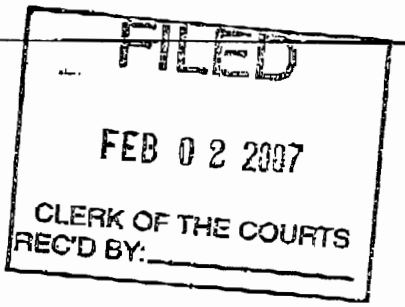
IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

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| **IN RE: ADOPTION OF AMH**, a minor,<br><br>**JERRY L. BAKER** and wife, **LOUISE K. BAKER**,<br><br>Petitioners/Appellees<br><br>v.<br><br>**SHAO-QIANG HE** and **QIN LUO**,<br><br>Respondents/Appellants. | No. W2004-01225-SC-R11-PT |

## BAKERS' PETITION TO REHEAR

**COME NOW** appellees, Jerry L. Baker and Louise K. Baker (hereinafter **"Bakers"**), pursuant to ***Tennessee Rules of Appellate Procedure***, Rule 39(a), and respectfully petition this Court to rehear the instant case and, on rehearing, modify this Court's January 23, 2007 judgment and opinion, copies of which are hereto appended, to conform it to the controlling constitutional law of Tennessee and the United States and the statutory law of Tennessee.

### Preface

It is well understood by the Bakers that petitions to rehear are not for the purpose of rearguing issues already argued. Yet, Rule 39 explicitly states, as reasons for rehearing, that:

1) The court's opinion incorrectly states the material facts established by the evidence and set forth in the record;

2) The court's opinion is in conflict with a statute, prior decision or

other principle of law;

3) The Court's opinion overlooks or misapprehends a material fact or proposition of law ... .

This Court speaks by no means other than its written minutes, orders, judgments and opinions. Therefore, the one and only way a party to an appeal can assess what is and what is not overlooked is by what is read in this Court's writings.

It can be surmised that the various Justices of this Court read the briefs, considered what was argued and, if what was argued does not appear in this Court's opinion, the absence is not a matter of oversight but a deliberate omission. The law knows of no such speculation; rather, if there is an omission of material fact or proposition of law absent from the opinion, the party can only speak to the omission as a matter the opinion overlooks, as if the opinion exists apart from its authors. On this basis, the Bakers are left with no choice but to conclude that what does not appear in the opinion is by oversight.

Filed simultaneously with this petition is a motion for stay of this Court's mandate. If this Court chooses to exercise its discretion to deny the stay, the Bakers will make an immediate motion for stay in this United States Supreme Court; however, ***Rules of the Supreme Court of the United States***, Rule 23.3 makes a motion for stay in this Court a prerequisite to a motion for stay in the United States Supreme Court.

## Conflict With Statute, Decision, Principle

The opinion states as follows at page 20:

> Here, the only **evidence of substantial harm** arises from the delay caused by the protracted litigation and the failure of the court system to protect the parent-child relationship throughout the proceedings. **Evidence** that **A.M.H. will be harmed** from a change of custody

> because she has lived and bonded with the Bakers **cannot constitute** the substantial **harm required** to prevent the parents from regaining custody. (fn. omitted)
>
> ***
>
> [at pages 20—21] The Juvenile Court of Shelby County is directed to consider, prepare, and implement a plan to resolve the pending custody matter with a view toward reunification of A.M.H. with her natural parents, ... , in a manner that **minimizes trauma** to the child. (emphasis added)

Thereby, the opinion acknowledges that **there is evidence of substantial harm to AMH**. In effect, the opinion dismisses the substantial harm to AMH as an irrelevancy as just a price AMH will have to pay, innocent though she be, for the sake of her unknown-to-her progenitors. The opinion adds that the Court will not address this substantial harm to AMH because the opinion concludes that this is "unnecessary."

The above-quoted words indicate the opinion's conclusion that the "failure of the court system" has resulted in substantial harm to AMH and that the substantial harm is because of the "court system." Somebody has to suffer. Why not AMH? Why not is answered by the General Assembly.

Likewise, the opinion's use of "minimizes trauma" recognizes that AMH will be traumatized by the order the opinion announces. The mandate to Juvenile Court is to reduce the quantum of trauma to AMH, and, thereby, acknowledges that the opinion presupposes AMH will suffer trauma.

The opinion does not suggest that AMH did anything to deserve to be traumatized or to suffer substantial harm.

In fn. 7, the opinion states as follows:

> Because this case is fully resolved on statutory grounds, we decline to address these [constitutional] issues. See Owens v. State, 908

> S.W.2d 923, 926 (Tenn. 1995) ('[U]nder Tennessee law, courts do not decide constitutional questions unless resolution is absolutely necessary for determination of the case and the rights of the parties.')

In fn. 6, the opinion states:

> [i]t is **unnecessary** to **reach** the **best interest of the child** analysis. See In re D.L.B., 118 S.W.3d 360, 368 (Tenn. 2003); Tenn. Code Ann. §36-1-113(c) (2005).

The General Assembly has answered why AMH should not be the one to suffer because of the "failure of the court system." As the official voice of citizens of Tennessee, the General Assembly codified the will of the citizens as follows in ***Tennessee Code Annotated*** §36-1-101:

> (a) The primary purpose of this part is to provide means and procedures ... that recognize and effectuate to the greatest extent possible the rights and **interests of persons affected by adoption**, ..., **which are** specifically **protected by** the **constitutions** of the **United States** and the state of **Tennessee** ... :
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> ***
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> (b) The secondary purpose of this part is to:
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> ***
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> (d) In all cases, when the best interests of the child and those of the adults are in conflict, such conflict shall **always** be resolved to favor the rights and **best interests of the child** which interests are hereby recognized as **constitutionally protected** and, to that end, this part shall be liberally construed. (emphasis added)

The opinion, at pages 15--16, states as follows:

> It is well-established that both the United States and Tennessee Constitutions protect parents' rights of custody and care of their children. See Hawk v. Hawk, 855 S.W.2d 573, 578—79 (Tenn. 1993) (**'[P]arental rights constitute a fundamental liberty interest.'**). (emphasis added)

The opinion has no words that make even an allusion to the fundamental constitutional rights of AMH, even though the United States Supreme Court and the General Assembly have opined at length concerning the constitutionally protected best interest rights of children like AMH. One can read the opinion and, from it, never know that AMH had any involved constitutional rights.

The General Assembly emphasized that the best interests of the children, protected by the Constitutions of the United States and Tennessee, must hold sway by being given preference in relation to the constitutional rights of adults (i.e., parents) claiming a constitutional entitlement to "custody and care of their children."

If the opinion is rendered exclusively as a matter of statutory construction, respectfully, the opinion overlooks interpreting §36-1-101 *in pari materia* with §36-1-113. Respectfully, there is no license from the General Assembly for any court to apply §36-1-113 outside the General Assembly's plain, clear and preeminent §36-1-101 umbrella.

The General Assembly speaks as authoritatively on the Constitution of Tennessee as does this Court.[1] By §36-1-101, the General Assembly spoke constitutional law for the citizens of Tennessee; the opinion overlooks the force and effect of what the General Assembly spoke, for the citizens, by §36-1-101.

In the clearest possible terms, quoted above, the citizens of Tennessee have spoken their will through the General Assembly that AMH both has constitutional rights and that, to the extent there is a conflict, the constitutional rights of AMH shall prevail over the constitutional rights of all (no exceptions) adults. The General Assembly has spoken its view of the Tennessee and United

[1] ***State v. Thompson***, 221 S.W. 491 (Tenn.1919)., ***Derryberry v. State Board***, 226 S.W. 102 (Tenn. 1924); ***Coleman v. Campbell***, 3 Tenn.Cas. (Shannon) 355 (1875); ***Britton v. Moody***, 42 Tenn. (2 Cold.) 15 (1865).

States Constitutions that, if there is substantial harm and trauma to be borne by some human being, because of a tension of constitutional rights, the substantial harm and trauma shall be borne by an adult in place of a child caught up in the process.

In Appellees' Brief, the Bakers briefed the constitutional rights of AMH (Appellees' Brief pp. 136—144). As further evidence that the issue concerning the constitutional rights of children caught up, innocently, in the adoption/termination process is a current and vital issue of constitutional law, the Bakers attach, as an addendum to this petition, a memorandum stating the position of the American Academy of Adoption Attorneys.

Presuming, but not conceding, the correctness of the opinion's assessment that the "failure of the court system" is the culprit, respectfully, the Bakers urge this Court to reconsider the opinion in light of the constitutional rights of AMH.

**Rendering AMH Lawyerless**

While the United States Supreme Court has recognized[2] that the Bakers, as the custodians of AMH by an as yet unreversed order of court, have standing to advocate on behalf of AMH, the attorney for AMH's guardian ad litem who advocated, independent of either the Bakers or those who claim parental rights, has been told by the opinion that this Court's mandate will terminate AMH's attorney's services. At the time of AMH's greatest need for counsel, the words of the opinion are at page 19:

> The attorney ad litem and the guardian ad litem are hereby ordered relieved of any further participation in proceedings concerning AMH.

Presumably, the quoted order is not effective sooner than eleven (11) days from January

[2] ***Smith v. Organization of Foster Families***, 431 U.S. 816, 841 (1977).

23, 2007; so, at least AMH has a lawyer until February 3, 2007, but this is not much time to seek relief for AMH, especially in light of the devastating and permanent substantial harm to which the innocent AMH is doomed by this Court's judgment.

Respectfully, it is the position of the Bakers that, at a minimum, the due process rights of AMH have been violated by denial of AMH's right to be served by her counsel of record. The Bakers respectfully request this Court to rehear this issue and reconsider the effect of such a mandate because AMH's constitutional right to procedural due process (i.e., the right to be heard) has been annihilated if the Court issues a mandate arbitrarily and summarily depriving AMH of counsel at this time and under these circumstances.

**Factual Determinations: §27-1-113**

The opinion, at page 13, states: "Judge Holly M. Kirby, dissented, stating that she would reverse the termination of the parents' rights to A.M.H. because the failure to visit was not willful."

Judge Kirby did not dissent from all of the court of appeals decision. She filed a "Partial Dissent." Included in Judge Kirby's Partial Dissent are the following words at page 10 of Judge Kirby's slip opinion:

> **Without a doubt**, in its **detailed careful opinion, the trial court** stated in the strongest terms its findings on credibility, that Father was deceitful and dishonest, and that Mother was dishonest, manipulative, and theatrical. In contrast, the trial court found the Bakers to be sincere, honest, and credible witnesses. **All of these findings are well supported by the evidence**, and the majority rightly accords great deference to the trial court's assessment of the parties' demeanor and credibility. (emphasis added)

While the above-quoted words of Judge Kirby are legally determinative of nothing, because they are only words from a Partial Dissent, these words do indicate that the Partial Dissent of

Judge Kirby is not based on criticism of the fact-finding work of the trial court.

What is important, however, is that the trial "court" and the intermediate appellate "court" concurred in the critical fact determinations prior to the record on appeal being presented for review by this Court. In the opinion of the court of appeals, the following are pertinent holdings, commencing at the court of appeals slip opinion page 89:

> [at slip op 95] After reviewing the record, we cannot say that the evidence in the record preponderates against the trial court's finding of fact, ***see In re M.J.B.***, 140 S.W.3d at 654, many of which result from the trial court's conclusions regarding the credibility of the witness. ***See Wells v. Tenn. Bd. Of Regents,*** 9 S.W.3d 779, 783 (Tenn. 1999) (noting that we will not re-evaluate the trial court's findings regarding the credibility of a witness absent clear and convincing evidence warranting a different result.)

Clearly, this Court failed to follow the rule this Court handed down in ***Wells***. To overturn the concurrent findings of the trial court and court of appeals that neither of the Hes were credible witnesses on custody issues, this Court has required itself to conclude that the Hes were credible witnesses, in spite of the finding to the contrary by four previous judges (Judge Childers, Judge Highers, Judge Farmer and Judge Kirby), and to so conclude based on clear and convincing evidence that the Hes were credible.

***Tennessee Code Annotated*** §27-1-113, in part pertinent here, reads as follows:

> To the extent that the findings of the chancery court and the court of appeals concur, they shall, if there be **any** evidence to support them, conclusive upon **any** review of the facts in the Supreme Court; ... . (emphasis added)

This Court has repeatedly stated the rule, without any exception, that this Court "cannot reverse," is "bound" by and cannot "go behind" factual determinations concurred in by the trial court

and the court of appeals.[3]

When this Court was challenged to hold that the concurrent findings rule did not control this Court's inferences and conclusions from facts concurred in by the trial court and the court of appeals, the Court repudiated the idea. More particularly, this Court quoted the law on point, in ***Conaway v. New York Life Ins. Co.***, 102 S.W.2d66, 171 Tenn. 290 (1937), to be as follows at 294:

> In the *Timmons Case* [***Brown v. Timmons***, 110 Tenn. 148, 72 S.W. 958, 959 (1902)] it was argued that when the Court of Appeals [...] sets out the testimony in its opinion, this court will draw its own conclusions of both law and fact and the inferences or conclusions of the Court of Appeals will not be binding on this court. Judge Wilkes, writing the opinion, repudiated this insistence, saying that 'the **Supreme Court is bound** by the finding of facts made by the Court of Chancery Appeals, and also **by its inferences of fact from the evidentiary facts found** and reported by them. Indeed, in its final analysis, it is the inference or conclusion of fact from the testimony in the record, **and** the **evidentiary facts deduced** therefrom **by** the Court of **Chancery Appeals**, that **is binding and conclusive in this court**. This court **is bound by** the findings of the Court of Chancery **Appeals** in its final **deductions and conclusions of fact** to the same, or **even greater**, extent than to its finding of detached or evidentiary facts," citing numerous authorities.

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[3] ***Shuptrine v. Quinn***, 597 S.W.2d 728, 730 (Tenn. 1979); ***City of Columbia v. C.F.W. Construct. Co.***, 557 S.W.2d 734, 740 (Tenn. 1977); ***Hackman v. Harris***, 475 S.W.2d 175, 177 (Tenn. 1972); ***Ingram v. Carruthers***, 250 S.W.2d 537, 539 (Tenn. 1952); ***Nicholson v. Cummings,*** 217 S.W.2d 942, 188 Tenn. 201, 205 (1949) reh. den. Mar. 11, 1949.; ***Reese v. Hake***, 199 S.W.2d 569, 184 Tenn. 423, 426 (1947) reh.den.Feb.1, 1947; ***Cooley v. East & West Ins. Co.***, 61 S.W.2d 656, 166 Tenn. 405, 408-09 (1933); ***Kenner v. City National Bank***,46 S.W.2d 46, 164 Tenn. 119, 124 (1932); ***Smith v. Grizzard***, 259 S.W. 537, 149 Tenn. 207, 210 (1924); ***Freels v. Northrup***, 678 S.W. 2d 55, 57 (Tenn. 1984); ***Hamblen County v. Morristown*** , 656 S.W. 2d 331, 335 (Tenn 1983); ***Gatlinburg Real Estate Co. v. Booth***, 651 S.W. 2d 203,205 (Tenn. 1983); ***Broyles v. Ford Life Ins. Co.*** 594 S.W. 2d 691, 692-693 (Tenn 1980); ***Hickory Springs Mfg. Co. v. Evans***, 541 S.W. 2d 97,98 (Tenn 1976), Rehearing denied Sept. 27, 1976; ***Provident Washington Ins. Co. v. Reese***, 373 S.W. 2d 613, 615 (Tenn 1963), Rehearing denied Jan. 8 1964; ***Joest v. John A. Denie's Sons Co.***, 126 S.W. 2d 312, 174 Tenn 410, 416 (Tenn. 1039).

> This holding is consistent with the principle recognized and applied in trials by jury, the uniform practice in this state being that verdicts will not be directed by the trial judge except in cases where the facts are undisputed *and* there is no doubt as to the conclusions to be drawn therefrom. That is to say, it is the province of the jury not only to determine what are the proven facts, but what are the **legitimate inferences** to be **drawn** therefrom. By analogy, and consistently with the holdings of this court above referred to, construing a former statute of similar import to the act of 1925, we think there can be no doubt that **this court is bound** by a concurrent finding of the Court of Appeals and the chancellor, not only as to the evidentiary facts, but as **to all inferences and conclusions** reasonably drawn therefrom. (emphasis added)

This rule has never changed.[4] What clue could the Bakers or AMH possible have had that they could not rest completely confident that this century-old rule would not stay as it always has been and control the outcome of this case in this Court?

The opinion takes note that the Bakers did not appeal to this Court to reverse the court of appeals adverse ruling on the support issue. In view of the reality that the concurrent findings rule was so controling on the custody issue and the visitation issue, what need did the Bakers have to appeal the support issue?

How could the Bakers have predicted that this Court would deny them access to the concurrent findings rule? Said with utmost respect for this Court, when courts refuse to follow preexisting rules in order to get to a result that the preexisting rules block, the very foundation of

[4] Beyond dispute, the concurrent findings rule has no application to questions of law, but what a question of law is cannot be manufactured out of thin air or expanded beyond the bounds of what the question of law is. While there is occassional mention of mixed questions of law and fact not being subject to the concurrent findings rule, at best, this is *obiter dictum*, i.e., never has this Court found itself free to revisit facts concurred in by a trial court and a court of appeals because the question to be decided was a mixed question. If a mixed question frees this Court to sit as a jury in spite of concurrent findings of a trial court and court of appeals, every contract case sets this Court free to be a jury; yet, many of the cases where this Court has reaffirmed the concurrent findings rule are contract cases. Like a question of law, a mixed question does not exist by ad hoc edict from case to case.

rule of law crumbles and due process becomes myth. No doubt unintentionally, it respectfully appears to the Bakers that the law was unable to divert this Court from doing what this Court felt was the "right" thing to do.

The opinion states as follows in footnote 6:

> Citing section **27-1-113** of the Tennessee Code Annotated, the Bakers argue that this Court must find abandonment because it is bound by the concurrent findings of fact of the trial court and the Court of Appeals. We conclude, however, that the statute is **inapplicable to** the dispositive question in this case—whether the parents' failure to visit constituted a **willful abandonment—because** that question is a question of law, **not a question of fact.** (emphasis added)

The opinion cites no authority. Respectfully, it is humanly impossible to determine, as a matter of law, whether willful abandonment has occurred or has not occurred without a presuppositional base of facts. And, this Court's decision in ***In re Swanson***, 2 S.W.3d 180 (Tenn. 1999) made clear that facts in a vacuum are meaningless because the will and knowledge of the actor/omitter is the tell-all as to whether the facts equal willful abandonment.

The only conclusion that makes sense is that, now, the trial court's job is merely to collect the evidence. Nothing will be served by findings of fact, required by §36-1-113(k), and there is nothing to be gained by the court of appeals attempting to assess the evidence because "willful abandonment ... is a question of law" and "not a question of fact."

So, what are the rule of law implications for future application of §27-1-113?

Does §27-1-113 have no application where this Court must decide any question of law, even though the question of law is impossible to decide without there first being established of what the facts are.

Taking the words of the opinion to mean what they say and say what they mean, but no more, the opinion reads that §27-1-113 is inapplicable to **"willful abandonment."** No word in the opinion states or implies that §27-1-113 is inapplicable to facts determinative of whether the Hes were fully aware of the consequence of the Hes' consent to the June 4, 1999 custody/guardianship order and that the consequence is exactly what the Hes intended at the time of the consent.

There is nothing to conclude from the opinion other than that §27-1-113 has full force and effect with respect to facts concerning the knowledge, understanding and willfulness of the Hes with respect to the June 4, 1999 consent order.

The trial court made thirty-four (34) documented findings of fact explicitly on this issue (Appellees' Brief pp. 75-81, i.e., enumerated findings 213-246) and the court of appeals devoted four (4) pages of its opinion (slip op. 46-49) concerning the trial court's findings and explaining why.

In spite of this concurrence, the opinion explicitly states this Court's findings of fact contradicting the facts concurred in by the trial court and the court of appeals and, based on this Court's contradictory findings of fact, the opinion states that custody relinquished by the Hes just shy of eight (8) years ago must be restored.

This Court has said, of this Court's empowerment to review facts, that it is strictly limited to those situations where the trial court and the court of appeals do not concur. See ***City of Columbia***, *supra*, 557 S.W.2d at 740.

The trial court and the court of appeals concurred (even Judge Kirby) that neither of the Hes were witnesses worthy of belief. Yet, the opinion references testimony from both of the Hes, as if trustworthy statements of fact, in explanation of this Court's opinion. The opinion has given credit to testimony that the trial court and the court of appeals have concurred is untrustworthy.

On page 17 of the opinion, there are listed what are enumerated as seven (7) "undisputed facts." Respectfully, standing in a vacuum, these facts, said to be "undisputed," have no substantive meaning. For instance, if, on a bar exam, the law graduates were asked to determine whether or not there had been willful abandonment and the answer was to be based on nothing other or more than the seven (7) enumerated "undisputed" facts, the most brilliant person being examined would have to place on the examination the words "impossible to answer."

This Court has reiterated many times that abandonment cannot be determined without knowing the state of mind of the one who is said to have abandoned. Enumerated facts (6) and (7) have no probative significance relevant to the state of mind of either of the Hes. Enumerated facts (1), (2), (3), (4) and (5), respectfully, are meaningless unless it is known what the state of mind of the persons involved is. What if all of these facts were made to occur to further a fraud?

To one who was not on-the-scene, it is very easy to be dismissive, or even recoil, at the suggestion of fraud; the possibility of fraud seems so unthinkable to many who hear such a suggestion that they rebuff the thought with disgust. But, there is no judicial officer in the world who was more positioned to make a reliable assessment on this, consistent with factuality, than the trial court below; the trial court is long-experienced and has never been faulted or subject to fault for failing to invest enormous judicial resources in adjudicating this case. To imply that "a failure of the court system" occurred because the trial judge, handpicked by Chief Justice Drowota, failed the system is an implication with no basis in fact.

## Conclusion

This Court and other courts of this state and many other jurisdictions have definitively restated enumerable times that judicial sympathy can never play any part in an adjudicated

decision. Every adjudicator is bound by strict application of the law totally without a view toward the consequence of the law's application. The moment any adjudicator deviates in the least from this cardinal and foundational premise, rule of law dissipates and rule of human judges replaces emotionless rule of law. Each time this happens, the foundation of our very nationhood is shaken as if by an earthquake.

While the Bakers are confident such was the case, respectfully, the Bakers do not attempt to convince this Court that the result in the trial court and in the court of appeals, philosophically speaking, was a "right" result or, even a "just" result. What the Bakers consider to be the "right" result in the trial court and the court of appeals is immaterial to the outcome of this case. What any other living human being considers to be the "right" result, no matter their station in life, is equally immaterial. This case is not about anybody's feelings as to what is "right" or "wrong" or, even, "just" or "unjust."

This case is about what strict application of preexisting law yields by way of a result. What result strict application of preexisting law yields is pure and simple justice; this is the only stuff for which any court exists. If the result yielded requires a deviation, no matter how slight, from strict application of law, *a foriorari*, the result is unjust, no matter what who might feel about what; law is not about feelings. All the Bakers plead is that the result required by the strict application of constitutional and other law be accorded them. Respectfully, the opinion does not do this.

It can be documented, from recent judicial history in Tennessee, that substantial emotional baggage goes with the subject of termination of rights of progenitors to parent children who are the product of their genes. This is a societal question that divides citizens. Friends have become enemies because each have different views of what is "right" and what is "wrong" on this question.

The one and only request of the Bakers is that the same rules existing before this case was filed and applicable in areas of the law that do not come to court with emotional strings be applied in the instant case. If such an application of the law yields a result that each Justice on this Court uniformly finds repulsive, the Bakers humbly plead with this Court to adjudicate that result in spite of those feelings. If this Court or the Justices on this Court choose to exercise the prerogative available to each to opine at length personal feelings and observations that the result required to be adjudicated is contrary to the personal beliefs of the Justices, this is use of a bully pulpit about which the Bakers cannot complain; no doubt, there would be many who would agree with what each Justice might opine, even if five widely divergent feelings were expressed.

All the Bakers beg of this Court is the benefit the rules of law, sans anybody's feelings about anything, that preexisted this case and control this case's outcome. The most serious threat to rule of law is changing the rules in the middle of a case.

What is at stake for society as a whole is that the well-intentioned error of Sir Thomas More's wife and Roper, his nephew, not be made in this case.

Respectfully submitted,

LARRY E. PARRISH, P.C.

By: _____
Larry E. Parrish, BPR 8464

## CERTIFICATE OF SERVICE

This is to certify that the foregoing **Baker's Petition To Rehear** was served upon counsel for the adverse parties by facsimile and by placing a true and exact copy in the United States mail, postage prepaid, addressed to:

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on this the 2nd day of February 2007.

Larry E. Parrish

AAAA POSITION ON CHILDREN'S RIGHTS IN ADOPTION

The American Academy of Adoption Attorneys believes that children should be recognized as individuals possessed of their own interests and rights, including the right to be part of a stable and permanent family, and the right to remain part of that family once it is established with an expectation that the status will be permanent. Indeed, the Academy believes that these rights are constitutionally founded and are at the core of all liberties, for if children cannot count on the inalienable right to life and liberty in the family context, then what does our society offer them? These constitutional interests are both procedural and substantive. Therefore they should not be disturbed absent a compelling, established competing interest which is entitled to constitutional protection. Even then, if the constitutionally protected interests are in conflict and evenly balanced, the conflict should be resolved in favor of the child.

Courts have reluctantly, but increasingly, recognized that children have rights under the United States Constitution, and it is unreasonable to remedy any purported breach of a biological parent's rights by curtailing the fundamental rights of the child. A recent California court of Appeals decision articulates the issue well:

"As a matter of simple common sense, the rights of children in their family relationships are at least as fundamental and compelling as those of their parents. If anything, children's familial rights are more compelling than adults', because children's interests in family relationships comprise more than the emotional and social interests which adults have in family life; children's interests also include the elementary and wholly practical needs of the small and helpless to be protected from harm and to have stable and permanent homes in which each child's mind and character can grow, unhampered by uncertainty and fear of what the next day or week or court appearance may bring.

. . . In some situations, however, children's and parents' rights conflict, and in these situations, the legal system traditionally protects the child."

In re Bridget R., 49 Cal.Rptr.2d 507 (Cal. App. 1996), review denied Cal. Sup. Ct. (1996).

The Bridget R. decision expands the nature of a child's rights beyond the recognition that it is constitutionally permissible for states to provide a custody hearing if an adoption is dismissed or set aside. The California court ruled that some kind of custody or guardianship hearing even may be constitutionally compelled in the wake of a failed adoption. Id. The court found that children have both procedural and substantive liberty interests protected under the due process clauses of the Fifth and Fourteenth Amendments, and that these interests include maintaining familial ties with prospective adoptive families with whom they have been previously placed pursuant to an apparently valid state

**ADDENDUM**

adoption with an expectation of permanency. These interests also include protection against precipitous or traumatic removal from an existing custodial environment without inquiry into whether the removal would be detrimental to the child, whether some less detrimental alternative is available, and whether removal and "return" to a birth parent is justified by a competing and equally compelling constitutional interest. Id. See also, In re Jasmon O., 878 P.2d 1297 (Cal. 1994) ("after an extended period of foster care [because of parental neglect or incapacity], it is within the court's discretion to decide that a child's interest in stability has come to outweigh the natural parent's interest in the care, custody, and companionship of the child....children, too, have fundamental rights").

It is the position of the Academy that whenever an adoption is challenged after a child has become part of a family for a sufficient time and under proper legal process to give rise to a reasonable expectation of permanency, the United States Constitution mandates that a hearing be held in which the child's fundamental liberty interest in his/her established family is considered before it is disrupted.

It has long been recognized that children are persons with rights protected by the United States Constitution. Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 74 (1976) ("Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority."); In re Gault, 387 U.S. 1, 13 (1967) (stating that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone"). The realm of personal family life is a fundamental interest protected by the Fourteenth Amendment to the United States Constitution. See, e.g., Santosky v. Kramer, 455 U.S. 745, 753 (1982) (there is an "historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment"); Smith v. Organization of Foster Families, 431 U.S. 816, 845 (1977); Smith v. City of Fontana, 818 F.2d 1411 (9th Cir. 1987) (stating that a child's interest in continued companionship and society of parents is a cognizable liberty interest); Spielman v. Hildebrand, 873 F.2d 1377 (10th Cir. 1989) (adoptive parents, like biological parents, have a fundamental liberty interest in the familial relation). This fundamental right belonging to both parents and children also has been explicitly recognized by states other than California. See, e.g., Reist v. Bay Circuit Judge, 241 N.W.2d 55, 62 (Mich. 1976) (holding that the rights of parent and child in their "fundamental human relationship" are encompassed within the term "liberty"); Espinoza v. O'Dell, 633 P.2d 455 (Colo. 1981) (recognizing liberty interest in mutual relationship between child and parent).

The United States Supreme Court in Smith v. Organization of Foster Families, 431 U.S. 816, 844 (1977) stated that "biological relationships are not the exclusive determination of the existence of a family." As the Court recognized,

the importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of

daily association, and from the role it plays in "promot[ing] a way of life" through the instruction of children, as well as from the fact of blood relationship. No one would seriously dispute that a deeply loving and interdependent relationship between an adult and a child in his or her care may exist even in the absence of blood relationship.

Id. (citation omitted). See also Lehr v. Robertson, 463 U.S. 248, 249, 261 (1983) (a "developed parent-child relationship" and not the "mere existence of a biological link" merits constitutional protection); Roberts v. United States Jaycees, 468 U.S. 609, 619-20 (1984) ("family relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life."). These cases recognize the importance of the reality of the existing family. A federal district court in California in Brown v. County of San Joaquin, 601 F. Supp. 653 (E.D. Cal. 1985), while discussing the protected interest of a foster parent, also noted the importance of this reality:

More importantly, however much a foster parent's appreciation of the nature of the relationship can be tutored by the circumstances of its creation, it is obvious that a very young foster child is incapable of knowing that the foster parent—foster child relationship is different from a biological parent-child relationship. No one can caution an infant against loving the individual who provides for all of his needs, physical and emotional; no one can instruct the infant foster child that his foster parent is not his real or natural parent; no one can diminish the infant foster child's feeling toward his foster parent and cause them to be distinguished from the feeling of an infant child to his natural parents.

Id. at 664-65 (citations omitted).

These considerations should apply whenever legislatures and courts consider efforts by noncustodial contestants to assert custodial or visitation rights with a child who is being adopted or is eligible for adoption. The child's interest in having his/her immediate familial relationship undisturbed must prevail in the face of unwarranted intrusion by those who do not have an established relationship with the child beyond a mere biological link. See, e.g., Hawk v. Hawk, 855 S.W.2d 573 (Tenn. 1993) (striking down Tennessee's former grandparent visitation statute as unconstitutional when applied to a stable family absent a showing of substantial harm to the child if visitation were terminated); Williams v. Williams, 24 Va. App. 778 (1997) (the parents' right to autonomy in child rearing is a fundamental right protected by the Fourteenth Amendment, and state interference with that right must be justified by a compelling state interest; "the primacy of the parent-child relationship" requires proof that harm or detriment to the welfare of the child would result without visitation, before visitation may be ordered over the united opposition of the child's parents). The Academy believes these fundamental interests are not

merely "parental rights," which these courts protected, but familial rights that belong to children as well as to parents.

The United States Government seems at last to have recognized children's rights to a stable home. In the recently enacted Adoption and Safe Families Act of 1997, a child's health and safety are deemed paramount, and permanency may override reunification as goal in foster care. Similar goals are evident in Adoption 2002: The President's Initiative on Adoption and Foster Care Guidelines for State Legislation Governing Permanence for Children.

This analysis also should be part of the consideration of tribal rights with respect to the adoption of children with Native American heritage. In this regard, the Academy supports the court's position in the Bridget R. case discussed above. Children's existing or impending stable family lives should not be interrupted absent a clear demonstration of cultural, political and psychological ties that are entitled to constitutional protection. Therefore, the Academy supports procedural amendments to the Indian Child Welfare Act that would provide opportunities for courts to examine and weigh these competing interests during the adoption process.

Finally, a child's liberty interest in family stability must be considered even when a failed adoption is meritoriously challenged, but results in protracted litigation. Children are the innocent victims of such litigation and the grief that it inflicts. They should not be awarded to the "winner" as if they were a prize, whether that winner is an adoptive parent or a biological parent. Children are blameless. Depriving a child of his/her established, psychological family ties without consideration of the harm he/she will suffer infringes upon his/her procedural due process rights. Therefore, under some circumstances, even a fit biological parent's custodial rights may be limited because of a child's independent right to remain in the only custodial environment he/she has known. See e.g., In re Appeal in Pima County Juvenile Severance Action no. 2-114487, 876 P.2d 1121 (Ariz. 1994) (rights of a father who fails to grasp parental "opportunity quickly, diligently, and persistently" may be terminated if the court finds that it is in the child's best interest, even if the father's failure is understandable due to the mother's efforts to thwart him); In re Baby Boy C., 581 A.2d 1141 (D.C.App. 1990) (a presumptively fit thwarted father's right to veto a proposed adoption may nonetheless be overcome by clear and convincing evidence that it is in the best interest of the minor for the adoption to proceed); In re Robert O., 604 N.E.2d 99 (N.Y. 1992) (promptness of biological father's actions to assert parental rights is measured in terms of the baby's life, not by the onset of the father's awareness); State ex rel R.E., 645 So.2d 205 (La. 1994) (putative father has burden of persuading court that he preserved his opportunity interest by taking concrete steps to preserve his relationship to the child); Sorentino v. Family & Children's Society of Elizabeth, 367 A.2d 1168, 1170 (N.J. 1976) (because the child had been in the custody of the adoptive parents for over two and a half years, the adoptive parents were entitled to a hearing on "whether transferring custody of the child to plaintiffs . . . will raise the probability of serious harm to the

child"); Sorentino v. Family & Children's Society of Elizabeth, 378 A.2d 18 (N.J. 1977) (Upon remand and appeal, custody with the adoptive parents was undisturbed); In re Guardianship of J.R., 416 A.2d 62 (N.J. Super. 1980) (following Sorentino, and holding that the parental rights of a biological parent may be terminated without a showing of unfitness where "foster care has been permitted for so extended a period as to have resulted in the virtual creation of a new parent-child relationship, albeit not one based upon blood but upon love, affection and need, and a trial judge, with evidential justification, concludes that disruption of that new relationship, suddenly or gradually, would damage the child").

In conclusion, the Academy believes that from the child's perspective, the relationship with his/her adoptive family is not different from the most traditional parent-child relationships protected in the past from state interference by courts. See e.g., Santosky v. Kramer, 455 U.S. 745 (1982); Smith v. Organization of Foster Families, 431 U.S. 816 (1977); Wisconsin v. Yoder, 406 U.S. 205 (1972); Pierce v. Society of Sisters, 268 U.S. 510 (1925); and Meyer v. Nebraska, 262 U.S. 390 (1923). The Academy is asking courts and legislatures to recognize that children have a constitutionally based liberty interest in the protection of their established families, rights which are at least equal to, and we believe outweigh, the rights of others who would claim a "possessory" interest in these children.

**ADDENDUM**