

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. M.L.G.,	:	
Relator,	:	
v.	:	No. 12AP-13
Robert G. Montgomery, in his official Capacity as a Judge of the Franklin County Probate Court and Franklin County Probate Court,	:	(REGULAR CALENDAR)
Respondents,	:	
J.L.H. and M.B.H.,	:	
Intervenors-Respondents.	:	
In the matter of: M.E.G.,	:	
M.L.G.,	:	
Petitioner-Appellee,	:	
v.	:	No. 12AP-401
J.L.G.,	:	(C.P.C. 09JU-08-11743)
Respondent-Appellant.	:	(REGULAR CALENDAR)

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D E C I S I O N

Rendered on August 9, 2012

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*Massucci & Kline LLC, LeeAnn M. Massucci and Kenneth R. Kline*, for M.L.G.

*Ron O'Brien*, Prosecuting Attorney, and *A. Paul Thies*, for Robert G. Montgomery and Franklin County Probate Court.

*Einstein & Poling, LLC*, and *Dianne D. Einstein*, for J.L.H.  
(fka J.L.G.) and M.B.H.

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IN MANDAMUS  
ON OBJECTIONS TO THE MAGISTRATE'S DECISION  
AND  
APPEAL FROM THE FRANKLIN COUNTY COURT OF COMMON PLEAS,  
DIVISION OF DOMESTIC RELATIONS, JUVENILE BRANCH

CONNOR, J.

{¶ 1} In these consolidated appeals, we address two related actions. Case No. 12AP-13 involves an original action in which objections have been filed to the magistrate's decision denying a request for writs of mandamus and prohibition arising out of a final decree of adoption issued by the Franklin County Probate Court ("probate court"). Case No. 12AP-401 involves an appeal from a judgment entry issued by the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch ("juvenile court"), granting shared custody to a nonparent. For the reasons that follow, we sustain the objections but otherwise adopt the magistrate's findings of fact and conclusions of law, except as to the conclusion that the juvenile court had jurisdiction to decide the custody issue, and we further remand the judgment of the juvenile court with instructions to dismiss the action.

{¶ 2} In case No. 12AP-13, relator, M.L.G., filed an original action requesting this court to issue a writ of prohibition ordering respondent, the Honorable Robert G. Montgomery ("Judge Montgomery"), a judge in the Franklin County Probate Court, to cease finalization of the adoption of the minor child, M.E.G., and to issue a writ of mandamus ordering Judge Montgomery to void the adoption of M.E.G. by intervenor-respondent, M.B.H. (formerly M.E.G.'s stepfather). This court referred this matter to a magistrate pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth District Court of Appeals. The magistrate issued a decision, which includes findings of fact and conclusions of law, which is appended to this decision. Intervenors-respondents, J.L.H (fka J.L.G.)<sup>1</sup> and M.B.H. (collectively, "J.L.H. and M.B.H."), have filed objections to the

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<sup>1</sup> J.L.H. is the minor child's biological mother and was formerly known as J.L.G. She became known as J.L.H. upon her marriage to M.B.H. At the time the custody complaint was filed in juvenile court, she was known as J.L.G. For ease of discussion, we shall refer to her throughout as J.L.H.

magistrate's decision recommending the denial of M.L.G.'s request for writs of prohibition and mandamus and granting their motion to dismiss on the limited grounds that the magistrate erred in her determination that the adoption has no effect on the jurisdiction of the juvenile court on the related custody case.

{¶ 3} In case No. 12AP-401, respondent-appellant, J.L.H., appeals from a judgment entry of the juvenile court, denying her motion to dismiss petitioner-appellee M.L.G.'s complaint for custody, as well as her motion to vacate visitation orders, and granting M.L.G. shared legal custody of M.E.G.

{¶ 4} M.L.G. and J.L.H. were a same-sex couple who began a long-term relationship in approximately 1998. The two women formalized their relationship by attending pre-wedding counseling and entering into a "holy union" through a ceremony attended by their friends and relatives in September 1999. In October 1999, they executed a "Marital Commitment Agreement." They also executed wills in which each woman left her property to the other, rather than their next of kin.

{¶ 5} The parties had discussions about beginning a family and decided J.L.H. would get pregnant first because she was older. The parties selected a private donor and J.L.H. was artificially inseminated. J.L.H. gave birth to M.E.G. on July 22, 2005.

{¶ 6} J.L.H. and M.L.G. lived together with M.E.G. for the first three years of the minor child's life. The parties did not enter into a written agreement regarding custody of M.E.G. In May 2008, M.L.G. and J.L.H. ended their relationship. J.L.H. and M.E.G. moved out of the house they had all shared in Toledo, Ohio and relocated to the Columbus area, while M.L.G. remained in the Toledo area.

{¶ 7} For approximately one year after the termination of the relationship, the parties continued with an informal arrangement regarding M.E.G. However, in August 2009, J.L.H. severed M.L.G.'s contact and communication with M.E.G. On August 28, 2009, M.L.G. filed a complaint for custody of M.E.G. in the juvenile court. The court ordered M.L.G. to have visitation with M.E.G. pending disposition of the custody action.

{¶ 8} On November 13, 2009, J.L.H. married M.B.H. On July 1, 2010, M.B.H. filed a petition in the probate court to adopt M.E.G.

{¶ 9} On September 14, 2010, the custody trial in this matter began in the juvenile court and spanned approximately ten non-consecutive days, with testimony finally

concluding on November 1, 2010, and with the final submission of closing arguments on November 15, 2010.

{¶ 10} On January 6, 2011, a final decree of adoption was issued by the probate court, which finalized the adoption of M.E.G. by M.B.H. On February 14, 2011, J.L.H. filed a motion to dismiss M.L.G.'s petition for custody on the grounds that the final decree of adoption divested the juvenile court of jurisdiction. Although approximately two months had passed since the conclusion of the custody trial, the magistrate had not yet issued a decision on the custody issue at that time.

{¶ 11} On September 26, 2011, the juvenile court magistrate issued a judgment entry denying J.L.H.'s motion to dismiss and motion to vacate the visitation order. The juvenile court magistrate also granted M.L.G. shared legal custody of M.E.G. Specifically, the juvenile court magistrate determined M.B.H.'s adoption of M.E.G. did not divest the juvenile court of jurisdiction to determine custody of M.E.G. The juvenile court magistrate also found J.L.H. had contractually, through her words and actions, relinquished custody of M.E.G. to M.L.G. and, furthermore, it was in the best interest of M.E.G. to order shared custody between J.L.H. and M.L.G.

{¶ 12} On October 11, 2011, J.L.H. filed objections to the juvenile court magistrate's decision. A hearing was held before the juvenile court judge on the objections on November 15, 2011.

{¶ 13} On January 4, 2012, M.L.G. filed her complaint for writs of prohibition and mandamus in this court, claiming the probate court is without jurisdiction to finalize the adoption of M.E.G. by M.B.H. Specifically, M.L.G. requested the issuance of a writ of prohibition prohibiting Judge Montgomery and the probate court from further finalizing the adoption of M.E.G., and the issuance of a writ of mandamus ordering Judge Montgomery and the probate court to immediately void the adoption of M.E.G. by M.B.H.

{¶ 14} On January 27, 2012, Judge Montgomery filed a motion to dismiss the complaint for the writs, arguing, inter alia, that M.L.G. lacked standing to bring the complaint because she is not a "parent" to M.E.G., and that M.L.G. is not entitled to the writs because she cannot establish a clear legal right to the extraordinary relief requested, the Judge Montgomery does not have a duty to perform the requested acts, and M.L.G. has or had adequate remedies at law.

{¶ 15} On March 26, 2012, the court of appeals magistrate issued a decision denying M.L.G.'s requests for writs of prohibition and mandamus and granting Judge Montgomery's motion to dismiss. Specifically, the magistrate determined M.L.G. is not a parent, and therefore, she has no parental rights. Because she has no parental rights to lose, M.L.G.'s consent to the adoption of M.E.G. was not necessary, and consequently, she has no standing to challenge the adoption. Additionally, the appellate magistrate determined the matter pending in the juvenile court is a custody issue, rather than a parenting issue, and the juvenile court has jurisdiction to consider custody issues between a parent and a nonparent, despite the adoption, because the proceedings in probate court do not affect the status of the custody matter in juvenile court.

{¶ 16} On April 9, 2012, J.L.H. and M.B.H. filed objections to the decision issued by the court of appeals magistrate. Specifically, J.L.H. and M.B.H. objected to the magistrate's determination that the juvenile court has jurisdiction to consider custody/visitation issues between the parties and that the proceedings in the probate court do not affect the custody matter in the juvenile court. M.L.G. filed a memorandum contra the objections and also asks this court to reconsider the appellate magistrate's denial of the writs of prohibition and mandamus.

{¶ 17} On April 26, 2012, the juvenile court, after conducting a de novo review of the juvenile magistrate's findings and rulings, overruled J.L.H.'s objections to the juvenile magistrate's decision, finding: (1) because M.L.G. is not and cannot be a "parent," the probate court was not required to refrain from proceedings with the adoption; (2) the juvenile court was not divested of jurisdiction by the probate court's exclusive jurisdiction over adoption matters, as the adoption proceedings did not affect the status of the custody matter in the juvenile court; (3) there was reliable, credible evidence presented to demonstrate J.L.H. intended to relinquish a portion of her custodial rights to M.L.G.; and (4) it is in M.E.G.'s best interest to order shared custody.

{¶ 18} On May 3, 2012, J.L.H. filed a timely notice of appeal challenging the juvenile court's determination and raising two assignments of error for our review:

- I. The juvenile court erred by denying [J.L.H.'s] motion to dismiss for lack of jurisdiction based on the issuance of the final adoption decree.

II. The juvenile court erred by awarding shared custody to [M.L.G.].

{¶ 19} We begin our analysis by addressing J.L.H. and M.B.H.'s objections to the decision of the appellate court magistrate, which are limited to certain conclusions of law reached by the magistrate. Although J.L.H. and M.B.H. agree with the magistrate's ultimate decision to grant their motion to dismiss and to deny M.L.G.'s request for writs of prohibition and mandamus, they object to the following determinations set forth by the magistrate: "As indicated previously, despite the fact that M.L.G. is not and cannot legally be identified as M.E.G.'s parent, the juvenile court does have jurisdiction to consider custody/visitation issues between the parties. \* \* \* The proceedings in the probate court do not affect the status of the custody matter in the juvenile court." Magistrate's Decision, at 6. Specifically, J.L.H. and M.B.H. dispute the magistrate's determination that the probate court's issuance of a final decree of adoption does not divest the juvenile court of jurisdiction to decide the custody matter.

{¶ 20} This objection is substantially similar to J.L.H.'s first assignment of error, in which she argues the juvenile court erred by failing to grant her motion to dismiss for lack of subject-matter jurisdiction, due to the probate court's issuance of a final decree of adoption. Therefore, we shall analyze these two challenges together.

{¶ 21} "It is well settled under Ohio law that a juvenile court may adjudicate custodial claims brought by the persons considered nonparents at law." *In re Bonfield*, 97 Ohio St.3d 387, 2002-Ohio-6660, ¶ 43. Additionally, a parent may relinquish sole custody of a child in favor of shared custody with a nonparent. *In re Mullen*, 185 Ohio App.3d 457, 2009-Ohio-6934, ¶ 6 (1st Dist.), citing *Bonfield*. Nevertheless, pursuant to R.C. 3107.15(A), a final decree of adoption relieves the biological parents or other legal parents of all parental rights and responsibilities and terminates all legal relationships between the adopted person and the adopted person's relatives or former family.

{¶ 22} R.C. 3107.15, entitled "Effect of adoption," reads in relevant part as follows:

(A) A final decree of adoption and an interlocutory order of adoption that has become final as issued by a court of this state, \* \* \* shall have the following effects as to all matters within the jurisdiction or before a court of this state \* \* \*:

(1) Except with respect to a spouse of the petitioner and relatives of the spouse, to relieve the biological or other legal

parents of the adopted person of all parental rights and responsibilities, and to terminate all legal relationships between the adopted person and the adopted person's relatives, including the adopted person's biological or other legal parents, so that the adopted person thereafter is a stranger to the adopted person's former relatives for all purposes including inheritance and the interpretation or construction of documents, statutes, and instruments, whether executed before or after the adoption is decreed, which do not expressly include the person by name or by some designation not based on a parent and child or blood relationship;

(2) To create the relationship of parent and child between petitioner and the adopted person, as if the adopted person were a legitimate blood descendant of the petitioner, for all purposes including inheritance and applicability of statutes, documents, and instruments, whether executed before or after the adoption is decreed, and \* \* \* which do not expressly exclude an adopted person from their operation or effect[.]

{¶ 23} A same-sex partner who is not the biological mother of a child cannot be considered a "parent" under Ohio law. *Bonfield* at ¶ 35-36. Therefore, under *Bonfield*, M.L.G. is not a "parent" and has no parental rights. Consequently, despite M.L.G.'s claim that she (or at least the juvenile court) should have received notification of the adoption and an opportunity to be heard in the adoption proceedings because she is a nonparent under *Bonfield*, her notification of or consent to the adoption of M.E.G. was not required by law, and she is without standing to challenge the adoption. Additionally, because the action in juvenile court was not a parentage action (but rather a custody action) and, thus, no "parenting" action was pending in juvenile court, we find the probate court, which has exclusive jurisdiction over matters of adoption, acted properly in moving forward with the adoption. More important, however, is our determination that the final decree of adoption served to terminate all pre-adoption legal relationships between M.E.G. (the adopted person) and her former family, except those established through her biological mother (J.L.H.), as shall be explained more fully below.

{¶ 24} An adoption terminates the jurisdiction of a juvenile court, a divorce court, and/or a probate court as it relates to the granting of post-adoption visitation rights with respect to former parents (*State ex rel. Kaylor v. Bruening*, 80 Ohio St.3d 142 (1997)); domestic relations court lacked jurisdiction to proceed on biological mother's pending

motions after probate court issued a final decree of adoption); former grandparents (*In re Adoption of Ridenour*, 61 Ohio St.3d 319 (1991); Supreme Court of Ohio reversed decision allowing grandparents to obtain visitation rights following an adoption by strangers)<sup>2</sup>; former relatives (*In re Adoption of Zschach*, 75 Ohio St.3d 648 (1996); pursuant to R.C. 3107.15(A)(1), a court lacks authority to incorporate visitation rights into a final decree of adoption for any biological relative); or to "an 'other person' \* \* \* whose grounds for seeking visitation arose out of the prior family relationship." *See In re L.H.*, 183 Ohio App.3d 505, 2009-Ohio-3046, ¶ 27 (2d Dist.).

{¶ 25} Based upon current statutory authority and case law, we believe a final decree of adoption awards all custodial rights solely to the adoptive parents and as a result, no other court can make any subsequent custody determinations which would award custodial rights to any other person based on a pre-adoption relationship which infringes upon the adoptive parents' custodial rights. Stated differently, we interpret R.C. 3107.15 as severing legal relationships with non-relatives, such as M.L.G., who attempt to base their claims on relationships in existence prior to the adoption. This is, in essence, what occurred in *L.H.*, a case which we find to be persuasive.

{¶ 26} In that case, a woman who was married was given custody of a non-biological child, but her spouse was not given custody of the child. The couple subsequently divorced and the ex-husband was awarded visitation with the child. The woman later re-married and she and her new husband adopted the child and moved to terminate her ex-husband's visitation rights. The juvenile court found the visitation was proper, pursuant to R.C. 3109.051, after finding the ex-husband had acted as a father figure for the child, was very bonded with the child, and it was in the best interest of the child to continue with the visitation. However, the Second District Court of Appeals

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<sup>2</sup> During oral argument, counsel for J.L.H. and M.B.H. referenced supplemental authority not previously referenced in her brief or memorandum contra in which grandparents were granted visitation rights where a child was adopted by a stepparent following the death and/or disappearance of one of the biological parents. *See Welsh v. Laffey*, 16 Ohio App.3d 110 (12th Dist.1984), and *Graziano v. Davis*, 50 Ohio App.2d 83 (7th Dist.1976). However, counsel did not file a notice of supplemental authority, despite an oral advisement to do so. *See also* App.R. 21. Furthermore, even if we were to consider these cases, they are distinguishable from the instant case, in that they are guided by specific statutes governing situations involving deceased parents and grandparent rights, which, in addition, have since been amended. *See* former R.C. 3109.05 and 3109.11. Additionally, *Welsh* has been at least impliedly overruled by *Ridenour* and *In re Martin*, 68 Ohio St.3d 250 (1994) (with respect to R.C. 3107.15 and grandparent visitation rights, the statute does not distinguish between adoptions by strangers and adoptions by nonstrangers). *See also Foor v. Foor*, 133 Ohio App.3d 250, 255 (12th Dist.1999).

reversed, finding that R.C. 3107.15(A)(1) prevents a juvenile court from awarding visitation pursuant to R.C. 3109.051(B)(1). The court of appeals determined R.C. 3109.051(B)(1) addresses visitation in the context of a domestic relations proceeding, rather than in the context of an adoption. The court of appeals further found "the effect of R.C. 3107.15(A) is to deny standing to former relatives of an adopted child to seek visitation pursuant to R.C. 3107.051(B)." *L.H.* at ¶ 27, citing *Farley v. Farley*, 85 Ohio App.3d 113 (5th Dist.1992). "The same would apply to an 'other person' \* \* \* whose grounds for seeking visitation arose out of the prior family relationship." *Id.*

{¶ 27} "Adoption is a function of the state which necessitates the exercise of power in determining the proper custody of a child." *State ex rel. Portage Cty. Welfare Dept. v. Summers*, 38 Ohio St.2d 144, 150 (1974). The adoption decree is a determination of custody. As a result, we agree with J.L.H. and M.B.H.'s assertion that it is illogical to find that an adoption proceeding and a custody proceeding between a parent and a nonparent are two separate matters that can be determined concurrently by two different courts. If adoptive parents are ordered to permit visitation with various third parties, they "will not enjoy the same autonomy as natural parents." *Ridenour* at 327. A final decree of adoption must be dispositive of any concurrent custody proceedings in another court and it must place all custodial rights in the adoptive parents. Therefore, we find a final decree of adoption terminates the jurisdiction of a juvenile court to award custodial rights to a nonparent on the basis of a pre-adoption relationship with the minor child.

{¶ 28} Based upon the foregoing, and following an independent review pursuant to Civ.R. 53, we find the court of appeals magistrate erred in concluding the adoption had no effect on the custody proceedings in juvenile court and in finding the juvenile court had jurisdiction to consider the custody issues between M.L.G. and J.L.H. Instead, we find the final decree of adoption divested the juvenile court of jurisdiction to hear the custody matter. Contrary to the magistrate's conclusion that the two matters can be pursued concurrently, we find the juvenile court erred in exercising jurisdiction over the custody matter. Therefore, we sustain J.L.H. and M.B.H.'s objections but adopt the magistrate's findings of fact and conclusions of law, subject to the exceptions noted above. In accordance with the magistrate's decision we deny the requested writs of mandamus and prohibition.

{¶ 29} Similarly, for the same reasons, we find the trial court erred in denying J.L.H.'s motion to dismiss the complaint for custody and to vacate the order of visitation for lack of jurisdiction. Because a final decree of adoption was issued, we find the juvenile court was without jurisdiction to subsequently award shared custody to M.L.G. Accordingly, we sustain respondent-appellant J.L.H.'s first assignment of error.

{¶ 30} Furthermore, because the juvenile court was without jurisdiction to make a determination of custody, it logically follows, based upon our reasoning as set forth above, that the juvenile court erred in awarding shared custody to both M.L.G. and J.L.H. based on a pre-adoption relationship when the juvenile court lacked jurisdiction to do so. Therefore, we sustain J.L.H.'s second assignment of error. As a result, we need not address the issue of whether J.L.H. relinquished partial custody of M.E.G. by her actions or whether or not shared custody is in the best interest of M.E.G.

{¶ 31} In conclusion, we sustain J.L.H. and M.B.H.'s objections but adopt the magistrate's findings of facts and conclusions of law, except as to the conclusion that the adoption had no effect on the custody proceedings in juvenile court and the finding that the juvenile court had jurisdiction to consider the custody issues between M.L.G. and J.L.H. In addition, we sustain J.L.H.'s first and second assignments of error, and reverse and remand this matter to the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch, with instructions to dismiss the action.

*Objections sustained; writs of prohibition  
and mandamus denied in case No. 12AP-13;  
judgment reversed; cause remanded  
with instructions in case No. 12AP-401.*

BROWN, P.J., and KLATT, J., concur.

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**A P P E N D I X**

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. M.L.G.,	:	
Relator,	:	
v.	:	No. 12AP-13
Robert G. Montgomery, in his official capacity as a Judge of the Franklin County Probate Court et al.,	:	(REGULAR CALENDAR)
Respondents,	:	
J.L.H. and M.B.H.,	:	
Intervenor-Respondents.	:	

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MAGISTRATE'S DECISION

Rendered on March 26, 2012

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*Massucci & Kline LLC, LeeAnn M. Massucci and Kenneth R. Kline*, for relator.

*Ron O'Brien*, Prosecuting Attorney, and *A. Paul Thies*, for respondents.

*Einstein & Poling, LLC*, and *Dianne D. Einstein*, for intervenor-respondents.

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IN PROHIBITION AND MANDAMUS  
ON MOTION TO DISMISS

{¶ 32} Relator, M.L.G., has filed this original action requesting that this court issue a writ of prohibition ordering respondent Honorable Robert G. Montgomery of the Franklin County Probate Court ("respondent") to cease any further action finalizing the adoption of M.E.G., a minor child, and a writ of mandamus ordering respondent to immediately void the adoption of M.E.G. by M.B.H.

Findings of Fact:

{¶ 33} 1. M.L.G. and J.L.G, nka J.L.H. (hereinafter "J.L.H."), began a long-term relationship in the summer of 1998 and formalized their relationship by attending pre-wedding counseling and entering into a "holy union" through a ceremony that was attended by relatives and friends. M.L.G. and J.L.H. entered into a Marital Commitment Agreement and prepared wills so that, in the event of the death of either party, the other party would get the property of the other, rather than their next of kin.

{¶ 34} 2. The parties decided to have a child together and because J.L.H. was older, it was determined that she would attempt to conceive first.

{¶ 35} 3. On July 22, 2005, J.L.H. gave birth to M.E.G., and the parties raised her together.

{¶ 36} 4. Once M.E.G. was born, M.L.G. remained at home while J.L.H. continued to work full time as a nurse.

{¶ 37} 5. The two women raised M.E.G. together as a family for the first three years of M.E.G.'s life until they separated in May 2008, and J.L.H. moved from Toledo, Ohio, and relocated in Dublin, Ohio.

{¶ 38} 6. In August 2009, J.L.H. completely severed all communication between M.L.G. and M.E.G, in spite of the fact that J.L.H. had agreed to parent jointly with M.L.G. and share her otherwise exclusive custodial rights with her.

{¶ 39} 7. On August 28, 2009, M.L.G. filed a complaint for custody of M.E.G. in the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch ("juvenile court").

{¶ 40} 8. The juvenile court ordered that M.L.G. have visitation with M.E.G. while the court adjudicated the custody matter.

{¶ 41} 9. J.L.H. married M.B.H. on July 1, 2010.

{¶ 42} 10. On January 6, 2011, respondent issued a final decree of adoption finalizing the adoption of M.E.G. by M.B.H.

{¶ 43} 11. On September 26, 2011, a juvenile court magistrate found that the adoption of M.E.G. by M.B.H. did not divest the juvenile court of its jurisdiction to determine custody issues concerning M.E.G.

{¶ 44} 12. On January 4, 2012, M.L.G. filed this complaint for writs of prohibition and mandamus, arguing that the probate court does not have jurisdiction to finalize the adoption of M.E.G. by M.B.H. and that the juvenile court has exclusive jurisdiction.

{¶ 45} 13. On January 30, 2012, J.L.H. and M.B.H. filed a motion to intervene, which was granted.

{¶ 46} 14. On January 27, 2012, respondent filed a motion to dismiss, arguing in part that M.L.G. does not have standing to bring this petition because she is not M.E.G.'s parent.

{¶ 47} 15. M.L.G. has not filed a memorandum contra, and the matter is currently before the magistrate on respondent's motion to dismiss.

#### Conclusions of Law:

{¶ 48} For the reasons that follow, it is this magistrate's decision that this court should grant respondent's motion to dismiss.

{¶ 49} A motion to dismiss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of the complaint. *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545 (1992). In reviewing the complaint, the court must take all the material allegations as admitted and construe all reasonable inferences in favor of the nonmoving party. *Id.*

{¶ 50} In order for a court to dismiss a complaint for failure to state a claim upon which relief can be granted, it must appear beyond doubt from the complaint that relator can prove no set of facts entitling him to recovery. *O'Brien v. Univ. Community Tenants Union*, 42 Ohio St.2d 242 (1975). As such, a complaint for writ of mandamus is not subject to dismissal under Civ.R. 12(B)(6) if the complaint alleges the existence of a legal duty by the respondent and the lack of an adequate remedy at law for relator with sufficient particularity to put the respondent on notice of the substance of the claim being asserted against it, and it appears that relator might prove some set of facts entitling him

to relief. *State ex rel. Boggs v. Springfield Loc. School Dist. Bd. of Edn.*, 72 Ohio St.3d 94 (1995).

{¶ 51} Respondent argues that M.L.G. does not have standing to file this petition because she is not a parent of the minor child, M.E.G, despite the fact that M.L.G. occupied the role of a "parent" during the first few years of M.E.G.'s life while she and J.L.H. were living together. It is undisputed that J.L.H. is the biological mother of M.E.G.

{¶ 52} In *In re Bonfield*, 97 Ohio St.3d 387, 2002-Ohio-6660, the Ohio Supreme Court considered the legal status of a same-sex cohabitant where the same-sex couple had agreed to have a child via artificial insemination. In spite of the fact that the biological parent of the children desired to have the nonparent same-sex cohabitant legally identified as a parent, the Supreme Court held that a same-sex partner who was not the biological mother could not be considered a "parent" under Ohio law. *Id.* at ¶ 35-36.

{¶ 53} Despite the fact that the same-sex partner who was not the biological mother of the children was not considered a parent, the Ohio Supreme Court determined that the juvenile court could make a custody determination. After noting that parents may waive their right to custody of their children, the Supreme Court upheld prior decisions finding that a "[parent's] agreement to grant custody to a third party is enforceable subject only to a judicial determination that the custodian is a proper person to assume the care, training, and education of the child." *In re Bonfield*, at ¶ 48, citing *Masitto v. Masitto*, 22 Ohio St.3d 63, 65 (1986). The juvenile court considers all known factors to determine what is in the best interest of the children.

{¶ 54} In the present case, it is undisputed that the custody action was filed, and that the juvenile court has exercised its jurisdiction and issued preliminary orders finding that it is in the best interest of M.E.G. that she maintain a relationship with M.L.G., and the court has ordered J.L.H. to comply with those orders and permit visitation of M.E.G. with M.L.G.

{¶ 55} M.L.G. cites *In re Adoption of Pushcar*, 110 Ohio St.3d 332, 2006-Ohio-4572, and *In re Adoption of P.A.C.*, 126 Ohio St.3d 236, 2010-Ohio-3351, and argues that, when the issue of parenting is pending in juvenile court, the probate court must defer to the juvenile court and refrain from proceeding with the adoption until adjudication in the juvenile court.

{¶ 56} In *In re Pushcar*, the petitioner and the child's mother were living together when the child was born, and the petitioner was listed as the child's father on the birth certificate. They were never married. The couple separated, and the petitioner filed a complaint in the juvenile court seeking to enforce the visitation he and the child's mother had agreed to. However, despite being listed on the child's birth certificate, the court required genetic testing. In the meantime, the child's mother remarried, and her new husband filed a petition in the probate court to adopt the child. The petitioner opposed the adoption on grounds that his consent (as father) was required.

{¶ 57} In *In re P.A.C.*, the petitioner and the child's mother were married when the child was born, and the petitioner was listed as the child's father on the birth certificate. However, it was undisputed that the petitioner was not the child's biological father. A man named Gary was the biological father. The petitioner and the child's mother were divorced. Gary filed a complaint for allocation of parental rights in the juvenile court, and the petitioner filed a parentage action against Gary. The child's mother remarried, and her new husband filed a petition in the probate court to adopt the child. The probate court stayed the adoption proceedings pending a determination in the parentage action.

{¶ 58} In both cases, the Ohio Supreme Court held that, when a parenting issue is pending in the juvenile court, the probate court must refrain from proceeding with the adoption of the child. Relator asserts that, pursuant to *In re Pushcar* and *In re P.A.C.*, the probate court should not have proceeded with the adoption of M.E.G.

{¶ 59} There is a significant distinction between M.L.G.'s situation and the situations of the petitioners in *In re Pushcar* and *In re P.A.C.* M.L.G. is not M.E.G.'s parent, and she cannot legally be made one. M.L.G. has no parental rights. *In re Bonfield*. The matter currently pending in the juvenile court is a custody issue and not a parenting issue. Unlike the petitioners in *In re Pushcar* and *In re P.A.C.*, M.L.G. has no standing to challenge M.E.G.'s adoption—her consent is not necessary—there are no parental rights for her to lose.

{¶ 60} M.L.G. confuses the jurisdiction of the juvenile court to determine custody matters with the jurisdiction of the probate court to consider adoption matters. It is undisputed that the probate court has exclusive jurisdiction over adoption matters in the state of Ohio. *In re Adoption of Ridenour*, 61 Ohio St.3d 319 (1991). The fact that the

juvenile court has exercised its jurisdiction concerning the custody of M.E.G. will not determine or in any way effect the parentage status of M.L.G. As indicated previously, despite the fact that M.L.G. is not and cannot legally be identified as M.E.G.'s parent, the juvenile court does have jurisdiction to consider custody/visitation issues between the parties.

{¶ 61} The proceedings in the juvenile court do not divest the probate court of its jurisdiction to consider the adoption petition filed by M.B.H. The juvenile court proceedings pertain to custody and visitation of M.L.G. with M.E.G., and it is not a parenting issue. M.L.G. has no standing to challenge the adoption of M.E.G. by M.B.H. The record indicates that J.L.H. and M.B.H. have married, and it is the desire of J.L.H. to have her husband, M.B.H., adopt M.E.G., and it is M.B.H.'s desire to do so. The proceedings in the probate court do not affect the status of the custody matter in the juvenile court. The two issues are separate and may be pursued concurrently. Further, pursuant to R.C. 3107.16(B), a proposed adoption may be called into question by any person within one year from the date of the decree. The decree was filed January 6, 2011; however, M.L.G. failed to enter an objection and, for this additional reason, lacks standing to pursue this action.

{¶ 62} Finding that M.L.G. can prove no set of facts entitling her to relief, it is this magistrate's decision that this court should deny her requests for writs of prohibition and mandamus and grant respondent's motion to dismiss.

/s/ Stephanie Bisca Brooks  
STEPHANIE BISCA BROOKS  
MAGISTRATE

### **NOTICE TO THE PARTIES**

Civ.R. 53(D)(3)(a)(iii) provides that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).