

2747

PLACEMENT PROCEDURES BY PROBATE COURTS IN ADOPTION OF CHILDREN—§§5103.16, 3107.14, 5103.17 R.C.

SYLLABUS:

1. Under Section 5103.16, Revised Code, probate courts may approve the *proposed* placement of children under the procedures set forth in that statute; probate courts may also, under Section 3107.08, Revised Code, during an adoption proceeding, and upon a finding that the child being adopted was placed in the home of the petitioner in violation of the laws relating to the placement of children, determine whether the placement is for the best interest of the child and either approve or disapprove it.

2. Proposed placements by a probate court under Section 5103.16, Revised Code, are “*** other adoption proceedings ***” as that phrase is used in Section 3107.14, Revised Code, and, therefore, all papers that are a part of the record in such placement proceedings should be separately recorded and indexed, and kept in the manner provided for under Section 3107.14, Revised Code.

3. When authorized by the probate court under Section 5103.16, Revised Code, to make an investigation of a proposed placement, or when appointed by a probate court under Sections 3107.04 and 3107.05, Revised Code, to act as the next friend of a child being adopted, a child welfare board has the duty to carry out the court’s request.

4. Though the division of social administration of the department of public welfare is not a necessary party to adoption proceedings, its responsibility under Section 5103.17, Revised Code, for enforcing certain laws concerning placement or adoption causes it to be a person in interest entitled to notice of an illegal placement under Section 3107.08, Revised Code, and thus a proper party to such proceedings.

Columbus, Ohio, January 10, 1962

Mrs. Mary Gorman, Director,
Department of Public Welfare
408 E. Town Street, Columbus 15, Ohio

Dear Madam:

Your request for my opinion reads:

"The Department of Public Welfare, Division of Social Administration is responsible for the enforcement of Section 5103.15, 5103.16, and 5103.17 of the Ohio Revised Code. Amended H. B. 966 of the 104th General Assembly amended Sections 5103.16 and 5103.17. The first paragraph of amended Section 5103.16 clarifies the law with respect to the acceptance for placement of children. A new paragraph (paragraph 3) in this section relates to the placement of children for adoption.

"Questions have arisen with respect to amended Section 5103.16. Among these are: (1) is the Probate Court mentioned in the first paragraph of the amended section limited in its jurisdiction to the procedures outlined in the third paragraph of such section? (2) Is the requirement for a record proceeding specified in the third paragraph of this section to be construed as a public record, or does the Probate Court, as in any adoption proceeding, retain its separate confidential index? (3) When a Probate Court appoints as next friend a public child welfare agency, is the obligation mandatory upon such agency? (4) Under amended Section 5103.17, does the Division of Social Administration of the Department become a party to all adoption proceedings in view of its responsibility for enforcing this section, or is its responsibility delimited by this Section?"

Section 5103.15, Revised Code, to which you refer, reads in part as follows:

"The parents, guardian, or other persons having the custody of a child, may enter into an agreement with any association or institution of this state established for the purposes of aiding, caring for, or placing children in homes, which has been approved and certified by the division of social administration, whereby such child is placed in the temporary custody of such institution or association; or such parent, guardian, or other person may make an agreement surrendering such child into the permanent custody of such association or institution, to be taken and cared for by such association or institution, or placed in a family home.

"* * *

* * *

* * *"

Regarding the placing of children, Section 5103.16, Revised Code, reads in part:

“No child shall be placed or accepted for placement, under any written or oral agreement or understanding transferring or surrendering the legal rights, powers, or duties of the legal parent, parents, or guardian of such child into the temporary or permanent custody of any person, association, or institution which is not certified by the division of social administration as provided in sections 5103.02 and 5103.03 of the Revised Code, without the written consent of the division or by a commitment of a juvenile court, *or by a probate court as provided in this section.*

“* * *

* * *

* * *

“No child shall be placed or received for *adoption* or with intent to *adopt* except through a placement made by a county welfare department having a child welfare division, county child welfare board, the division of social administration, or an organization authorized to place children for adoption under a certificate of the division of social administration, unless *prior to* such placement and receiving of the child the parent or parents of the child have *personally applied to*, and *appeared before*, the probate court of the county in which such child is then a resident for approval of the *proposed placement* specified in such application, and unless said court, after an independent investigation of the proposed placement has determined that it is in the best interests of the child and has approved *of record* the proposed placement. The investigation shall be made by qualified persons having experience in the child adoption field. The court in its discretion may authorize such department, board, divisions, or organization to make such investigation in its behalf.” (Emphasis added)

Under Section 5103.16, *supra*, a child may be placed, etc., without going through an authorized agency such as the county welfare department, etc., if the probate court has authorized the placement under the procedure specified in the section, *prior to the* time that said placement was made.

Your first question asks if probate courts are limited in their jurisdiction to the circumstances and procedures described in Section 5103.16, Revised Code. Specifically, the question is whether the court’s jurisdiction to approve independent placements is limited to the situation where the court’s approval is sought prior to the placement in accordance with Section 5103.16, *supra*. The question arises because of an alleged conflict between that section and Section 3107.08, Revised Code, which deals with adoption proceedings and reads:

“If the probate court finds that a child sought to be adopted was placed in the home of the petitioner *in violation of the laws relating to the placement of children* in foster homes, it may certify a copy of such finding to the juvenile court of the county where the child is living and suspend further action on the petition. The juvenile court shall, after notice to the parents of the child, the petitioners, the persons who placed the child in said home, and all other persons in interest as provided in sections 2101.26 to 2101.28, inclusive, of the Revised Code, and after hearing, determine whether such placement is for the *best interest of the child*, and shall thereupon either approve or disapprove the same, and certify a copy of its findings to the probate court wherein the petition is filed. If the placement is disapproved, the juvenile court shall retain jurisdiction, order the child removed from the home of the petitioner, and determine such child’s custody and disposition.

“If the probate court does not certify its finding to the juvenile court, the probate court shall, after notice to the persons mentioned in this section and as provided in sections 2101.26 to 2101.28, inclusive, of the Revised Code, and after hearing, approve or disapprove the placement. If the placement is disapproved, a copy of the finding shall be certified to the juvenile court of the county where the child is living for appropriate action in accordance with this section. If the placement is approved, the adoption proceedings shall go forward in the probate court.” (Emphasis added)

Thus, in considering an adoption matter, if the probate court finds that a child has been placed illegally, the court may certify this finding to the juvenile court (which may approve or disapprove the placement), or the probate court may approve or disapprove the placement itself. Accordingly, while Section 5103.16, *supra*, prescribes how a probate court may approve the placement of a child *prior* to the time that the placement is made, a probate court may, under Section 3107.08, *supra*, approve a placement which has already been made, even though not made in accordance with said Section 5103.16. And here it will be noted that Section 5103.16, *supra*, is the predicate upon which Section 3107.08, *supra*, comes into operation.

Supporting my above conclusion is the fact that under Section 3107.08, *supra*, a probate court may approve an illegal placement only after finding that the placement is “for the best interest of the child”; and to hold that the provisions of Section 5103.16, *supra*, prevent a probate court from approving a placement not made in accordance with those provisions would preclude the court from doing what it finds is in the best interest of the child. Any interpretation that would reach such a conclusion should obviously be avoided.

Your second question is whether the requirement in Section 5103.16, *supra*, for a record proceeding, refers to a public record, or whether the probate court should, as in adoption proceedings, separately record and index the necessary papers. Under that section, independent placements of children are permitted only after a probate court “* * * has approved of record the proposed placement”. (Emphasis added) As to confidential records, Section 3107.14, Revised Code, reads:

“The petition, the interlocutory order, the final decree of adoption, and *other adoption proceedings* shall be recorded in a book kept for such purposes and separately indexed. Such book shall be a part of the records of the probate court, and all consents, affidavits, and other papers shall be properly filed. Such papers, records, and books shall not be open to inspection or copy by any person, other than the parties of record and their attorneys, except upon order of the court for good cause shown.” (Emphasis added)

The placements under discussion here are placements for *adoption* and must therefore come within the phrase “* * * other adoption proceedings.” Accordingly, all papers that are a part of the proceedings to approve a proposed placement under Section 5103.16, Revised Code, should be separately recorded, indexed, and kept pursuant to Section 3107.14, Revised Code.

Your third question is whether a public child welfare agency has a mandatory obligation when appointed by a probate court to act as next friend. By next friend you evidently refer to the person who is to investigate the proposed placement under Section 5103.16, Revised Code, rather than the next friend of the child required under Section 3107.05, Revised Code, (in an adoption proceeding). Though the language of said Section 5103.16, by merely giving the court power to “authorize” a public child welfare agency to make the investigation, appears to be permissive in its effect, it is my opinion that the duty is mandatory once the court authorizes the agency to investigate.

Section 5153.16, Revised Code, is controlling in regard to the respect that must be paid by a public child welfare agency to requests of a court; it reads in part:

“The county child welfare board shall, subject to the rules, regulations, and standards of the division of social administration, have the following powers and *duties* on behalf of children in the

county deemed by the board or department to be in need of public care or protective services :

“* * *

* * *

* * *

“(L) To co-operate with, make its services available to, and act as the agent of persons, *courts*, the department of public welfare, and other organizations within and outside the state, in matters relating to the welfare of children ;

“* * *

* * *

* * *”

(Emphasis added)

Accordingly, a county child welfare board has the duty to make the investigation concerning a proposed placement of a child for adoption under Section 5103.16, Revised Code, when authorized by a probate court.

Your fourth question is whether the division of social administration of the department of public welfare, is a party to all adoption proceedings in view of its responsibility under Section 5103.17, Revised Code, for enforcing Sections 5103.15, 5103.16, and 2151.39, Revised Code, each of which is concerned with placement or adoption. Sections 5103.15 and 5103.16, Revised Code, have already been quoted. Section 5103.17, *supra*, provides :

“No persons, organizations, hospitals, or associations which have not been approved and certified by the division of social administration for the placement of children for adoptions or in foster homes shall advertise that they will adopt children or place them in foster homes, hold out inducements to parents to part with their offspring, or in any manner knowingly become a party to the separation of a child from its parents or guardians, except through a juvenile court commitment.

“The division of social administration shall enforce this section and sections 5103.15, 5103.16, and 2151.39 of the Revised Code.”

Section 2151.39, Revised Code, requires from persons or associations of another state who place a child within this state a guaranty to the department of public welfare that they will remove the child should it become a public charge within five years.

In regard to the specific question asked, I find no statute explicitly making the division a party to all adoption proceedings, and must conclude, therefore, that the division is not a *necessary* party in such proceedings. There are, however, sections in Chapter 3107., Revised Code, pertaining to adoption proceedings, which appear to make the division a *proper* party

to such proceedings. Under Division (D) of Section 3107.05, Revised Code, the next friend must inform the court of the circumstances under which the child came into the home of the adopting parent. Under Section 3107.08, Revised Code, if the probate court finds that a child sought to be adopted was illegally placed in the home, it may certify its finding to the juvenile court, which must hold a hearing and determine whether the placement was in the best interest of the child. If the probate court does not certify its finding to the juvenile court it must itself hold a hearing. Whichever court holds the hearing must give notice to “. . . all other persons in interest.” It must be assumed that the requirement for a notice to interested persons has a purpose, and the main purpose that such persons could fulfill would be to intervene as parties in the proceedings. Furthermore, under Section 3107.11, Revised Code, any interested party may by motion ask the court to revoke its interlocutory order of adoption at any time prior to the entry of final decree. In view of the responsibility given the division under Section 5103.17, Revised Code, to enforce certain statutes concerning placement and adoption, it is my opinion that the division is certainly an interested person or party entitled to notice under Section 3107.08, Revised Code, or to make the motion permitted under Section 3107.11, Revised Code, should the division feel that the statutes it is required to enforce are being violated.

Section 5103.99, Revised Code, provides another tool for the division to use in its enforcement duties, Division (B) thereof reading:

“Whoever violates section 5103.15, 5103.16, or 5103.17 of the Revised Code shall be fined not less than five hundred nor more than one thousand dollars or imprisoned not more than six months, or both.”

This section makes violations of the enumerated statutes misdemeanors, the prosecutions of which the division has a duty to initiate under Section 5103.17, Revised Code. This duty may be accomplished by filing a proper affidavit in a court of competent jurisdiction in all cases where there is evidence indicating a violation of Section 5103.15, 5103.16, or 5103.17, Revised Code.

Accordingly, in answer to your specific questions, it is my opinion and you are advised:

1. Under Section 5103.16, Revised Code, probate courts may approve the *proposed* placement of children under the procedures set forth in that

statute; probate courts may also, under Section 3107.08, Revised Code, during an adoption proceeding, and upon a finding that the child being adopted was placed in the home of the petitioner in violation of the laws relating to the placement of children, determine whether the placement is for the best interest of the child and either approve or disapprove it.

2. Proposed placements by a probate court under Section 5103.16, Revised Code, are “* * * other adoption proceedings * * *” as that phrase is used in Section 3107.14, Revised Code, and, therefore, all papers that are a part of the record in such placement proceedings should be separately recorded and indexed, and kept in the manner provided for under Section 3107.14, Revised Code.

3. When authorized by the probate court under Section 5103.16, Revised Code, to make an investigation of a proposed placement, or when appointed by a probate court under Sections 3107.04 and 3107.05, Revised Code, to act as the next friend of a child being adopted, a child welfare board has the duty to carry out the court’s request.

4. Though the division of social administration of the department of public welfare is not a necessary party to adoption proceedings, its responsibility under Section 5103.17, Revised Code, for enforcing certain laws concerning placement or adoption causes it to be a person in interest entitled to notice of an illegal placement under Section 3107.08, Revised Code, and thus a proper party to such proceedings.

Respectfully,

MARK MCELROY

Attorney General