

IN THE SUPREME COURT OF OHIO

ORIGINAL

09-1757

In the Matter of the Adoption of:
Paityn Alexa (Tuttle) Crooks

On Appeal from the Hamilton
County Court of Appeals
First District Court of Appeals

Gary D. Otten,

Appellant,

Court of Appeals
Case No. C-081149

v.

Kevin Michael Crooks

Appellee.

MOTION FOR STAY

Gary D. Otten Pro Se
1907 Eastern Ave.
Covington, KY 41014
Tel No. (859)-468-8911
Fax No.(512) 532-7163 (note 512 area code)
gdotten@gmail.com

PRO SE

Michael R. Voorhees (0039293)
11159 Kenwood Rd.
Cincinnati, OH 45242
Tel No. (513)-489-2555
Fax No. (513)-489-2556
mike@voorheeslevy.com

COUNSEL FOR APPELLEE

FILED
SEP 30 2009
CLERK OF COURT
SUPREME COURT OF OHIO

Comes now Gary D. Otten representing himself and pursuant to S.Ct.Pr.R. II, §2(A)(3), requests a stay of the Hamilton County First District Court of Appeals Decision of September 2, 2009 in Case No. C-081149 pending resolution of this appeal. Copies of the appellate court's Final Entry and Opinion entered Sept 2, 2009, are attached hereto as Exhibit A and B respectively. The reasons for this request are set forth more particularly in the following memorandum of law.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'G. Otten', written over a horizontal line.

Gary D. Otten Pro Se
1907 Eastern Ave.
Covington, KY 41014
Telephone (859) 468-8911
Fax: (512) 532-7163 (note 512 area code)
Email: gdotten@gmail.com

MEMORANDUM OF LAW

I. Background

This matter relates to a Juvenile court and a Probate court proceeding regarding Paityn Alexa Tuttle a child who was born as a result of a relationship between Susan Crooks (Mother) and Gary Otten. Paityn was born July 13, 2005. On Aug 9, 2005 Otten and the Mother took Paityn for a DNA test. A DNA report was issued on Aug 12, 2005 showing Otten to be the Father. After that the parents spent over a year parenting Paityn together and generally making joint decisions regarding her upbringing. Otten supported and spent a lot of time with his daughter. In the last months of 2006 the parents romantic relationship started to cool. By January 29, 2007 the relationship cooled to the point that Otten thought it could permanently effect his parenting time with his daughter. As such he filed papers in the Clermont County Juvenile Court to have legal rights to his daughter, the DNA test showing Otten was the father of Paityn was also filed. The Mother responded to this motion with a motion of her own asking for support. These motions were set for a hearing on March 26, 2007. However on March 19, 2007 the Mother moved to continued the March 26, 2007 hearing, it was continued until May 11, 2007. On April 13, 2007 the Mother got married and a week after that on April 20, 2007 her new husband Kevin M. Crooks filed to adopt Paityn in the Hamilton County Probate Court. Otten requested that the Probate court stay the adoption. That motion was granted on June 6, 2007 pending a decision by the Juvenile court. In the Juvenile court there were a few decisions that followed, which required some revision, but on March 10, 2008 the Magistrate issued an order which was later affirmed by the judge. Otten was found to be the Father, and granted standard parenting time and a order for support was issued. After the Juvenile court ruling, Otten filed a motion to dismiss the adoption in the Hamilton County Probate court. That motion was granted

by the Magistrate, appealed by Crooks and affirmed by the Judge. Crooks then appealed to the First District Court of Appeals. On September 2, 2009 the court issued its opinion, reversing and remanding back to the trial court, from that decision reversing and remanding, this appeal is timely taken.

II. Arguments

A. Request for a Stay during appeal to the Supreme Court of Ohio

For the reasons described below, Otten submits that the circumstances in this case warrant this motion to stay pending judicial review. In seeking an injunction or in this case a stay, Otten must establish the following: 1) probability of success on the merits 2) balance of harm weighs in favor of granting preliminary relief 3) Otten will suffer irreparable harm, and 4) the granting of preliminary relief will serve the public interest.¹

1. Probability of the Ohio Supreme Court allowing jurisdiction and success on the merits

The application of R.C. §3107.07(B) to Otten would fail strict scrutiny. Otten and the trial court looked first to *In re Adoption of Pushcar*² for a simple path to resolve this case. Otten has also looked to other facts of the case, and to the Ohio and Federal constitutions for protection when arguing his case in the Probate court³. This case will give the Court an opportunity to clarify the *Pushcar* ruling and to clarify the procedure to follow once the court that had jurisdiction first, reaches a judgment. The following arguments will be made by Otten in regards to this case.

a. An adoption without Otten's consent would violate Otten's rights under the equal protection clause. Otten spent a lot of time with his daughter, and provided private health

1 *KLN LOGISTICS v. NORTON*, 174 Ohio App.3d 712 (2008) 2008-Ohio-212 at ¶8.

2 *In re Adoption of Pushcar* (2006), 110 Ohio St.3d 332, 853 N.E.2d 647.

3 Fathers memorandum of support of Stay Oct 12, 2007.

insurance, money, food, clothes, took his child to get a DNA test to show he is the biological father.⁴ Otten also filed a parentage action, with an attached affidavit stating he was the father. The DNA test was also attached. This parentage action was filed months before the adoption petition was filed. Otten is entitled to substantial rights under the Equal Protection Clause. The court in *Caban v. Mohammed*, 441 U.S. 380 (1979) noted “But in cases such as this, where the father has established a substantial relationship with the child and has admitted his paternity”...”The sex-based distinction in § 111 between unmarried mothers and unmarried fathers violates the Equal Protection Clause of the Fourteenth Amendment because it bears no substantial relation to any important state interest”. For the reasons stated Otten should be able to veto an adoption just as the Mother can.

b. Because he supported and had lots of contact with the child, Otten's Due Process Rights are being violated. The United States Supreme Court and the Ohio Supreme Court require any statute that deprives parents of a fundamental liberty interest in being parents be “fundamentally fair.”⁵ Due process requires notice and an opportunity to be heard and, more importantly as to the case at bar, the opportunity to be heard “must occur at a meaningful time and in a meaningful

4 Undisputed sworn testimony given by Gary D. Otten in the Trial Court of Common Pleas, Juvenile Division, Clermont County, Ohio Case No. 2007-JG-14510. June 20, 2007. “We stayed at Susan's for extended periods of time, you know, weeks at a time, and , you know, Susan came over to my house....Clothes, food, money, just, you know, stuff like that. We've lived together..Me and Susan and Paityn and Hannah and Alana....holidays, summer, stuff like that..Just lots of money going back and forth there's no way you could count those things; also see: Fathers memorandum of support of Stay Oct 12, 2007.

5 *Santosky v. Kramer*, (1982) 455 U.S. 745; 102 S. Ct. 1388; 71 L. Ed. 2d 599 (syllabus paragraph 1) (“Process is constitutionally due a natural parent at a state-initiated parental rights termination proceeding. (a) The fundamental liberty interest of natural parents in the care, custody, and management of their child is protected by the Fourteenth Amendment, and does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. A parental rights termination proceeding interferes with that fundamental liberty interest. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.

manner.”⁶ The *Lehr v. Robertson*⁷ court found “Where an unwed father demonstrates a full commitment to the responsibilities of parenthood by “com[ing] forward to participate in the rearing of his child,” *Caban v. Mohammed*, 441 U. S. 380, 441 U. S. 392, his interest in personal contact with his child acquires substantial protection under the Due Process Clause”.⁸

This case distinguishes itself from *Lear v. Robertson* in that, Otten supported and had lots of contact with his child. The Father in *Lehr* filed his parentage action *after* the adoption petition was filed, Otten filed his parentage action *before* the adoption action was filed.

The putative Father registry was created to provide notification to potential Fathers of an imminent adoption and to relieve Mothers of the responsibility of locating wayward putative fathers. If the putative father is not in the registry, has not been declared the legal father yet, and presumably isn't involved in a Juvenile court proceeding to determine parentage. Then the adoption can proceed swiftly which is an understandable compelling interest of the State. The thirty day deadline one can imagine is to facilitate infant adoptions after the 30th day. In the case at bar however a statute designed to support a notification scheme for Adoptions, with clear intent and purposes is being misapplied, because Otten was already participating with the Mother in a juvenile case to establish himself as Father. There is no compelling interest of the State to expedite adoptions where the father has previously filed motions in Juvenile court stating he is the biological father, and stating his desire to raise his daughter. In the initial Juvenile filing,

6 *State of Ohio v Cowan*; 103 Ohio St. 3d 144, 146; 2004 Ohio 4777; 814 N.E.2d 846, 848 at ¶8. (“[A]t its core, procedural due process under both the Ohio and United States Constitutions requires, at a minimum, an opportunity to be heard when the state seeks to infringe a protected liberty or property right. Further, the opportunity to be heard must occur at a meaningful time and in a meaningful manner.”)(internal citations omitted)

7 *Lehr v. Robertson* (1983), 463 U.S. 248, 265, 103 S.Ct. 2985

8 U.S. Const. Amend. 14, § 1 (Citizens of the United States)(“ ... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws”)

Otten requested shared parenting, he also wrote "Gary has custody of his other kids age 6,7 (Girls), Paityn can be at Dads anytime, when it doesn't interfere with Mom's schedule".

Otten is being denied his due process rights because of a notification scheme that he didn't know about. However, at the time of the adoption filing, Otten was known by the State as a party who had an interest in Paityn. Otten had already initiated parenting proceedings in the Juvenile Court, with the Mother actively participating in those proceedings. As a result, Otten learned of the adoption attempt, and was able to participate in the adoption proceedings fully. Excluding him from participating in them now after they are over, for failure to participate in a prior notification scheme designed to give notice to the same proceeding, doesn't make sense, in that again it is not a compelling interest of the State.⁹

c. Otten and Mother may have determined paternity in an administrative proceeding. By the filing of his motion to establish parenting rights in the Juvenile Court January 29, 2007 with the attached DNA report showing that he was the father, and signing the affidavit that accompanies that paperwork stating he was Paityn Tuttle's Father. Otten was "legally screaming"¹⁰ to everyone within earshot that he was the father, the Mother heard and later that

⁹ Eldridge v. Williams, 424 U.S. 319, 335 (1976) "More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: first, 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. See, e.g., Goldberg v. Kelly, supra at 397 U. S. 263-271."

¹⁰ This is a binding judicial admission.

Gerrick v. Gorsuch (1961), 172 Ohio State 417, 178 N.E.2d 40 (syllabus ¶2); Faxon Hills Constr.v.United Brotherhood Carpenters (1958), 168 Ohio St. 8, 151 N.E.2d 12 (syllabus ¶1)

Cf. Civ. R. 12(C) Motion for Judgment on the Pleadings;

See 43 Ohio Jur. 3d Evidence and Witnesses § 293 (Admission made in other proceedings)
("Judicial admissions are not only receivable against the pleader in proceedings other than

day she went and filed papers along with a Sworn affidavit stating that Otten was Paityn's biological Father, and asking to start the process to allow Otten to pay support. These two notarized affidavits combined, may be an acknowledgment of paternity as defined by R.C. §3111.31. If not they come close, and they show the intent of both parties. Filing deadlines, and judicial admissions are an important part of the legal process, they offer some protection. In this case, they show both parents intent to declare Otten the Father and to take a parentage action to a conclusion under the R.C. §3111 statutes. It's true Otten and the Trial court, thought Pushcar provided a simple way to solve the case, but the other overbearing facts of this case can't be overlooked, especially if Pushcar is found not to apply.

d. The Pushcar ruling was applied correctly by the trial court to Otten's case. It turns out that the Pushcar case is like a beautiful painting, everyone sees in it something a little different. Indeed the fact that the mother in Pushcar claimed consent not required because of R.C. § 3107.07(A) shouldn't matter, the case may have also been filed under a different section of R.C. §3107.07. The Pushcar court seemed to recognize this, and provided for that in their blanket ruling, that “When an issue concerning parenting of a minor is pending in the juvenile court, a probate court must refrain from proceeding “emphasis added” with the adoption of that child.” The Court also applied the well established “jurisdictional priority rule” which holds that as between two courts of concurrent jurisdiction, the court that first obtains jurisdiction must be allowed to take the case to judgment.¹¹ In re Adoption of Asente, 90 Ohio St.3d 91 (2000) the

those in which they were filed on behalf of the pleader's opponent, but a pleading containing an admission is also admissible against the pleader in a subsequent proceeding on behalf of a stranger to the former action.”)

¹¹ *Id.* (citing *State ex rel. Shimko v. Franklin Cty. Court of Common Pleas* (1998), 81 Ohio St.3d 1244, 1246, 691 N.E.2d 677; and *State ex rel. Racing Guild of Ohio v. Morgan* (1985), 17 Ohio St.3d 54, 56, 476 N.E.2d 1060, quoting *State ex rel Ohillips v Polcar* (1977), 50 Ohio St.2d 279; 364 NE2d 33 (syllabus)(“As between courts of concurrent jurisdiction, the tribunal whose power is first invoked by the institution of proper proceedings acquires jurisdiction, to the exclusion of all other tribunals, to adjudicate upon the whole issue and to settle the rights

court used poignant words to express their view of the type of case Otten is now engaged in.

“There are many statutes, and proposed statutes, throughout this murky area of the law designed to avoid the very situation we find ourselves in today. One common thread runs through every statute, every court opinion, and every learned treatise on this matter. That common thread is built on 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.”

Crooks argues that any rulings by the Juvenile court are meaningless because Otten already missed the 30 day filing deadline of the registry. This is an incorrect interpretation however, because it also seems to be implied from the case law that when the probate court proceedings resume, it is not the data set related to all the parenting issues, that was present at the beginning of the Juvenile court proceeding that should be taken into account for processing by the probate court, nor the data set that was present at the time the petition for adoption was filed. The data set that the probate court works off of after it resumes proceedings after a stay, is the data set that the juvenile court hands back to it. This is the way the Pushcar case was processed. (Table 1.) Presumably this is the way the Pushcar ruling is meant to be applied. Put another way, in family law cases such as this, when two courts of concurrent jurisdiction are addressing various aspects of the same case that are interrelated. The court that obtains jurisdiction first proceeds to a judgment. That judgment is used by the court that refrained, to render any additional judgments. The refraining court proceeds as if the filing date of the case before it, is the day after the first court rendered their decision.

of the parties.”)

Crooks and the 1st District Appeals Court argue, that a filing in a probate court freezes the data set that the probate court will work off of, unless the facts of the complaint giving rise to the probate action, can be altered by the Juvenile court directly. Crooks argues that if the Juvenile court alters the foundation upon which those facts rest, it can't be taken into consideration by the probate court. Case law seems to contradict that, in fact Pushcar altered the foundation, but not the direct fact of non support.

Case	Legal Status at time of adoption petition filing (foundation)	Facts which always remains true	Quick Glance Not considering which court had jurisdiction first, or other factors.	After Juvenile Court Judgment of Legal Status	Consent Required After Juvenile Decree?
Pushcar	Putative Father	Didn't Support for 1 year prior to adoption petition	Filed under 3107.07(A) the adoption case perhaps could have been dismissed, then refiled under 3107.07(B), not considering jurisdiction	Father	Yes Now he is Father, Being Father resets support and communication clock
Otten	Putative Father	Didn't register as putative father in registry	Filed under 3107.07(B) The adoption case could have proceeded, not considering jurisdiction and other facts	Father	Yes Now he is Father, Being Father renders moot the fact of not registering for registry.

Table 1

The analysis of this issue in the Appellate court decision of September 2, 2009 in ¶17 through ¶23 is contradictory. In order to support their decision in Otten's case, the appellate court, had to reanalyze and reinterpret some of the findings of the Pushcar courts and the legal status of the biological dad¹² in Pushcar". Also, in the appellate court's decision in ¶25 it cast a grim view of one of Otten's arguments regarding the application of R.C. §3107.07(B) and 3107.11 to Otten's case. However it is exaggerated, no rewriting of the statute is necessary. All

¹² Biological Dad means the Male in Pushcar Nicholas Verdone. Stating him as Father or Putative Father seems to confuse the argument.

that Otten requires to make his case, is a bit of reasoning when applying the statute, like the Brooks Court did¹³ and like the Pushcar and Asente decisions suggest.

At ¶21 in the appellate's court decision it states “Pushcar involved the application of R.C. §3107.07(A) as an exception to the requirement of a fathers consent to adopt, not R.C. §3107.07(B)(1) and R.C. §3107.11 which are at issues in this case.” The major factor in Pushcar and Otten's case is that they already filed actions in Juvenile court. Both Fathers were relying on juvenile court decisions being reached under the R.C. §3111 statutes before application of R.C. §3107.07 statutes because they *had previously filed Juvenile actions* which meant the Juvenile courts had first Jurisdiction, that is the overriding factor of both cases. The Mother in Pushcar could have amended her petition, if the Juvenile court wouldn't have been allowed to proceed to declare Mr. Verdone the Father.

The Appeals court ruled In re Adoption of Pushcar, 2005-Ohio-5114 ¶19 The second issue is whether or not the probate court had the authority to proceed on the adoption petition prior to the conclusion of the paternity action in juvenile court. We hold that they did not.... ¶29 “the probate court had jurisdiction to consider appellee's petition, notwithstanding the pending action in juvenile court” (“emphasis added”) ...¶32” It is clear from the Supreme Court’s language that while they acknowledge the dual jurisdiction rule established in *Biddle*¹⁴, they were announcing unequivocally that legal “tugs of war” by multiple courts over a single child simply cannot be tolerated. The language in the *Asente* case stands foursquare with the instant case. It cannot be emphasized too strongly that the Lake County Juvenile Court should be allowed to adjudicate the matter before it to a conclusion, and that all other courts refrain from intervening therein unless and until there is an adjudication from that

13 In the Matter of the Adoption of Brooks, 136 Ohio App.3d 824 (2000)

14 *In re Biddle* (1958), 168 Ohio St. 209

court”

The appeals court decision in Otten's case, is not consistent with Pushcar and other rulings by the Supreme court of Ohio. The decision in Otten's case would have an analogy with the appeals court in Pushcar giving orders to reverse and dismiss the adoption, because the Pushcar father Nicholas Verdone hadn't been legally declared the father. This is not what the appeals court in Pushcar decided, instead they remanded with direction to the trial court that they must refrain until the Juvenile matter was finished. The Supreme court later affirmed that decision.

It was ultimately the fact that the appeals court ruled that the Juvenile court should proceed first, and the subsequent declaration by the Juvenile court, that shut down the Pushcar adoption attempt.

Otten has tried to frame the Pushcar question in as many different ways as possible. The bottom line is that both Fathers kept there procedural due process rights intact, by the Juvenile Court, who had jurisdiction first, being allowed to proceed to a judgment, before the adoption proceedings were allowed to proceed. Fathers in the respective cases, were relying on the Juvenile Courts jurisdiction and subsequent rulings to be able to withhold consent to an adoption.

e. Mother and Step Father should be equitably estopped from pursuing an adoption action based on Otten still having status as putative father. Mother asked for a continuance of the Parentage Action after knowing and admitting Otten was the Father in those proceedings. Otten didn't oppose the continuance, because he thought the Mother was acting in good faith. The continuance prevented the judge from issuing a decree that Otten was Paityn's Legal Father. After seeking a continuance, the Mother then got married and with Step-Father in tow, ran to the probate court in a different county, to claim that Otten wasn't the legally declared Father yet.

Because Otten wasn't the legal father, Mother and Step-Father claimed he had lost the right to withhold consent to an adoption, because he did not register for the putative father registry.

This created an equitable estoppel.¹⁵ Thus the Mother and Step-Father should be equitably estopped from proceeding with the adoption on the basis that Otten's consent is not necessary.¹⁶

Lacking the continuance Mother asked for in bad faith Otten would have been declared the Legal father.

f. The putative father registry is being misapplied to this case, because no adoption was

15 KORDEL v. OCCHIPINTI, 2007-L-163 (12-19-2008){¶ 10}"The purpose of equitable estoppel is to prevent actual or constructive fraud and to promote the ends of justice. It is available only in defense of a legal or equitable right or claim made in good faith and should not be used to uphold crime, fraud, or injustice. * * * The party claiming the estoppel must have relied on conduct of an adversary in such a manner as to change his position for the worse and that reliance must have been reasonable in that the party claiming estoppel did not know and could not have known that its adversary's conduct was misleading." State Bd. of Pharmacy v. Frantz (1990), 51 Ohio St.3d 143, 145, citing Heckler v. Community Health Servs. (1984), 467 U.S. 51, 59. "It is therefore fundamental to the application of equitable estoppel for plaintiffs to establish that * * * specific actions by defendants somehow kept them from timely bringing suit * * *," Doe v. Archdiocese of Cincinnati, 109 Ohio St.3d 491, 2006-Ohio-2625, ¶ 45 (citation omitted).

42 Ohio Jur. 3d Estoppel and Waiver § 24 (Equitable Estoppel or Estoppel in Pais)
(The purpose of equitable estoppel is to prevent actual or constructive fraud and to promote the ends of justice. In determining its application, the counter equities of the parties are entitled to due consideration. The doctrine is available only in defense of a legal or equitable right or claim made in good faith, and can never be used to uphold crime, fraud, injustice, or wrong of any kind. From the nature of equitable estoppel, it is apparent that the doctrine will find a great variety of applications in almost any sort of proceeding.")

American Definition: The most comprehensive definition of equitable estoppel or estoppel in pais is that it is the principle by which a party who knows or should know the truth is absolutely precluded, both at law and in equity, from denying, or asserting the contrary of, any material fact which, by his words or conduct, affirmative or negative, intentionally or through culpable negligence, he has induced another, who was excusably ignorant of the true facts and who had a right to rely upon such words or conduct, to believe and act upon them thereby, as a consequence reasonably to be anticipated, changing his position in such a way that he would suffer injury if such denial or contrary assertion was allowed. *28 Am Jur 2d Estoppel and Waiver § 28*

16 Asserted in Fathers memorandum of support of Stay Oct 12, 2007.

necessary or contemplated at the time of the Juvenile Court filing. Per R.C. §3111.05 Otten has until the child reaches the age of 23 to determine the existence or nonexistence of a father and child relationship regardless of whether or not he has registered with the putative father registry. The Juvenile court has original jurisdiction to determine paternity, under §3111.01 to §3111.18 of the Revised Code¹⁷. Otten was following these statutes and deadline when he filed for parenting rights. At the time of the Juvenile case filing no step-parent adoption was contemplated, as the Mother was not married yet. The adoption attempt of Paityn was without a need, there was no necessity, other than the Mothers necessity to prevent Otten from obtaining parenting rights under R.C. §3111.01 – R.C. §3111.99. The child in this case had two parents willing to provide a stable home, under these circumstances no compelling Private, Public or State interest is served by allowing Crooks to adopt Paityn via a step parent adoption. In The matter of the Adoption of Zschach¹⁸ the purpose of the adoption statutes is discussed

Ultimately, the goal of adoption statutes is to protect the best interests of children. In cases where adoption is necessary, this is best accomplished by providing the child with a permanent and stable home, see *In re Adoption of Ridenour* (1991), 61 Ohio St.3d 319, 328, 574 N.E.2d 1055, 1063, and ensuring that the adoption process is completed in an expeditious manner. See *In re Adoption of Baby Girl Hudnall* (1991), 71 Ohio App.3d 376, 380, 594 N.E.2d 45, 48. If these goals are met, the new parent-child relationship will have the best opportunity to develop fully.

The following Illinois case explains it better, the laws of Ohio and Illinois are similar when it comes to the putative father registry. When the Ohio General Assembly enacted Am.Sub.H.B. No. 419 in 1996, just like the Illinois legislature, they were trying to solve the notification issues that surround adoptions.

17 R.C. §2151.23(B)(2)

18 *In re Adoption of Zschach*, 75 Ohio St.3d 648 (1996)

The Illinois Supreme Court was presented with a case like the case at bar and reached a different conclusion than the First District Court of Appeals. In *J.S.A. v. M.H.*, 224 Ill.2d 182 (2007), the court found that because of the different reasons that lead to the parentage act, the adoption legislation and the putative father registry, the putative father registry didn't apply to the Biological Father because at the time of his filing of the parentage action, no adoption was contemplated. Since the parenting laws of Ohio and Illinois are similar, the following excerpt from the ruling will likely be a better argument than anything that Otten could put forth. A complete reading of the decision sheds even more light on the thought process of the Illinois Supreme court in their case, it was to say the least extensive.

Looking, as we must, to the plain language of both the Parentage Act and the Putative Father Registry provisions, we begin by observing that the General Assembly specifically set forth separate and unique public policy purposes for each enactment. With respect to the Parentage Act, the legislature stated that the public policy purpose of that statute is to further the "right of every child to the physical, mental, emotional' and monetary support of his or her parents under this Act." 750 ILCS 45/1.1 (West 1998). In other words, in enacting the Parentage Act the General Assembly intended to establish a statutory scheme whereby a court determines who is the parent of the child in the eyes of the law, which, in turn, implicates the rights and responsibilities of that person *vis-a-vis* the child with respect to physical, emotional and financial support. To further this important objective, the Parentage Act contains a long-term statute of limitation, which allows a man to institute parentage proceedings until the child reaches 20 years of age. 750 ILCS 45/8(a)(1) (West 1998).

In contrast, the legislature has explicitly stated that the purpose of the Putative Father Registry is 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." 750 ILCS 50/12.1 (West 1998). The Putative Father Registry provisions contain a short-term window for registration (750 ILCS 50/12.1(b) (West 1998)), and the plain language of the Registry provisions state that they apply only in those instances where an adoption is pending, or where it is expected that there will be an adoption. The Putative Father Registry provisions purport "only to ensure that a putative father, who registers promptly, that is, within the time limits specified in the statute, is notified of adoption proceedings so that he can assert his parental rights while those proceedings are pending." (Emphasis omitted.) In re Petition to Adopt O.J.M., 293 Ill. App. 3d 49, 57 (1997). The registration requirement thereby "avoids the injection of uncertainty and instability into the adoption process" and promotes the finality and stability of

adoptions. *In re Petition to Adopt O.J.M.*, 293 Ill. App. 3d at 57.

The plain meaning of the language employed by the General Assembly in each enactment could not be clearer: each statute has a specific and distinct purpose which does not generally overlap with the other, and each applies in different factual situations. 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 requiring J.S.A. to comply with its provisions. The case before us does not present a situation where, in direct response to a pending, *bona fide* adoption action, a putative father is attempting to establish parentage in an effort to bring himself within section 8(b)(1)(B) of the Adoption Act (750 ILCS 50/8(b)(1)(B) (West 1998)), which provides that an order of parentage allows him the right to with-hold consent to the adoption. Such a situation injects into the adoption proceedings the exact type of uncertainty, instability and threat to finality intended to be eliminated by the provisions of the Putative Father Registry. Instead, the factual situation in the instant cause presents the exact *opposite* of that situation.

The record in the instant appeal establishes that J.S.A. Was the first party to initiate judicial proceedings in the circuit court of Will County by filing a petition to establish a father-child relationship with W.T.H. under the Parentage Act. It was only after J.S.A. filed his paternity action under the Parentage Act that M.H. and W.C.H. commenced adoption proceedings with respect to W.T.H. — apparently doing so in direct response to J.S.A.'s earlier parentage petition. Thus, at the time that J.S.A. filed his parentage petition, no action for the adoption of W.T.H. was pending in the circuit court. Further, no reasonable argument can be raised that J.S.A. would "expect" that M.H. and W.C.H. would file an adoption action with respect to W.T.H., as M.H. is the natural mother of the child and as W.C.H. took the position — even in the adoption petition itself — that he was the child's biological father. Accordingly, the factual situation present here does not trigger the requirements of the Putative Father Registry, because W.T.H. was neither the subject of a pending adoption proceeding nor expected to be the subject of such a proceeding at the time J.S.A. filed his parentage action. See 750 ILCS 50/12.1 (West 1998).

In addition, the purposes of neither statute would be furthered by imposing such a requirement here. In the matter before us, J.S.A. petitioned the court to establish parentage and, in response, the marital couple attempted to thwart his parentage action by instituting adoption proceedings six weeks later for a child that they had in their custody for nearly four years imposing the requirement that J.S.A. was mandated to comply with the provisions of the Putative Father Registry as a prerequisite to filing his parentage action under these facts would certainly not further either statute's objectives, especially that of the Putative Father Registry to provide notice of adoption proceedings to the putative father. As stated, in Page 207 this case the adoption proceedings were instituted in response to J.S.A.'s parentage petition, and there was no question that all parties were aware of J.S.A.'s identity and his contention that he is the biological father of W.T.H.

In sum, the plain language of both the Parentage Act and the Putative Father Registry provides no indication that the Putative Father Registry provisions were intended by the General Assembly to apply to filings under the Parentage Act when there is no adoption action pending or contemplated at the time a parentage petition is filed. Although our decision is based upon the plain language of the statute, we observe that our conclusion is consistent with the legislative history of the Putative Father Registry. The Putative Father Registry found its genesis in the aftermath of this court's decision in *In re Petition of Doe*, 159 Ill. 2d 347 (1994), commonly known as the "Baby Richard" case. The Putative Father Registry provisions were included as part of House Bill 2424, which was enacted as Public Act 88-950 on July 3, 1994 — only 17 days after this court's decision in *Doe*. Pub. Act 88 — 550, eff. July 3, 1994; see also *In re Petition to Adopt O.J.M.*, 293 Ill. App. 3d at 54-55 (discussing the Page 208 history of the Putative Father Registry requirements and that the statute was enacted in response to the "Baby Richard" decision); S. Bostick, *The Baby Richard Law: Changes to the Illinois Adoption Act*, 82 Ill. B.J. 654 (1994) (same).

The legislative debates on House Bill 2424 reinforce the notion that the main objectives of the Putative Father Registry are to provide timely notice to a putative father in adoption proceedings and to avoid uncertainty and ensure finality in those actions. In one example, Representative Dart explained the purpose of the enactment as follows: "[T]he thrust of the Bill * * * what its attempting to do is to put some type of . . . some finality and some type of predictability into our adoption laws as they exist right now. As the 'Baby Richard' case [has] highlighted to many people, there are some major problems here. * * * The provisions here set up a registry, a registry for parents so that a biological father does not have to worry about the fact that he might run into some type of problem or disagreement with the biological mother [because] [he] will have the opportunity to sign on to a registry so that his rights will be ensured." 88th Ill. Gen. Assem., House Proceedings, June 30, 1994, at 105 (statements of Representative Dart).¹⁹

g. The Ohio legislature directs courts to interpret laws to withstand constitutional scrutiny, and to strike a fair balance between competing laws, based on what their intent was. The appeals court in their decision stated that "We can only conclude that the statutes mean this: If you fail to timely register on the putative father registry, or if you fail to take other enumerated action before the petition is filed, then, as here, your child can be adopted without notice and your consent." Allowing this statute to stand alone and trump all other statutes may not make sense when applied to Otten. Indeed it was already found not to apply by a decree of Fatherhood as the

19 *J.S.A. v. M.H.*, 224 Ill.2d 182 (2007)

Brooks Court found²⁰. A similar finding in the case at bar, would keep the statutes dealing with the putative father registry constitutionally intact, the ruling in Pushcar seems to anticipate these situations, and seems designed to prevent them or at least to err on the side of caution. The Ohio Legislature provides rules of construction to aid courts in interpreting all statutes, which includes considering the consequences of a particular construction in light of the Legislative purpose and intent.²¹ The Ohio Supreme Court directs courts to review several factors, including: “the circumstances surrounding the legislative enactment, the history of the statute, the spirit of the statute, and the public policy that induced the statute's enactment.”²² A cardinal rule of construction is that a reasonable result was intended and all statutes should be so construed.²³ Further, when addressing interrelated provisions and statutes, the court should harmonize them.²⁴

20 In the Matter of the Adoption of Brooks, 136 Ohio App.3d 824 (2000)

21 R.C. § 1.49 (Aids in construction of ambiguous statutes)

If a statute is ambiguous, the court, in determining the intention of the legislature, may consider among other matters the:

- (A) object sought to be attained;
- (B) circumstances under which the statute was enacted;
- (C) legislative history;
- (D) common law or former statutory provisions, including laws upon the same or similar subjects;
- (E) consequences of a particular construction;
- (F) administrative construction of the statute

22 *State v. Moaning* (1996), 76 Ohio St.3d 126, 666 N.E.2d 1115.

23 *State ex rel. Toledo Edison Co. v. Clyde* (1996), 76 Ohio St.3d 508, 668 N.E.2d 498; *State ex rel. Haines v. Rhodes* (1958), 168 Ohio St. 165, 151 N.E.2d 716 (syllabus ¶2) (“The General Assembly is presumed not to intend any ridiculous or absurd results from the operation of a statute which it enacts, and, if reasonably possible to do so, statutes must be construed so as to prevent such results.”)

85 Ohio Jur. 3d Statutes § 247 (Consequences of Interpretation; Avoidance of Undesirable Consequences; Reasonableness or Absurdity) (“[I]f the construction and interpretation of statutory language reveals the statute to be facially ambiguous, it is the function of the courts to construe the statutory language to effect a reasonable result. Doubtful provisions should, if possible, be given a reasonable, rational, sensible, or intelligent construction”)

24 *United Tel. Co. of Ohio v. Limbach* (1994), 71 Ohio St.3d 369, 372, 643 N.E.2d 1129, 1131; See also, *Bayside Nursing Ctr. v. Ohio Dept. of Health* (1994), 96 Ohio App.3d 754, 761, 645 N.E.2d 1314, 1318.

With regard to adoption statutes in specific; “[A]ny exception to the requirement of parental consent must be strictly construed so as to protect the right of natural parents to raise and nurture their children.”²⁵ Adoption is “the family law equivalent of the death penalty” so the court must grant the parent “every procedural and substantive protection the law allows.”²⁶ Because they have “the effect of abrogating the common-law rights of natural parents, (adoption statutes) must be strictly construed to protect the rights of natural parents.”²⁷

The Ohio Supreme Court directs courts to interpret a statute so as to preserve its constitutionality or, stated another way, to avoid a constitutional problem in the first place.²⁸

h. As a minor argument, Otten wasn't put on notice of the putative father registry when he

²⁵ *In re Adoption of Greer* (1994), 70 Ohio St.3d 293, 638 N.E.2d 999 (citing *In re Adoption of Schoeppner* (1976), 46 Ohio St.2d 21, 24, 75 O.O.2d 12, 13, 345 N.E.2d 608, 610.

²⁶ *In re Groh* (2003), 153 Ohio App.3d 414, 427, 2003-Ohio-3087, 794 N.E.2d 695 *In Re Smith* (1991), 77 Ohio App.3d 1.

²⁷ *In re Adoptions of Groh*, 153 Ohio App.3d 414, 427, 2003-Ohio-3087, 794 N.E.2d 695 (citing *In re Adoption of Jorgensen* (1986), 33 Ohio App.3d 207, 209, 515 N.E.2d 622.)

See 47 Ohio Jur. 3d Family Law § 883 (Necessity for strict compliance)(“Any exception to the requirement of parental consent must be strictly construed because a decree of adoption divests a parent of all legal rights and obligations due from the child and the child is released from all legal obligations to the parent.”)

²⁸ *In re Adoption of Greer* (1994), 70 Ohio St.3d 293, 638 N.E.2d 999 (“Moreover, this court has long recognized it to be a well-settled principle of statutory construction that “where constitutional questions are raised, courts will liberally construe a statute to save it from constitutional infirmities.”)(citing *State v. Sinito* (1975), 43 Ohio St.2d 98, 101, 330 N.E.2d 896, 898)

Brookbank v. Gray (1996), 74 Ohio St.3d 279, 658 N.E.2d 724 (“[T]here is another reason why we cannot interpret the statute as the trial court did. This is because “[w]here reasonably possible, a statute should be given a construction which will avoid rather than a construction which will raise serious questions as to its constitutionality.”)(citing *Co-operative Legislative Comm. of Transp. Bd. v. Pub. Util. Comm.* (1964), 177 Ohio St. 101, 202 N.E.2d 699 (paragraph two of the syllabus))

See *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 115 S.Ct. 464, 467 (1994); *Eubanks v. Wilkinson*, 937 F.2d 1118, 1122 (6th Cir.1991)(“Courts construe statutes to avoid constitutional difficulty when fairly possible.”)

had sex with the Mother. Otten stated in sworn testimony²⁹ in Juvenile court, all consensual sex took place in Kentucky.³⁰ R.C. §3107.061 puts a man on notice who has sexual intercourse with a woman. This notice only extends to a man having sex within the geographical boundaries of the State of Ohio. An ordinary and legal action by Otten in his home state of Kentucky, can't put him on notice that he may lose his constitutional rights in a future application of law in another state. The United States Supreme Court in *May v. Anderson*³¹ held that a state must have in personam jurisdiction over a parent to make an order that validly affects his/her rights to child custody. In an article published in the Harvard Journal of Law & Public Policy Summer 2002 by Mary Beck, with the Title "Toward a National Putative Father Registry Database (Adoptions):" it states "Recently, in the context of adoptions where interstate travel was used to thwart their efforts to assert paternity, two unwed fathers successfully sued in tort for intentional interference with their parental rights."³² Otten has testified that he was not aware during the 30 day period

29 This is a binding judicial admission.

Gerrick v. Gorsuch (1961), 172 Ohio State 417, 178 N.E.2d 40 (syllabus ¶2); *Faxon Hills Constr.v.United Brotherhood Carpenters* (1958), 168 Ohio St. 8, 151 N.E.2d 12 (syllabus ¶1)

Cf. Civ. R. 12(C) Motion for Judgment on the Pleadings;

See 43 Ohio Jur. 3d Evidence and Witnesses § 293 (Admission made in other proceedings) ("Judicial admissions are not only receivable against the pleader in proceedings other than those in which they were filed on behalf of the pleader's opponent, but a pleading containing an admission is also admissible against the pleader in a subsequent proceeding on behalf of a stranger to the former action.")

30 Undisputed sworn testimony given by Gary D. Otten in the Trial Court of Common Pleas, Juvenile Division, Clermont County, Ohio Case No. 2007-JG-14510. June 20, 2007 Page-12, Line-18 Question. "All right, and just an aside, where did any sexual liaisons take place, which State?" Answer. "Always in Kentucky.";

31 345 U.S. 528 (1953) "[I]t is now too well settled to be open to further dispute that the 'full faith and credit' clause and the act of Congress passed pursuant to it [Footnote 5] do not entitle a judgment *in personam* to extraterritorial effect if it be made to appear that it was rendered without jurisdiction over the person sought to be bound."

32 Original Footnote in the article Toward a National Putative Father Registry Database (Adoptions): See *Kessel v. Leavitt*, 511 S.E.2d 720 (W.Va. 1998); *Kessel v. Leavitt*, 75 Cal. Rptr. 2D 639 (Cal. Ct. App 1998) (ordered not published); *Smith v. Malouf*, 722 So.2d 490 (Miss. 1998), implied overruling recognized by *Adams v. U.S. Homecrafters, Inc.*, 744 So. 2D 736, 742 (Miss. 1999).

after the birth, of Ohio's requirement of him to register with the Putative father registry.

2. Balance of harm weighs in favor of granting preliminary relief

This case is currently active or pending in 4 different courts of law, The Clermont County Juvenile court, the 12th District Appeals court, the Probate court of Hamilton County, and the Ohio Supreme Court. This is a parenting case and adoption attempt, more akin to an election dispute case, with Crooks and Mother's counsels and Otten rushing to the Juvenile court or the Probate court with motions based on the latest decisions by the other court or the appeals court. The interwoven relationship between what happens in the Probate court, Juvenile court and its appellate court in two different counties would make unraveling any actions based on the September 2, 2009 decision a logistical nightmare. A stay of the appeals court decision will assure that the relatively stable conditions that have existed for the past few months, will remain in place. Otten has been able to spend time with his daughter after some favorable rulings in the Juvenile case. The granting of a stay, will likely result in further co-operation by the Mother to facilitate visitation. Lacking a stay pending decisions by the Supreme Court, the Juvenile court may choose to cut off all visitation again. The Juvenile court has a motion before it as a result of the ruling of September 2, 2009, that ask the Juvenile Court to "Vacate Orders regarding parenting rights and responsibilities of Plaintiff, Gary Otten." The probate court also finds itself facing multiple motions from both parties in this case. A stay pending appeal would also make sure that no decisions would be made by the probate court that would later have to be reversed.

3. Otten will suffer irreparable harm

Should this Court not stay the ruling of September 2, 2009 , yet later reverse the appellate court's decision, Otten's child may already be adopted by Crooks. Such an award to Crooks may

not be fully reversible. As it stands now, Otten may be without standing in the Hamilton County Probate Court. Once Paityn is legally adopted by Crooks, it would be difficult or impossible to unravel everything that goes with such a decree. Also, lacking a stay, as mentioned, the Juvenile Court may completely cut off all visitation that is in place now, the time Otten misses with his daughter can never be given back.

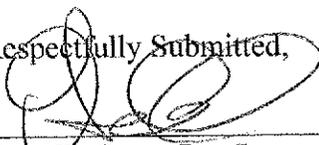
4. The granting of preliminary relief will serve the public interest.

The Public in general will benefit from a stay, by the knowledge that in matter's of children, every procedural safeguard is put in to effect before a child is temporarily or permanently removed from her parent. The public will also benefit indirectly by the fact that no court will issue orders that will have to be reversed later on. This will save valuable time and expense of each of the courts that are involved directly or indirectly from this case.

III. Conclusion

WHEREFORE, OTTEN respectfully requests that this Court grant a stay of the judgment of the court of appeals until this appeal is resolved.

Respectfully Submitted,



Gary D. Otten Pro Se
1907 Eastern Ave.
Covington, KY 41014
Telephone (859) 468-8911
Fax: (512) 532-7163 (note 512 area code)
Email: gdotten@gmail.com

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing has been served upon Michael R. Voorhees, Attorney for Appellee Kevin Crooks, Voorhees & Levy, 11159 Kenwood Rd., Cincinnati, OH 45242 by ordinary U.S. Mail, postage prepaid this 29 day of September, 2009..



Gary D. Otten Pro Se
1907 Eastern Ave.
Covington, KY 41014
Telephone (859) 468-8911
Fax: (512) 532-7163 (note 512 area code)
Email: gdotten@gmail.com

E-2 A1

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

IN THE MATTER OF THE ADOPTION :
OF P.A.C.,¹

APPEAL NO. C-081149
TRIAL NO. 2007-001743



JUDGMENT ENTRY.

This cause was heard upon the appeal, the record, the briefs, and arguments.

The judgment of the trial court is reversed and cause remanded for the reasons set forth in the Opinion filed this date.

Further, the court holds that there were reasonable grounds for this appeal, allows no penalty and orders that costs are taxed under App. R. 24.

The Court further orders that 1) a copy of this Judgment with a copy of the Opinion attached constitutes the mandate, and 2) the mandate be sent to the trial court for execution under App. R. 27.

To The Clerk:

Enter upon the Journal of the Court on September 2, 2009 per Order of the Court.

By: _____

Presiding Judge



¹ We note that the petitioner in this action sought to change the minor child's name to P.A.C. in conjunction with his adoption of the child. The probate court used the proposed name of the minor child in the case caption. For consistency, we use the case caption used by the trial court, even though the court dismissed the petition, leaving the child's birth name intact.

Ex "B"

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

IN THE MATTER OF THE ADOPTION
OF P.A.C.,¹

:
:
:
:
:

APPEAL NO. C-081149
TRIAL NO. 2007-001743

OPINION.

PRESENTED TO THE CLERK
OF COURTS FOR FILING

SEP 02 2009

Civil Appeal From: Hamilton County Court of Common Pleas, Probate Division

COURT OF APPEALS

Judgment Appealed From Is: Reversed and Cause Remanded

Date of Judgment Entry on Appeal: September 2, 2009

Michael R. Voorhees, and Voorhees & Levy LLC, for Appellant Kevin Michael Crooks,

Bradley G. Braun, for Appellee Gary D. Otten.

Note: We have removed this case from the accelerated calendar.

ENTERED
SEP - 2 2009

¹ We note that the petitioner in this action sought to change the minor child's name to P.A.C. in conjunction with his adoption of the child. The probate court used the proposed name of the minor child in the case caption. For consistency, we use the case caption used by the trial court, even though the court dismissed the petition, leaving the child's birth name intact.

CUNNINGHAM, Judge.

{¶1} Kevin Michael Crooks appeals from the judgment of the Hamilton County Court of Common Pleas, Probate Division, dismissing his petition to adopt his stepdaughter, P.A.C. The probate court dismissed the adoption petition after determining that the adoption required the consent of P.A.C.'s biological father, Gary D. Otten, and that Otten had refused consent. But where Otten did not safeguard his right to object to the adoption before the petition was filed, his consent to adopt was not required. Accordingly, we reverse the probate court's judgment and remand the case for a best-interest hearing on the adoption petition.

I. History

{¶2} P.A.C. was born in July 2005. Susan Tuttle ("Tuttle") is the biological mother of P.A.C. Tuttle was married to Jeremy Tuttle at the time of P.A.C.'s birth. Although Jeremy Tuttle is listed as the father on P.A.C.'s birth certificate, he is not P.A.C.'s biological father, and this was acknowledged in the Tuttles' November 2, 2005, divorce decree. Otten learned that he is P.A.C.'s biological father from the results of a private DNA test dated August 12, 2005.

{¶3} Otten did not timely register with the Ohio Putative Father Registry as P.A.C.'s putative father. Additionally, after P.A.C.'s birth and before Crooks petitioned to adopt P.A.C., Otten failed to "acknowledge" his paternity in the manner required by statute, and he also failed to obtain a judicial determination of paternity. But in January 2007, about 18 months after P.A.C.'s birth, Otten filed a complaint to determine parentage in the Clermont County Court of Common Pleas, Juvenile Division.



OHIO FIRST DISTRICT COURT OF APPEALS

{¶4} About two weeks after Otten had filed his parentage action, Tuttle filed a parentage action against Otten in the same court.² The cases were consolidated and were scheduled for a hearing on March 26, 2007. But the juvenile court continued the hearing at Tuttle's request.

{¶5} On April 13, 2007, Tuttle married Crooks. On April 20, 2007, Crooks filed a petition in the Hamilton County Court of Common Pleas, Probate Division, to adopt P.A.C. and to change her last name to "Crooks." Tuttle then moved to dismiss the parentage action in juvenile court on the ground that the probate court in Hamilton County had taken exclusive jurisdiction over the "issue."³

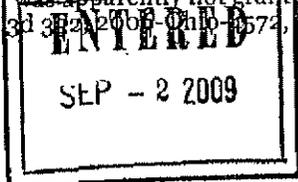
{¶6} After Otten learned of the adoption petition, he moved as P.A.C.'s "father" to dismiss or stay the adoption proceedings pending the conclusion of the parentage action in juvenile court. Otten relied on another adoption case, *In re Adoption of Pushcar*, where the Ohio Supreme Court held that "[w]hen an issue concerning parenting of a minor is pending in the juvenile court, a probate court must refrain from proceeding with the adoption of that child."⁴

{¶7} Crooks opposed Otten's motion and, calling Otten P.A.C.'s "putative father," challenged Otten's standing to be heard in the adoption proceeding. Crooks cited R.C. 3107.062, which provides that a putative father who fails to timely register on the putative father registry shall not be provided notice of the adoption hearing, and R.C. 3107.07(B), which provides that, in this circumstance, the putative father's consent to adopt is not required. Additionally, Crooks argued that *Pushcar* did not bear on the dispute because the decision involved the application of R.C. 3107.07(A), which concerns

² Otten filed his confession of judgment admitting that he was P.A.C.'s father on May 24, 2007.

³ This motion was apparently not granted.

⁴ 110 Ohio St.3d 382 (2006)-Ohio-4574, 853 N.E.2d 647, syllabus.



when the father's consent to adopt is not required due to a failure to support the minor or to communicate with the minor for a period of one year.

{¶8} In June 2007, the probate court stayed the adoption proceedings pending the outcome of the parentage action in juvenile court. After some action by the juvenile court and a series of motions by Otten and Crooks, the probate court continued the stay pending a final ruling by the juvenile court on the paternity of P.A.C. The probate court stated in its entry that “[a]t such time as the Clermont County Juvenile Court makes a final ruling as to paternity of the minor, this Court will give full faith and credit to that ruling and such status will be applicable to the adoption petition filed in our Court.” Thus, the probate court stayed the adoption proceedings not just for the resolution of parentage as it might be relevant to a best-interest determination, but to determine Otten's procedural and substantive rights under the adoption statutes.

{¶9} Thereafter, on May 28, 2008, the juvenile court determined that Otten was P.A.C.'s biological father, granted Otten parenting time with the child, and set Otten's child-support obligation effective June 20, 2007. The probate court then lifted the stay.

{¶10} After the stay was lifted, Otten again moved to dismiss the adoption petition, claiming that as P.A.C.'s father his consent was required and that he would not give it.⁵ The probate court, consistent with its prior announcement that it would give full faith and credit to the paternity determination, considered Otten as P.A.C.'s father for the purpose of consent and determined that Otten's consent was necessary by statute for the adoption. Because Otten refused to consent to the adoption, the probate court dismissed the petition.

⁵ See R.C. 3107.07(B).



{¶11} Crooks appeals the probate court's dismissal of the adoption petition for lack of Otten's consent. He raises two assignments of error: (1) "The Probate Court erred by not entering a finding that the consent of the putative father is not required as a matter of law because the putative father failed to register with the Putative Father Registry," and (2) "The Probate Court erred in finding that it did not have exclusive jurisdiction over the adoption proceeding." We find merit in the first assignment of error and hold that the probate court erred by determining that Otten's consent was necessary for the adoption. Thus, we reverse the probate court's judgment dismissing the adoption petition.

II. A Putative Father

{¶12} Among the adoption statutes, R.C. 3107.01(H) provides that " 'Putative father' means a man, including one under the 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 conception or birth; (2) He has not adopted the child; (3) He had 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."⁶

{¶13} The statute's reliance on pre-petition events is consistent with R.C. 3107.06(B), which explains when a "father's" consent to adopt is required: "Unless consent is not required under section 3107.07 of the Revised Code, a petition to adopt a minor may be granted only if written consent to the adoption has been

⁶ R.C. 3107.01(H).



executed by * * * : (B) The father of the minor, if any of the following apply: (1) The minor was conceived or born while the father was married to the mother; (2) The minor is his child by adoption; (3) Prior to the date the petition was filed, it was determined by a court proceeding pursuant to sections 3111.01 to 3111.18 of the Revised Code, a court proceeding in another state, an administrative proceeding pursuant to sections 3111.38 to 3111.54 of the Revised Code, or an administrative proceeding in another state that he has a parent and child relationship with the minor; (4) He acknowledged paternity of the child and that acknowledgement has become final pursuant to section 2151.232, 3111.25, or 3111.821 of the revised code.”⁷

Conditional Role of the Putative Father

{¶14} In legislation that became effective in 1996 and 1997, the Ohio General Assembly sought to limit a putative father’s ability to interfere with an adoption if the putative father has failed to comply with clearly enunciated procedural requirements. One statute warns 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 * * *.”⁸ Consent to adopt is also not required if a putative father fails to timely register with the putative father registry, usually within 30 days of the child’s birth.⁹ Moreover, the General Assembly has mandated that a putative father who has failed to timely register “shall not” be given notice of the hearing on the petition.¹⁰

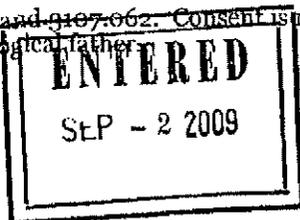
{¶15} To register, the putative father completes a registration form, created by the department of job and family services, that includes his name, the address or telephone number where he wishes to receive notice of a petition to adopt the minor he

⁷ R.C. 3107.06(B).

⁸ R.C. 3107.061.

⁹ R.C. 3107.07(B) and ~~3107.062~~. Consent is not required from a timely registered putative father who is not the biological father.

¹⁰ R.C. 3107.11.



claims as his child, and the name of the mother. He then submits the form to the department.¹¹ The department maintains the registry and searches the registry upon request by the mother or by the agency or attorney arranging a minor's adoption.¹² The certified results of the search must be filed in the adoption action with certain exceptions.¹³

{¶16} Importantly, a putative father who timely registers claims paternity of the child from the start of the child's life. Courts have held, however, that the registration requirement is irrelevant if a putative father ceases to meet the statutory definition of a putative father before the adoption petition is filed. For example, if a putative father judicially or administratively establishes his parentage before the filing of the adoption petition, he ceases to be a putative father, and like any other father, his consent to the adoption is required unless an exception applies, regardless of his failure to timely register with the putative father registry.¹⁴

III. In re Adoption of Pushcar

{¶17} In determining that Otten's consent was required for the adoption, the probate court considered Otten to be P.A.C.'s father, not her putative father, because Otten had initiated the parentage action that established his paternity before Crooks filed the adoption petition. The probate court and Otten relied on the Ohio Supreme Court's decision in *In re Adoption of Pushcar*.¹⁵ But *Pushcar* did not involve the legal significance of a putative father's failure to timely register with the putative father registry.

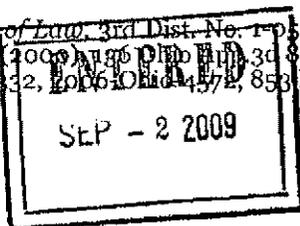
¹¹ R.C. 3107.062.

¹² R.C. 3107.063.

¹³ R.C. 3107.064.

¹⁴ *In re Adoption of Law*, 3rd Dist. No. 1-05-64, 2006-Ohio-600, at ¶15, citing *In re Adoption of Baby Boy Brooks* (2009) 196 Ohio App.3d 824, 830, 737 N.E.2d 1062.

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



OHIO FIRST DISTRICT COURT OF APPEALS

{¶18} *Pushcar* involved a stepparent adoption where the petitioner had alleged that the consent of the “father” was not required under R.C. 3107.07(A) based upon the father’s failure to communicate with or support the child for a one-year period “immediately preceding either the filing of the adoption petition or the placement in the home of the petitioner.”¹⁶ The father in *Pushcar* was not married to the child’s mother at the time of birth, but he had signed the birth certificate, which had automatically entered him as the child’s legal father in the Centralized Paternity Registry under a former law.¹⁷ Yet because he had not judicially or administratively established paternity, the duty of child support was not triggered as contemplated under R.C. 3107.07(A).¹⁸ Moreover, the father had instituted a parentage action in juvenile court that was pending when the adoption petition was filed, and its outcome could have established the starting point for R.C. 3107.07(A).¹⁹ Despite these circumstances, the probate court determined that the father had not communicated with or supported his child for a one-year period and allowed the adoption without the father’s consent.²⁰

{¶19} The appellate court reversed.²¹ First, in response to the father’s argument that the probate court had lacked jurisdiction to proceed with the adoption because a previously filed parentage action was pending in juvenile court, the court of appeals held that the probate court did have jurisdiction to consider the adoption petition, but that it should have refrained from proceeding until the juvenile court had adjudicated the parentage action to its conclusion.²² Second, citing *In re Adoption of Sunderhaus*,²³ the

¹⁶ See *Pushcar* at ¶5.

¹⁷ Id. at ¶1.

¹⁸ See id. at ¶12.

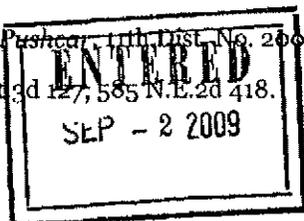
¹⁹ Id. at ¶14.

²⁰ Id. at ¶6.

²¹ *In re Adoption of Pushcar*, 1st Dist. No. 2005-L-050, 2005-Ohio-5114.

²² Id. at ¶29-32.

²³ (1992), 63 Ohio St.3d 127, 585 N.E.2d 418.



court held that the adoption could not proceed under R.C. 3107.07(A), as the petitioner had failed to prove that the exception to the consent requirement under that subsection had been satisfied.²⁴ In *Sunderhaus*, the Ohio Supreme Court had interpreted the statute as requiring a paternity determination before the running of the one-year period so that the subsection would comport with the “requirements of due process and the plain meaning of its provisions.”²⁵

{¶20} The petitioner in *Pushcar* appealed the appellate court’s decision to the Ohio Supreme Court. The supreme court reaffirmed its holding in *Sunderhaus* concerning the interpretation of R.C. 3107.07(A) and affirmed the appellate court’s determination that the probate court should have refrained from proceeding with the adoption of the child when an issue concerning the parentage of the child was pending in juvenile court.²⁶

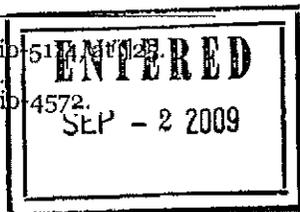
Pushcar Distinguished

{¶21} *Pushcar* involved the application of R.C. 3107.07(A) as an exception to the requirement of a father’s consent to adopt, not the application of R.C. 3107.07(B)(1) and 3107.11, which are at issue in this case. Here, the probate court determined that this difference was irrelevant because the *Pushcar* court’s analysis inherently involved whether to strictly construe the statutory requirement that, to be considered a “father,” paternity must be judicially established before the date the adoption petition is filed. The probate court characterized the man contesting the adoption in *Pushcar* as a “putative father” at the time the petition was filed because of the absence of a paternity determination. The probate court concluded that the

²⁴ *Pushcar*, 2005-Ohio-5144, ¶12.

²⁵ *Sunderhaus* at 132.

²⁶ *Pushcar*, 2006-Ohio-4572.



Ohio Supreme Court had not strictly construed the time requirement. As a result, the probate court maintained that it was required to determine Otten's status based upon the juvenile court's parentage determination, and that it could ignore the application of R.C. 3107.11 and 3107.07(B)(1).

{¶22} But the probate court's analysis did not take into account that the man contesting the adoption in *Pushcar* had signed the birth certificate, which appears to be the equivalent of an "acknowledgement" under former law because it had resulted in his automatic enrollment on the Centralized Paternity Registry as the legal father, and at the very least had safeguarded his right to notice and consent. Importantly, the *Pushcar* court did not use the paternity determination to avoid the application of R.C. 3107.07(B)(1) and 3107.11. Moreover, the petitioner in *Pushcar* had specifically relied on R.C. 3107.07(A) to support his claim that the probate court had jurisdiction to grant the petition without the consent of the minor child's father. Thus, the issue before this court—the interpretation and application of R.C. 3107.07(B)(1) and 3107.11—was not even contemplated by the *Pushcar* court.

{¶23} After our review, we reject the probate court's conclusion that the Ohio Supreme Court in *Pushcar* intended to override the General Assembly's clear statutory directives with regard to a putative father who has failed to timely register or otherwise safeguard his rights to notice of and consent to an adoption.

IV. Clear Statutory Mandate

{¶24} The adoption statutes at issue in this case, R.C. 3107.07(B)(1) and R.C. 3107.11, unequivocally express the General Assembly's intent to strictly enforce the registration requirement where a man has not otherwise safeguarded his right to be heard on an adoption.



{¶25} Otten's interpretation of the statute, as adopted by the probate court, would require us to rewrite the statute, not to construe it in his favor. We recognize that the Ohio Supreme Court has often acknowledged the fundamental right of "natural parents" to the care and custody of their children, and that any exception to the requirement of parental consent must be strictly construed because adoption terminates that fundamental right.²⁷ And we recognize that parental consent, when required, is a jurisdictional prerequisite to a valid adoption.²⁸ Moreover, we know, as the General Assembly does, that a putative father can be a biological father. This is why, we believe, the General Assembly has created strict deadlines for the procedural requirements at issue in this case. We can only conclude that the statutes mean this: If you fail to timely register on the putative father registry, or if you fail to take other enumerated action **before** the petition is filed, then, as here, your child can be adopted without notice and your consent.

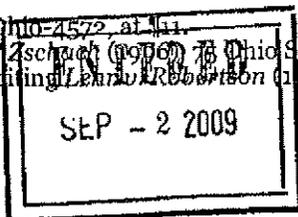
{¶26} Our adherence to the procedural mandates may appear inequitable in this case, but it is required in light of the statutory language. We follow the Ohio Supreme Court's holding in *In re Adoption of Zschach*, where the court strictly adhered to a different procedural mandate against a putative father in a former version of R.C. 3107.07(B), because "the state's interest in facilitating the adoption of children and having the adoption proceeding completed expeditiously justifies such a rigid application."²⁹

{¶27} Otten could have protected his substantive and procedural rights by several means, including timely registering on the putative father registry. If he had

²⁷ *Pushcar*, 2006-Ohio-4572, at ¶11.

²⁸ *In re Adoption of Zschach* (1996), 73 Ohio St.3d 648, 657, 665 N.E.2d 1070.

²⁹ *Zschach* at 652, citing *Leahy v. Robinson* (1983), 463 U.S. 248, 265, 103 S.Ct. 2985.



done so, he would have avoided the “race to the courthouse” that he now condemns, and he would have demonstrated his acceptance of his responsibility to P.A.C. within the first month of her birth, a time period that the General Assembly considers more important than Otten.

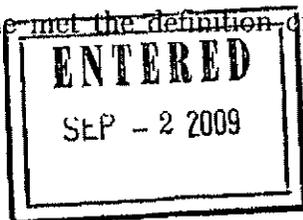
{¶28} We conclude that the General Assembly could have easily worded the statutes differently, but it did not. Because of the wording of the statutes, on the date the petition was filed, Otten’s status was that of a “putative father” who had not timely registered. Thus, we conclude that his consent was not required for the adoption, despite the juvenile court’s subsequent declaration of parentage. The probate court erred by holding otherwise. Thus, we find merit in Crooks’s first assignment of error.

V. Jurisdiction

{¶29} In his second assignment of error, Crooks argues that “the probate court erred in finding that it did not have exclusive jurisdiction over the adoption proceeding.” But the probate court never found that it did not have exclusive jurisdiction over the adoption proceeding. And the probate court, not the juvenile court, ruled on the adoption petition and ultimately dismissed it for lack of Otten’s consent. Because the record does not support Crooks’s argument, we overrule the second assignment of error.

VI. Conclusion

{¶30} The probate court erred by failing to hold that this case was subject to the statutory exception to the consent requirement of a putative father in an adoption proceeding. Where Otten failed to timely register on the putative father registry, and he met the definition of a putative father on the date the adoption



on the adoption petition.

Judgment reversed and cause remanded.

HENDON, P.J., and PAINTER, J., concur.

Please Note:

The court has recorded its own entry on the date of the release of this opinion.

