearing on their petition, but the Bakers requested the juvenile court to reschedule the hearing until June 22, 2001. Two days before the scheduled June 22, 2001 hearing, the Bakers filed a "Petition for Adoption and Termination of Parental Rights" in the Chancery Court of Shelby County.

Mr. He testified during the trial that he might have received a telephone call from INS in April of 2000.

Mr. He testified during the trial that he was not sure whether he received a telephone call from INS in 2001.

The Bakers and Deputy Astor testified during the trial that the Hes were told not to come back *that day* on January 28, 2001.

On May 12, 2004, the trial court terminated Mr. He and Mrs. He's parental rights to A.M.H on grounds of willful abandonment. Specifically, Judge Childers found that the Hes willfully failed to visit and willfully failed to support A.M.H during the four months before June 22, 2001. The Hes appealed.

In a Majority opinion, the Appellate Court reversed trial courts finding on the issue of willful failure to support A.M.H, but affirmed the finding that the Hes willfully failed to visit,

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9 Petitioners: Bakers

10 Childers omitted this evidence. The fax was a trial exhibit. The Majority admitted this evidence under Hes appeal.

and affirmed trial court's ruling that it was to the best interest of A.M.H to terminate Hes' parental rights.

STATEMENT OF INTEREST

Background and Expertise of Amicus

I am a citizen of People's Republic of China with permanent residence in the United States. I came to US for my Ph. D study at the University of Minnesota in 1990 with an F-1 visa. I graduated in 1995 with a Ph. D degree. I have two children, both born in the US.

I wrote numerous articles to promote understanding between Americans and Chinese.

I have never met the Hes in person. I became involved in the A.M.H case in 2002 and became very familiar with the case. After trial court's ruling, I authored the "15 point statement on Childers' ruling". In December 2004, through the Hes, I presented the following argument to the Tennessee Court of Appeals: *the Bakers could not accuse the Hes of willful failure to support because (a) the Bakers contended that they had obtained full guardianship of A.M.H and had full duty and responsibility to support A.M.H since June 4, 1999, and (b) the Bakers refused Hes' support payment in the past and did not reverse their position of refusing support payment afterwards.* This argument had been accepted by the Court of Appeals, leading to the reversal of trial court's ruling on willful failure to support.

Interest of Amicus

Once the outcome of the A.M.H case becomes a Tennessee case law, it will gravely affect the fundamental rights of Amicus:

- Amicus may engage in similar parental rights and child custody dispute with Tennessee residents.
- Amicus may move to and reside in Tennessee in the future and subject to the rule of Tennessee state laws.
- The A.M.H case decision may serve as a reference for any state of the U.S., thus affecting the rights of Amicus there.
- Due to its wide publicity, the A.M.H. case decision may even serve as reference in those global regions where common law is practiced, thus affecting the rights of Amicus there.
- Because Amicus and the Hes have similar backgrounds, and the case is partially dependent on such background, Amicus has strong interest to see the A.M.H case reach a just and legally sound conclusion.

SUMMARY OF ARGUMENT

The Appellate Court reversed the trial court's finding that the Hes willfully failed to support A.M.H.

On the issue of willful failure to visit, the Appellate Court (Majority) performed several tests for the period of four months preceding the Bakers' petition to terminate Hes' parental rights. The Majority held that

1. The Hes made no attempt to visit. In particular, the Majority found that Hes' complaints with the Juvenile Court on visitation and subsequent custody petition on April 9, 2001 (two months before the Bakers filed for termination of Hes' parental rights) was solely for the purpose of remaining in the U.S.
2. The Hes had no excuse not to visit. The Majority ruled that on January 28, 2001 the police only told the Hes not to come back the Bakers' home on *that day*. The Majority also ruled that the Hes were not intimidated by authorities.
3. Although the Hes did not have the knowledge of the statutory duty to visit A.M.H., such lack of knowledge is "***merely*** 'a factor in determining willfulness'". Using a dictionary definition of "factor", the Majority concluded that a "factor" is not a necessary component.
4. Although there was a lack of notice, because the Bakers are private individuals, the Fourteenth Amendment does not apply.
5. It is to the best interest of A.M.H to terminate Hes' parental rights.

In this brief, Amicus will show the above analysis and conclusions by the Majority erroneous. Amicus will argue that

- The Baker could not establish a location where the Hes could have possibly visited A.M.H during the four months prior to Baker's petition to terminate Hes' parental rights.
- The Hes knew that having custody of A.M.H. could **not** avoid deportation when they filed the April 9th, 2001 petition for custody.
- Hes' seeking assistance from the Juvenile Court on visitation and subsequent petition to regain custody were genuine attempts to restore visitation and regain custody of A.M.H.
- Prior to the Bakers petition to terminate Hes' parental rights, the Hes followed Bakers' rules and police instructions without exception.
- The Bakers' and the police testimonies that the Hes could return to the Bakers home in the night of January 28, 2001 were not clear and convincing evidence.
- Knowledge of the Tennessee statutory requirement to visit is a necessary component in determining willful failure to visit.
- The termination of parental rights is a state action carried out by the judicial branch of the government, the Fourteenth Amendment applies. For abandonment cases, the Court must find by clear and convincing evidence that the parents whose parental rights are to be terminated had full knowledge of the particular Tennessee statute that may lead to termination of their parental rights.

- The Majority's read of the dictionary definition of the word "factor" was a misinterpretation.
- A.M.H's lack of attachment to the Hes were due to the Bakers' hindrance of Hes' attempt to establish a relationship with A.M.H and Courts' unjust treatment of the Hes. The only way to remedy the situation is to return A.M.H to her parents.

ARGUMENT

I. Factors in determining willful failure to visit

The Hes had not visited A.M.H for four months when the Bakers petitioned to terminate their parental rights. The question is whether the failure to visit was willful. To answer this question, the Court needs to establish a set of rules that can be used to test against the situation.

A. Relevant Tennessee Statutes

The Tennessee statute sets a very precise period, four (4) consecutive months, in the definition of abandonment[11].

> *Tennessee Code Annotated* § 36-1-113(g)(1): Initiation of termination of parental or guardianship rights may be based upon any of the following grounds: (1) Abandonment by the parent or guardian, as defined in § 36-1-102, has occurred;
>
> Tenn. Code Ann. § 36-1-102:
>
> (1) (A) For purposes of terminating the parental or guardian rights of parent(s) or guardian(s) of a child to that child in order to make that child available for adoption, "abandonment" means that:
>
> (i) For a period of four (4) consecutive months immediately preceding the filing of a proceeding or pleading to terminate the parental rights of the parent(s) or guardian(s) of the child who is the subject of the petition for termination of parental rights or adoption, that the parent(s) or guardian(s) either have willfully failed to visit or have willfully failed to support or have willfully failed to make reasonable payments toward the support of the child;
>
> § 36-1-102 (1) (E) For purposes of this subdivision (1), "willfully failed to visit" means the willful failure, for a period of four (4) consecutive months, to visit or engage in more than token visitation;

The above Tennessee statutes define duties for the parent not to abandon their children or bear the potential consequence. "Duty is an obligation assumed (as by contract) or imposed by

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11 It should be noted that the legislature may have not specified the calendar to use for the definition of "month" for this section of the statute.

law to conduct oneself in conformance with a certain standard of act in a particular way" (Merriam-Webster's Dictionary of Law, 1996)

B. Tests for willful failure to perform a duty

The Bakers knew the willful abandonment statutes no later than May 2000 when their attorney Kevin Weaver told them that they could petition to terminate Hes' parental rights. The Hes had no such knowledge. After the January 28, 2001 incident, the Bakers waited till June 20, 2001 to file their petition to terminate Hes' parental rights, 4 consecutive months and 20 days had passed by then.

To prove that the Hes willfully abandoned A.M.H, the Bakers must prove by clear and convincing evidence that for 4 consecutive months the Hes **willfully** failed to visit A.M.H or **willfully** failed to support A.M.H. Then the judge, a State official decides whether the Bakers meet their burden of proof[12].

> **Willful**: done deliberately or knowingly and often in conscious violation of disregard of the law, duty, or the rights of others" (Merriam-Webster's Dictionary of Law, 1996)

On "willful failure to support" (for four consecutive months[13]), the Court has established the following test:

Failure to support[14] a child is "willful" when a person is 1) aware of his or her duty to support, 2) has the capacity to provide support, 3) makes no attempt to provide support, and 4) has no justifiable excuse for not providing the support.

The word "and" in the sentence above denotes a logical AND condition. To reach a conclusion of "willful failure", each and every one of the above four conditions must be satisfied. A failure can't be found willful if ANY ONE of the four conditions is NOT met. For instance, if a person's failure to support met only the first three conditions, she knew the duty, had the capacity, made no attempt, but she had justifiable excuse for not performing the duty[15], her failure to perform the duty was not willful. If a person made an attempt to provide the support, then the failure must be due to other factors out of her control. If a person's failure to support met only the last 3 conditions, but was unaware of her duty, she merely failed to support, there was no willfulness.

We can generalize the above standard to "willful failure to perform a duty" as follows:

> Failure to perform a duty is "willful" when a person 1) is aware of her duty, 2) has the capacity to perform the duty, 3) makes no attempt to perform the duty, and 4) has no justifiable excuse not to perform the duty.

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12 Hes' request for jury trial was denied.

13 With the definition of Tenn. Code Ann. § 36-1-102 (1) (E), when we say "willful failure to visit", it has a "four months" period implicitly attached to it.

14 Again, there is a 4 months period implicitly attached, if it was less than 4 months, we would not be in this discussion.

15 For example, if she was unconscious and hospitalized for 4 months.

Again, the four factors must exist simultaneously to reach a willful failure conclusion. Taking out any of the four factors, there can be no willful failure.

Applying the above to the duty of "not failing to visit for four consecutive months", we have:

Failure to perform the duty to visit is "willful" when a person 1) is aware of his or her duty to visit at least once in every four consecutive months, 2) has the capacity to visit, 3) makes no attempt to visit, and 4) has no justifiable excuse for not visiting.

Again, the above denotes a logical AND condition. All four factors must be true to produce a final result of "true", if any one of the factors is false, the final product is false. Zero multiplies any number is zero[16].

One can check the validity of the above statement by trying to hold any 3 of the above 4 conditions true and 1 false.

(a) Suppose one was aware of the duty, had the capacity to visit, made no attempt to visit, but had good excuse (for example, she was threatened by life if she tried to visit), then there was no willfulness.

(b) Suppose one was aware of the duty to visit, had the capacity to visit, had no justifiable excuse for not visiting, but made attempts to visit, then her failure to visit could not be willful.

(c) Suppose one did not have the capacity to visit (for instance, she was incapacitated), then her failure to visit could not be willful, regardless of the other conditions.

(d) Finally, if one had the capacity to visit, made no attempts to visit, had no justifiable excuse for not visiting, but was unaware of her statutory duty to visit, the failure should not be willful. However, this is a debated point in this appeal. The Majority on appeal have held that knowledge of the duty was not necessary in determining willfulness. We will come back to this when we discuss the definition of "factor" later.

The "visit" in the above must be qualified by a minimum frequency requirement to make the rule operational. In Tennessee Statute, it's one visit every four months minimum.

Since the Court is making a mechanistic imposition of the statute and is using the statutory period of 4 months as the numerical measure in defining abandonment, the number four (4) becomes an artificial and arbitrary "magic number" that the State of Tennessee has legislated. In Tennessee, you are fine[17] if you are within 4 and no one can go after your kids; you are in trouble if you *willfully* go over 4, and the state has the power to terminate your parental rights. The magic number is different in other states[18].

Private citizens like the Bakers have no authority or power to terminate someone's parental rights, they can only petition the Court (the judicial branch of the State) to do it. Only the Court has the power to terminate one's parental rights based on the laws enacted by legislature.

Legislative Branch of the State established a "magic number" 4 in Tennessee. Unless a Tennessee resident knew about this "magic number" 4 and the grave and irreversible

16 The Appellate Court took a mathematical definition for "factor", we will come back to this point later.
17 We assume there are no other conditions such as abuse.
18 For instance, in North Carolina and Arizona, the relevant period is 6 months, in Pennsylvania it is 12 month.

consequence[19] of exceeding it, it would be a violation of one's due process for the Judicial Branch of the State to terminate one's parental rights for exceeding this "magic number".

In the next sections, I will show that the case laws in the Tennessee Courts support the above interpretation of "willful failure", I will also discuss the errors in the Majority opinion.

II. Hes' failure to visit for four consecutive months and the argument on willfulness

From January 28, 2001 when the Hes were asked to leave Bakers' home, to June 20, 2001 when Bakers petitioned the Juvenile Court to terminate Hes' parental rights under Tennessee statute, the Hes had not visited A.M.H for four months and 20 days. This was not in dispute.

The Majority was correct to note that they "are asked simply to resolve whether the Hes' conduct in the four months immediately preceding the Bakers' petition to terminate their parental rights was willful[20]." The Majority was also correct to have the parameters of the analysis limited to the statutory four-month period, furthermore the Majority was correct to note that to determine "willfulness" it may become necessary in a given case to evaluate events occurring prior to the start of the four month period.

The Majority further established the following principle: while events prior to the start of the four months period might be important in determining the "willfulness" or the lack of it, **events happened after the four months period should have no relevance**, as future events can't have causal effects on past events.

Also, since the Bakers are petitioning the State to terminate Hes' constitutionally protected rights, the Bakers have the burden of proof, by clear and convincing evidence.

With the above kept in mind, Amicus proceeds to analyze the four **factors** in determining willfulness.

A. Whether Hes had the capacity to visit A.M.H

Since the Bakers are accusing the Hes of willful failure to visit A.M.H, they must show that the Hes could have visited A.M.H **but for** their willful failure.

During four months immediately preceding the Bakers' petition to terminate Hes' parental rights, the Hes had the physical capacity to visit A.M.H. They could have visited A.M.H if they were allowed to see A.M.H and knew where to go and see A.M.H[21].

After January 28, 2001, the Bakers had decided that they wouldn't allow the Hes to visit A.M.H at the Bakers' home any more, and there wasn't another alternative location. Although the Bakers claimed that "Mrs. Baker telephoned the Exchange Club Family Center to inquire about its ability to provide visitation services and facilities for any future visits with A.M.H by the Hes"[22], there was no record of any definitive or semi-definitive arrangement made. There was no record of Bakers' reserving or signing up such service.

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19 Losing her connection with her birth child forever.

20 Since the Majority concluded that there was no willful failure to support by the Hes, we will focus only on "visit".

21 It could not possibly be Bakers' home.

22 See trial court ruling.

The Bakers had custody of A.M.H., but they never arranged a location for the Hes to visit A.M.H. Furthermore, the Bakers didn't respond to Hes' attempt to establish communication with them. A necessary condition, location, for the Hes to visit A.M.H did not exist.

B. Whether Hes made attempts to visit A.M.H

The Majority did not consider Hes' April 9, 2001 petition to modify custody filed with the Juvenile Court as attempt to visit A.M.H based on the following arguments:

1. The Hes did not mention visitation on the petition to modify custody.
2. The Hes wanted to regain custody of A.M.H for the sole purpose of avoiding I.N.S deportation.

Amicus will first show that Hes knew that having custody of A.M.H could not avoid deportation when they filed the petition for custody. Therefore, Hes' petition for custody was not for the purpose of avoiding deportation. Amicus will then show that Hes' April 9, 2001 petition to modify custody was an attempt to visit A.M.H.

1. Whether Hes' April 9, 2001 petition for custody was for the purpose of avoiding deportation

Amicus' analysis will focus on the following analysis in the Majority opinion:

> During March, April, or May of 2001, immigration officials contacted Father about the Hes' immigration status. The trial court concluded that the Hes' attempts to regain custody of A.M.H. during this period were for the sole purpose of avoiding deportation.
>
> The Hes assert that the record does not support the trial court's conclusion since there is no evidence showing a connection between the calls from immigration officials and the Hes' desire to have A.M.H. returned to them. We cannot conclude that the record does not support this conclusion. The trial court determined that, at the end of the initial three month foster care period, the Hes met with the Bakers and asked them to raise A.M.H. until she turned eighteen, but they wanted to retain their parental rights in order to remain in this country. In May of 2000, the Hes filed their first petition seeking to modify the June 4, 1999 custody order. Father testified that he had been contacted by immigration officials before the Hes filed this petition. After filing the May 2000 petition, Father met with Mr. Baker at the Hes' apartment to discuss the petition. One of the options presented by Father included the Bakers promising to refrain from any action which would cause the Hes to be deported. The CASA assigned to investigate the Hes' May 2000 petition filed a report with the juvenile court expressing concern that the Hes were seeking to regain custody to avoid deportation. Thus, the Hes' desire to avoid deportation has been a consistent theme throughout the tortured history of this case.

Hes' parental rights over A.M.H were never challenged prior to June 20, 2001. Moreover, there was no legal basis for the notion that Hes' having custody of A.M.H could avoid deportation. Therefore, the validity of the Majority opinion quoted above depends solely on the

Hes' state of mind: whether the Hes held the belief that having custody of A.M.H could keep them in the U.S. *at the time they filed their April 9, 2001 petition*.

Based on the trial records, there were two pieces of evidence that showed that the Hes had the desire to remain in US, one is the CASA report in May 2000 and the other is Option #1 that Mr. He and Mr. Baker discussed in May 2000[23].

The first piece of evidence, the May 2000 CASA report reads in part:

> "They (the Bakers) stated that they believe Mr. He and Mrs. Luo want custody of [A.M.H.] reinstated in order to become citizens and stay in the United States. Mr. Baker stated that Mr. He would do anything to remain in this country"

CASA reported what the Bakers said. The concerns originated from the Bakers.

However, the same May 2000 CASA report also included the following statements:

> "The CASA is concerned about the possibility that Mr. He and Ms. Luo might send Anna Mae back to China if custody is reinstated. Mr. He informed Mr. Baker that they might send Anna Mae back to China to live with relatives if Mr. He and Ms. Luo regained custody. The Bakers believe that this would be traumatic to the child since Anna Mae thinks of the Bakers as her parents."

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23 The following is Mr. Bakers' testimony regarding the origin of this option (examination of Mr. Baker by MR. PARRISH)

Q. Who introduced the change to the agreement? You or Jack?
A. Jack.
Q. And did he say what changes he was suggesting?
A. He stated that they wanted to change the agreement where they -- Anna would go with them and live with them in their home, and then ---
*****
A. He had responded that Anna was to go with them and live in their home, but that he would -- but that they would allow Anna to come back to our home and see us twice a week.
Q. Did he say anything else before you spoke?
A. I don't remember saying anything else right then…. So I asked him if I could write it down.
Q. And he said -- Mr. He said?
A. He didn't mind me writing it down. …
Q. Was there anything else said after you wrote down exactly what he told you?
A. After I had wrote it, he added a part to it, and by "he added," I mean, he spoke it, that we would agree not to try to have him -- them deported.

Thus, the CASA actually reported two concerns of the Bakers: one was that the Hes wanted custody of A.M.H. to remain in the U.S.; the other was that the Hes might send A.M.H. back to China. The two concerns brought up by the same Bakers were in direct contradiction of each other. The second concern had two possibilities:

1) The Hes and A.M.H. leave US and go back to China together. This would indicate that the Hes didn't want to remain in U.S. at all.

2) The Hes send A.M.H to China and give her custody to relatives in China, while Hes remain in US but don't have custody of A.M.H. This would indicate that the Hes did not believe that having custody of A.M.H could avoid deportation[24].

The Majority chose to ignore Bakers' second concern which contradicted Bakers' first concern that the Hes wanted A.M.H. custody to become U.S. citizens, and used the first concern as clear and convincing evidence in deciding Hes' motivation for regaining custody of A.M.H.

The Majority ruled that the Bakers' hindrance of Hes visits before Feb 20, 2001 was irrelevant because it was out of the 4 months period preceding Bakers' petition to terminate Hes' parental rights, as the statute required the Court to limit the parameters within the relevant period. Following the same reasoning, the CASA report of Bakers' concern referred to events more than 12 months before June 2001 and should be also considered irrelevant. There was no evidence showing that the Hes had the desire to remain in U.S. indefinitely in the four months before June 20, 2001. On the contrary, the Hes indicated in their February 2001 fax to the Juvenile Court that they wanted to take A.M.H back and go back to China.

The Bakers presented another piece of evidence: the three options Mr. Baker and Mr. He discussed on May 4, 2000. The Bakers argued that Option #1 showed that the Hes had the desire to avoid deportation back in May 2000, this is not in dispute. However, to show that the Hes filed the custody petition for the purpose of avoiding deportation, Bakers must **also** prove that the **Hes held the belief**[25] that **having custody of A.M.H** could **avoid deportation when they filed the petitions**. Option #1 was the following,

> "That the Bakers and the He's [sic] agree to give [A.M.H.] back to the Hes without disputing custody in court. The Hes agree that in the event the Hes must leave the United States for China they will let the Bakers adopt [A.M.H.] forever.
>
> * The Bakers must agree not to cause the Hes to leave the United States by reporting to the U.S. Government."

Option #1 was spoken by Mr. He and recorded by Mr. Baker. It had an added clause: **"*The Bakers must agree not to cause the Hes to leave the United States by reporting to the U.S.***

24 We already mentioned that Hes' parental rights weren't challenged until June 2001.

25 There is no law or factual basis to support the theory that having custody of a US born child can avoid deportation.

***Government.*"** Mr. He specifically amended the proposed option to include an additional condition that Bakers must not cause the Hes to leave US by turning them in to the government. This option thus had the following components:

1) Bakers gave custody of A.M.H back to the Hes.
2) The Hes would let Bakers adopt A.M.H if the Hes must leave US.
3) However, the Bakers must not cause the Hes to leave US by reporting the Hes to US government[26].

Mr. He's proposal was clear and logical[27]: the Hes would have A.M.H back[28], afterwards, in the case they must leave US (voluntarily or not), they would let Bakers adopt A.M.H. However, the Bakers must not cheat the proposed agreement by reporting the Hes to United States and cause the Hes to leave US[29].

When the options were discussed between Mr. Baker and Mr. He, Mr. He had a pending criminal case in the State of Tennessee which prevented him from leaving U.S. Therefore, the added clause in Option #1 was definitely referring to future actions by Bakers after the Hes regained custody of A.M.H.

This evidence clearly shows that no later than May 2000 Mr. He became aware that even if they regained custody of A.M.H, the Bakers could still cause them to be deported by simply reporting them to the government[30]. In other words, Mr. He understood that having the custody of A.M.H could not provide any shield against deportation no later than May 4th, 2000. Since the trial court has found that Mrs. He depended on Mr. He for providing important information[31], Mrs. He also knew no later than May 2000 that having the custody of A.M.H could not provide any shield against deportation.

Amicus' conclusion that Mr. He knew that having custody of A.M.H couldn't avoid deportation is also consistent with the fact that the Hes sent their other child, Andy, who was also born in US, to China in May 2001.

Another piece of evidence known to the Court also ran against the Court's conclusion that the Hes filed the petition for A.M.H custody for the purpose of avoiding deportation.

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26 According to Mr. Baker's trial testimony, this clause of Bakers not reporting Hes to the government was an addition presented by Mr. He after Mr. He had proposed Option #1 and #2.

27 The trial court has found by clear and convincing evidence that Mr. He "exhibits a high level of intelligence. He has demonstrated that he also has a high level of knowledge of the culture in the United States, that he is familiar with the justice system"

28 There was an option #2 that went together with option #1 that would require the Hes to stay in Memphis and allow Bakers to visit A.M.H.

29 This amendment to the original proposal could not be a pre-condition. Firstly, it was added at the end of option #1; secondly, trying to make it a pre-condition for the original proposal would lead to a nonsensical set of proposal.

30 Amicus attempted to interpret Option #1 with the presumption that the Mr. He believed custody could avoid deportation, in every possible construction, the proposed Option #1 became nonsensical. The trial court has found Mr. He to be highly intelligent.

31 Childers wrote this about Mrs. He: "She has confidence in Mr. He, prefers Mr. He as her translator, has no desire to part company with Mr. He for any reason and intends to cooperate fully with Mr. He to remain together with him as a family and believes Mr. He has never failed to keep her fully and honestly informed about the legal matters involving AMH."

In May 2000, the Hes filed their first petition to modify custody. According to Mr. He, the INS called the Hes around May 2000. The Juvenile Court denied the Hes' petition in June 2000. Had the Hes filed the petition for the purpose of avoiding deportation, they should have appealed the Juvenile Court's ruling immediately, so they could use A.M.H as a shield against deportation.

However, the trial court found that after the June 2000 Juvenile Court denial of Hes' May 3, 2000 petition, the Hes had the right to appeal but the Hes willfully failed to file an appeal[32]. The finding that the Hes willfully failed to appeal that decision again proves that the Hes knew that having custody of the child could not avoid deportation.

The Court clearly erred in concluding that the Hes filed petitions for A.M.H custody in May 2000 and April 2001 for the purpose of avoiding deportation.

During the trial, MS. HOMLES examined Mr. He on the deportation issue:

> Q. Okay, Mr. He, I'm confused about deportation. You testified last night that you were very, very fearful of being deported on several occasions. Do you recall that?
>
> A. I was very scared. I said we are scared of being deported.
>
> Q. But on the other hand, you've testified several times that if you get the child we're here about, you are going immediately to China?
>
> A. Yes.
>
> Q. Okay, so why are you afraid of being deported? All that means is sending you to China.
>
> A. No, I was afraid of being deported before we had our child back. So that's why.
> (Tr., examination of Jack He)

Here, Mr. He testified why he was scared of being deported: he was afraid of losing his kid. He wanted to have his kid back so if they were deported the He family would be deported as a whole. This again showed that Mr. He didn't believe having custody of the kid could avoid deportation[33].

However, as I have shown in the "15-point", the Court took the consistent position that everything the Hes said was incredible[34] unless the Bakers liked it[35], as if Bakers have the

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32 Trial record shows that the petition was denied partially on the ground that there was a pending criminal case and the Hes' financial situation needed improvement. Record showed that the Hes urged the Criminal Court for a speedy trial and worked harder to earn more income.

33 Both the trial court and the Majority on appeal confused the following two concepts: (a) to avoid deportation, (b) to remain in US indefinitely. For someone to be deported is to be taken into custody and rushed out of the border. No visitor to any foreign country would enjoy deportation and everyone would avoid deportation.

34 For instance, regarding Dr. Chang's mental evaluation of Mr. He, Childers ruled that: "Dr. Chang testified that her clinical evaluation and mental status examination of Mr. He were based on questions she asked of and responses given by, Mr. He. The Court finds the credibility of Mr. He to be seriously lacking; therefore, the opinions given by Dr. Chang, based on Mr. He's credibility, are entitled to no weight."

power to turn Hes' lies into truth. Regarding the alleged I.N.S calls, we have a very similar situation. Mr. He testified that he was "not sure" if he received INS calls[36] in 2001, the Bakers held that "he did", and the Court ruled that Mr. He's "not sure" equates to "clear and convincing". Similarly, when Mr. He testified that he was afraid of being deported without his kid, the Bakers said "lie!", and the trial court and the Majority on appeal agreed with the Bakers.

Clearly, the Court failed to establish that the Hes' petitions for custody were due to the "desire to avoid deportation". In fact, the way the Courts reasoned is very troubling. Although the Bakers repeatedly stated their view that the Hes wanted A.M.H back to avoid deportation, the Court shouldn't blindly follow the Bakers' tortured theory to the book. The Hes' desire to have their child back is just a natural instinct.

The tortured theory that Hes filed the 2001 petition for A.M.H custody for the purpose of avoiding deportation can not withstand minimum level of scrutiny.

2. Whether Hes' seeking assistance and petition at Juvenile Court were attempts to visit

In February 2001, the Hes faxed a letter to the Juvenile Court complaining about Bakers interference with their visits and sought help for regaining custody of A.M.H. On April 9, 2001, with the advice of the Court staff, the Hes signed a formal petition to regain custody of A.M.H.

Both the trial court and the Majority on appeal ruled that although the Hes petitioned for

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35 For instance, the Bakers said that Mr. He told him China had a 50% female infant mortality rate, and the Court took it at face value. See also the CASA report example.

36 There was no evidence to show that INS called the Hes in 2001. In Mr. He's deposition made in 2001, he testified that he only received INS calls in 2000. During the trial, Baker's attorney asked if he also received a call from INS in 2001, Mr. He never confirmed that he did. The following is the relevant part of the transcript:

> Q. May of 2000. When in May -- I'm sorry -- April of 2000 had you heard from I.N.S.?
> A. I.N.S. I'm not sure about the date. I think in March or May -- or March or -- I'm not sure about the date, but I was arrested – my wife was arrested.
> Q. Shortly before May the 3rd of 2000, you had heard from I.N.S. -- correct -- March or April of 2000?
> A. 2000? I think I testified that we received a phone call ---
> Q. …. Forget about the six-hour deposition. Today, isn't it true you were notified by I.N.S. in April of 2000, yes or no or I don't know?
> A. Yes, I was called. I received a phone call.
> **********
> Q. Didn't you hear from I.N.S. in March of 2001?
> A. I was not sure about the date.
> **********
> Q. It was before April the 9th of 2001, was it not?
> A. I'm not sure, ma'am.
> (Shaoqiang He, Vol 1, P311-312)

While Mr. Baker can take the position that the Bakers are no good at dates during the trial, Mr. He was not afforded this liberty. Bakers' attorney asked some leading questions by cleverly changing year from 2000 to 2001, the 100% incredible Mr. He said "not sure", and the Court found it a "clear and convincing" that Mr. He received INS calls in March, April or May of 2001. Again, the Bakers can even turn Mr. He's "not sure" into "clear and convincing", as far as the Court is concerned.

custody, they failed to request visitation. The Majority wrote:

> "This petition, which was filed in May of 2001, asked for a modification of custody, but it did not ask for visitation."

The dissenting opinion pointed out that trial court and the Majority's argument "defies logic", because custody is much more than visitation. The Hes were petitioning not only to see A.M.H but to take full responsibility for her.

"**Visit**" is defined as "to go to see" (Webster's College Dictonary, 4th Edition)

In their fax to Juvenile Court on February 15, 2001, the Hes wrote:" "We have decided to take our child back and go back to China."

For the Hes to take their child A.M.H back, they must at least *go to see* A.M.H first, then take her back home. Without visiting A.M.H, there is no way for the Hes to take her back.

To get custody of A.M.H, the Hes must *go to see* A.M.H (then take her home, and take care of her). Therefore, requesting custody includes requesting the right to visit (and more).

There was no court order to grant the Hes visitation of A.M.H, the Hes and Bakers agreed on visitation back in June 1999. When the Hes complained about Bakers interference with their visits, they pointed out that the Bakers were violating the agreement that "both families agreed that we have weekly visitation rights[37]". The Hes asked the Juvenile Court to address their complaint about Bakers' interference with Hes' visits.

In May 2000, after the Hes petitioned for custody of A.M.H, the CASA ("Court Appointed Special Advocate") "*recommended that the Bakers retain custody of A.M.H. and that the juvenile court* ***grant the Hes supervised visitation with A.M.H. twice a week for four hours each day***[38]."

The CASA regarded court granted supervised visitation as a lesser substitute of granting custody. When custody is denied for parents out of pure financial reasons, CASA recommends more visitation as an alternative to promote relationship building between the parents and the child.

The Hes went through petitioning custody with the Juvenile Court less than 9 months before, the memory was still fresh. They officially requested custody from the Juvenile Court on April 9, 2001. If the Juvenile Court was quick to grant their petition, they would be able to go see A.M.H and take her home soon after. If the Juvenile Court denied their petition, they knew they would at least get more visitation. The CASA recommended more visits to the juvenile court nine months ago.

During the trial, Sara Cloud of the Juvenile Court testified about the Hes' complaints regarding visitation and she suggested the remedy. The following is Linda Homles' examination of Ms. Cloud during the trial:

> Q. And he came -- he and Ms. He came down to

37 See Hes' Feb 15, 2001 letter to the Juvenile Court.
38 See majority opinion.

Juvenile Court?

A. Yes.

Q. About how many times, a range -- two to ten?

A. I may have seen them down there, maybe, three or four times.

Q. **Okay, when they came down and they were complaining about visitation and they wanted their child back, what did you tell them to do?**

A. File a petition.

The Hes did exactly what Ms. Cloud recommended for addressing their complaint about visitation: file a custody petition. Hes' seeking help from Juvenile Court on visitation and subsequent petition for custody were thus documented attempts to visit A.M.H.

3. Whether trial court's findings on credibility of litigants' tears are based on uniform standard of evidence

In the section titled "LITIGANT CREDIBILITY", the trial court made the following conclusion on Mrs. He:

> The evidence shows that she is calculating, almost theatrical, in her actions. The evidence further shows that she is dishonest and manipulative, and has a history of acting in an unstable manner when it serves her own self-interest. For example, during cross-examination, Mrs. He would begin sobbing when asked difficult questions. However, Mrs. He would immediately regain her composure when asked subsequent questions. It appears to the Court that Mrs. He's courtroom hysterics were calculated by Mrs. He in an effort to avoid answering the difficult cross-examination questions.
>
> Trial court ruling, May 12, 2004

On appeal, regarding Hes' April 9th 2001 visit to the Juvenile Court, the Majority was quick to point out that "Ms. Brown described Mother's behavior that day as 'hysterical'" (Majority Opinion, p.19). Let's look at the relevant trial transcript:

> CROSS-EXAMINATION of Candice Brown
>
> BY MR. PARRISH:
>
> Q. And do you deal with hysterical mothers at Juvenile Court often?
>
> A. Most of the time.
>
> Q. So that was not uncommon for her --uncommon in the business that you're in for her to be

hysterical?

A. No.

Q. And when you say hysterical, do you mean screaming and yelling and pulling her hair out, or what do you mean?

A. **She just couldn't get it under control. She couldn't stop crying.**

Q. Okay, so you just mean sobbing and not able to turn off the tears?

A. And she couldn't speak. I had to wait until she calmed down.

Mrs. He, an Asian mom, shed tears without making much noise in a Juvenile Court office for not being able to see her baby. Both the trial court and the Majority jumped up and called her behavior "hysterical".

Now, let's see what if a white man cries for someone else's baby:

Examination of Mr. Baker BY MR. PARRISH

Q. What was the tone of this conversation?

A. It was pretty civil until then. When he said that, **I got emotional and started crying.**

Q. Okay, and when talking about this child, it doesn't take much to get you crying, does it?

A. No, sir.

Q. So you said that you got upset and started crying. What was your tone as you were crying?

A. It's just -- I mean, it was just a tone of disbelief that someone could be so calloused to make a statement like that. Whether it's true or not, I don't know that it is or it isn't, but it shook me up real bad.

Q. And did you say anything to him after he said that?

A. I told him that I would do everything that I could physically and financially do to prevent him from shipping this little girl to China

****

Q. Did he say anything else before you spoke?

A. I don't remember saying anything else right then. When he said that, **I was already having a hard time not crying**, and I wanted to write it down….

The trial court held: "Mr. Baker impressed the Court as a man who has a great deal of love, care, and concern for children in general, but who has an enormous amount of love, care, and concern for his own natural born children and for A.M.H. He testified in an honest, straightforward, sincere manner. Mr. Baker impressed the Court with his sincerity and the concern he expressed for A.M.H's welfare and safety."

I have no problems believing that Mr. Baker's alleged tears were sincere and real, and I definitely will not call him hysterical. But I have difficulty understanding how the Court made a finding of fact that the Mother's tears were "theatrical" and her complaints regarding visitation and petition for A.M.H custody were fake.

Robert Lackman, an American scientist teaching in China, and a personal friend of Amicus, wrote several articles about the case. Dr. Lackman noted that "Judge Childers seems to think Chinese tears cannot be genuine." Although the Appellate Court affirmed this finding, Amicus believe this should be reexamined by the high Court as a matter of law.

C. Whether the Hes had justifiable excuses for failing to visit A.M.H

On appeal, the Hes took the position that the Bakers set a "trap of abandonment".

Under the advice of their attorney Kevin Weaver, the Bakers contemplated filing to terminate Hes' parental rights as early as May 2000. Thus, the Bakers knew the Tennessee abandonment statute well. The Bakers decided to disallow the Hes into their home after January 28, 2001 and made no communications with the Hes. They waited four months, and filed to terminate Hes' parental rights.

On January 28, 2001, answering Bakers' phone call, two policemen went to Bakers' home to escort the Hes out. One of the policemen spoke to the Hes. Before the 2004 trial, the Hes, Jerry Baker and Louise Baker[39] all agreed on one thing: the police told the Hes not to come to back to the Bakers' home. The Hes added that they were threatened with arrests[40]. The Bakers' sworn statements also supplied one more detail: the officer spoke to the Hes was Deputy Blankenship.

The Hes stated that the police told them not come back to Bakers' home, and they complied. The Bakers also testified that they "***would not ever have them back in***" Bakers' home. These were justifiable excuses for the Hes not to return to the Bakers' home to visit A.M.H, and there was no other alternative location where the Hes could visit A.M.H.

The Bakers have to prove that the Hes' excuses were false.

1. Whether hearsay evidence, modified testimonies and "possibly, yes" testimonies are clear and convincing evidence

During the trial presided over by Judge Childers, the Bakers originally planed to call both Deputy Blankenship and Deputy Astor as witnesses. However, they later dropped Deputy Blankenship as a witness and called Deputy Astor as the only witness.

The Bakers then testified that Deputy Astor told the Hes not to return to the Bakers' home *that day*. What is crucial here is the two words **"that day".**

39 Mr. Baker and Mrs. Baker were found by the trial court to have 100% credibility.
40 Deputy Astor later testified that he could have arrested the Hes.

There are two ways to interpret the sentence "the police officers told the Hes not to come back into the Bakers' home on January 28th, 2001."

1) On that day, Deputy Astor told the Hes not to come back to Bakers' home; or
2) Deputy Astor told the Hes not to [come back to Bakers' home on that day only], but they could come back that night.

At trial, Louise Baker initially testified that she did not know what the police officers told the Hes on January 28, 2001 because "[w]e didn't hear the conversation with the police." (Louise Baker, p. 473). When confronted with her sworn interrogatory response, she switched back. Mr. Siegel asked Mrs. Baker to read her own sworn statement made in 2002:

> Q. All right, starting with Deputy Blankenship, would you read that into the record, please?
>
> A. "Deputy Blankenship was called to the home of the Petitioners on January 31st, 2001 when Mr. He and Ms. Luo insisted on removing the Court's ward from the Petitioners' home for the day, refused to leave when they were told that this Court's ward was sick and could not leave; was also a witness to the emotional and volatile outburst of Mr. He and Ms. Luo, and instructed Mr. He and Ms. Lieu not to return to the home of the Petitioners."
>
> Q. And do you see the part where it says, "And instructed Mr. He and Ms. Luo not to return to the home of the petitioners?"
>
> A. On that day.
>
> Q. Well, do you say "on that day"?
>
> A. I must have left a few words out.
>
> Q. You just happen to leave that word out?
>
> A. Absolutely.
>
> **********
>
> Q. And would you also agree with me that you wanted them not to return to your home not only that day but for all future days?
>
> A. ***We would not ever have them back in our home after the way they acted.*** That was twice that our household was uprooted and upset, and they did it in front of the child, did not care that they were upsetting everybody.
>
> Q. And so your solution to the problem was to call The Exchange Club shortly after the January 28th, 2001 incident. Is that right?

A. Absolutely.

Q. And what did you set up with The Exchange Club?

A. ***I didn't set up anything.***

(Louise Baker, p. 477; emphasis added).

At trial, when Jerry Baker was asked about his interrogatory response in which he, too, indicated that the Hes were instructed not to return to the home of the Bakers, the following exchange occurred:

Q. And isn't it true that on January 28th, 2001, the police, in fact, did tell the Hes not to return to your home?

A. I think they said don't return to my home that day.

Q. Okay, well, Mr. Baker were you here just last night when we were cross-examining your wife, Ms. Baker, about that very same question?

A. Yes, sir.

Q. And do you recall that I asked her about her answer to Interrogatory No. 3?

A. Yes, sir.

Q. And do you recall that I even told her in your presence that your answer to Interrogatory No. 3 was identical to her answer to Interrogatory No. 3. Do you recall that?

A. Yes, sir.

Q. And do you recall that in your answer to Interrogatory No. 3, you indicated under oath that the Hes were told not to return to your home, period, without qualification? Do you recall that?

A. Recall what?

Q. Would you like me to show you your answer to Interrogatory No. 3?

A. You can just tell me. That's fine.

Q. That the Hes were told by the police not to return to your home after January 28th, 2001?

A. Is there a question there? What is the question?

(Whereupon, the last question was read by the reporter.)

BY MR. SIEGEL:

Q. Did the police or did the police not instruct the Hes -- did they tell the Hes not to return to your home on January 28th, 2001?

A. I think they said don't return that day.

Q. ***Well, what time was it, Mr. Baker, that they said that?***

A. ***It was after the Hes had left.***

****

Q. Can you tell me why you didn't qualify your answer to Interrogatory No. 3 by simply saying what you're trying to say right now, which is the police only told the Hes not to come back **that day**?

A. How many interrogatories were there?

Q. Mr. Baker, I am not the one answering these questions.

A. The only thing I could think of is there were so many there that that word- - you know, the extra word slipped by. I mean, I apologize.

Q. Well, when you signed the interrogatories, were you not advised by your attorney that it's under oath?

A. I wasn't- - if I would have realized that - - and I should have- - I would have changed it, but I didn't realize it.

Q. Realized what?

A. If it says that they were told not to return to our home, then I'm mistaken.

Q. So you come in here today in court two years or so later telling us that you're mistaken? Is that how I understand your testimony -- three years later?

A. When was that done?

Q. Are you asking me when the interrogatory answers were done?

A. Yes, sir.

Q. Mr. Baker, it looks like you signed the interrogatories on March 22nd of 2002. So that sounds almost about three years ago, doesn't it?

A. Two years ago.

Q. Would you agree with me that your memory was probably better two years ago than it is right now about an incident that occurred back in 2001?

A. I would agree- - I would agree that my memory, for the most part, was better on some things two years ago, **but not that.**

Q. Oh, so somehow your memory about this particular event is better two years ago down the road? Is that what you're trying to tell me here?

A. No, I think I remembered that then. I'm just saying that I screwed up and that it wasn't supposed to be- - there was supposed to be another word there. **But if you want to take it for the other thing, it's there. So be it.**

(Jerry Baker, pp. 879-881; emphasis added).

During the trial, Larry Parrish and Kim Mullins made drastic changes on their under oath testimonies regarding the "no-contact" order issued by Judge Alissandratos, the trial court accepted the modified versions. Here again, the two Bakers conveniently added two subtle but crucial words "that day" into their two separate testimonies three years later, and the trial court accepted the two modifications with praises of the two Bakers' credibility.

Mr. Baker's testimony deserves a careful examination. In particular, this portion of Mr. Baker's testimony is of interest:

BY MR. SIEGEL:

Q. Did the police or did the police not instruct the Hes -- did they tell the Hes not to return to your home on January 28th, 2001?

A. I think they said don't return that day.

Q. ***Well, what time was it, Mr. Baker, that they said that?***

A. ***It was after the Hes had left.***

It is clear that the Bakers didn't hear what the police told the Hes. Instead, Mr. Baker testified that the police said "don't return that day" **after** the Hes had left. Even if the Court allows such modified testimony three years later, at most, this was hearsay evidence. Curiously, the trial court found such modified testimony on hearsay evidence "clear and convincing" and the Appellate Court affirmed it.

During the 2004 trial, Deputy John Astor testified that he had handled approximately 3000 similar disturbance calls since the January 28, 2001 incident at the Bakers' home, and he did not make any note or written report for the incident on *that day*. David Siegel examined Deputy Astor on what he told the Hes *that day*:

BY MR. SIEGEL:

Q. Did you tell them not to come back that day?

A. Possibly, yes.

(John Astor, examination by David Siegel, p. 20)

"Possibly, yes" was John Astor's answer to the crucial question of "that day". A clear and convincing proof must be "highly probable" instead of merely being possible. Yet, again, the Courts found such a weak statement "clear and convincing".

In order to be clear and convincing, evidence must eliminate any serious or substantial doubt about the correctness of the conclusions to be drawn from the evidence. Hodges v. S.C. Toof & Co., 833 S.W.2d 896, 901 n.3 (Tenn. 1992); *O'Daniel v. Messier*, 905 S.W.2d at 188. *In contrast to the preponderance of the evidence standard, clear and convincing evidence should demonstrate that the truth of the facts asserted is "highly probable" as opposed to merely "more probable" than not. Lettner v. Plummer*, 559 S.W.2d 785, 787 (Tenn. 1977); *Goldsmith v. Roberts*, 622 S.W.2d 438, 441 (Tenn.App. 1981); *Brandon v. Wright*, 838 S.W.2d at 536.

"Possible" means "capable of existing", "probable" means "likely to occur" (Websters' College Dictionary, Fourth Edition). Deputy Astor's testimony indicated that he wasn't even sure whether he said it or not. Therefore, Deputy Astor's testimony should not be considered "clear and convincing" evidence, and should not be used to support Bakers' modified testimonies.

Although the standard of review does not permit disturbing trial court's findings based on witness credibility, conflicting testimonies from credible witness should be invalidated[41]. It was thus a **clear error** that the trial court had admitted Deputy Astor's testimony as clear and convincing evidence.

Even if Astor did say "that day", the Bakers must still prove that the Hes also heard it. But, there is no proof that the Hes heard the word "that day". The Hes testified that they were simply told not to come back, in perfect agreement with Bakers' sworn statements made in March 2002.

2. The Majority's omissions and subtle transformations of evidence

Regardless of what words the Bakers remembered, it is an undisputed fact that the Bakers decided that they would not allow the Hes to come to the Bakers' home at or immediately after the January 28, 2001 incident, and the Bakers have not changed their position ever since.

Also, if until 2004 it had not dawn to the Bakers that the two words "that day" were uttered in 2001, even though the Tennessee Courts readily accepted those two brand new words recalled years later in the memory imprints from the depth of their minds, the Bakers could not prove by clear and convincing evidence that the Hes also heard the two words "that day" on January 28,

41 The Majority implicitly reversed Childers' finding that the Bakers did not hinder Hes' visits, but The Majority claimed that "any evidence tending to show that the Bakers attempted to impede the Hes' visitation at certain times prior to the four month period at issue fails to demonstrate why the Hes did not visit A.M.H. during the four month period."

2001. Furthermore, Deputy Astor admitted that he could not repeat verbatim what he said on that day. So it is reasonable to assume that in 2001, Mr. He, with lesser English listening comprehension abilities than the Bakers, also understood the police verbal instructions without the two new words "that day"— in other words, the Hes understood that they were instructed by armed law enforcement personnel not to come back to Bakers' home[42].

Mr. He had been an agreeable person. On Aug 1, 2000, when Mrs. He and Mrs. Baker had an argument, he apologized to the Bakers for Mrs. He. Mrs. He was upset for being asked to leave early. But when the police arrived, she complied with the police's order and left. *She complied.*

On Aug 1, 2000, the Bakers setup a new rule to disallow Mrs. He into their home unless Mr. He accompanied her. Mr. He immediately quit his job in Macon, Georgia and came back to Memphis so he could accompany Mrs. He to visit their A.M.H. It is reasonable to assume that Mr. He went out of state for a better job and the sudden interruption of employment cost the Hes some income. On Aug 1, 2000, the police did not instruct the Hes to leave and never come back. The Bakers set new condition for the visits; the Hes complied with Bakers new rule and resumed visits. There was no record showing that the Hes argued against the Bakers' new rule for visiting A.M.H. *The Hes complied.*

This evidence showed that the Hes followed the rules set by the police and the Bakers.

The Majority wrote on the same evidence:

> Stated differently, the Hes seek to assert that they were complying with the instructions of an authority figure and felt intimidated. However, the Hes have demonstrated on several occasions that they are not intimidated by the authority of others. The Bakers called the police on August 1, 2000 when Mother refused to leave their home after causing a disturbance. After the police arrived and instructed her to leave, Mother left the Bakers' residence. However, she subsequently returned and continued her weekly visits with A.M.H. On another occasion Mother picketed the Bakers' home and a neighbor asked Mother to move her car. When Mother refused, the neighbor called the police. After the police instructed Mother to move the vehicle, Mother complied and returned to picketing the Bakers' home. On April 2, 2001, Mother called the Bakers' home to instruct them to come retrieve a baby bed that Mrs. Baker had loaned the Hes. However, Mother did not leave a message requesting to visit A.M.H., further evidencing her lack of fear in contacting the Bakers. Finally, when ordered by Chancellor Alissandratos to surrender A.M.H.'s passport to the court, the Hes refused to comply. These incidences demonstrate that the Hes' justification for not returning to the Bakers' home after January 28, 2001 is not well founded.

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42 In fact, and in view of the evidence, coming back to Bakers' home had been impossible due to Bakers' decision to ban the Hes from their home.

Compared with our analysis of the Aug 1, 2000 incident above, it is interesting to note that the Majority reached a complete opposite conclusion on the same set of facts.

The Majority wrote:

> However, the Hes have demonstrated on several occasions that they are not intimidated by the authority of others. The Bakers called the police on August 1, 2000 when Mother refused to leave their home after causing a disturbance. After the police arrived and instructed her to leave, Mother left the Bakers' residence. However, she subsequently returned and continued her weekly visits with A.M.H.

First, the Majority made a conclusion before presenting the facts, "However, the Hes have demonstrated on several occasions that they are not intimidated by the authority of others". The reader is being led into a conclusion of the Judge. Also note the use of words "the authority of others", instead of just police; this broadens the scope of "authorities".

Now, the reader is prepared, the Majority proceeded to state "Mother refused to leave their home after causing a disturbance". This is a subtle shift of causality by the Majority here. The fact was: Mother refused to leave home after Mrs. Baker asked her to leave[43]; the Bakers' insistence that Mother must leave and Mother's refusal to do so caused a "disturbance"[44]. By a subtle swap of time sequence, the reader starts to get an image of a ferocious Mother.

Next, the Majority put in the fact "*After the police arrived and instructed her to leave, Mother left the Bakers' residence*". And immediately, he wrote: "*However, she subsequently returned and continued her weekly visits with A.M.H.*" See the problem here? There were two facts correctly stated here, but by inserting the word "However" in the middle, the Majority inserted a strong correlation between the two separate events happened many days apart. The first fact shows that Mrs. He complied with the police order to leave. By adding a "However" in front of the fact the Mrs. He came back later. The Majority led the reader to consider this fact as one that negates the previous one: the Hes came back despite the fact the police asked Mother to leave. Now the reader's mind is convinced that the Hes "are not intimidated by the authority of others". The reader gets a completely different view of the facts when coupled with the subtle transformations made previously. The fact was, on August 1, 2000, the police did not instruct Mrs. He not to come back.

Let's try to state the facts plainly: On Aug 1, 2000, Mrs. He refused to leave Bakers' home when Mrs. Baker asked her to leave, Mrs. Baker called police, police instructed Mrs. He to leave, Mrs. He left. Because of this incident, the Bakers told the Hes that Mrs. He could not come back alone any more, as a result, Mr. He quit his job in Georgia and came back to Memphis, the Hes resumed their visits.

Now the reader can draw his own conclusions: on August 1, 2000, the police never asked

43 And without explaining to Mrs. He in a way she could understand

44 The Court only presented the testimony that Mrs. He was crying and cursing, nothing on what the Bakers said or did.

the Hes not to come back, and the Bakers explicitly allowed the Hes to come back under a new set of rules. The Hes complied with the rules and continued the visits.

In the subsequent examples, the Majority continued to describe Mrs. He in a demonized fashion. However, if you look at incidents, you see the dates of some of the events were omitted. The Majority did correctly note in their opinion that "***[c]onduct after the termination petition is filed is obviously of no value in determining whether a parent's conduct prior to the filing of the petition was willful.***" The reason is simple: people's behavior change over time.

Regarding the picketing incident, the trial court wrote:

> "On another occasion, sometime after the January 28, 2001, disturbance, Rebecca Smith[45], a neighbor of the Bakers, saw Mrs. He standing beside her car in front of the Bakers' home, holding a sign. Ms. Smith approached Mrs. He and asked Mrs. He to move her car because Ms. Smith was afraid for Mrs. He's safety. Mrs. He refused to move her car so Ms. Smith went inside her home and called the police. Police officers arrived at the Bakers' home and spoke to Mrs. He, and, after that conversation, Mrs. He moved her car, but remained at the Bakers' home with her sign, and the police officers left."

This was after January 28, 2001, Mrs. He holding a sign[46] in front of Bakers' home. *Mrs. He again obeyed the order of the police and moved her car*. The police asked Mrs. He to move her car, the police did not ask her to stop picketing. We don't know if the police had given explicit permission for Mrs. He to continue picketing outside of Bakers' home. In any case, Mrs. He did what the police told her to do, she obediently followed police instructions.

If the time of this picketing incident was before June 20, 2001, it should be clear evidence that Mrs. He attempted to go to see[47] A.M.H within the statutory period prior to Bakers' petition to terminate her rights. If it was after June 20, 2001, then the Majority was violating their own rule here: anything after the June 20, 2001 is irrelevant in determining the willfulness of Hes within the parameters of the statute. But, the Majority nevertheless chose to conceal the time and date in order to create a false impression of a fearless Mrs. He[48].

The timing of the passport incident is known to us. It was February 7, 2002, eight(8) months after June 2001, completely irrelevant in determining whether the Hes willfully failed to visit A.M.H in the 4 months before June 20, 2001. Nevertheless, the Majority concealed the time and allowed it as evidence against Hes. Let's further examine this Feb 7, 2002 passport incident in detail to see how the Majority switched things around.

The February 7, 2002 hearing was Hes' first appearance in the Chancery Court. According to the transcript that day, Judge Alissandratos issued a set of rulings against the Hes, including requiring the them to pay $15,000 deposit for the Bakers in a week, surrender A.M.H's passport, undergo DNA testing, etc, etc. The following is the part of the transcript regarding A.M.H's passport. Mr. Sossaman was Hes' court appointed attorney at the time:

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45 Not a state authority figure
46 Why didn't Higher tell us what was on the sign?
47 Webster's definition of "visit"
48 What about Mr. He? He wasn't there.

MS. MULLINS: But my concern is for Anna. Anna is an American citizen and has an American passport, and my concern is - - I think that that passport needs to be lodged in a safe place. Right now - -

THE COURT: Who has got the passport?

MS. MULLINS: Mr. He has her passport.

THE COURT: Okay. I will order that he - - ask your client where that passport is right now, please, as we speak where it is.
MR. SOSSAMAN: In his apartment, Your Honor.

THE COURT: Okay. Today before four o'clock, I want that down there at the Clerk and Master's.

MS. MULLINS: Thank you. And we can place that in the order as well then?

THE COURT: Oh, yes.

MS. MULLINS: Okay. That was all of my concerns. Thank you.

THE COURT: And I want something completely understood that if it isn't here by four o'clock today, I want a contempt citation tomorrow.

MS. MULLINS: Filed by me?

THE COURT: No, you get an attorney ad litem because it's your request. You get an attorney ad litem to represent you.

MS. MULLINS: Yes, sir.

THE COURT: Because he says he's got it right back there at the apartment so - - and the streets are clear and the sun is shining.

MS. MULLINS: Yes, sir. Thank you.

(Feb 7, 2002 transcript, page 65 line 9 to page 66 line 21)

Ms. Mullins brought up the passport issue in the court without filing a motion, and Judge Alissandratos ordered instantly that the Hes must turn in A.M.H's passport the same afternoon. Hes' court appointed lawyer Dennis Sossaman did not contest the passport order in the court. A.M.H's passport is a property of the United States Federal government (22 CFR Part 51), the Hes had an obligation to protect it. After the Hes and their attorney left the court room, Larry Parrish and Alissandratos stayed alone in the Court and drafted the Guardianship and No-Contact Order which the two signed next morning. Around the same time Parrish and Alissandrators were drafting their ex parte order in private, the Hes faxed a letter to Dennis Sossaman requesting him to appeal Alissandratos' order. Mr. He wrote in the faxed letter:

Dear Mr. Sossaman,

We do not want to show contempt for court orders, but before receiving legal consultation from an immigration attorney, we don't want to turn in our daughter's passport and our marriage license because we think these are our own properties.

So please, please file a motion with Chancery court, requesting a delay of these orders this afternoon. I will call you now to make sure you receive this fax.

Sincerely,

Shaoqiang He

The Majority took out the date and time off this 2002 incident long after June 20, 2001 and wrote "*Finally, when ordered by Chancellor Alissandratos to surrender A.M.H.'s passport to the court, the Hes refused to comply*." Then use it to show the Hes *"are not intimidated by the authority of others"*

As we stated above, this incident was irrelevant because it was eight months after Bakers' filed their petition, the Hes' behavior pattern could have changed after eight months of legal dispute with the Bakers. Furthermore, if one looks at the full evidence available to the Majority, the Hes did not simply refuse to comply, instead, they were respectful and reasonable, they wanted their lawyer to appeal the spontaneous decision made by Judge Alissandratos, whose ground was in part that "the streets are clear and the sun is shining".

The April 2, 2001 message left by Mrs. He on Bakers' voice mail proved one thing: the Hes tried to contact the Bakers to establish a two way communication between the Hes and the Bakers. The Bakers did not return the call, signaled their refusal to communicate with the Hes any more. The Hes' attorney had asked the Bakers to produce the tape recording of the voice message, the Bakers failed to do so. Yet, the Bakers insisted that there was no mentioning of visitation in that phone call.

The Bakers made a decision to disallow the Hes to come to their home after January 28, 2001. The Bakers contemplated seeking state authority to terminate Hes parental rights back in May 2000, and they knew the statute.

The Majority intended to show the Hes as fearless aliens with no regard for the police orders and their own lives. But they had to twist some facts around and conceal others to create false impressions.

The evidence the Majority presented showed that before June 20, 2001, the Hes followed the rules set by police and the Bakers without any exception.

The Hes and Bakers both testified before 2004 trial that the police told the Hes not to come back to Bakers' home.

The Bakers testified that they made a rule after January 28, 2001 that the Hes would not be allowed into the Bakers' home[49].

Therefore, after January 28, 2001, both the Hes and the Bakers had concluded that the Bakers' home ceased to be a place where the Hes could visit A.M.H.

Furthermore, the Hes were not aware of any other place where they could visit A.M.H.

The Bakers made no direct communication with the Hes after January 28, 2001 and did not respond to Hes' attempt to establish two way communications with the Bakers.

The Hes had no other option but to request the juvenile court to help them, which they did.

D. Whether Hes were aware of their statutory duty to visit and the Majority's erroneous interpretation of case law

> **Willful**: done deliberately or knowingly and often in conscious violation of disregard of the law, duty, or the rights of others" (Merriam-Webster's Dictionary of Law, 1996)

> "Nonetheless, Mother's knowledge of a duty or expectation that she provide support and visit is *a factor in determining willfulness*. We find nothing in the record to indicate she was ever told she was expected to provide support or face termination of her parental rights."
>
> -- ***In re W.B., IV***, (COTTRELL, Judge)

By definition, for something to be done willfully, it has to be done deliberately and knowingly. Without knowledge, there can't be willfulness. The Majority does not agree.

The Hes, as biological parents of A.M.H, were aware of their natural duty as parents to their child. Every normal human being has this awareness. The trial court confused the awareness of this natural duty with the knowledge of the Tennessee statute. However, Judge Cottrell made it crystal clear here. The knowledge of the duty is defined as whether the person knew that she was expected to perform the duty or face consequences defined by the law. The laws of nature dictate that a biological parent is forever a parent of a child, regardless of

49 Bakers claimed they phoned some external facility to see if something can be arranged there for the visit, however, this is irrelevant, as the Bakers never communicated this to the Hes and the Hes did not tap onto Bakers' phones. Remember, Bakers have the burden to prove that Hes willfully failed to visit.

visitation or support. As we argued previously, for the people of Tennessee, unless they know the magic number 4, they are unaware of the specific requirements imposed by the State.

In DCS cases, the Tennessee statute requires notice to show proof that the parents had been made known of their duty by DCS. One should note that the notice required by Title 37 of Tennessee Code is very specific. It is not just a notice saying "come visit and support". That kind of notice is invalid. Under Tennessee statute, the notice must conform to the following standard:

> The statement shall include the definitions of "abandonment" and "abandonment of an infant" contained in § 36-1-102 and the criteria and procedures for termination of parental rights.

Clearly, the legislative intent was to make sure that the parents know their duty as defined by Tennessee abandonment statutes: fail to visit or support for longer than 4 months and you may lose your parental rights under Tennessee law. This is due process. The Tennessee statute defined a period of 4 months, not 4 years, not 4 days, not 4 hours or 4 minutes. That's the Tennessee law. Unless the parent knows this statute, there is no knowledge of the duty and there can be no willfulness in violating the statutory requirement set by Tennessee legislature and his/her parental rights can not be terminated under that Tennessee statute.

In private individual cases, there is no notice requirement, but the petitioner must prove willful abandonment by clear and convincing evidence. For instance, if Kevin Weaver had testified that he told the Hes about the Tennessee abandonment statutes and possible termination of parental rights for exceeding it, then the Bakers could have proven that the Hes knew their duty as defined by the statute. In this case, there was no record to show that the Hes were aware of the statute prior to June 20, 2001.

In Section I, we concluded that four conditions must be met simultaneously to find willful failure to perform a duty, the awareness of the duty is one of the four conditions.

In re W.B., IV , the case law stated that the knowledge of the duty is *a factor in determining willfulness*.

What is a factor? The Majority looked it up in the Webster's College Dictionary[50].

> **fac[tor** 7fak$t ! r8
>
> ***n.***
>
> 5ME *factour* < OFr *facteur* < L *factor*, doer, maker < pp. of *facere*, DO16
>
> **1** *a*) a person who carries on business transactions for another; commission merchant; agent for the sale of goods entrusted to his possession *b*) an agent, as a banking or finance company, engaged in financing the operations of certain companies, or in financing wholesale and retail sales, through the purchase of accounts receivable

50 The Majority used the 2001 edition, the one I have is the 2005 4th edition, as I do not have access to an earlier edition, however, there should not be any major differences between the two editions on the definition of "factor".

> **2** 5< fig. use of sense 46 any of the circumstances, conditions, etc. that bring about a result; element or constituent that makes a thing what it is
>
> **3** *Biol.* GENE
>
> **4** *Math.* any of two or more quantities which form a product when multiplied together

The question is which definition we should use. Definition 1 a) and 1 b) are for some type of business person. Definition 3 is a biological term for GENE. We are left with 2 and 4. But, the big ***Math*** in front of it indicates that definition 4 is a term of **mathematics**, as in "3 is a factor of 6".

With definition 1, 3 and 4 excluded, the only sensible choice in this context is definition 2.

However, if the Majority had chosen definition 2, then factor is defined as "element or constituent that makes a thing what it is[51]". When we apply this definition to the case law ***In re W.B., IV***, we get the following:

> "knowledge of a duty or expectation that she provide support and visit is an element or constituent that makes *willfulness* what it is*"*

This definition would support our view and common sense – no knowledge, no willfulness, or in other words, knowledge is necessary for concluding willfulness. But, apparently, the Majority didn't like this definition and chose definition 4(Math) instead.

The Majority made the curious choice of the mathematics definition for "factor" and went on to perform some subtle transformations of the case law. They concluded[52]:

> A "factor" is defined as "[o]ne of two or more quantities that when multiplied together yield a given product." Webster's II New College Dictionary 401 (2001). **A factor is, therefore, but one element to be considered, perhaps among many, in reaching a conclusion. Thus, whether or not a private party with custody of the child notified the biological parents of the potential grounds for terminating their parental rights is but one factor to be considered.**
> (Majority opinion, emphasis added)

With this deliberate choice of the wrong definition for the word "factor", the Majority greatly relaxed the standard for finding willfulness in failure to visit. By doing so, the Majority abridged the rights of the Hes. If allowed to stand as case law, such a loosened standard will affect the fundamental rights and lives of Tennessee parents for generations to come.

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51 The definition "that bring about a result" indicates a "causal" contribution.

52 Even if we took Majority' choice of the mathematical definition, the English language is surprisingly consistent. Suppose that willfulness is a product of multiple factors multiplied together, with knowledge of duty being one of the factors, then the lack of knowledge means this factor is 0. 0 multiplies any number is still 0. Therefore, no knowledge, no willfulness.

III. Constitutionality of Title 36 and 37 of the Tennessee Code

Title 36 of Tennessee Code does not mention notice, but title 37 requires notice. The dissent on appeal questioned in the dissenting opinion: “How can this disparity be justified? Fairness dictates that parents and petitioners in all termination cases be held to the same standard, regardless of whether DCS is involved . . . .”

The Majority argued:

> As the judicial branch of government, we are to address the issue presented by the Hes in this case and asercertain whether the statutory scheme adopted by the legislature comports with the Fourteenth Amendment of the United States Constitution. The dissent overlooks the constraints, or the lack thereof, imposed by the United States Constitution and proceeds to formulate what it believes to be sound policy in this area of the law. We are told repeatedly by the dissent that it is not fair for the legislature to require DCS to provide parents with notice of the abandonment ground for termination while not requiring the same notice when private individuals are involved. ***Compare*** Tenn. Code Ann. § 37-2-403(a)(2) (2003) ***with*** Tenn. Code Ann. § 36-1-102 (2003) ***and*** Tenn. Code Ann. § 36-1-113(2003). The reason the legislature is permitted to make this distinction is well settled in the law. When DCS, a *state agency*, seeks to terminate a biological parent’s parental rights, the notice requirement imposed upon DCS by the legislature seeks to ensure that the biological parent’s fundamental rights as parents are protected from unwarranted state infringement. The United States Supreme Court has recognized as much, stating: “When the *State* moves to destroy weakened familial bonds, *it* must provide the parents with fundamentally fair procedures.” ***Santosky v. Kramer***, 455 U.S. 745, 753-54 (1982) (emphasis added.) Why do we draw a distinction when private parties are involved? Because it is only state action, not the actions of private individuals, which the Fourteenth Amendment seeks to safeguard against. ***The Civil Rights Cases***, 109 U.S. 3, 11 (1883). Therefore, the legislature is permitted to make the distinction which the dissent finds most troubling.

The Majority identified DCS as “*a state agency*”. They seem have narrowed the definition of the “*State*” in the Fourteenth Amendment to the executive branch only. This is incorrect.

In **Shelley** v. **Kraemer**. 334 US 1 (1948), a privately made contract that prohibited "people of the Negro or Mongolian race" from living on a particular piece of land. The US Supreme Court found that, although a discriminatory private contract could not violate the Equal Protection Clause, the courts' *enforcement* of such a contract could: the Supreme Court reasoned,

courts were part of the state.

The A.M.H case is even clearer. The termination of Hes parental rights is purely a *State* action. It is not private actions by private individuals as the Majority argued. In the A.M.H case, the Bakers are merely private individuals that seek to induce State action to terminate Hes' parental rights according to the laws passed by the legislature. In fact, the Tennessee law states:

> (a) The chancery and circuit courts shall have concurrent jurisdiction with the juvenile court to terminate parental or guardianship rights to a child in a separate proceeding, or as a part of the adoption proceeding by utilizing any grounds for termination of parental or guardianship rights permitted in this part or in title 37, chapter 1, part 1 and title 37, chapter 2, part 4.
> (Tenn. Code Ann. **36-1-113.)**

The Majority argument failed to acknowledge and assume the Court's ultimate responsibility as part of the *State* in the A.M.H. case. The Bakers have no authority to terminate Hes' parental rights and no power to enforce a termination of parental rights. The Bakers can't say that the Hes failed to visit and rights terminated. Only public entrusted judges such as Judge Childers and the Majority on appeal can sit on the bench and issue such rulings according to the statutes, and they must do so with care to protect individuals' rights as part of their duty as state officials. Both the legislature and the courts are parts of the State. The enforcement of the court order is carried out by the executive branch. The Bakers asked the State to terminate the Hes' parental rights. "When the *State* moves to destroy weakened familial bonds, *it* must provide the parents with fundamentally fair procedures." ***Santosky v. Kramer***, 455 U.S. 745, 753-54 (1982).

If the Tennessee statute is interpreted in the way the Majority did, then we will have a situation where the *State* terminates parental rights more easily in private adoption cases than in DCS cases, resulting in state legislated discrimination against the class of parents who put their children in private foster care. That would be a violation of both due process and equal protection principles of the U.S. constitution.

Based on Amicus' argument presented in this brief, when a private individual asks a state court to terminate someone's parental rights for willful failure to visit pursuant to the willful abandonment statute of the state (for the instant case, Title 36 of the Tennessee Code), she must prove each and every one of the following factors by clear and convincing evidence:

> The parent did not visit the child for a consecutive period defined by the willful abandonment statute, and during the entire period,
>
> (1) the parent was aware of the state's statutory definition of willful abandonment and the consequence of willful abandonment, and
>
> (2) the parent had the capacity to visit the child, and
>
> (3) the parent made no attempt to visit the child, and
>
> (4) the parent had no justifiable excuses not to visit the child.

Factor (1) above is different from the notice requirement defined in Tenn. Code Ann. §37-2,

the petitioner is not required to post notice. But, the petitioner must prove to the Judicial Branch of the State that during the entire statutory period (four months) of alleged willful abandonment the parent knew the definition of willful abandonment per Tenn. Code Ann. § 36-1-102 and the parent knew her parental rights could be terminated due to willful abandonment.

Once the above proposed standard in proving willful abandonment is adopted, Title 36 and Title 37 of the Tennessee Code will be in perfect harmony and in compliance of the Fourteenth Amendment of United States Constitution.

IV. It's to A.M.H's best interest to allow her to grow up with her birth parents

The evidence showed that the Hes made every effort to visit A.M.H and maintain a parent-child relationship with A.M.H. The Hes understood the June 4, 1999 custody order was for a short period of time. They repeatedly sought to regain custody of A.M.H through the Juvenile Court once their situation improved.

As presented above, the Hes were not aware of the Tennessee statutes on willful abandonment; they made repeated attempts to visit A.M.H by seeking help from the Juvenile Court and formally filing a petition for custody within the statutory four month period; they had good reason not to go to Bakers home for safety concerns and per their understanding of instructions from law enforcement; furthermore, they had no place to visit A.M.H. There was no willfulness in their failure to visit A.M.H from January 28, 2001 to June 20, 2001.

Throughout this case, there is a pattern of bias against the Hes. The trial court and Appellate Court's treatment of evidence failed to follow the clear and convincing standard. The Hes lost their contact with their child A.M.H due to the hindrance of the Bakers and the trial court's ex parte "no-contact" order. The trial Court and appellate Court's decisions further prevented Hes from seeing their child. A.M.H's current lack of attachment to her birth parents was due to Court's unjust treatment of the Hes. The Court erred and Hes suffered.

No one can substitute one's birth parents. In Chinese culture, the bond between parent and child is of utmost importance. A.M.H does not deserve to lose the connection to her birth parents. One day, A.M.H will grow up and discover the history of this case. The Court should correct the error right now and immediately return the custody of A.M.H to her birth parents to allow the rebuilding of their parent-child relationship.

CONCLUSION

The Hes did not abandon their child A.M.H. There was no willful failure to visit. It will be a violation of Hes' liberty rights for the Judicial Branch of the State of Tennessee to terminate Hes' parental rights to A.M.H.

Amicus respectfully asks the Supreme Court of Tennessee to reverse trial court's ruling on terminating Hes' parental rights. *Amicus* respectfully asks the Supreme Court of Tennessee to

give the custody of A.M.H back to her birth parents.

Respectfully submitted,
Dongxiao Yue

By: _____/s/ YDX__ _____
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Brief has been submitted to TN Supreme Court. This is the electronic version re-flowed to single line space.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing document has been forwarded by courier service (FedEx), on August 7, 2006 to the following:

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