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THE SUPREME COURT OF PENNSYLVANIA

DOCKET NO. 14 WAP 2024

In the Interest of S.W., Minor

Children's Fast Track Appeal

BRIEF ON BEHALF OF APPELLEES,

ANN.E AND A.E., PROSPECTIVE ADOPTIVE PARENTS

Brief in Response to Appeal from the March 13, 2024, Opinion and Order of the Superior Court at 22 WDA 2023, vacating the November 8, 2022, Order of the Court of Common Pleas of Allegheny County- Family Division, Juvenile Section at No. CP-02-DP-0000729-2020

Brooke B. McMorrow, Esquire
Pa. I.D. 92628

10475 Perry Highway, Suite 204
Wexford, PA 15090
brooke@mcmorrowlaw.com

Counsel for Ann.E. and A.E.,
Appellees, Prospective Adoptive
Parents

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STATEMENT OF JURISDICTION

This is an appeal from a final order of the Superior Court of Pennsylvania, Western District. The Supreme Court accepted the Appellants' Joint Petition for Allowance of Appeal in this matter on May 22, 2024. Pursuant to 42 Pa.C.S. §724, the Supreme Court has jurisdiction to review the order.

STATEMENT OF THE SCOPE AND STANDARD OF REVIEW

The present case concerns a question of law. Accordingly, the Supreme Court's scope of review in this matter is plenary, and the standard of review is de novo. In re J.S., 980 A.2d 117, 120 (Pa. Super. 2009).

STATEMENT OF THE QUESTION PRESENTED

The same question is presented in this matter as between the Brief submitted on behalf of Appellant, Allegheny County Office of Children, Youth and Families (hereinafter referred to as "OCYF"), the Brief submitted on behalf of Appellant, S.W., a minor, and the Brief submitted on behalf of Appellee, W.W., and is restated below:

1. Whether the judicially created "prospective adoptive parent" exception to the general prohibition against foster parents participating in dependency cases was

abrogated by the Pennsylvania Legislature's subsequent enactment of 42 Pa.C.S. §6336.1(a), which provides that preadoptive foster parents shall not have standing in the matter absent an award of legal custody of the child ?

Suggested Answer of Appellees: No. The prospective adoptive parent exception survives the legislative enactment and was not abrogated. Further, there is not a "general prohibition" but rather limited circumstances under which foster parents may intervene.

STATEMENT OF THE CASE

Appellees, Ann.E and A.E. served as the foster parents of minor child, S.W. (hereinafter referred to as "Child") for a period of nearly two years. The biological mother of the child is W.W. (hereinafter referred to as "Mother"). The biological father of the Child has not been a party in the action.

The Child was placed in the care of Appellees in October 2020 when the Child was approximately one month old, after having been removed from Mother's care. The Child remained in the care of the Appellees from October 15, 2020 until mid-September of 2022.

Following a request by OCYF to remove the Child from the Appellees, a hearing was held on August 26, 2022 to address OCYF's request for removal. The request to remove the Child was based on unsubstantiated and false statements made

by caseworkers from OCYF and Pressley Ridge as well as upon an alleged anonymous complaint.[1]

At the time of the August 26, 2022 hearing, Appellees had not intervened in the dependency matter. Thus, at that time, they merely had notice to attend and be heard at the August 26th hearing, but they did not have the right to illicit testimony, present evidence and/or to call any witnesses to contest the Child's removal from their care. Appellees did not have adequate time between the date of notice of the August 26, 2022 hearing and the hearing itself, in which to prepare a Motion to Intervene.

Accordingly, following the August 26, 2022 hearing on the issue of removal the Appellees subsequently submitted a Motion to Intervene that was heard by the Allegheny County Court of Common Pleas Juvenile Section (hereinafter referred to as the "Trial Court"). The Appellees' Motion to Intervene was denied by the Trial

[1] It is the position of the Former Foster Parents that had OCYF done its due diligence in its investigation into the validity of the false allegations made against the Former Foster Parents, it would have learned that none of the false statements would have been proven to be true. Further, it would be clear from the timeline of events in this matter, that such baseless claims as made against Ann.E. and A.E. were made in retaliation of either Ann.E.'s decision to speak at the permanency review hearing in July 2022 wherein she voiced concerns over OCYF's treatment of the Child and/or as a potential way to delay a possible termination of Mother's parental rights until the day of the August 26, 2022 removal hearing. (Former Foster Parents were of the understanding that the August 26, 2022 date was initially set to address the contested termination of the parental rights of Mother after OCYF had failed to timely file the Involuntary Termination of Parental Rights paperwork earlier in the year. Thereafter, it seems to have been switched to address the request of OCYF to remove the Child from Former Foster Parents.)

Court without prejudice and thereafter the Motion to Intervene was represented in October of 2022, accompanied by a Memorandum of Law.

Following oral argument on the Appellees' re-presented Motion to Intervene, the Trial Court took the matter under advisement and subsequently issued its November 8, 2022 Order of Court denying Appellees' request to intervene in the dependency matter.

It is the November 8, 2022 Trial Court Order to which the Appellees took an appeal to the Pennsylvania Superior Court. In said appeal, the Appellees argued that the prospective adoptive parent exception, as found in Pennsylvania case law, granted them standing to challenge the removal of the Child from their care in the dependency matter. The Appellants herein, at that time, made the same arguments as they make before the Pennsylvania Supreme Court now; chiefly, that 42 Pa.C.S. § 6336.1(a) abrogates Pennsylvania case law.

The Superior Court disagreed with the Appellants and found under existing legal precedent, that the Appellees met the prospective adoptive parent exception to challenge the removal of the Child from their care. *In Interest of S.W.*, 312 A.3d, 345, 361 (Pa.Super. 2024). Accordingly, the case was remanded back to the Trial Court. It is noted that during the pending Superior Court appeal, on February 15, 2023, Mother's parental rights were ultimately terminated by the Trial Court. Mother's appeal of the same was denied.

Subsequently, in April 2024 Allegheny County OCYF and KidsVoice filed an Amended Joint Petition for Allowance of Appeal to the Pennsylvania Supreme Court. Said Allowance was granted, over the argument of Appellees who maintain that the legal precedent established in case law remains good law and was not abrogated by subsequent legislative enactments.

Accordingly, briefs were submitted on behalf of S.W., W.W. and OCYF in June of 2024. This Brief in Response, filed by Appellees, followed.

SUMMARY OF THE ARGUMENT

The prospective adoptive parent exception as put forth in *Mitch v. Bucks County Children and Youth Social Services Agency*, 556 A.2d 424 (Pa. Super. 1989), *In re Griffin*, 690 A.2d 1992 (Pa. Super. 1997), *In the Interest of M.R.F., III*, 182 A.3d 1050 (Pa. Super. 2018), and subsequently affirmed most recently by the Pennsylvania Superior Court *In Interest of S.W.*, 312 A.3d 361 (Pa. Super. 2024) should be upheld.

The legislative enactment of 42 Pa.C.S. § 6336.1(a) does not, and need not, abrogate the existing prospective adoptive parent exception found in case law. The plain reading of 42 Pa.C.S. § 6336.1(a) does not barre standing and prohibit the court from conferring standing, based upon traditional notions of standing to sue. In truth, prospective adoptive parents, like Ann.E. and A.E. suffer a direct and substantial injury when an agency removes a child from their care.

To propose that foster parents should not have standing, simply because their interest is, or maybe, subordinate to the interests of biological parents is incongruent with the law. Foster parents need not have the greatest or most substantial interest in a dependency matter in order to be granted standing.

Rather than a complete abrogation by the Legislature as Appellants contend, what has truly resulted is the creation of a narrowly carved exception in case law. An exception under which some foster parents may be found to be prospective adoptive parents, and thus be awarded standing to challenge the removal of child(ren) from their care.

The trial court can, and *very* often is, called upon to engage in the kind of case-by-case analysis that would be required in order to determine whether foster parents may meet the requirements of the prospective adoptive parent exception in a given case. To de-cry that the trial court should have to be engaged in a case-by-case analysis rings as disingenuous when it does so in various domestic matters, including but not limited to determinations made pursuant to 23 Pa.C.S. §5328 (custody determinations) and 23 Pa.C.S. §3502 (awards for equitable distribution in divorce matters).

Appellants seem to suggest that should the Superior Court's opinion *In Interest of S.W.*, 312 A.3d 361 (Pa. Super. 2024) be upheld that insurmountable delays will result in the juvenile courts. Further, that the goal of reunification will

somehow be permitted to be circumvented and that the best interests of the children in dependency matters will be lost and parental rights subordinated.

Allowing prospective adoptive parents to challenge removal does not prohibit the trial courts from ultimately maintaining reunification between biological parents and their children as the goal in a dependency matter. Nor does it prohibit the trial courts from serving and always placing the best interests of the children first; in fact, it may offer the trial court further information upon which it can conduct its best interest analysis. Put simply, the prospective adoptive parent exception has already existed for decades and there seems to have been no catastrophic fallout as a result. The Juvenile Act remains intact, there has been no flood of prospective adoptive parents overwhelming the trial courts, and the dependency process has continued in much the same way as it has for years. That the prospective adoptive parent exception may be applicable in some cases has not resulted in the razing of the Juvenile Act and our juvenile court systems as Appellants contend.

ARGUMENT OF THE APPELLEES

Appellees assert and maintain that the prospective adoptive parent exception as found in *Mitch v. Bucks County Children and Youth Social Services Agency*, 556 A.2d 424 (Pa. Super. 1989), *In re Griffin*, 690 A.2d 1992 (Pa. Super. 1997), 556 A.2d 424 (Pa. Super. 1989), *In the Interest of M.R.F., III*, 182 A.3d 1050 (Pa. Super. 2018), and most recently as in *In Interest of S.W.*, 312 A.3d 361 (Pa. Super. 2024)

should be upheld as it is good law which rather than destroying the foundations upon which the juvenile court is built, supports the same. The prospective adoptive parent exception also supports foster parents, such as Ann.E. and A.E. who are a critical piece of the puzzle in the juvenile court process, without whom the dependency system as a whole would struggle immensely.

A. The Legislature's enactment of 42 Pa.C.S. § 6336.1(a) does not, and need not, abrogate the existing prospective adoptive parent exception.

The right to intervene in a dependency action is an *extremely narrow* right and it should not be granted without significant analysis and a determination as to whether the third party meets the requirements of standing under the law. This type of thorough and significant legal analysis is one which the trial courts frequently undertake. Appellees acknowledge that the court cannot simply grant standing to *any and all* parties who may be interested in a dependency matter and they are not seeking to promulgate the same.

Rather, Appellees put forth that, "... our case law has carved a narrow exception to permit the limited participation of a foster [parent] who has attained prospective adoptive status: prospective adoptive parents have standing to contest the child welfare's agency's decision to remove a child it placed with them in anticipation of adoption." *In re Griffin*, 690 A.2d 1192 (pa. Super. 1997); *Mitch v. Bucks County Children and Youth Social Service Agency*, 556 A.2d 242 (Pa. Super. 1989).

Specifically, the Superior Court has held that "...prospective adoptive parents, unlike foster parents, are urged to form long-term emotional bonds with the children placed in their care... the nature of prospective adoptive placements is sufficient to distinguish them... and thus they should have standing to seek judicial review of an agency's decisions regarding custody." *Mitch v. Bucks County Children & Youth Social Service Agency*, 383 Pa. Super. 42, 45-46, 556 A.2d 419, 420-412 (Pa. Super. Ct. 1989).

> Further distinguishing prospective adoptive parents, like Ann.E. and A.E. from foster parents generally, the Superior Court in *Mitch* expounded that; "prospective adoptive parents, unlike foster parents, have an expectation of permanent custody, which though it may be contingent upon the agency's ultimate approval, is nevertheless genuine and reasonable. Because of this expectation of permanency, prospective adoptive parents are encouraged to form emotional bonds with the child from the first day of the placement. By removing the child from the care of the prospective adoptive parents, the agency forecloses the possibility of adoption. In light of the expectation of permanent custody that attends an adoptive placement, an agency's decision to remove a child constitutes a direct and substantial injury to prospective adoptive parents. Because prospective adoptive parents, unlike foster parents, suffer a direct and substantial injury when an agency removes a child from them..." *Mitch*, at 383 Pa. Super. 42, 50, 556 A.2d 419, 423 (Pa. Super. 1989).

Such is the case herein. Ann.E. and A.E. had the Child in their care for approximately two years. During that lengthy course of time which occurred during the formative years of the Child, a substantial and close emotional bond was formed between Ann.E., A.E. and the Child. Ann.E. and A.E. did have the understanding that reunification was the goal between Mother and Child, if possible, and they did

not seek to thwart that goal and in fact endeavored to support that goal.[2] However, in the event of the termination of Mother's parental rights, it was expected that they would be able to pursue adoption and that the same would likely be granted.[3] Thus Ann.E. and A.E. distinguished themselves from foster parents and achieved the status of prospective adoptive parents. A status for which case law carves a narrow exception, granting intervention to challenge the removal of the child/children from the prospective adoptive parents' care.

Appellants argue that the enactment of 42 Pa. C.S. §6336.1(a) abrogates the prospective adoptive parent exception based on, firstly, the alleged plain reading of the statute, and secondly, but perhaps less convincingly, based upon the existence of purported fractured case law.

Taking these two arguments in turn, firstly 42 Pa.C.S.A. §6351 allows any person to file a petition and thus, foster parents have standing to initiate an action pursuant to the Juvenile Act. Further, the Juvenile Act and the Federal Adoption and

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[2] Ann.E. and A.E. assert that their earnest efforts in looking out for the Child's best interests were misrepresented by OCYF to the Trial Court. Given that at that time, Ann.E. and A.E. had yet to formally intervene, they were prohibited from entering evidence which would have substantiated their position.

[3] Ann.E. and A.E. assert that while the Tial Court repeatedly confirmed during the course of dependency proceedings that it was aware the goal was for the reunification of Mother and Child, that it was made clear to them that they were being considered as potential adoptive parents should the goal of the dependency action change to adoption. Indeed, it was understood by Ann.E. and A.E. that initially the August 26, 2022 hearing was scheduled to address the termination of Mother's parental rights, prior to the change to use that hearing to instead address OCYF's request for removal of the Child.

Safe Families Act recognize that foster parents are to be given notice and hearing whenever a petition is filed to transfer custody of the foster child. 42 Pa.C.S.A. §6336.1. While this may not in and of itself expressly grant foster parents standing to file petitions, this *does not prohibit* the court from conferring standing, based upon traditional notions of standing to sue. (*See*, Justice Newman's rational in dissent, *In the Interest of G.C.*, 558 Pa. 116, 130 (Pa. July 22, 1999). Indeed, prospective adoptive parents suffer a direct and substantial injury.

Appellants point to the non-precedential Superior Court's decision *In the Interest of K.R.*, 239 A. 3d 70 (Pa. Super. Ct. 2020)[4] to bolster their position that 42 Pa. C.S. §6336.1(a) bars nearly all foster parents, including prospective adoptive parents, from having standing in dependency actions, absent an award of legal custody to the foster posters. Appellees maintain and assert that this application and reading of 42 Pa. C.S. §6336.1(a) is improper.

Nowhere, in the plain language of the statute, does it explicitly state that prospective adoptive parents do not have standing nor should they be granted standing if they meet the requirements of the judicially carved exception. This very

[4] In addition to *In the Interest of K.R.*, 239 A. 3d 70 (Pa. Super. Ct. 2020) having been a non-precedential decision, it is also factually distinct from this matter. Specifically, Appellees assert that the facts on the record in this matter illustrate their distinction as prospective adoptive parents, as that exception is as outlined by The Superior Court in *In the Interest of M.R.F. III.*

interpretation was adopted by Pennsylvania Supreme Court Justice Newman in her dissent in *In the Interest of G.C.* 558 Pa. 116, 129, 735 A.2d 1126, 1233 (Pa. 1999).

The facts emphasized by Justice Newman in her dissent, *In the Interest of G.C.*, are nearly identical to the facts of the instant matter. She wrote, and the same is applicable to the case herein, that "These foster parents have a real interest in this child's welfare, and in fact may have a limited liberty interest in that foster care relationship." See; *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 53 L. Ed. 2d 14, 97 S. Ct. 2094 (1997), *In the Interest of G.C.*, 558 Pa. 116, 129 (Pa. July 22, 1999).

To echo Justice Newman, to propose that foster parents should not have standing, simply because their interest is, or maybe, subordinate to the interests of biological parents is incongruent with the law. Foster parents need not have the greatest or most substantial interest in a dependency matter in order to be granted standing. Rather, the issue of standing is itself a threshold question that concerns who has the right to appear before the court. As long as a third party meets the standing requirements outlined by statute and/or in case law they are joined in an action as a party. Once a third party is granted standing, the trial court must then weigh the various interests and consider all factors in rendering its decision. As stated above herein, trial courts undertake such an analysis and weighing of interests between multiple parties all the time.

This can be analogized to grandparent standing in custody actions, pursuant to 23 Pa.C.S. §5324-5. First, the third-party grandparent must allege and prove they meet the standing requirements in order to be able to seek custody. Provided that standing is met, then the grandparent can seek custody of their grandchild(ren), but that does not mean that simply because standing is granted to the grandparent that their interests prevail over those of the parent(s) or that the trial court must do away with the polestar that is "the best interests of the child/children". (See; *In re J.S.*, 980 A.2d 117, 121 (Pa. Super. 2009) noting the best interests of the children as the polestar in juvenile matters.)

Likewise, merely because a foster parent satisfies the prospective adoptive parent exception and is granted standing to intervene and challenge the removal of a child from their care, does not mean that the trial courts will be hamstrung and forced to subjugate the best interests of the child and/or the goal of reunification to whatsoever the prospective adoptive parent requests. Appellees have acknowledged that being granted standing does not mean that they will prevail in their request for relief pending before the Trial Court.

Secondly, as to the case law which Appellants have claimed is fractured, the case law is quite clear. There exists an exception for prospective adoptive parents to intervene in dependency matters. That string of cases, suggests that the prospective adoptive parent exception survives.

As has been established, the prospective adoptive parent exception arose out of *Mitch v. Bucks County Children and Youth Social Service Agency*, 556 A.2d 419, 423 (Pa. Super. 1989), and was further most notably supported *In Re Griffin*, 690 A.2d 1191 (Pa. Super. 1997), and again in *In the Interest of M.R.F., III*, 182 A.3d 1050 (Pa. Super. 2018). The Superior Court in its March 13, 2024 opinion makes clear that the findings and determination of the Superior Court in *M.R.F., III* provide that the prospective adoptive parent exception survived the enactment of Section 6336.1(a). *In Interest of S.W.*, at 355. Specifically, "... that the exception is available to foster parents involved in dependency proceedings, who have prospective adoptive status; but that this standing is only for a limited purpose..." to challenge the removal of the child from their home. *In Interest of S.W.*, at 355. Such has been the intent of Ann.E. and A.E.; to challenge the removal of the Child from their home.

It is recognized that while the Superior Court may have acknowledged that it has misgivings about the prospective adoptive parent exception, that the prospective adoptive parent exception nevertheless survives. More importantly, unlike Appellants suggest, the case law is not so fractured as to prohibit any kind of understanding and/or application of the prospective adoptive parent exception (as the Superior Court was able to apply it to the matter and facts herein). Indeed, it would seem that §6336.1(a) can co-exist with the prospective adoptive parent exception intact.

B. Addressing the Public Policy Considerations and Ramifications of the Prospective Adoptive Parent Exception.

Appellants have made much of the possible ramifications of the prospective adoptive parent exception should the Superior Court's opinion, In the Interest of S.W., be upheld. First, they allege that the upholding of the prospective adoptive parent exception would result in some kind of tremendous and unsurmountable delays that would harm the very foster children the courts seek to protect.[5] Secondly, that such an exception serves to undermine the Juvenile Act and the focus on reunification of biological parent(s) with their child(ren).

Taking those two claims in turn, firstly, while the Appellants expound upon this parade of horribles and seem to suggest that the dependency and juvenile court systems would potentially crumble under the weight of the prospective adoptive parent exception, and the purported rush of foster parents who would then attempt to challenge removal of children from their care, the fact remains that this exception had already existed prior to this appeal. In fact, the exception has existed *for decades*. Yet, the juvenile court system carries on and continues to operate and function with a focus on reunification (*where possible*) and with the best interests of the children at its core.

[5] Ann.E. and A.E. make note that it can be argued that Appellants' appeal herein is a delay. Further, OCYF's previous failure to timely submit the Involuntary Termination of Parental Rights paperwork back in 2022 resulted in the initial termination hearing scheduled for February 2022 being delayed until August 26, 2022. Ann. E. and A.E. have not been the sole source of delays in permancy for the Child as has been suggested.

There are several other jurisdictions that have adopted policies which allow foster parents to become parties in dependency actions under certain circumstances; including the states of Delaware, South Carolina, and West Virginia. If other states are able to serve the best interests of the dependent children in their state by permitting foster parent intervention, so too can Pennsylvania. Appellees put forth, that indeed, Pennsylvania has continued to do so since the inception of the prospective adoptive parent exception.

Absent from Appellants arguments is any genuine recognition of how crucial and commendable a role it is that foster parents play in the juvenile court system. Foster parents, and prospective adoptive parents alike, play an integral role in providing information to the court regarding the best interest and welfare of the children they foster and care for on a daily basis. As provided by Justice Newman,

> "To resolve what custody arrangement is best for any child that is adjudicated dependent under the Juvenile Act, the court should have the input of all interested parties, not simply an overburdened social service agency. The combined effort of all interested parties, whether they be the agency, the extended family or foster parents, is essential to decide what custody arrangement is best."

In the Interest of G.C., 558 Pa. 116, 137, 735 A.2d 1126, 1237-1238 (Pa. 1999).

"... we should encourage foster families to provide nurturing and supportive homes, and one of the ways to accomplish this is to keep foster parents part of the solution..." *In the Interest of G.C.*, 558 Pa. 116, 136-137 (Pa. July 22, 1999).

Not all foster parents will satisfy the prospective adoptive parent exception, nor will all foster parents seek to be classified as prospective adoptive parents. However, those that are and those that do, such as Appellees Ann.E. and A.E. should be able to come before the court to challenge removal of a child from their home and expound upon why it is not in the child's best interests to be removed from their care.

Absent from the Briefs of Appellants is the recognition that improper removal of children from the homes of prospective adoptive parents can also be a source of trauma for foster children. The removal of a child from the home of their biological parent(s) will already be a source of trauma for the child, to remove a child from another home and persons to whom they have become deeply bonded, the home of their prospective adoptive parents, may only serve to inflict more trauma upon dependent children. Accordingly, providing the courts with more information, such as the information that can come from prospective adoptive parents, can only serve as a benefit to the court as it conducts its best interest analysis.

Thereafter, let the trial courts make their analysis based upon all the facts provided as put forth by all interested parties. Surely, minimizing any delay in the juvenile courts' dependency process should not be put above safeguarding the best interests and the welfare of those children deemed dependent. If upholding the prospective adoptive parent exception will assist the trial courts in determining the

best interests of the children, will not be in juxtaposition with reunification and the rights of biological parents, and will keep the good foster parents, like Ann.E. and A.E., continuing to offer their homes and their hearts to dependent children, then any delay that *may* arise would be a small consequence.

CONCLUSION

For the foregoing reasons, Appellees, Ann.E and A.E., the Prospective Adoptive Parents herein, respectfully request that this Honorable Supreme Court uphold the Pennsylvania Superior Court's ruling *In Interest of S.W., 312 A.3d, 345, 361 (Pa.Super. 2024)* and find that the prospective adoptive parent exception survives the enactment of 42 Pa.C.S. § 6336.1(a).

Respectfully submitted,

Brooke B. McMorrow, Esquire
Pa. I.D. 92628

10475 Perry Highway, Suite 204
Wexford, PA 15090
brooke@mcmorrowlaw.com

Counsel for Appellees A.E. and Ann.E., Prospective Adoptive Parents

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief has been served on this day upon the following persons via U.S. Mail, Email, and via electronic filing. This service satisfies the requirements of Pa. R.A.P. 121.

Alexandria Stryker, Esquire
Allegheny County Law Dept
445 Fort Pitt Blvd., Suite 300
Pittsburgh, PA 15219
Alexandria.stryker@alleghenycounty.us

Thomas Welshonce, Esquire
& Marcus Spisso, Esquire
KidsVoice
437 Grant Street, Suite 700
Pittsburgh, PA 15219
twelshonce@kidsvoice.org
mspisso@kidsvoice.org

Rosalyn Guy-McCorkle, Esquire
Allegheny County Law Department
445 Fort Pitt Blvd., Ste. 300
Pittsburgh, PA 15219
fortpittlaw@verizon.net

Andrea R. Groh, Esquire
& Catherine Volponi, Esquire
Juvenile Court Project
436 Seventh Avenue, 11th Floor
Pittsburgh, PA 15219
agroh@acbfparentadvocates.org
cvolponi@acbfparentadvocates.org

Date: July 12, 2024

Brooke B. McMorrow, Esquire
Pa. I.D. 92628

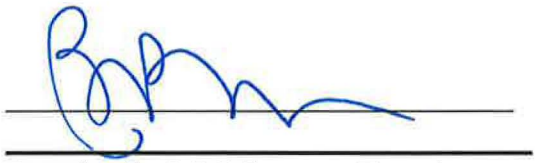
10475 Perry Highway, Suite 204
Wexford, PA 15090

PA. R.A.P. 1115(f) CERTIFICATION

I hereby certify that the foregoing is twenty pages and complies with the word count limit of Pa. R.A.P. 1116(c). This Brief contains 4,489 words, based on the word count feature of Microsoft Word.

PA. R.A.P. 127 CERTIFICATION

I herby certify that the foregoing Brief complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts, pursuant to Pa. R.A.P. 127 that require filing confidential information and documents differently that nonconfidential information and documents.



Brooke B. McMorrow, Esquire
Pa. I.D. 92628

10475 Perry Highway, Suite 204
Wexford, PA 15090
brooke@mcmorrowlaw.com

Counsel for Appellees, A.E. and Ann.E.
Prospective Adoptive Parents