

**SUPREME COURT OF KENTUCKY**  
**ACTION NOS. 2000-SC-001127-D and 2001-SC-000325-D**

REGINA MOORE and  
JERRY DORNING

APPELLANTS/CROSS APPELLEES

v.

KENTON CIRCUIT COURT  
ACTION NO. 1998-CI-01610  
HONORABLE PATRICIA M. SUMME  
and  
KENTUCKY COURT OF APPEALS  
ACTION NOS. 1999-CA-000363-MR and 1999-CA-000688-MR

RICHARD ASENTE  
and CHERYL ASENTE

APPELLEES/CROSS APPELLANTS

and

JUSTIN LEE MOORE

APPELLEE

\*\* \*\* \*\* \*\* \*\*  
BRIEF FOR AMICUS CURIAE JUSTICE FOR CHILDREN PROJECT

\*\* \*\* \*\* \*\* \*\*

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**CERTIFICATION**

It is hereby certified that a copy of this Brief has been mailed to Glenda Harrison, Northern Kentucky Legal Aid Society, Inc., 302 Greenup Street, Covington, KY 41011; Stephanie Dietz, Summe & Summe, 3384 Madison Avenue, Covington, KY 41017; Thomas R. Willenborg, 130 Park Place, Covington, KY 41011; The Honorable Patricia Summe, Kenton Circuit Court, Div. Four, 230 Madison Avenue, Covington, KY 41011; W. Waverly Townes, Ackerson, Mosley & Yann, 1200 One Riverfront Plaza, Louisville, KY 40202; Miren Desai, Assistant Counsel, Office of the General Counsel, Cabinet for Families & Children, 275 E. Main Street, 4 WC, Frankfort, KY 40621; George Geohegan, III, Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601-9229; and Michael R. Voorhees, Phillips Law Firm, 9521 Montgomery Road, Cincinnati, OH 45242, on this the 17th day of August, 2001. It is also certified that the record on appeal was not removed from the Clerk's office.

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Andrew J. Ruzicho, Esq.

## STATEMENT OF AUTHORITIES

	<u>Page</u>
STATEMENT OF POINTS AND AUTHORITIES .....	i
PURPOSE OF THE BRIEF .....	1
ARGUMENT.....	1
I. JUSTIN AND JOSEPH HAVE A FUNDAMENTAL RIGHT TO MAINTAIN AND PURSUE THEIR SIBLING RELATIONSHIP UNDER THE SUBSTANTIVE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT .....	1
<u>Troxel v. Granville</u> 530 U.S. 57, 120 S. Ct. 2054, 147 L.Ed.2d 49 (2000).....	2, 3, 4, 6
<u>Smith v. Organization of Foster Families for Equality and Reform</u> 431 U.S. 816, 97 S. Ct. 2094, 53 L.Ed.2d 14 (1977).....	2, 3
<u>Moore v. City of East Cleveland</u> 431 U.S. 494, 97 S. Ct. 1932, 52 L.Ed.2d 531 (1977).....	1, 2, 4
<u>Whalen v. County of Fulton</u> 126 F.3d 400 (2d Cir. 1997) .....	5
<u>Rivera v. Marcus</u> 696 F.2d 1016 (2d Cir. 1982) .....	5
<u>Aristotle P. v. Johnson</u> 721 F.Supp. 1002 (N.D. Ill. 1989) .....	5
<u>Honaker v. Burnside</u> 388 S.E.2d 322, 182 W.Va. 448 (W.Va. 1989).....	5
<u>In re Tamara R.</u> 764 A.2d 844, 136 Md. App. 326 (Md. Ct. Spec. App. 2000) .....	6, 7
<u>Webster v. Ryan</u> N.Y.L.J., June 29, 2001 at 23 (N.Y. Fam. Ct. June 29, 2001) .....	7

	<u>In re Adoption of Anthony</u>	
	448 N.Y.S.2d 377 (N.Y. Fam. Ct. 1982).....	6
	<u>L. H. v. G. and H.</u>	
	497 A.2d 215, 203 N.J. Super. 385 (N.J. Super. Ct. 1985).....	5, 6
II.	FREEDOM OF ASSOCIATION UNDER THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION PROTECTS FAMILIAL RELATIONSHIPS LIKE THOSE BETWEEN JUSTIN AND JOSEPH. JUSTIN AND JOSEPH HAVE A RIGHT TO MAINTAIN AND PURSUE THEIR SIBLING RELATIONSHIP UNDER THE FIRST AMENDMENT .....	8
	<u>Roberts v. United States Jaycees</u>	
	468 U.S. 609, 104 S. Ct. 3244, 82 L.Ed.2d 462 (1984).....	8, 9
	<u>Trujillo v. Board of County Commissioners</u>	
	768 F.2d 1186 (10 <sup>th</sup> Cir. 1985).....	9
	<u>Aristotle P. v. Johnson</u>	
	721 F.Supp. 1002 (N.D. Ill. 1989) .....	9
	William Wesley Patton and Sara Latz, <i>Severing Hansel From Gretel: An Analysis of Siblings=Association Rights</i> , 48 U. Miami L. Rev. 745 (1994).....	9
III.	JUSTIN AND JOSEPH MAY NOT BE DEPRIVED OF THEIR LIBERTY INTEREST WITHOUT DUE PROCESS OF LAW. JUSTIN AND JOSEPH ARE ENTITLED TO NOTICE, A PRE-PLACEMENT HEARING, AND COUNSEL UNDER THE PROCEDURAL DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION .....	10
	<u>Cleveland Board of Education v. LaFleur</u>	
	414 U.S. 632, 94 S. Ct. 791, 39 L.Ed.2d 52 (1974).....	11
	<u>Roberts v. United States Jaycees</u>	
	468 U.S. 609, 104 S. Ct. 3244, 82 L.Ed.2d 462 (1984).....	11
	<u>Lassiter v. Department of Social Services</u>	
	452 U.S. 18, 101 S. Ct. 2153, 68 L.Ed.2d 640 (1981).....	14

<u>Smith v. Organization of Foster Families for Equality and Reform</u>	
431 U.S. 816, 97 S. Ct. 2094, 53 L.Ed.2d 14 (1977).....	13, 14
<u>Moore v. City of East Cleveland</u>	
431 U.S. 494, 97 S. Ct. 1932, 52 L.Ed.2d 531 (1977).....	11
<u>Mathews v. Eldridge</u>	
424 U.S. 319, 96 S. Ct. 893, 47 L.Ed.2d 18 (1976).....	11
<u>Cleveland Board of Education v. Loudermill</u>	
470 U.S. 532, 105 S. Ct. 1487, 84 L.Ed.2d 494 (1985).....	11
<u>Roth v. Board of Regents</u>	
408 U.S. 564, 92 S. Ct. 2701, 33 L.Ed.2d 548 (1972).....	10
<u>In re Gault</u>	
387 U.S. 1, 87 S. Ct. 1428, 18 L.Ed.2d 527 (1967).....	12
<u>Shelley v. Kraemer</u>	
334 U.S. 1, 68 S. Ct. 836, 92 L.Ed.2d 1161 (1948).....	10
<u>Rivera v. Marcus</u>	
696 F.2d 1016 (2d Cir. 1982).....	11
Erwin Chemerinsky, Constitutional Law: Principles and Policies (1997) .....	11
CONCLUSION.....	15

## PURPOSE OF THE BRIEF

At its most basic, this Court is being asked to decide what established intimate familial relationships four-year-old Justin Moore may maintain and pursue, although Justin has had no direct participation in any of these proceedings. Any resolution of this issue must respect the constitutional rights of Justin and his biological brother, Joseph Asente, to maintain and pursue their existing sibling relationship. Amicus curiae respectfully submits that these children have a right to maintain and pursue this relationship under the substantive and procedural due process clauses of the Fourteenth Amendment and the association clause of the First Amendment to the United States Constitution.

## ARGUMENT

### I.

Justin and Joseph have a fundamental right to maintain and pursue their sibling relationship under the substantive due process clause of the Fourteenth Amendment.

Liberties deeply rooted in this Nation's history and tradition are fundamental rights. Moore v. City of East Cleveland, 431 U.S. 494, 503, 97 S. Ct. 1932, 1938, 52 L.Ed.2d 531(1977). The family unit garners considerable constitutional protection precisely because the institution of the family is deeply rooted in our history and tradition and provides the means for the inculcation and transmission of important moral and cultural values. Id. at 503-04, 97 S. Ct. at 1938. Moreover, the concept of a family is a broad one, encompassing not just a nuclear family but an extended family as well, which may include aunts, grandparents, or even cousins.

Id. at 504, 97 S. Ct. at 1938. As the United States Supreme Court noted in Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816, 844, 97 S. Ct. 2094, 2109, 53 L.Ed.2d 14 (1977), the importance of the family stems from the *emotional attachments* that derive from the intimacy of daily association (emphasis added), not from any biological relationship. Thus the right to maintain and pursue intimate familial associations is a fundamental right protected by the substantive due process clause of the Fourteenth Amendment. Moore v. City of East Cleveland, 431 U.S. at 503, 97 S.Ct. at 1938.

Moreover, these rights are rights of the *family* and of the *individuals in that association*; they are not simply the rights of parents to the care, custody, control, or upbringing of their children. For example, the Court in Moore v. City of East Cleveland, 431 U.S. at 502, 97 S. Ct. at 1937, held that the Due Process Clause protects more than just parental rights and authority; it also protects the sanctity of the family and familial rights. Thus the Court rejected the state's claim that constitutional protection ends at the boundaries of the nuclear family because of the protection afforded the extended family. Id. at 502, 97 S. Ct. at 1937. Nor are the hallmarks of living in a family -- intimacy and emotional attachment -- only experienced by parents. Rather, the Court has noted that these characteristics, even advantages, of familial arrangements are important to all the individuals involved. Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. at 844, 97 S. Ct. at 2109 (The importance of the familial relationship, to the *individuals involved* . . . stems from the emotional attachments that derive from the intimacy of daily association (emphasis added)).

Nor does the United States Supreme Court's decision in Troxel v. Granville, 530 U.S.

57, 120 S. Ct. 2054, 147 L.Ed.2d 49 (2000), bar consideration of these brothers' rights to maintain and pursue their relationship. While a clear majority of the justices acknowledge the constitutional importance of the parental right to raise one's children as one sees fit, the Court did not hold that the interests of parents supersede all other interests. Rather a mere plurality of the Court simply found that the grandparent visitation statute in the case at bar was unconstitutional as applied, and left for future determination the issue whether nonparent visitation statutes violate the Due Process Clause as a per se matter. *Id.* at 73, 120 S. Ct. at 2064 (O'Connor, J., plurality opinion). Troxel thus left unresolved the precise scope of the parental right and the permissible limits of the state's authority to overrule parental decision making and choice. In this regard, it is particularly noteworthy that the plurality held, without further elaboration, that an infringement of the parental liberty interest in the case at bar warranted a heightened scrutiny. *Id.* at 65, 120 S. Ct. at 2060 (O'Connor, J., plurality opinion). Noting that the Court had failed to articulate the standard of review, only Justice Thomas argued that strict scrutiny should be applied to an infringement of the right of parents to direct the upbringing of their children. *Id.* at 80, 120 S. Ct. at 2068 (Thomas, J., concurring).

Of course, the United States Supreme Court has never explicitly stated that siblings have a substantive due process right to maintain and pursue their relationship, in part because the Court has never had a chance to consider the issue. In Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. at 842, 97 S. Ct. at 2108, for example, the Court considered the relationship between foster parent and foster child, not that of the foster child and her siblings. Nevertheless the Court in a footnote noted that the interest in maintaining the

familial relationship created by the foster care placement belonged as much to the child as to the foster parent. Id. at 842 n.45, 97 S. Ct. at 2108 n.45. Furthermore, the Court's language in Moore v. City of East Cleveland suggests that the relationship between siblings may warrant protection. In Moore, the Court found that a grandmother, her son, and her two grandsons, who were cousins, had a constitutionally protected interest in maintaining their familial arrangement. As the Court noted, "the tradition of . . . cousins . . . sharing a household along with parents and children" is deserving of constitutional protection. 431 U.S. at 504, 97 S. Ct. at 1938.

The notion that children may have a liberty interest in maintaining familial relationships finds further support in Troxel. Justice Stevens, in his dissenting opinion, noted that the Court's "prior cases recognizing that children are, generally speaking, constitutionally protected actors require that this Court reject any suggestion that when it comes to parental rights, children are so much chattel." Troxel, 530 U.S. at 88-89, 120 S. Ct. at 2072 (Stevens, J., dissenting). Thus, it is extremely likely "that children also have fundamental liberty interests in preserving established familial or family-like bonds." Id. at 88, 120 S. Ct. at 2072 (Stevens, J., dissenting). Consequently, "there may be circumstances in which a child has a stronger interest at stake than mere protection from serious harm caused by the termination of visitation by a 'person' other than a parent." Id. at 90, 120 S. Ct. at 2073 (Stevens, J., dissenting). Parental rights are limited not only by the state's *parens patriae* interest but in the child's individual interest in preserving relationships. Id. at 88, 120 S. Ct. at 2072 (Stevens, J., dissenting).

The federal courts have considered a number of cases involving the constitutional rights

of siblings to form and maintain a relationship. In Rivera v. Marcus, 696 F.2d 1016 (2d Cir. 1982), the court found that the substantive due process clause specifically protected the liberty interest of an adult half-sister in maintaining a relationship with her minor half-brother and half-sister whom she had lived with continuously for six years. The court specifically held that the half-sister had an important liberty interest in maintaining the integrity and stability of her family. Id. at 1024-25. This right to maintain a relationship with a sibling will be granted protection under the substantive due process clause when the siblings have lived together and have an ongoing relationship. Whalen v. County of Fulton, 126 F.3d 400, 405-06 (2d Cir. 1997). The state cannot interfere with this relationship and the existence of a policy which interferes with this liberty interest may warrant judicial relief. Aristotle P. v. Johnson, 721 F.Supp. 1002, 1007-08 (N.D. Ill. 1989) (holding that motion to dismiss ' 1983 claim inappropriate where plaintiffs have alleged that state failed to facilitate visits between siblings involuntarily placed in foster care).

State courts, too, have found that children have protectible interests in maintaining familial relationships. For example, the Supreme Court of Appeals of West Virginia acknowledged the importance of the sibling relationship when it ordered continuing visitation between a child and her half-brother. Honaker v. Burnside, 388 S.E.2d 322, 326 182 W.Va. 448, 452 (W. Va. 1989). In that case, although custody of the child was awarded to her biological father in lieu of her stepfather, the court found that continued visitation with her half-brother, the child of her stepfather, was in the child's best interests. Id. at 326, 182 W.Va. at 452. In L.H. v. G. and H., 497 A.2d 215, 203 N.J. Super. 385 (N.J. Super. Ct. 1985), the relationship between siblings, and the emotional and biological bonds created, coupled with

shared life experiences, led the court to conclude that siblings have a natural and inalienable right to establish and nurture their relationship with each other. Id. at 218, 203 N.J. Super. at 391. Moreover, protection of this relationship often redounds to the child's best interests; thus courts have ordered ongoing visitation between siblings when one child has been placed for adoption. In re Adoption of Anthony, 448 N.Y.S.2d 377, 380 (N.Y. Fam. Ct. 1982).

Nor has Troxel barred consideration of the child's interest in maintaining and preserving familial relationships. In In re Tamara R., 764 A.2d 844, 136 Md. App. 326 (Md. Ct. Spec. App. 2000), a child found to be in need of assistance after recanting and then reasserting her allegations of sexual abuse by her father, petitioned the juvenile court for visitation with her brother and half-sister. Id. at 846, 136 Md. App. at 240. Their father, who had custody of the minor children, objected to visitation and alleged that any order permitting such visitation would violate his constitutional rights to raise his children as he saw fit; the juvenile court agreed. Id. at 846-47, 136 Md. App. at 240-41. The Maryland Court of Special Appeals held that a court order permitting visitation between the minor children would not violate the father's constitutional liberty interests if there were sufficient evidence of harm to the child should visitation be denied. Id. at 854, 136 Md. App. at 254. Although not deciding whether the sibling relationship at issue warranted constitutional protection, the court nevertheless recognized the importance of the relationship which was entitled to significant consideration and protection by the courts in cases involving the family. Id. at 856, 136 Md. App. at 259. The appellate court then remanded to the juvenile court to consider the harm to all the minor children if visitation were denied as well as the reasons for the father's opposition. Id. at 857, 136 Md.

App. at 260.

In Webster v. Ryan, N.Y.L.J., June 29, 2001, at 23 (N.Y. Fam. Ct. June 29, 2001), the court held that a child has an independent, constitutionally guaranteed right to maintain contact with a person whom the child has developed a parent-like relationship. @ Id. The child, who had been living with his foster mother for all but a few weeks of his short life, was returned to his father's custody after an appellate court determined that his parental rights were terminated improperly. Id. The court acknowledged that parents do have a fundamental right to the care and custody of their children but that that right must be balanced against the fundamental liberty interest of the child to maintain contact with a person with whom the child has developed a parent-like relationship. @ Id. Consequently, the court ordered further hearings to determine if the child does have such a relationship, the circumstances of the relationship, and whether continued contact would infringe on the parent's rightful authority. Id.

In the case at bar, Justin and Joseph are biological brothers who have been living together since February 17, 1998. At the time Justin was voluntarily placed with the Asentes he was not quite a year old; his brother, Joseph was then over two years old. The boys have lived together continuously and have formed an emotional bond. Thus, the two boys have a substantive due process right to maintain and pursue their relationship, a right that is fundamental and may not be infringed absent a compelling state interest. There is nothing in the record before this Court to support a finding of a compelling state interest warranting severance of this relationship. Moreover, the extent of their relationship and the significance of their emotional bond has not been adequately considered by the courts below and this Court should remand for

further consideration of this issue.

## II.

Freedom of association under the First Amendment to the United States

Constitution protects familial relationships like those between Justin and Joseph.

Justin and Joseph have a right to maintain and pursue their sibling relationship under the First Amendment.

Freedom of association under the First Amendment not only means the right to associate for purposes of First Amendment activities like speech, assembly, and the exercise of religion, Roberts v. United States Jaycees, 468 U.S. 609, 618, 104 S. Ct. 3244, 3249, 82 L.Ed.2d 462 (1984); it also protects choices to enter into and maintain certain intimate human relationships that must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme. Id. at 617-18, 104 S. Ct. at 3249. The Supreme Court in Roberts held that the First Amendment offers certain highly personal relationships a substantial measure of sanctuary from unjustified interference by the State. Id. at 618, 104 S. Ct. at 3250. Although the United States Jaycees, a nonprofit membership organization, was not the kind of highly personal relationship protected by the First Amendment, id. at 621, 104 S. Ct. at 3251; family relationships are protected by the Bill of Rights. 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. Id. at 619-20, 104 S. Ct. at 3250.

Although the Supreme Court has never considered whether a sibling relationship is the sort of relationship protected by the First Amendment, certainly the language of the Roberts case suggests that this is the sort of relationship entitled to protection under the Bill of Rights. Other federal courts also have recognized the sibling relationship as worthy of constitutional protection under the First Amendment. Trujillo v. Board of County Commissioners, 768 F.2d 1186, 1189 (10<sup>th</sup> Cir. 1985). A[C]hildren's relationships with their siblings are the sort of intimate human relationships that are afforded a substantial measure of sanctuary from unjustified interference by the State. Aristotle P. v. Johnson, 721 F.Supp. at 1005. Sibling relationships may be even more important than relationships with parents which may be tenuous or nonexistent. Id. at 1006.

The importance of access to sibling bonds cannot be underestimated. Research suggests that the nearness in age and the degree of involvement in one another's lives are important determinants for the strength of sibling bonds. The effects of divorce and remarriage, or deficient parenting may also influence sibling bonds and make them more important. Additionally the sibling bond provides an important context for moral development. William Wesley Patton and Sara Latz, *Severing Hansel From Gretel: An Analysis of Siblings' Association Rights*, 48 U. Miami L. Rev. 745, 766-67 (1994).

In the case at bar, the constitutional importance of the relationship between Justin and Joseph is clear. Their relationship as biological brothers who have been living together for over two years and who, from the record, have an emotional bond, is the sort of intimate relationship which warrants protection under the First Amendment. Moreover, that relationship is an

important one that may influence their future emotional and moral development. Any interference with that fundamental relationship should only be infringed for compelling state reasons.

### III.

Justin and Joseph may not be deprived of their liberty interest without due process of law. Justin and Joseph are entitled to notice, a pre-placement hearing, and counsel under the procedural due process clause of the Fourteenth Amendment to the United States Constitution.

The state may not deprive any person of his life, liberty, or property without due process of law. To ascertain whether the procedural due process clause applies to any given state action, a court must consider first, if the state has worked the deprivation and second, whether there is a protectible interest in life, liberty, or property. Judicial action may be regarded as state action for the purposes of the Fourteenth Amendment. Shelley v. Kraemer, 334 U.S. 1, 14, 68 S. Ct. 836, 842, 92 L.Ed.2d 1161 (1948). In determining the extent of the liberty interest, the Supreme Court has held that the meaning of liberty must be broad enough to encompass those activities essential to the orderly pursuit of happiness. Roth v. Board of Regents, 408 U.S. 564, 572, 92 S. Ct. 2701, 2707, 33 L.Ed.2d 548 (1972). There is little doubt that the right to maintain and pursue intimate familial relationships is a liberty interest protected by the First Amendment, Roberts v. United States Jaycees, 468 U.S. at 617-18, 104 S. Ct. at 3250; and the Fourteenth Amendment, Moore v. City of East Cleveland, 431 U.S. at 502-03; 97 S. Ct. at 1937-38; Cleveland Board of Education v. LaFleur, 414 U.S. 632, 639-

40, 94 S. Ct. 791, 796, 39 L.ED.2d 52 (1974). That right also should extend to siblings who seek to pursue and maintain a preexisting relationship. Moore v. City of East Cleveland, 431 U.S. at 504, 97 S. Ct. at 1938; Rivera v. Marcus, 696 F.2d at 1024-25.

The state also must provide due process when it has deprived an individual of a protected liberty interest. To determine what process is due, the United States Supreme Court in Mathews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893, 47 L.Ed.2d 18 (1976), has articulated a tripartite balancing test for deciding what procedures are required. The factors that should be balanced are:

[f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335, 96 S. Ct. at 903. Generally, notice, an opportunity to be heard, and an impartial decision maker are the essentials of procedural due process. Erwin Chemerinsky, Constitutional Law: Principles and Policies 450 (1997). Nevertheless, what process is due in a particular case is a constitutional question that must be answered by the court. Cleveland Board of Education v. Loudermill, 470 U.S. 532, 547-48 105 S. Ct. 1487, 1496, 84 L.Ed.2d 494 (1985).

In the case at bar, the private interest affected is substantial. The Supreme Court has

made clear that matters affecting private family life are entitled to significant constitutional protection. The relationship between siblings is unique; the biological bond provides an opportunity for the establishment of life-long emotional bonds and shared life experiences. That opportunity, when seized, warrants considerable constitutional deference. The record, although sketchy, indicates that Justin and Joseph have grasped and built on that opportunity in the twenty-seven months they have lived together.

The risk of erroneous deprivation is great in the absence of any procedural protection. As in In re Gault, the substantial infringement on the child's liberty interest mandates notice, 387 U.S.1, 41, 87 S. Ct. 1428, 1451, 18 L.Ed.2d 527 (1967). These procedural protections are necessary in light of the nature of the interest involved and the considerable deference to familial relationships accorded by the Constitution. Thus, without providing Justin and Joseph notice and a pre-removal opportunity to be heard before a court, the likelihood that their constitutional interests will be infringed is assured. No party to this proceeding is representing the interests of these two boys in maintaining a relationship with each other. Rather, the entire focus of the arguments by appellants and appellees has been on *their* rights to maintain *their* relationships with Justin. Thus without providing Justin and Joseph with notice and an opportunity to be heard in this matter, we cannot know the nature and extent of the relationship between these two boys.

The importance of that relationship also requires a pre-removal hearing. Because the relationship is an important one, to sever that relationship without fully exploring the ramifications of doing so may work irreparable harm. Justin now has spent most of his young life in the

company and companionship of his brother, Joseph. It is incumbent on this Court to preserve that relationship and insure that there are future opportunities for the relationship to continue and grow. That may only be accomplished by ascertaining what needs to be done to preserve that relationship--before it is damaged. That of necessity requires a pre-removal hearing.

Justin and Joseph also should have the services of court-appointed counsel in that hearing. It is clear from the facts of this case, that none of the adults involved could act as a disinterested best friend on behalf of the children. Both the prospective adoptive parents and the biological parents are urging on this Court, and appropriately so, a particular outcome that best serves their own interests. While those interests may be commensurate with the rights of Justin and Joseph, a court may reach this conclusion only after having considered all the evidence. Bringing that evidence to light would best be accomplished by appointing a legal representative for the children whose loyalty is to them and their rights and interests.

Consistent with the dictates of due process, it is clear that in this case, where the results may potentially be much more far-reaching and permanent for both Justin and Joseph, their voices should be heard through representation of counsel. The costs and burdens imposed on the state to provide these additional procedural safeguards is minimal.

The case at bar thus differs from the facts of Smith v. Organization of Foster Families for Equality and Reform, *supra*. In that case, the Supreme Court held that due process did not require the direct participation of the child or the child's representative in a foster care pre-removal hearing. 431 U.S. at 852, 97 S. Ct. at 2113-14, but the circumstances in Smith v. Organization of Foster Families for Equality and Reform differ radically from those here. The

relationship which was to be protected was a relationship between foster parent and foster child; thus the adult's interest would be coextensive with that of the child. Id. at 850-52, 97 S. Ct. at 2112-13. Moreover, because the placement decision was not final or irrevocable in Smith v. Organization of Foster Families for Equality and Reform, the Court found that consultation with the child about the child's wishes was adequate. Id. at 852, 97 S. Ct. at 2113-14.

Furthermore, a child, unlike an adult, may have special need of counsel in these matters. In Lassiter v. Department of Social Services, 452 U.S. 18, 101 S. Ct. 2153, 68 L.Ed.2d 640 (1981), the Supreme Court held that the appointment of counsel to an indigent parent in a termination of parental rights proceeding was to be made on a case-by-case basis. Id. at 31-32, 101 S. Ct. at 2162. Among the factors to be considered in making the appointment are whether there are no troublesome points of law, whether an expert will testify for the state, and if the weight of the evidence is sufficiently great that presence of counsel would not have made a qualitative difference. Id. at 32-33, 101 S. Ct. at 2162-63. Obviously, these factors envision the parent as a fully competent and capable participant in the legal proceeding. Certainly, the same could not be said for a child, particularly a very young child who will have very little experience in these matters.

The costs and burdens imposed on the state to provide these additional procedural safeguards is minimal. In a case such as this, where the adoption of a child is contested, and that child has been living with his prospective adoptive sibling who also is his biological brother, the costs of these additional procedural safeguards would be minimal. Providing the boy's notice and

an opportunity to be heard would not add significantly to the costs already assumed by the state in providing the parties with a judicial forum for the resolution of their dispute. Moreover, the cost of providing the child with court-appointed legal counsel would add little additional burden on the state, given the infrequency with which these sorts of cases occur.

For these reasons, procedural due process mandates that Justin and Joseph be given notice, an opportunity to be heard before removal, and counsel.

### **CONCLUSION**

Any decision made by this Court to resolve the present dispute over the care, control, and custody of Justin Moore must respect the constitutional rights of Justin and his biological brother, Joseph Asente, to maintain and pursue their existing sibling relationship. Joseph and Justin have a right to maintain and pursue this relationship under the substantive and procedural due process clauses of the Fourteenth Amendment and the association clause of the First Amendment to the United States Constitution.

Respectfully submitted,

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