

Proponent Testimony for S.B. 23
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Senator Jones and members of the Senate Medicaid, Health and Human Services Committee:

My name is Fred Greenman. I am the Legal Advisor to the American Adoption Congress. I have practiced law for 50 years and appeared before various federal and state courts. I represented a group of birth parents, adoptive parents and adoptees in the federal and state lawsuits that upheld Tennessee's 1995 statute granting adoptees retroactive access to their birth records. I also advised a similar group in the lawsuit that upheld Oregon's 1998 initiative granting similar access. I have testified before legislatures in several other states concerning similar access.

Although several other states have since granted such retroactive access to adoptees, no other lawsuits have challenged such access.

My concern with adoption stems from my daughter, who was born out of wedlock and surrendered in 1960. I was fortunate enough to have been reunited with her in 1991.

I will attempt to summarize the decisions I mentioned that upheld the Tennessee statute and Oregon initiative.

Doe v. Sundquist, 106 F. 3d 702 (6th Cir., 1997), cert. den. 522 U.S. 810 (1997)

The Tennessee statute was the first in this country to give adoptees access to their previously sealed adoption records as a matter of right. Before the statute was passed, Tennessee adoptees could only see their records if they obtained an order to that effect from a Tennessee state court. The statute was to go into effect for most adoptees in 1996. It eliminated the requirement of a court order but imposed some other restrictions which I will discuss in a minute. It became the subject of two lawsuits, one in the federal courts and one in the Tennessee state courts.

The statute allowed adoptees access to most of their adoption records, not just to their original birth certificates as in H.B.61. Some of these records are several hundred pages long. Excluded from disclosure were much of the materials evaluating the adoptive parents; also excluded were materials related to "crisis pregnancy counseling." If the adoption records indicated that the adoptee was the product of rape or incest, no identifying information could be released without written consent of the biological parent who was the victim.

The statute created a contact veto which allowed birth parents and several other birth relatives of the adoptee to register and prohibit contact by the adoptee. Violating such a veto was and is a misdemeanor. There are also civil penalties.

The plaintiffs were two birth mothers plus an adoption agency and an adoptive parent couple. They began their lawsuit in the Federal District Court six days before the statute was to go into effect, and asked the Court to enjoin the Governor of Tennessee from enforcing the statute. The Court received evidence and briefs not only from the parties and their attorneys but also from two groups of *amici curiae*. These included 69 adoptees, birth parents and adoptive parents supporting the statute and an organization of adoption agencies called the National Council for Adoption, which supported the plaintiffs and was instrumental in beginning the action.

The District Court denied preliminary injunctions sought by plaintiffs, who then appealed that denial to the U.S. Court of Appeals for the Sixth Circuit. The Court of Appeals affirmed the District Court. The Court of Appeals' decision is reported as Doe v. Sundquist, 106 F. 3d 702 (1997).

Plaintiffs argued that the Tennessee statute violated at least three federal rights of privacy: familial privacy, reproductive privacy and privacy of personal, confidential information. Judge Engel wrote the opinion. He began:

First we note our skepticism that information concerning a birth might be protected from disclosure by the Constitution. A birth is simultaneously an intimate occasion and a public event—the government has long kept records of when, where and by whom babies are born. Such records have myriad purposes, such as furthering the interest of children in knowing the circumstances of their birth. The Tennessee legislature has resolved a conflict between that interest and the competing interest of some parents in concealing the circumstances of a birth. We are powerless to disturb this resolution unless the Constitution elevates the right to avoid disclosure of adoption records above the right to know the identity of one's parents. (106 F. 3d at 705.)

The Court noted that the alleged right of familial privacy was based on dicta in Meyer v. Nebraska, 262 U.S. 390 (1923), that the Due Process Clause guaranteed the right to marry, establish a home and bring up children. The Court said that nothing in the Tennessee statute infringed on that right, since “People in Tennessee are still free not only to marry and raise children, but also to adopt children and to give them up for adoption.”

As to reproductive privacy, the Court said, “Even assuming that a law placing an undue burden on adoptions might conceivably be held to infringe on privacy rights, much as laws placing undue burdens on abortions are unconstitutional, the Tennessee statute does not unduly burden the adoption process. Whether it burdens the process at all is the subject of great dispute in two briefs submitted to this Court by *amici curiae*. Any burden that does exist is incidental and not undue.”

As to the plaintiffs' claim that they had a right to avoid disclosure of confidential information, the Court noted that it had previously held that there was no such general constitutional right.

The Court of Appeals concluded:

In sum, we find that the plaintiffs' likelihood of success on the merits of their federal constitutional claims is so remote as to make the issuance of preliminary injunctive relief wholly inappropriate. (106 F. 3d at 706.)

The statute appears to be a serious attempt to weigh and balance two frequently conflicting interests: the interest of a child adopted at an early age to know who that child's birth parents were, an interest entitled to a good deal of respect and sympathy, and the interest of birth parents in the protection of the integrity of a sound adoption system. (106 F. 3d at 707.)

Judge Engel then turned to the procedural consideration that the Court of Appeals was reviewing the District Court's denial of a preliminary injunction rather than a final decision on the merits. He noted that ordinarily whether to issue a preliminary injunction depended upon the strength of the plaintiffs' claim and the harm that might result if an injunction was denied, but concluded:

Here the plaintiffs' ultimate chance of success on their federal claims is so slim as to be entirely ephemeral. (106 F. 3d at 707.)

The Court of Appeals then took an unusual step. Ordinarily, after determining that a lower court correctly denied a preliminary injunction, the reviewing court remands the case to the lower court for trial. Here the Court of Appeals found that unnecessary. Instead, because the plaintiffs' claims founded on the federal constitution were so weak, the Court of Appeals ordered them to be dismissed entirely, with prejudice. It allowed the plaintiffs to sue in the Tennessee state courts based on the Tennessee Constitution if they chose.

The plaintiffs attempted to appeal this decision to the U. S. Supreme Court, but that Court declined to hear the case. Meanwhile, the plaintiffs began a new action in a Tennessee state trial court.

Doe v. Sundquist, 2 S.W. 3d 919 (Tenn. 1999)

This time, they alleged that the Tennessee statute violated the Tennessee Constitution. In particular, they alleged that the statute violated the Tennessee Constitution's prohibition of retrospective laws or laws impairing the obligations of contracts, and that it violated the right of privacy under the Tennessee Constitution. The Tennessee trial court dismissed the complaint for failure to state a claim, but the Tennessee Court of Appeals reversed that judgment and held that the statute violated the Tennessee Constitution. The defendants then appealed to the Tennessee Supreme Court, which upheld the statute. Doe v. Sundquist, 2 S.W. 3d 919 (Tenn. 1999).

The most important issue in the Tennessee Court of Appeals and Supreme Court was whether the statute was retrospective or impaired obligations of contracts. Previous decisions had construed that prohibition to prohibit laws that take away or impair vested rights. Definitions of “vested rights” tend to be vague and circular. The Tennessee Supreme Court quoted with approval the following from a Colorado decision:

In determining whether a retroactive statute impairs or destroys vested rights, the most important inquiries are (1) whether the public interest is advanced or retarded, (2) whether the retroactive provision gives effect to or defeats the *bona fide* intentions or reasonable expectations of affected persons, and (3) whether the statute surprises persons who have long relied on a contrary state of the law. (2 S.W. 3rd at 924.)

The Tennessee Supreme Court then examined whether it would have been reasonable for a birth parent to expect or believe that adoption records were permanently sealed. For that purpose, the Court briefly reviewed the history of that aspect of adoption laws in Tennessee. The Court noted that the early statutes did not require records to be sealed or the parties’ identities to remain confidential. The Court then noted that a subsequent amendment provided that even if sealed, the records could be disclosed if a court found that disclosure was in the best interest of the adoptee and the public. The Court also noted that later amendments permitted disclosure of information under some circumstances even without a judicial finding. The Court concluded:

There simply has never been an absolute guarantee or even a reasonable expectation by the birth parent or any other party that adoption records were permanently sealed. In fact, reviewing the history of adoption statutes in this state reveals just the opposite. Accordingly, we disagree with the Court of Appeals’ conclusions that the plaintiffs had a vested right in the confidentiality of records concerning their cases with no possibility of disclosure. (2 S.W. 3rd at 925.)

Turning to the familial privacy claims, the Tennessee Supreme Court found the statute neither impeded a birth parent’s freedom to determine whether to raise a family nor disrupted the biological or adoptive family. Disclosure was limited to adult adoptees and the contact veto would reduce any possibility of disruption.

The Court also rejected procreational privacy claims, stating that the decision as to whether to carry a pregnancy to term differs fundamentally from the decision of whether to surrender a child for adoption. Furthermore, the Court found that while the prospect of having adoption records released to the adoptee 21 years after the adoption might have some bearing on the birth mother’s decision whether to surrender the child, it was far too speculative to conclude that such a prospect interfered with the right to procreational privacy.

Like the Federal Court of Appeals, the Tennessee Supreme Court flatly rejected a privacy right to nondisclosure of personal information, citing one of its own prior decisions and the 6th Circuit cases that the Federal Court of Appeals had cited in the federal case.

The Tennessee Supreme Court then allowed the statute to take effect, after delays totaling three years and three months.

Does 1, 2, 3, 4, 5, 6, & 7 v. State of Oregon, 164 Or. App. 543, 993 P.2d 822 (1999); review den. 330 Or. 138 (2000), stay den. 530 U.S. 1228 (2000)

In Oregon in 1998, voters enacted an initiative entitled Measure 58 which gave adult adoptees the right to copies of their original birth certificates with no restrictions. Measure 58 read:

“Upon request of a written application to the state registrar, any adopted person 21 years of age or older born in the state of Oregon shall be issued a certified copy of his/her unaltered, original and unamended certificate of birth in the custody of the state registrar, with procedures, filing fees and waiting periods identical to those imposed upon non-adopted citizens of the State of Oregon pursuant to ORS 432.120 and 432.146. Contains no exceptions.” (164 Or. App. at 544.)

A group of birth mothers who surrendered their children between 1960 and 1994 sued under the pseudonyms Jane Doe 1, 2, etc. to have the initiative declared invalid and to enjoin its implementation. The sponsor of the initiative, several other adoptees, the Oregon Adoptive Rights Association and a birth mother who wanted contact with her child all intervened.

Both sides moved for summary judgment. The trial court found that the initiative was valid and granted summary judgment to the State and other defendants. The plaintiffs then appealed to the Oregon Court of Appeals, an intermediate appellate court. That Court affirmed the judgment below.

The Oregon Court of Appeals was the highest court to render an opinion in the case. The Oregon Supreme Court denied review and the U. S. Supreme Court denied a stay, without opinion. The initiative went into effect in 2000.

In Oregon, the legislature can amend or repeal an initiative. While the litigation over Measure 58 proceeded, many interested parties conferred on possible amendments to the initiative. These parties included adoption agencies, state and government officials, religious organizations, the Oregon Adoptive Rights Association, the sponsor of Measure 58 and others. The conferees eventually settled on a compromise called the contact preference. That compromise was enacted in Oregon in 1999 and is the source of the contact preference provision in Senate Bill 23, in the companion House bill 61 and in similar statutes enacted in Alabama, New Hampshire, Maine and other states. In my opinion, it is an admirable example of resolving emotional legislative issues by discussion, ingenuity and compromise.

Getting back to the decision of the Oregon Court of Appeals, the principal issue before that Court arose from Article 1, Section 21 of the Oregon Constitution, which prohibits any law “impairing the obligation of contracts.” The plaintiff birth mothers claimed that they were

promised by staff of various private entities, such as hospitals and adoption agencies, that under Oregon law, their identities would be kept confidential. The birth mothers' attorneys argued that those promises of confidentiality, coupled with the Oregon statutes that provided for the sealing of adoption records, were material terms of the contracts for the adoptions of their children.

The Court of Appeals reviewed the history of Oregon adoption law provisions concerning secrecy and access to the identities of birth parents. The Court noted that altered birth certificates for adoptees began in 1941, but at that time, the adoptee was entitled to inspect the original birth certificate. In 1957 that right was eliminated, but a court could release the original birth certificate. The Court noted a further change in 1983, under which a new birth certificate would not be created if the adoptee, the adoptive parents or the court so requested. Another provision enacted in 1983 provided that sealed birth certificates were subject to inspection either by court order or as might be provided by rules of the state registrar.

The Court found that the history of these statutory changes made clear that the legislature had not guaranteed the confidentiality that the plaintiffs claimed. Among other things, all adoption records could be opened on court order, not all additional original birth certificates were sealed when a child was relinquished, and the birth mother had no say in whether the original birth certificate was sealed.

The Court rejected arguments based on statements to the birth mothers by employees and staff of private entities such as adoption agencies and hospitals because they were not agents of the state and, even if they had been, could not bind the state to any commitment that contradicted the statutes.

Plaintiffs also asserted privacy claims based on an Oregon tort case, *Humphers v. First Interstate Bank*, which the Court simply found irrelevant to any constitutional issues.

Finally, plaintiffs asserted federal constitutional procreative privacy rights, such as those established in *Roe v. Wade*. The Oregon court rejected their contentions as follows:

“A decision to prevent pregnancy, or to terminate pregnancy in an early stage, is a decision that may be made unilaterally by individuals seeking to prevent conception or by a woman who wishes to terminate a pregnancy. A decision to relinquish a child for adoption, however, is not a decision that may be made unilaterally by a birth mother or by any other party. It requires, at a minimum, a willing birth mother, a willing adoptive parent, and the active oversight and approval of the state. Given that reality, it cannot be said that a birth mother has a fundamental right to give birth to a child and then have someone else assume legal responsibility for that child. * * * Although adoption is an option that generally is available to women faced with the dilemma of an unwanted pregnancy, we conclude that it is not a fundamental right. Because a birth mother has no fundamental right to have her child adopted, she also can have no correlative fundamental right to have her child adopted under circumstances that guarantee that her identity will not be revealed to the child.” (164 Or. App. at 565)

The Oregon court then quoted the introductory language of Judge Engel in Doe v. Sundquist that I have quoted above, and affirmed the judgment of the lower court.

Thank you for allowing me to submit testimony.