THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Brian M. Gibbons, Circuit Court Judge

Case No. 2013-CP-42-1569

BLH by parents/general guardians Kenneth and Angela Hensley, and on behalf of all others similarly situated, ... Respondent,

v.

South Carolina Department of Social Services, ... Appellant.

REPLY BRIEF OF APPELLANT

Andrew F. Lindemann
Joel S. Hughes
DAVIDSON & LINDEMANN, P.A.
1611 Devonshire Drive
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222

Counsel for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

ARGUMENTS

I. The certification of the class and the notification process put into place by the Circuit Court violates the statutory and constitutional rights of confidentiality, privacy and due process enjoyed by the adoptive children, the adoptive parents, and even the biological parents.

In its opening brief, the Appellant South Carolina Department of Social Services expressed grave concerns that the class action process is being applied in this case to violate the statutory and constitutional rights of confidentiality, privacy and due process enjoyed by the adoptive children, the adoptive parents, and even the biological parents. As DSS points out, it is not those participants in the adoption process that are seeking confidential information for their own purposes or to disclose that information to adopted children who may currently be unaware of their status as such. It is the class representative and class counsel that seek that information, which makes this situation unique as well as troubling.

In response, the Respondent BLH does not confront this issue directly. Instead, BLH proclaims in conclusory fashion that "the certification of the class and the notification process does not violate the statutory or constitutional rights of confidentiality, privacy or due process." *See*, Respondent's Brief, p. 6. Then BLH further argues that DSS is taking the position in this appeal that a child's adoptive status should be shrouded in secrecy and that such a position is contrary to the policies and advice typically offered by DSS to adoptive parents.

BLH, however, has totally misconstrued DSS's position and concerns. DSS is not even remotely suggesting that adoption is a stigma or should be shrouded in secrecy. DSS does encourage parents to advise children of their adoptive status. But that is ultimately a familial decision that DSS cannot make for the parents. There is recognition, which BLH does not dispute, that some adoptive parents choose for a variety of reasons not to disclose the adoptive status to their adopted children. That is a personal decision to made by the parents and not by the State.

While BLH is correct that there is not a case holding that a child's adoptive status should be kept secret, there is a whole of body of authority that recognizes the due process rights of parents to make child-rearing decisions without interference from the government. The United States Supreme Court has recognized that "freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment." *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). The Supreme Court has observed that "[o]ur decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition." *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977).

Similarly, the Fourth Circuit Court of Appeals has held that "[m]uch like the foundational concept of individual privacy, the sanctity of the family unit is a fundamental precept firmly ensconced in the Constitution and shielded by the Due Process Clause of the Fourteenth Amendment." *Hodge v. Jones*, 31 F.3d 157, 163

(4th Cir. 1994). "The bonds between parent and child are, in a word, sacrosanct, and the relationship between parent and child inviolable except for the most compelling reasons." *Jordan by Jordan v. Jackson*, 15 F.3d 333, 343 (4th Cir. 1994). "The concept of familial privacy has been restricted by the Supreme Court to (1) thwarting governmental attempts to interfere with particularly intimate family decisions, and (2) voiding government actions that sever, alter, or otherwise affect the parent/child relationship." *Hodge*, 31 F.3d at 163.

In short, contrary to any suggestion by BLH to the contrary, there are certainly constitutional rights at play that must be examined closely and great effort made to protect. That is the concern voiced by DSS. To reiterate, the decision to disclose a child's adoptive status is that of the parent, and for the state to make or sanction that disclosure – particularly under the unique and unprecedented circumstances presented by this class action lawsuit – would interfere with the sanctity of the parent-child relationship. That intimate family decision falls within the protections of due process and should be safeguarded.

BLH also complains that DSS has made the claim without any evidentiary support that there are likely certain adoptive children who qualify as class members who are unaware of their adoptive status and would learn of that status only upon receipt of the court-ordered and sanctioned Notice of Class Action. BLH, nonetheless, cites to a report from the United States Department of Health and Human Services to the effect that 97% of children ages five and older know

they were adopted. In so doing, BLH suggests that a majority of children know of their adoptive status; yet that misses the point entirely. It is not alright that only three percent of families will have their rights to confidentiality, privacy and due process violated. If even one family will have their constitutional rights violated, that is not something that the courts should order to occur and sanction with the imprimatur of the state. And, that is particularly true since those due process rights would be violated only to allow a class action lawsuit to proceed that will result in a maximum recovery of less than $3,000 for any one class member. The class members will receive at most $240 per year for the number of years since 2004 that their adoptive parents were receiving an adoption subsidy from DSS.

In sum, DSS is not taking this position to suggest that adoption is a stigma or should be shrouded in secrecy. DSS is taking this position to make certain that fundamental rights are protected. The decision of an adoptive parent to reveal to their child that he or she is adopted is an intimate family decision. The state can make a recommendation that disclosure is beneficial, but the state does not mandate that. Instead, it is a decision that is protected by such fundamental rights as privacy and due process. Quite simply, contrary to BLH's assertions, DSS is not attempting to protect a right that does not exist.

II. The critical issues of confidentiality, privacy and due process as discussed herein are immediately appealable under existing precedent.

In its opening brief, DSS explained that the critical issues of confidentiality, privacy and due process are appropriate for consideration by way of an interlocutory appeal. In response, BLH contends that the appeal is premature. BLH contends that DSS should have waited until BLH prepared the Notice of Class Action and submitted it to the Circuit Court for approval before this issue was pursued on appeal. BLH claims that, until the language of the notice is approved and the procedure for dissemination of the notice is determined, there is no issue for this Court to even consider. BLH further contends that Judge Gibbons did not consider or address the issues raised in this appeal. DSS disagrees for several reasons.

First, the order on appeal certified the class action and, in doing so, set forth the procedures to be followed in notifying the class members and described what was to be included in the notice. The order on appeal also addressed issues of confidentiality and directed DSS to produce the names and available addresses of any potential class members to the class counsel. The provisions as contained in that order are sufficient enough to warrant this appeal and allow for a review on the merits.

Second, BLH contends that Judge Gibbons did not specifically address the issues of confidentiality, privacy and due process. Counsel for DSS did raise to Judge Gibbons the issues raised in this appeal, and there is no question that Judge

Gibbons did discuss confidentiality provisions in his order. The order does not, however, protect the rights of families where a decision was made not to disclose the adoptive status to the child. Nonetheless, it is fair to conclude that the issues are incorporated in his decision and that Judge Gibbons intended to proceed as he ordered despite the concerns raised.

Third, while it is certainly possible to allow the Notice of Class Action to be prepared and presented to the Circuit Court before this appeal is heard, that would accomplish nothing more than to waste judicial resources, waste the parties' resources and result in further delay of this litigation. The issues are legal ones. The parties have fully briefed the issues. There is no real purpose for finding this appeal premature and requiring DSS to re-file after the Notice of Class Action is prepared and approved by the Court.

Finally, BLH cites to a portion of the transcript of the April 4, 2015 hearing to suggest that DSS agreed to the entire procedure that Judge Gibbons ultimately adopted. However, the issue being addressed in that transcript excerpt was the earlier ruling by Judge Gibbons that placed the duty of notifying the class on DSS rather than class counsel. DSS's counsel indicated that he agreed that the burden of notification of the potential class, including expenses, was to be borne by the class counsel. DSS's counsel reiterated at that time that the order would need confidentiality provisions in place to allow for DSS to provide the names and addresses of class members to class counsel. However, DSS's counsel did not waive

objection to nor consent to any process that would potentially impair the confidentiality, privacy and due process interests of persons who were not even before the court, including potential class members and their families. From a logical standpoint, DSS would not have the standing or authority to waive the statutory and constitutional rights of others.

In sum, an interlocutory appeal is appropriate under the test set forth in *Doe v. Howe*, 362 S.C. 212, 607 S.E.2d 354 (2004), and *Ex Parte Capital U-Drive-It, Inc.*, 369 S.C. 1, 630 S.E.2d 464 (2006). The Court is therefore urged to proceed with addressing this important issue. It has been fully briefed and is ripe for consideration. And it needs to be resolved so that the rights of persons not even before the court are not impaired.

CONCLUSION

Based on the foregoing discussion and analysis, the Appellant South Carolina Department of Social Services respectfully renews its request that this Court reverse the class certification orders issued by Judge Brian Gibbons, including the notification process which will necessarily inform class members that they are adopted children and which is in violation of the statutory and constitutional rights of confidentiality, privacy and due process enjoyed by the adoptive children, the adoptive parents, and even the biological parents.

Respectfully submitted,

DAVIDSON & LINDEMANN, P.A.

BY: 

ANDREW F. LINDEMANN
JOEL S. HUGHES
1611 Devonshire Drive
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222

Counsel for Appellant South Carolina Department of Social Services

Columbia, South Carolina

June 9, 2016

CERTIFICATE OF COUNSEL

RECEIVED
JUN 09 2016
SC Court of Appeals

The undersigned counsel for the Appellant South Carolina Department of Social Services certifies that the Final Reply Brief of Appellant complies with Rule 211(b), SCACR.

DAVIDSON & LINDEMANN, P.A.

BY: _____

ANDREW F. LINDEMANN
JOEL S. HUGHES
1611 Devonshire Drive
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222

Counsel for Appellant South Carolina Department of Social Services

Columbia, South Carolina

June 9, 2016

CERTIFICATE OF COMPLIANCE

The undersigned counsel for the Appellant South Carolina Department of Social Services certifies that the Final Reply Brief of Appellant complies with the Supreme Court's Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings, issued April 15, 2014.

DAVIDSON & LINDEMANN, P.A.

BY: _____

ANDREW F. LINDEMANN
JOEL S. HUGHES
1611 Devonshire Drive
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222

Counsel for Appellant South Carolina Department of Social Services

Columbia, South Carolina

June 9, 2016

CERTIFICATE OF SERVICE

The undersigned employee of Davidson & Lindemann, P.A., counsel for the Appellant, South Carolina Department of Social Services does hereby certify that service of the final **Reply Brief of Appellant** was made upon all counsel of record by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 9th day of June 2016:

T. Ryan Langley, Esquire
Hodge & Langley Law Firm, P.C.
Post Office Box 2765
Spartanburg, South Carolina 29304-2765

James F. Thompson, Esquire
Post Office Box 1853
Spartanburg, South Carolina 29304