

IN THE SUPREME COURT OF OHIO

State ex. rel. Gary Otten, : Case No. 2008-0054
: :
Relator, : :
: : Original Action in Procedendo
v. : :
: :
Honorable Stephanie A. Wyler, : Amicus Brief
: Supporting Relator,
Respondent. : Urging Granting of the Writ

BRIEF OF AMICUS CURIAE ERIK L. SMITH

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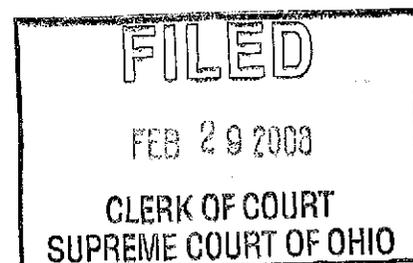


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STATEMENT OF INTEREST OF AMICUS CURIAE

Erik L. Smith, an Ohio citizen, urges the court to grant the writ of procedendo.

As a certified paralegal and an advocate for natural parents in adoption, Smith regularly assists attorneys in and outside of Ohio in juvenile and contested adoption cases. He aims to facilitate reform in child welfare and adoption law, and to educate the public about juvenile and adoption law generally. To achieve those goals, Smith publishes regularly in lay publications and legal journals¹ on juvenile and adoption law topics. He also has a website devoted to juvenile and adoption law, emphasizing Ohio.²

Smith also has experience as a respondent in a contested adoption.³ That litigation resulted in an overturned adoption and an agreed custody arrangement. Smith now regularly receives requests from natural parents and other potential litigants for advice on practical and psychological issues of open adoption. Smith also refers correspondents to lawyers for answers to legal questions. Smith has the perspective of having both a legal education and experience as a party in an extensive adversarial proceeding where his parental rights were in jeopardy.

Also, unwed fathers contesting adoptions have always lacked amici support. But prospective adoptive parents and adoption agencies have always had willing amici, such

¹ E.g., "Putative Father Registry Deadlines and the Servicemembers Civil Relief Act." 60 *Air Force Law Review* 175 (2007); "Basics of the Ohio Putative Father Registry." 19 *Ohio Lawyer* 6 (March/April 2005).

² www.eriksmith.org.

³ *In the Interest of Baby Boy Collins.*, 93-PA-00361, consolidated in 93-PA-01108, Bexar County, Texas, 525th Judicial District. (Not appealed).

as the National Council For Adoption,⁴ Catholic Conference of Ohio,⁵ Hear My Voice, The Justice for Children Project, and the American Academy of Adoption Attorneys.⁶ Thus, Smith helps balance assistance to this court.

Smith also feels compelled to assist the court because of the inexcusable delay in the underlying case that has harmed the father and child. The father had a formed personal and financial relationship with his child. He was trying to formalize that relationship when the stepfather sought to end it solely because the father did not file in the putative father registry (PFR) nearly two years before. Because of respondent's stay, ordered while knowing of the probate court's stay, the father has not seen his child for over a year. The following exchange is revealing: [Respondent]: "I mean, this kid is going to be thirty by the time you guys get this straightened out, you realize that." Mr. Voorhees: "And that's okay with me." (Ex. "A" in Respondent's Motion to Dismiss, pg. lines 11-14.) Regardless of the resolution, the delay should be unacceptable to everyone. And the duty to proceed to a final judgment does not rest on the parties now, but on respondent. Thus, Smith assists this court in determining this action promptly.

Smith addresses the issue of whether *In re Application of Pushcar*⁷ applies to adoption petitions brought under R.C. 3107.07(B). If *Pushcar* is to be followed, respondent has a duty to proceed to final judgment.

⁴ See, for example, *In re Adoption of Zschach* (1996), 75 Ohio St.3d 648, 665 N.E.2d 1070 and *In re Martin* (1994), 68 Ohio St.3d 250, 1994-Ohio-506, 626 N.E.2d 82.

⁵ See, for example, *Morrow v. Family & Community Serv. of Catholic Charities, Inc.* (1986), 28 Ohio St.3d 247, 504 N.E.2d 2.

⁶ See, for example, *In re Adoption of Asente*, 90 Ohio St.3d 91, 2000-Ohio-32.

⁷ 110 Ohio St.3d 332, 2006-Ohio-4572, 853 N.E.2d 647.

STATEMENT OF FACTS

Smith defers to the parties' agreed statement of facts and to the statement of facts in relator's brief and pleadings. Smith only reminds the court of the following: Relator is the natural father of the child who is the subject of a parentage action in juvenile court and of a later-filed step-parent adoption in probate court. Both proceedings were stayed pending the outcome of the other. Respondent is the juvenile court judge. The child was year and a half old when the father brought his parentage action (DOB: 7/13/05). The child is now two and a half years old. When the deadline for filing in the PFR ran, the mother and father were co-parenting the child. (Relator's Compl. Ex. "I," p. 18). The father has covered the child on his health insurance continuously since the child was three months old. (Id., Ex. "C," June 20, 2007 trial).

ARGUMENT

An underlying issue in this case is whether the holding in *In re Application of Pushcar*⁸ applies where an adoption petition seeks to proceed under Section (B) instead of Section (A) of R.C. 3107.07? If yes, then respondent erroneously stayed the juvenile court proceedings, justifying procedendo relief.

In *Pushcar*, this court held that, "When an issue concerning parenting of a minor is pending in juvenile court, a probate court must refrain from proceeding with the adoption of that child."⁹ That holding apparently confused respondent by seeming to conflict with R.C. 3107.01(H)(3). That statute defines "putative father" as a man who "may" be a child's father and has not been determined to have a parent-child

⁸ 110 Ohio St.3d 332, 2006-Ohio-4572, 853 N.E.2d 647.

⁹ Id., syllabus.

relationship by a court or administrative agency before an adoption petition is filed. Under R.C. 3107.07(B), the putative father must file in the PFR within 30 days of the birth to have standing in the adoption. Respondent apparently believed that any adjudication of parental rights and responsibilities would be void if the probate court applied that law to the father. Hence, respondent stayed the juvenile proceeding.

But respondent determined paternity without dispute. The mother even petitioned the juvenile court to establish the father's paternity before the stepfather petitioned to adopt, to which the father confessed. (Relator's Compl. Exs. "L" and "N"). DNA results had been submitted. Thus, when the adoption petition was filed, the father was not a man who "may" have been the child's father, but whom everyone knew to be the father. That alone makes the application of 3107.01(H) questionable.

But even if the paternity assertions and findings did not affect 3107.01(H) that way, respondent's stay order was still erroneous by conflicting with *Pushcar*.

Proposition of Law No. I

Where issues concerning parenting of a minor are pending in juvenile court when an adoption petition is filed, the juvenile court must resolve those parenting issues before releasing jurisdiction to another court.

Pushcar sought to enforce "the bedrock proposition that once a court of competent jurisdiction has begun the task of deciding the long-term fate of a child, all other courts are to refrain from exercising jurisdiction over that matter."¹⁰ That prevents endless litigation due to disagreements about jurisdiction.¹¹ In *Pushcar*, the

¹⁰ Id., ¶10.

¹¹ *In re Adoption of Asente*, 90 Ohio St.3d 91, 92, 2000-Ohio-32, 734 N.E.2d 1224.

putative father sought to establish parentage with the Ohio Department of Job and Family Services. The Department declined to proceed because it considered the father a parent via the birth certificate. So the putative father sought a visitation order in juvenile court. But the proceedings were continued because the court required genetic testing to establish paternity. A few months later, the stepfather petitioned to adopt the child under R.C. 3107.07(A), which applied to parents. The probate court found the father's consent unnecessary as a parent. The Appellate Court reversed, reasoning that the adoption could not proceed under Section (A) because paternity had not been judicially established.

This court affirmed, holding that the time period under R.C. 3107.07(A) could not run until paternity was judicially ascertained.¹² Moreover, because a proceeding was pending in juvenile court when the adoption petition was filed, the probate court should not have proceeded until the juvenile court adjudicated the pending matter.¹³

Logic dictates then that where the putative father initiated parentage proceedings before the adoption petition filing, the juvenile court must resolve the parenting issues before any other court may proceed. To deny that reasoning based solely on the adoption petition's allegation defeats the purpose behind *Pushcar*'s bedrock proposition--which is to eliminate disagreements about jurisdiction and to fulfill due process. Otherwise, the stepfather in *Pushcar* could have circumvented this court's decision simply by amending his petition to allege the father as putative. After all, the father's parent-child relationship in *Pushcar* was not adjudicated when the opinion

¹² *Pushcar*, ¶14.

¹³ *Id.*

came out.¹⁴ This court could not have meant to allow that circumvention, either in *Pushcar* or any other similar case. Accordingly, where the paternity/parentage action is filed first, the bedrock proposition reiterated in *Pushcar* must apply regardless of which ground the adoption petitioner alleged.

Other jurisdictions

The Illinois Supreme Court reasoned similarly in 2007 in a case on-point with this one, *J.S.A. v. M.H.*¹⁵ In *J.S.A.*, the unwed father of the child missed the PFR filing deadline, which the law set at 30 days after the birth. Statutorily, the putative father lost any right to "maintain any action to assert any interest in the child."¹⁶ When the child was three years old, the putative father petitioned to establish parentage and to gain visitation. Before the court adjudicated those issues, the stepfather petitioned to adopt. The stepfather argued that the father's failure to register in the PFR defeated him in the adoption, voiding all orders in the parentage proceeding.

The Illinois Supreme Court disagreed, noting that the Illinois Parentage Act intended to enforce the "right of every child to the physical, mental and monetary support of his or her parents under the Act."¹⁷ Accordingly, the Parentage Act let a man initiate parenting proceedings until the child was 20 years old.¹⁸ In contrast, the PFR filing requirement aimed to avoid the injection of uncertainty and instability into the

¹⁴ Id.

¹⁵ 863 N.E.2d 236 (Ill. 2007).

¹⁶ Id., at 243 citing 750 ILCS 50/12.1 (b) and (g).

¹⁷ Id., at 249 citing 750 ILCS 45/1.1.

¹⁸ Id., citing 750 ILCS 45/8(a)(1).

adoption process, and to promote finality and stability in adoptions.¹⁹ The registry's purpose was to "determin[e] the identity and location of a putative father of a minor child who is, or is expected to be, the subject of an adoption proceeding, in order to provide notice of such proceeding to the putative father."²⁰

The court held that the statutes let the father contest the adoption because making the father register where no adoption was contemplated when the parentage action was filed did not further the PFR's purpose.²¹ Otherwise, a putative father who had not registered within 30 days after the birth could never establish parentage.²² In turn, every putative father would have to file timely in the PFR even lacking any reason to believe the PFR would ever apply to him.²³ The legislature could not have intended those results when enacting the PFR.²⁴ Rather, each statute had a separate and distinct purpose that generally did not overlap with the other, and which applied in different factual situations.²⁵ "We find that not only are the specific facts which trigger the application of the Putative Father Registry provisions nonexistent in the matter before us, but also that the specific purpose of the Putative Father Registry is not furthered by

¹⁹ Id., at 249.

²⁰ Id., at 249, quoting 750 ILCS 50/12.1.

²¹ Id., at 250.

²² Id., at 252.

²³ Id.

²⁴ Id.

²⁵ Id., at 249.

requiring [the father] to comply with its provisions."²⁶ Thus, the parentage action had to proceed on the merits.²⁷ Should the father's paternity be established, his custody and visitation rights could be granted upon finding them to be in the child's best interest.²⁸ That would not apply where the adoption petition preceded the parentage complaint.²⁹

As in *J.S.A.*, the father sought parentage in juvenile court before the stepfather petitioned to adopt. The purposes behind Ohio's parentage and adoption statutes are essentially the same as those in Illinois. And Ohio's PFR filing requirement, deadline, and consequence of non-compliance are identical to Illinois law--failure to file within 30 days after the birth waives the putative father's interest in the adoption. As in *J.S.A.*, when the father here filed his parentage action, no stepparent adoption petition was pending, contemplated, or possible. (The mother was not married then.) Thus, when enacting the PFR, the Ohio legislature could not have intended parentage to be forever foreclosed where, at the time the father seeks formal parentage, he has a personal relationship with the child and the adoption is neither contemplated nor possible. Like the purpose of the Illinois PFR in *J.S.A.*, the purpose of the Ohio PFR in promoting stability in adoptions is not furthered under these facts. The stepfather's adoption petition was merely a reaction to the parentage complaint and an attempt to short-circuit it.

²⁶ *Id.*, at 249-250.

²⁷ *Id.*, at 253.

²⁸ *Id.*

²⁹ *Id.*, at footnote 1.

A Tennessee case, *Nale v. Robertson*,³⁰ should also be persuasive. There, the Tennessee Supreme Court concluded that the state and federal constitutions required the natural father's parental rights be determined in the legitimation case before the adoption could proceed. Tennessee law let adoptions of non-legitimated children be granted under the child's best interest standard. Tennessee also made a natural father a necessary party to the adoption where he had petitioned for legitimation or filed in the PFR. The child was surrendered for adoption right after birth. Five days later, the putative father filed in the PFR and petitioned to legitimate the child. Paternity was uncontested. The prospective adoptive parents then petitioned to adopt, alleging the child's best interest. The trial court denied the father's legitimation petition, finding that adoption served the child's best interest.³¹ The court granted the adoption. The child was almost two years old then.

The Appellate Court reversed, and the Supreme Court affirmed, holding that, because the outcome of the legitimation proceeding determined the standard to use in the adoption--father's fitness or child's best interest--the father's rights could not be defeated simply by petitioning for adoption before adjudication of legitimation.³² In other words, the juvenile court could not deny a legitimation petition simply because persons other than the biological father wanted to adopt the child.³³ Instead, where

³⁰ 871 S.W.2d 674 (Tenn. 1994).

³¹ *Id.*, at 676.

³² *Id.*, at 677.

³³ *Id.*, at 678.

paternity was shown, courts could deny legitimation petitions only where legitimation would affirmatively harm the child.³⁴ Thus, the state and federal constitutions required determining the natural father's parental rights in the legitimation case before proceeding with the adoption case.³⁵ In fact, the legitimation would need to be decided adversely to the putative father before the adoption could even be considered.³⁶ Accordingly, the statute letting a court decree the adoption based on the child's best interest, without determining the father's parental rights judicially, was unconstitutional as applied to the father.³⁷ Furthermore, because the record showed that the natural father had grasped his opportunity to develop a substantial parent-child relationship, he was entitled to an order of legitimation.³⁸

Nale differs from our scenario in that the putative father there filed timely in the PFR. But if respondent releases jurisdiction based on the father's failure to register, then the criteria for granting the adoption would be those pertaining to putative fathers, not those pertaining to parents. As in *Nale*, respondent is setting the standard to use in the adoption based solely on whether an adoption was sought, not because granting rights to the father would harm the child. That is shown by the fact that had adoption not been sought, respondent would not have stayed the juvenile proceeding. Thus, letting the adoption proceed before adjudicating the father's rights would be

³⁴ Id.

³⁵ Id., at 680.

³⁶ Id., at 677.

³⁷ Id., at 680-681.

³⁸ Id.

unconstitutional as applied to this father.

*This case is distinguishable from Lehr v. Robertson*³⁹

The probate court's stay does not make an exception to the PFR contrary to *Lehr v. Robertson*. In *Lehr*, the putative father filed for filiation (paternity and visitation) and, separately, tried to vacate the adoption judgment, alleging that he did not get proper notice of it. The U.S. Supreme Court concluded that the father's failure to file in New York's PFR eliminated any need to notify him under New York law. The filiation proceeding did not entitle the putative father to notice because the adoption statute did not make that procedure a qualification for notice, and adoption statutes had to be followed precisely.⁴⁰ The trial court dismissed the filiation case. The Appellate Court affirmed the adoption judgment.

One might therefore conclude that respondent was adhering to the precise requirements of the adoption statutes by ordering the stay. But three crucial facts distinguish *Lehr* from this case.

One, unlike Ohio law, the statute challenged in *Lehr* specified no deadline for the PFR filing.⁴¹ Thus, while *Lehr* supports the constitutionality of PFRs generally, it does not support the proposition that Ohio's 30-day filing deadline furthers a legitimate state interest under these facts. One must not confuse the Ohio PFR with the deadline for filing in it. Under New York's statute, the father in *Lehr* could have registered when the

³⁹ (1983), 463 U.S. 248, 103 S.Ct. 2985, 77 L.Ed. 2d 614.

⁴⁰ *Lehr*, 463 U.S. at 265, 103 S.Ct. at 2995, 77 L.Ed. 2d at 629.

⁴¹ *Lehr*, at majority footnote 5.

child was a year and a half old to keep his standing in the adoption. But here, after the child turned 30 days old, the father could seek only parentage. Some states, like Indiana, try to avoid that situation by letting men register in the PFR within a certain time after the birth or before the adoption petition is filed, whichever is later. Statutory nuances like those make a critical difference in applying *Lehr*.

Two, the father in *Lehr* filed a paternity and visitation petition a month *after* the stepfather petitioned to adopt.⁴² The father then did not appeal the paternity action's dismissal.⁴³ In contrast, the father here brought his paternity action at least two months before the stepfather's adoption petition, and the juvenile court declined to dismiss the parentage action. Had the father in *Lehr* brought the paternity and visitation actions before the stepfather's adoption petition, the case would have proceeded differently.

Three, the father in *Lehr* lacked any personal or financial relationship with the child when the stepfather petitioned to adopt.⁴⁴ But here, as the juvenile court found, the father co-parented the child for an extended time upon and after the birth. The father also has provided health insurance for the child continuously since the child was three months old. That alone gives the father constitutional protection, which speaks against the adoption, and in favor of parentage.

Thus, *Lehr* is distinguishable from this case and does not support any notion that a final order in the juvenile case would make an improper exception to the Ohio PFR.

⁴² *Id.*, 463 U.S. at 252, 103 S.Ct. at 2988, 77 L.Ed.2d at 621.

⁴³ *Id.*, 463 U.S. at 253, 103 S.Ct. at 2989, 77 L.Ed. 2d at 621.

⁴⁴ *Id.*, 463 U.S. at 262, 103 S.Ct. at 2994, 77 L.Ed. 2d at 627.

CONCLUSION

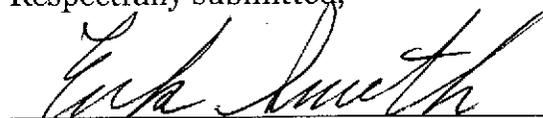
Where the putative father has initiated parentage proceedings before the adoption petition, *Pushcar* dictates that the juvenile court must resolve the parenting issues before another court may proceed. To deny that reasoning based solely on the adoption petition's ground only encourages disagreements about jurisdiction.

Here, when the father filed his paternity action, no stepparent adoption was contemplated or possible. Thus, the Ohio PFR's purpose of giving timely notice to fathers so adoptions can proceed promptly and finally is not furthered by the 30-day filing deadline in this case. The Ohio legislature could not have intended to foreclose parentage for a man who has a financial and personal relationship with the child simply for not filing in the PFR long before an adoption was contemplated.

Respondent's stay also sets the standard to use in the adoption solely because an adoption was sought, not because granting the father rights would affirmatively harm the child. That violates the father's due process right.

Lehr v. Robertson does not apply, as the validity of the Ohio PFR as a general mechanism is not questioned. Rather, the validity and application of the PFR filing deadline, construed with the parentage act, under these particular facts is the crux issue. Thus, respondent has unnecessarily delayed proceeding to judgment by erroneously staying the proceeding. Accordingly, this court should grant the writ of procedendo.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I mailed a true copy of the above amicus brief by regular U.S. Mail to the following persons on February 29, 2008:

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