

**IN THE SUPREME COURT OF OHIO**

**IN THE MATTER OF:**

**THE ADOPTION OF JUSTIN RICHARD ASENTE  
a.k.a. Justin Lee Moore**

Regina Moore	:	OHIO SUPREME COURT NO.	99-2158
and	:	COURT OF APPEALS NOS.	99TR0055
Jerry Dorning	:	(Consolidated)	99TR0056
	:		99TR0057
Appellees,	:		99TR0058
	:		
v.	:	On Appeal from the Trumbull	
	:	County Court of Appeals,	
	:	Eleventh Appellate District	
Richard Asente and Cheryl Asente	:		
and	:		
Justin Richard Asente	:		
a.k.a. Justin Lee Moore	:		
	:		
Appellants.	:		

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**BRIEF *AMICUS CURIAE* OF THE JUSTICE FOR CHILDREN  
PROJECT IN SUPPORT OF APPELLANTS**

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**INTEREST OF *AMICUS CURIAE***

*Amicus Curiae*, The Ohio State University College of Law Justice for Children Project, is an educational and interdisciplinary research project housed within The Ohio State University College of Law. Begun in January 1998, the Project's mission is to explore ways in which the law may be used to improve the experiences of children by engaging in original scholarship and research, educating students in the law while considering the insights of other disciplines, and constructing and pursuing legal and nonlegal solutions to many of the intractable problems confronting children.

The Justice for Children Project has two primary components. The first creates opportunities for faculty to engage in original research and writing in a number of areas affecting children and their families. Through the publication of scholarly articles, the support of interdisciplinary research, and the promotion and sponsorship of symposia, the Project permits students to explore particular issues affecting children from an interdisciplinary perspective. This is particularly important in light of

increasing public concerns about juvenile crime, education, and safe families. The Project's first goal, therefore, is to produce scholarship that provides philosophical support for the work of children's rights advocates by building bridges between theory and practice and by considering and integrating the findings of other disciplines.

The Project's second component involves the direct legal representation of children and their interests in the local court systems through the Justice for Children Practicum, a one-semester course open to eligible third-year law students. Certified by the Ohio Supreme Court as Legal Interns, students represent clients under faculty supervision in a variety of proceedings implicating the rights of children. These may include abuse and neglect, delinquency, status offense, and termination of parental rights cases. Interns work with their clients at all stages of the representation and participate in pretrial hearings and at trial. The objective of the Practicum is not to represent a large number of clients, but instead to assemble a selection of interesting cases that provide the Interns with an opportunity to learn a good practice model. The Practicum's clients benefit from the fact that participating students represent a limited number of clients.

The Project is grateful for the assistance provided by many students in the preparation of this brief. The Project acknowledges in particular the assistance of students Andrew Miller, Brian Ray, and Andrew Lockshin.

The Justice for Children Project has undertaken the role of *Amicus Curiae* in this litigation as part of its overall mission to secure a legal solution that would benefit the children in this contested adoption matter. The Justice for Children Project has no relationship to any of the individuals involved in this litigation.

## STATEMENT OF FACTS

The facts and procedural history of this case are described by both Appellants and Appellees. Following are those facts most relevant to the positions urged in this brief.

Mr. and Mrs. Richard and Cheryl Asente are the adoptive parents of Joseph Asente, born December 18, 1995, to Regina Moore and Jerry Dorning. 98 ADP 04 Record pg. 5 (hereinafter referred to as R. 5). Ms. Moore and Mr. Dorning placed Joseph in the Asentes' home when he was just 11 days old. R. 301. The Asentes adopted Joseph in 1996 and welcomed him into their family. R. 331. On February 28, 1997, Ms. Moore and Mr. Dorning gave birth to a second child, Justin Lee Moore. R. 382. Ms. Moore and Mr. Dorning wanted the Asentes to adopt Justin, and on February 17, 1998, placed Justin in the Asentes' home with his full biological brother, Joseph. R. 2. Since the Asentes have taken custody of Justin, there have been a plethora of legal proceedings as the biological parents want to rescind the planned adoption and the Asentes are attempting to enforce it. Unfortunately, the rights of the brothers to be with one another has not been stressed enough in any of the many proceedings.

Though there are few matters in which the appellants and appellees agree, both seem to recognize the importance of the brothers remaining together. In a report prepared by Irene L. Kachlinsky (the Guardian *ad litem* in Kentucky, hereinafter referred to as "GAL Kachlinsky"), the biological parents of both young Justin and Joseph emphasize the importance of the siblings being together. Ms. Moore stated to GAL Kachlinsky that she "believes that it is in the child's (Justin's) best interests to be placed for adoption with his biological brother." R. 21. Furthermore, both Ms. Moore and Mr. Dorning expressed to GAL Kachlinsky that they "agree that termination of their parental rights and placement of the child (Justin) with his biological brother (Joseph) at the Asentes is in the best interest of the child." R. 23. Similarly, Richard and Cheryl Asente wanted to adopt Justin, as they believe that "this is the best plan for their son Joey and his full sibling Justin." R. 31.

As both the appellants and appellees have acknowledged the unique quality of the sibling relationship, it would be best to allow the children to remain together so that they may foster this

special connection. In the time since Justin's placement in the Asente household, in February of 1998, he now recognizes his brother Joseph and calls him by name. R. 77, 140. Furthermore, the boys attend gymnastics together, make cookies with their father, and often play with one another. R. 303-04. In his conclusion, Mr. Daniel B. Letson (the appointed Guardian *ad litem* in Ohio, hereinafter referred to as "GAL Letson"), explicitly stresses the strength of the bond that has been built between the brothers and the extreme psychological damage that will likely result if they do not remain together. R. 304. Specifically GAL Letson concluded, "It is clear that, even at his young age, Justin identifies himself as Joseph's sibling and the Asentes' son." *Id.* GAL Letson continued, "It is reasonable to believe that the separation of Justin and Joseph will cause both children problems that they do not now experience." *Id.*

In addition to evidence from both GAL Kachlinsky and GAL Letson, the record contains the ODHS Prefinalization Adoption Assessment Report written by M. Elaine Martin, a licensed social worker and an employee of The Adoption Center, Inc. In her report, Ms. Martin summarizes the intensity of the attachment that the brothers have for each other. R. 329. Specifically Ms. Martin wrote, "he (Joseph) loves his little brother and accepted him immediately and shares freely with him. He is very much the 'big brother.'" *Id.* Ms. Martin also noted that Justin instantly bonded with Joseph and that they play well together and are loving and affectionate. R. 332.

As evidenced throughout the record, the brothers have developed a close relationship and separation would be detrimental to both of them. R. 304. The appellees, appellants, both guardians *ad litem*, and a licensed social worker have all recognized the importance of Justin and Joseph's brotherly bond. GAL Letson best summarized the children's needs when he concluded that the boys have become very close and now share "the affection that only siblings raised together can share." R. 441.

## ARGUMENT

PROPOSITION OF LAW: JUSTIN AND HIS BIOLOGICAL BROTHER, JOSEPH, HAVE CONSTITUTIONAL RIGHTS TO MAINTAIN AND PURSUE THEIR EXISTING SIBLING RELATIONSHIP.

It is a well-settled proposition that children have constitutional rights. Those rights do not mature and come into being only when one attains the age of majority, *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 74 (1976); rather, the United States Supreme Court has made clear that certain provisions of the Constitution extend to those who have not yet reached adulthood. *See, e.g., In re Gault*, 387 U.S. 1, 13 (1967). Among the rights accorded children are freedom of speech under the First Amendment, *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506 (1969) (students in and out of school are constitutional persons possessed of fundamental rights which the state must respect; these include freedom of expression); privacy and the freedom from unreasonable searches and seizures under the Fourth Amendment, *New Jersey v. T.L.O.*, 469 U.S. 325, 336-37 (1985) (Fourth Amendment applies to searches conducted by school officials); the Fifth Amendment privilege against self-incrimination, *In re Gault*, 387 U.S. 1, 47 (1967) (language of Fifth Amendment unequivocal and it would be surprising to extend its privileges only to hardened criminals but not to children); and due process under the Fourteenth Amendment, *Goss v. Lopez*, 419 U.S. at 576 (due process applies to school suspensions, however short in duration). Minors also have a constitutionally protected liberty interest that must be respected by the state. *Goss v. Lopez*, 419 U.S. 565 (1975) (minor's liberty interest in reputation implicated by a suspension); *In re Gault*, 387 U.S. at 30-31 (minor's right to liberty implicated by commitment to juvenile institution warrants constitutional protection).

Any decision made by this Court to resolve the present dispute over the care, control, and custody of Justin Asente, a.k.a. Justin Moore, must respect the constitutional rights of Justin and

his biological brother, Joseph Asente, to maintain and pursue their existing sibling relationship. *Amicus curiae* reaches this conclusion by establishing that these children have a right to maintain and pursue this relationship under the substantive and procedural due process clauses of the Fourteenth Amendment to the United States Constitution and Article I, §§1 and 16 of the Ohio Constitution and under the association clause of the First Amendment and Article I, § 3 of the Ohio Constitution.

A. Justin and Joseph have a fundamental right to maintain and pursue their sibling relationship under the substantive due process clause of the Fourteenth Amendment and under Article I, §§ 1 and 16 of the Ohio Constitution.

The substantive due process clause of the Fourteenth Amendment to the United States Constitution mandates that the state provide an adequate reason for any deprivation of life, liberty, or property. The adequacy of that reason turns on the nature of the right infringed; thus, if the proposed state action infringes on a fundamental right, substantive due process is satisfied only if the proposed action serves a compelling governmental purpose. Moreover, such action mandates strict scrutiny by the reviewing court; that is, the court must be persuaded that a truly vital interest is served by the action in question.

A liberty explicitly stated in the text of the Constitution is a fundamental right. But a right may nevertheless be fundamental even if it is not mentioned explicitly in the text of the Constitution. The United States Supreme Court often has looked to history and tradition when deciding whether a right is fundamental. Thus the Court has held that liberties “deeply rooted in this Nation’s history and tradition” are fundamental rights. *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977). The limits of the substantive due process clause, then, “come from a careful respect for the teachings of history and a solid recognition of the basic values that underlie our society.” 431 U.S. at 503 (*quoting Griswold v. Connecticut*, 381 U.S. 479, 501 (1965) (Harlan, J., concurring)).

It is a matter of well-established constitutional jurisprudence that “freedom of choice in matters of . . . family life is one of the liberties protected by the Due Process Clause of the

Fourteenth Amendment.” *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 639-40 (1974). 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. *Moore v. City of East Cleveland*, 431 U.S. at 503-04. 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. *Moore v. City of East Cleveland*, 431 U.S. at 504. As the United States Supreme Court noted in *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816 (1977), the importance of the family “stems from the *emotional attachments* that derive from the intimacy of daily association,” 431 U.S. at 844 (emphasis added); not from any biological relationship. Thus the right to maintain and pursue these 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.

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* 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. 431 U.S. at 502-03. 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. 431 U.S. at 502. 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 (“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).

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*, for example, the Court considered the relationship between foster parent and foster child, not that of the foster child and her siblings. 431 U.S. at 842. 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. 431 U.S. at 842 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.

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. 696 F.2d 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).

At least one state court has found that siblings have a natural and inalienable right to establish and nurture their relationship with each other. *L.H. v. G. and H.*, 497 A.2d 215, 218 (N.J. Super. Ct. 1985). The relationship between siblings, and the emotional and biological

bonds created, coupled with shared life experiences, warrant considerable deference and protection. 497 A.2d at 218. 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, 381 (N.Y. Fam. Ct. 1982).

Like the United States courts and the courts of other states, Ohio has recognized the importance of familial relationships. While no case has yet explicitly recognized a constitutional right of children to maintain an existing sibling relationship, the foundations do exist in Ohio law for such a finding. In the Ohio Constitution, Article 1, § 1 protects the liberty of the individual, *American Cancer Society v. City of Dayton*, 160 Ohio St. 114, 122, 114 N.E.2d 219, 224 (1953). Article I, § 16 guarantees that "every person, for an injury done him in his land, goods, person or reputation, shall have remedy by due course of law . . . ." Article I, §16, affords protection analogous to that provided by the Fourteenth Amendment due process clause. *State ex. rel Heller v. Miller*, 61 Ohio St. 2d 6, 8, 399 N.E.2d 66, 67 (1980) ("When read in conjunction with Sections 1, 2 and 19, Section 16 is the equivalent of the Fourteenth Amendments's due process clause. . . . As a consequence, decisions of the United States Supreme Court can be utilized to give meaning to the guarantees of Article I of the Ohio Constitution.") State courts may, of course, rely on their own constitutions to provide broader protection for individual rights independent of protections afforded by the United States Constitution. *Arnold v. Cleveland*, 67 Ohio St. 3d 35, 35, 616 N.E.2d 163, 164 (1993) (stating in paragraph one of the syllabus, "The Ohio Constitution is a document of independent force. . . . [S]tate courts are unrestricted in according greater civil liberties and protection to individuals and groups.")

Looking to the traditions and basic values in Ohio law, one finds recognition of the importance of familial relationships and, more particularly, concern for the protection of sibling relationships. For example, the Second District Court of Appeals recently discussed parental rights as one of those "rights secured by natural law which Article I, Section 1 of the Ohio Constitution was intended to protect from infringement by the police power of the state." *State v. Hause*, 1999 WL 959184, Montgomery App. No. 17614, unreported (Aug. 6, 1999), (relying

on Ohio Const. Art. I, § 1 and *Santosky v. Kramer*, 455 U.S. 745 (1982)). *State v. Suchomski*, 58 Ohio St. 3d. 74, 567 N.E2d 1304 (1991), similarly supports the related notion that parents have a right to raise their children by imposing reasonable physical discipline. Also, in *In re Whitaker*, in construing an Ohio visitation statute, and without addressing any constitutional issue, the Court recognized the familial relationship interest inherent in contact between grandchildren and grandparents. 36 Ohio St. 3d 213, 217, 522 N.E.2d 563, 568 (1988) (quoting *Mimkon v. Ford*, 66 N.J. 426, 332 A.2d 199 (1975)).

Like these cases which recognize the special nature of familial relations, numerous Ohio statutes demonstrate that Ohio recognizes and values the special relationship that exists between siblings. Numerous Ohio statutes require courts to consider the sibling relationship as one factor in determining the subject child's best interest. This is true, for example, in custody and visitation cases and in hearings to determine whether a child should be permanently committed to the custody of a child welfare agency. R.C. 2151.414 (D)(2) (requires that in determining the best interest of a child in a hearing on a motion for permanent custody, the trial court shall consider all relevant factors including, "[t]he interaction and interrelationship of the child with his parents, *siblings*, relatives, foster parents and out of home providers, and any other person who may significantly affect the child[.]" (Emphasis added.) In determining whether to grant companionship or visitation rights to a parent, grandparent, relative or other person during a divorce, dissolution, or child support proceeding, pursuant to R.C. 3109.051, 3109.11 or 3109.12, the court shall consider all relevant factors including "[t]he prior interaction and interrelationships of the child with his parents, *siblings*, and other persons . . . ." (Emphasis added.) Similarly, R.C. 3109.04 (F)(1) requires that in determining the best interest of a child for purposes of the allocation of parental rights and responsibilities for the care of children, the court shall consider all relevant factors including "[t]he child's interaction and interrelationship with his parents, *siblings*, and any other person who may significantly affect the child's best interest." (Emphasis added.)

The special status of birth siblings is also recognized in R.C. 3107.49, a statute which controls the release of information from an adopted person's file. R.C. 3107.49 authorizes the

department of health to assist only two categories of people in finding this information: birth parents and birth siblings. Taken together, all of these statutes illustrate Ohio's interest in recognition of the special relationship that can exist between siblings and make clear Ohio's interest in protecting that relationship.

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.

B. Freedom of association under the First Amendment to the United States Constitution and Article I, § 3 of the Ohio 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 to the United States Constitution and Article I, § 3 of the Ohio Constitution.

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 (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.” 468 U.S. at 617-18. 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.” 468 U.S. at 618. Although the United States Jaycees, a nonprofit membership organization, was not the kind of “highly personal

relationship” protected by the First Amendment, 468 U.S. at 620; family relationships are protected by the Bill of Rights. “[F]amily 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.” 468 U.S. at 619-20.

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). “[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. 721 F.Supp. 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 and Article I, § 3. 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.

C. 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 and Article I, § 16 of the Ohio 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 (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 (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 617-618, and the Fourteenth Amendment, *Moore v. City of East Cleveland*, 431 U.S. at 503-04; *Cleveland Board of Education v. LaFleur*, 414 U.S. at 639-40. 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; *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 (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.

424 U.S. at 335. 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 (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. at 41. 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.

In *In re Whitaker*, 36 Ohio St. 3d 213, 217, 522 N.E.2d 563, 568 (1988), this Court encouraged trial courts to remember the obvious fact that the most important person involved in visitation matters is in fact the child in issue. In *Whitaker*, the Court was construing the then-current version of R.C. 3109.04 (C)(2), which governed the disposition of visitation issues. Under the statute, the trial court was required to consider the wishes of any subject child over age eleven or older. While noting that the statute did not mandate that a trial court consider the wishes of a younger child, the Court noted “it is certainly within the trial court’s discretion to allow a child under the age of eleven to testify concerning his or her wishes. Indeed, it must be remembered that the single most important individual in a case addressing visitation rights is the child.” *Id.*

Consistent with the sentiments expressed by the Court in *Whitaker*, and 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*, 431 U.S. 816 (1977). 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 840-41. 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. 431 U.S. at 839. 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. 431 U.S. at 855-56.

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 (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. 452 U.S. at 31-32. Among the factors to be considered in making the appointment are whether there are no troublesome points of law, 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. 452 U.S. at 25-27. 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 boys 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 Asente, a.k.a. 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 to the United States Constitution and Article I, §§ 1 and 16 of the Ohio Constitution and under the association clause of the First Amendment and under Article I, § 3 of the Ohio Constitution.

For these and the foregoing reasons, the court below must be reversed and this matter remanded to the trial court for proceedings that address the interests and rights of the children.

Respectfully submitted,

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