IN THE SUPREME COURT OF OHIO

The State, ex rel Gary Otten	:	**Supreme Court Case No. 2008-0054** **Original Action in Procedendo**
Relator	:	
	:	**Appeal Pending in Hamilton County Court of Appeals, First Appellate District Court of Appeals Case No. C 070858**
v.	:	
The Honorable Stephanie A. Wyler Judge, Clermont County Juvenile Court	:	**Hamilton County Probate Court Case No. 2007-001743**
Respondent	:	**Appeal Pending in Clermont County Court of Appeals, Twelfth Appellate District Court of Appeals Case No. 2008 CA 01-005**
	:	**Clermont County Juvenile Court Case No. 2007 JG 14510**

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MOTHER'S AMENDED MOTION TO DISMISS COMPLAINT FOR WRIT OF PROCEDENDO

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Motion to Dismiss Complaint

Now comes Susan Crooks, the Mother of Paityn Alexa Tuttle, by and through counsel, and hereby moves this Supreme Court to dismiss the Compliant for Writ of Procedendo filed by Gary Otten on January 8, 2008. A memorandum in support of this Motion to Dismiss is included below and filed herewith.

Memorandum in Support of Motion to Dismiss Complaint

To be entitled to the requested writ of procedendo, Relator is required to establish, beyond doubt, (1) a clear legal right to have Judge Wyler proceed, (2) Judge Wyler's clear legal duty to proceed, and (3) the lack of an adequate remedy in the ordinary course of the law. *State ex rel. Weiss v. Hoover* (1999), 84 Ohio St.3d 530, 531-532, 1999 Ohio 422, 705 N.E.2d 1227. The Relator in this case cannot establish any of these requirements. There is no legal right or duty for Judge Wyler to proceed with any further ruling until after the adoption is either finalized or dismissed by the court of last resort. The Hamilton Court Probate Court misunderstood and misapplied the case of *In re Adoption of Pushcar* (2006), 110 Ohio St. 3d 332. The decision of the Hamilton County Probate Court is currently on an expedited appeal in the First Appellate District under Case Number C070858. The law regarding the Putative Father Registry is very clear and there is a high probability that the adoption will ultimately be finalized without the consent of Otten. Judge Wyler understood the law regarding the Putative Father Registry and it is certainly within her discretion to determine that it is not in the best interest of the child to allow parenting time to someone whose rights will be ultimately terminated. The ultimate issue is presently being litigated in the First Appellate District, in which Relator is participating. Relator clearly has a remedy in the ordinary course of the law and is not entitled to the requested writ of procedendo.

The key undisputed fact in this matter is that on April 20, 2007, the date of the filing of the Petition for Adoption in the Hamilton County Probate Court, Gary Otten was the putative father of this child. A "putative father" is defined in R.C. 3107.01(H) as follows:

> (H) "Putative father" means a man, including one under age eighteen, who may be a child's father and to whom all of the following apply:
> (1) He is not married to the child's mother at the time of the child's conception or birth;
> (2) He has not adopted the child;
> (3) He has not been determined, ***prior to the date a petition to adopt the child is filed***, to have a parent and child relationship with the child by a court proceeding pursuant to sections 3111.01 to 3111.18 of the Revised Code, a court proceeding in another state, an administrative agency proceeding pursuant to sections 3111.38 to 3111.54 of the Revised Code, or an administrative agency proceeding in another state;
> (4) He has not acknowledged paternity of the child pursuant to sections 3111.21 to 3111.35 of the Revised Code.
>
> ***(emphasis added)***

Subsections (H)(1), (2), (3) and (4) of R.C. 3107.01 all clearly apply to Otten. Under subsection (H)(3), the finding of a parent and child relationship was required to be determined prior to the date a petition to adopt the child was filed. The Petition for Adoption was filed on April 20, 2007. There was no determination of a parent and child relationship prior to April 20, 2007. Any determination of a parent-child relationship made after April 20, 2007 is meaningless in the adoption proceeding. Otten had over 21 months from the date of the child's birth to establish paternity, but he did not.

As a putative father, Otten was on notice, as a matter of law pursuant to R.C. 3107.061, that Paityn may be adopted without his consent. This statutory notice is set forth in R.C. 3107.061 as follows:

> § 3107.061 Putative father on notice consent unnecessary.
> A man who has sexual intercourse with a woman is on notice that if a child is born as a result and the man is the putative father, the child may be adopted without his consent pursuant to division (B) of section 3107.07 of the Revised Code.

The State of Ohio, like many other states, has established a statutory schemeto balance the rights of the child, the adoptive parent or parents, the mother, and the putative father. The consent to adoption is not required of the putative father, pursuant to R.C. 3107.07(B)(1), as follows:

> § 3107.07 Who need not consent.
>
> Consent to adoption is not required of any of the following:
>
> * * *
>
> (B) The putative father of a minor if either of the following applies:
>
> (1) The putative father fails to register as the minor's putative father with the putative father registry established under section 3107.062 [3107.06.2] of the Revised Code not later than thirty days after the minor's birth;
>
> * * *

Pursuant to R.C. 3107.07(B)(1), a putative father is required to register not later than thirty days after the birth of the child. The Putative Father Registry is defined in Section 3107.062 of the Ohio Revised Code as follows:

> § 3107.062 Putative father registry.
> The department of job and family services shall establish a putative father registry. To register, a putative father must complete a registration form prescribed under section 3107.065 [3107.06.5] of the Revised Code and submit it to the department. The registration form shall include the putative father's name; the address or telephone number at which he wishes to receive, pursuant to section 3107.11 of the Revised Code, notice of a petition to adopt the minor he claims as his child; and the name of the mother of the minor.
>
> A putative father may register before or not later than thirty days after the birth of the child. No fee shall be charged for registration.
>
> On receipt of a completed registration form, the department shall indicate on the form the date of receipt and file it in the putative father registry. The department shall maintain registration forms in a manner that enables it to access a registration form using either the name of the putative father or of the mother.

The Putative Father Registry Certification dated April 23, 2007 was filed with the Probate Court. The final search of the Registry verified that no putative father registered. Therefore, Otten failed to register with the Putative Father Registry as required by R.C. 3107.062 within the required time of not later than thirty days after the birth of the child. Paityn was born on July 13, 2005.

A putative father, such as Otten, was required to register with the Putative Father Registry by no later than August 12, 2005. Having failed to register, Otten's consent to the adoption of Paityn is not required, *as a matter of law,* pursuant to R. C. 3107.07(B)(1). All issues raised by the putative father are now moot as a result of his failure to register with the Putative Father Registry and his failure to establish paternity prior to the filing of the petition for adoption.

The Court of Appeals for the Tenth Appellate District in Ohio provided an in-depth analysis of the history and the filing requirements of the Putative Father Registry in the case of *In the Matter of Adoption of Baby Boy Brooks* (2000), 136 Ohio App. 3d 824, 737 N.E. 2d 1062. The statutory requirements were described as follows:

> The Ohio General Assembly enacted Am.Sub.H.B. No. 419 in 1996, which altered the existing adoption statutes and created a putative father registry. See *R.C. 3107.062* to 3107.065. Under *R.C. 3107.062*, a putative father must register no later than thirty days after the birth of a child. A search of the registry must be conducted before a final decree of adoption may be issued. *R.C. 3107.064(A)*. *R.C. 3107.06* lists the individuals from whom consent is required for an adoption to proceed, but it specifically provides an exception that 'unless consent is not required under *section 3107.07 of the Revised Code*,' meaning that the exceptions in *R.C. 3107.07* must be explored first. Under *R.C. 3107.07(B)(1)*, consent to adoption is not required of a putative father who fails to register with the putative father registry not later than thirty days after the child's birth. Moreover, *R.C. 3107.061* provides that '[a] man who has sexual intercourse with a woman is on notice that if a child is born as a result and the man is the putative father, the child may be adopted without his consent pursuant to division (B) of *section 3107.07 of the Revised Code*.' Thus, it appears from *R.C. 3107.07(B)(1)* and 3106.061 that the consent of a putative father to an adoption is not required if he fails to register with the putative father registry within thirty days of the child's birth.
>
> *Id.* at 832-833.

A summary of the legislative history and the legislative intent of the Putative Father Registry was also detailed as follows:

> The Ohio Legislative Service Commission prepared an analysis of Am.Sub. H.B. No. 419, which provides insight into the legislative intent behind the changes to the adoption statutes. 3 Baldwin's Ohio Legislative Service (1996), L-336. The Legislative Service Commission cautions that the final version of bills may be different from the legislative analysis because they are subject to floor amendments and conference committee changes. *Id.* According to the analysis, the changes to the

> adoption laws require a putative father to register with the putative father registry within thirty days of the child's birth or his consent will not be required. *Id.* at L-336, L-346. The original version of *R.C. 3107.07(B)(1)*, as amended by Am.Sub.H.B. No. 419, contained an exception to the requirement of registration within thirty days if the putative father was not able to register within the thirty-day time period for reasons beyond his control, other than a lack of knowledge of the child's birth, but the putative father must register within ten days after it becomes possible for him to register or his consent will not be required. *Id.* at L-287, L-346. However, this exception in *R.C. 3107.07(B)(1)* was removed from the final version of Am.Sub.H.B. No. 419. See *R.C. 3107.07(B)(1)*, effective September 18, 1996. Thus, the General Assembly determined that there would be no exceptions to the thirty-day filing requirement.
>
> Given that the legislature did not intend for there to be any exceptions to the registration requirement, that the purpose of the adoption laws is to provide children with a stable home in an expeditious manner, and that adoption laws are to be strictly construed, I conclude that the General Assembly intended in *R.C. 3107.07(B)(1)* to eliminate the necessity of a putative father's consent to an adoption if he fails to register with the putative father registry within thirty days of the child's birth.
>
> *Id.* at 834.

The above comments from *Brooks* are applicable to this matter. Otten failed to timely register with the Putative Father Registry. As stated in *Brooks*, there are no exceptions to the thirty-day filing requirement. Given there are no exceptions to this statutory requirement, Otten can offer no excuse. Otten had nearly two years to establish paternity prior to the filing of the adoption.

The Supreme Court of the United States has acknowledged and accepted the legal basis and the constitutionality of the putative father registry in *Lehr v. Robertson* (1983), 463 U.S. 248, 103 S. Ct. 2985, 77 L. Ed. 2d 614. In *Lehr*, the U.S. Supreme Court rejected a due process challenge to the New York putative father registry that required notice of an adoption petition to a putative father only if the putative father fell into one of seven categories, which included putative fathers who had registered with New York's adoption registry. The Supreme Court concluded that the statutory scheme adequately protected a putative father's opportunity to establish a relationship with his child because the statutory procedure was unlikely to omit most responsible fathers and did not place "qualification for notice *** beyond the control of an interested putative father." *Id.* at 264. The Supreme Court noted that ignorance of the law does not relieve a putative father from having to

comply with the statutory requirement to register. The Supreme Court found no due process violation, even though the statutory scheme denied a putative father who had expressed an interest in his child because:

> [t]he right to receive notice was completely within appellant's control. By mailing a postcard to the putative father registry, he could have guaranteed that he would receive notice of any proceeding to adopt Jessica. The possibility that he may have failed to do so because of his ignorance of the law cannot be a sufficient reason for criticizing the law itself. The New York Legislature concluded that a more open-ended notice requirement would merely complicate the adoption process, threaten the privacy interests of unwed mothers, create the risk of unnecessary controversy, and impair the desired finality of adoption decrees. *Id.* at 264.

The Supreme Court also rejected the putative father's claim that, even if the statutory scheme adequately protected a putative father's opportunity to establish a relationship with his child in the "normal case," he was nonetheless entitled to "special notice" because the trial court and birth-mother "knew that he had filed an affiliation proceeding in another court." *Id. at* 264-265. The Supreme Court stated:

> [t]his argument amounts to nothing more than an indirect attack on the notice provisions of the New York statute. The legitimate state interests in facilitating the adoption of young children and having the adoption proceeding completed expeditiously that underlie the entire statutory scheme also justify a trial judge's determination to require all interested parties to adhere precisely to the procedural requirements of the statute. The Constitution does not require either a trial judge or a litigant to give special notice to nonparties who are presumptively capable of asserting and protecting their own rights. Since the New York statutes adequately protected appellant's inchoate interest in establishing a relationship with Jessica, we find no merit in the claim that his constitutional rights were offended because the Family Court strictly complied with the notice provisions of the statute.
>
> *Id.* at 265.

The state legislature in Ohio has determined that for a putative father to be entitled to notice of an adoption proceeding, the putative father must register with the Putative Father Registry not later than thirty days after the birth of the child. There is no other filing, procedure, or way for the putative father to assert his rights in an adoption proceeding in Ohio. There must be strict compliance with the statutory requirements in Ohio, so that the adoption process fulfills its

intended goal of protecting the best interests of the child. Otten failed to timely register and failed to establish paternity prior to the filing of the petition for adoption. The consent of Otten is not required as a matter of law pursuant to R.C. 3107.07(B)(1). Pursuant to R.C. 3107.15, the effect of the adoption will be the termination of the rights of the child's biological father. Upon the finalization of the adoption, any and all parental rights that Otten may claim will terminate.

It is within the discretion of Judge Wyler to determine that it is not in the best interest of the child to allow parenting time to someone whose rights will be ultimately terminated. "The determination of whether to issue a stay of proceedings generally rests within the court's discretion and will not be disturbed absent a showing of an abuse of discretion." *State ex rel. Verhovec v. Mascio* (1998), 81 Ohio St.3d 334, 336, 1998 Ohio 431, 691 N.E.2d 282. Given that there is a legal issue presently being litigated, which will resolve all issues, in an expedited appeal in the Hamilton County Court of Appeals, there is no abuse of discretion in this case.

The legal issue on appeal is the misunderstanding and misapplication of *Pushcar* by the Hamilton County Probate Court. *Pushcar* involved a step-parent adoption where the Probate Court found that the consent of father was not required pursuant to R.C. 3107.07(A) based upon his failure to communicate with the child for a one year period. The father was named on the birth certificate, but had not yet established paternity. (This aspect of Ohio law changed in 2001. The putative father can now only be named on the birth certificate if the Affidavit of Paternity is executed by mother and putative father. The Affidavit of Paternity establishes paternity.) The Appellate Court in *Pushcar* held that the Probate Court could not allow the adoption to proceed under R.C. 3107.07(A) because there had been no judicial determination of paternity. This Supreme Court affirmed and held that, in such circumstances, the Probate Court must defer to the Juvenile Court and refrain from addressing the matter until adjudication in the Juvenile Court. *Pushcar* has no application to this adoption proceeding. *Pushcar* is only applicable to R.C. 3107.07(A) cases, and has no application to R.C.

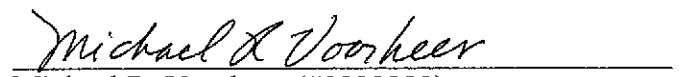
3107.07(B) cases. The entire basis of the decision in *Pushcar* was that the requisite one-year statute for failure to communication did not begin to run until the date of the establishment of paternity. The one-year statute in R.C. 3107.07(A) and the *Pushcar* case do not apply to the present case. The establishment of paternity is not relevant in the present case. Otten is a putative father in the adoption proceeding and his consent is not required pursuant to R.C. 3107.07(B)(1), and not pursuant to R.C. 3107.07(A) as in *Pushcar*. In misapplying *Pushcar*, the Hamilton County Probate Court created an impermissible exception to the Putative Father Registry. The Clermont County Juvenile Court understood this legal issue and there is a high probability that the First Appellate District will also understand.

A writ of procedendo will not issue if an adequate remedy exists in the ordinary course of law. Procedendo is not a substitute for an appeal. When this original Motion to Dismiss was filed it was believed that Otten did not appeal Judge Wyler's decision. However, in the mail on January 17, 2008, Counsel for Mother received the Notice of Appeal filed by Counsel for Gary Otten. This Notice of Appeal was filed on January 7, 2008. The Compliant for Writ of Procedendo was filed with this Supreme Court on January 8, 2008. In the Compliant for Writ of Procedendo, Relator alleged that there was no adequate remedy in the ordinary course of the law because the Juvenile Court has issued no final appealable order. However, Counsel for Relator had just filed an appeal the day before the Complaint was filed in this Supreme Court. Counsel for Relator failed to disclose that there were two appeals pending in this case, one of which Counsel for Relator had just filed the day before the filing in this Supreme Court. Procedendo is not a substitute for an appeal. Relator must not be permitted to appeal the decision to the Court of Appeals, while at the same time make a claim in this Supreme Court that he has no adequate remedy. The ultimate issue that will resolve the entire matter is currently on an expedited appeal in the First Appellate District. There is clearly an

adequate remedy that exists in the ordinary course of law and the request for a writ of procedendo must be denied.

WHEREFORE, for the reasons set forth above, Susan Crooks, by and through counsel, respectfully request this Court to dismiss the Complaint for Writ of Procedendo.

Respectfully submitted,



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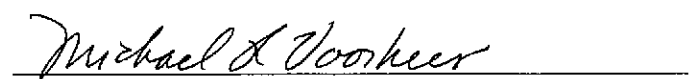
Certificate of Service

I hereby certify that a copy of the foregoing Amended Motion to Dismiss has been sent by regular U.S. mail or by hand-delivery this 23d day of January, 2008 to: Judge Stephanie A. Wyler, Clermont County Juvenile Court, 2340 Clermont Center Drive, Batavia, Ohio 45103; and J. Stephen Cox, Attorney for Relator, Martin & Bailey, 120 E. Fourth Street, Suite 420, Cincinnati, Ohio 45202.



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