

ORIGINAL

IN THE SUPREME COURT OF OHIO

In the Matter of the Adoption of: : Case No. 09-1757  
Paityn Alexa (Tuttle) Crooks :  
 :  
Gary D. Otten, : On Appeal from the  
 : Hamilton County Court  
Appellant : of Appeals, First  
 : Appellate District  
v. :  
 : Court of Appeals  
Kevin M. Crooks, : Case No. C-081149  
 :  
Appellee. : Amicus Curiae Brief  
 : Supporting Appellant  
 : Urging Acceptance of  
 : Jurisdiction

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MEMORANDUM IN SUPPORT OF JURISDICTION  
OF AMICUS CURIAE ERIK L. SMITH

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Erik L. Smith  
329 Firwood Drive, Apt. B  
Dayton, Ohio 45419  
Tel: (937) 298-1368  
Email: edenstore@msn.com

AMICUS CURIAE, PRO SE

Michael R. Voorhees (0039293)  
11159 Kenwood Road  
Cincinnati, Ohio 45242  
Tel: (513) 489-2555  
Fax: (513) 489-2556  
mike@voorheeslevy.com

COUNSEL FOR APPELLEE,  
KEVIN CROOKS

Kenneth Cahill (0056207)  
COUNSEL OF RECORD  
Dworken & Bernstein, Co, L.P.A.  
60 South Park Place  
Painesville, Ohio 44077  
Tel: (440) 352-3391  
Fax: (440) 352-3469  
kcahill@dworkenlaw.com

COUNSEL FOR APPELLANT,  
GARY D. OTTEN

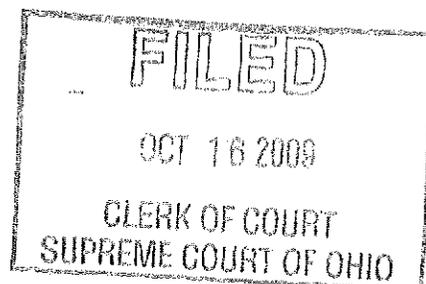


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## STATEMENT OF INTEREST OF AMICUS CURIAE

Erik L. Smith, an Ohio citizen and resident, urges the court to accept this case. As a certified paralegal and an advocate for natural parents in adoption, Smith regularly assists attorneys in and outside of Ohio in juvenile and adoption cases. His mission is to bring about systemic reform in child welfare and adoption law, and to educate the public about juvenile and adoption law generally. To help achieve those goals, Smith publishes regularly in law reviews and journals on juvenile and adoption law topics.<sup>1</sup>

In the year following this Court's opinion in *In re Adoption of Pushcar*, 110 Ohio St.3d 332, 2006-Ohio-4572, 853 N.E.2d 647, Smith worked on three cases where parentage and adoption proceedings were pending concurrently in separate counties. Appellant's case was the latest, and only, case appealed. In each case, the respective trial courts and the attorneys were confused or at odds about whether the holding in *Pushcar* applied to adoption petitions alleging biological fathers as putative. Those cases compelled the Franklin County chapter of the American Academy of Adoption Attorneys to ask Smith to submit a memorandum to them to begin discussion on the topic. The conclusions in the memo differ from the conclusions of the court of appeals in this case. Regardless of the correct interpretation, attorneys and courts stand unsure of how far the holding in *Pushcar* reaches. At the same time, the focus on *Pushcar* seemed to divert the court of appeals' attention in this case from other obvious issues, such as the collateral attack doctrine, the interaction between the adoption and the parentage

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<sup>1</sup> E.g., County Agency Child Support in Disrupted Adoptions. Summer 2009. *Columbus Bar Lawyers Quarterly*. 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 (2005).

statutory schemes, and due process concerns. Thus, Smith deals with those issues here and hopes the Court will see this brief as an aid.

THIS CASE IS ONE OF GREAT OR PUBLIC IMPORTANCE AND INVOLVES A  
SUBSTANTIAL CONSTITUTIONAL QUESTION

This case presents two critical issues for the future of adoptions of children in Ohio: (1) whether a juvenile court's valid adjudication of parental rights and status can be collaterally attacked in an adoption proceeding; and (2) whether the PFR applies to an unwed father who has a significant personal and financial relationship with his child and files a complaint to establish parentage before an adoption is sought. Here, the court of appeals nullified an order of parentage entered when the minor child was two years old because the unwed father did not file in the putative father registry (PFR) by the time the child was 30 days old. Yet when the child was 30 days old, the unwed father was supporting and co-parenting the child and had obtained DNA results showing his biological relationship. The father continued parenting the child for over a year. When the child was about 17 months old, the father filed for adjudication of parentage, with the mother filing a paternity complaint against the father in the same court. The court of appeals nevertheless held that R.C. 3107.07(B) prohibited recognizing the father's relationship with the child and the parentage adjudication.

The syllabus in *In re Adoption of Pushcar* reads: "When an issue concerning the parenting of a minor is pending in the juvenile court, a probate court must refrain from proceeding with the adoption of that child." Despite that plain language, the court of appeals concluded that *Pushcar* applied only to legal fathers or adoption petitions alleging Section (A) rather than Section (B) of R.C. 3107.07. (Op. at ¶ 22.) Thus, the parental status established in the juvenile court was ineffective in the adoption. (Id.)

The court of appeals' decision creates a gap in the law that likely will omit many responsible fathers from the adoption equation. Fathers who take personal and financial responsibility for their offspring for an extended time will lack opportunity to establish a legal tie with their child simply because they did not file in a registry right after the child was born. In fact, those fathers will be prohibited even from receiving notice of an adoption petition should it be filed before the father can secure a formal legal tie. R.C. 3107.11(A)(3) (prohibiting notice). Yet putative fathers who do little except file in the PFR will qualify for notice of an adoption regardless of the child's age and the responsibility the father has taken. The ruling of the court of appeals undermines the legislative intent of the adoption and parentage statutes (R.C. Chaps. 3107 and 3111) . The decision allows for the absurd result that a father who has no personal, and little financial, relationship with his child can veto an adoption because he timely filed in the PFR; but a father who did not file in the PFR before the child turned 31 days old cannot even qualify for notice of the adoption despite his significant personal and financial relationship with the minor.

Thus, the court of appeals' decision makes this court's decision in *Pushcar* virtually inapplicable outside its own facts. The impetus behind the decision in *Pushcar* was to avoid jurisdictional tugs-of-war regarding children. Yet the court of appeals in this case concluded that *Pushcar* applied only to putative fathers who qualified for notice of the adoption statutorily or were legal fathers already. The court of appeals made that conclusion despite the parties spending two years in juvenile court reaching an adjudication of parentage that was never appealed and which the probate court had previously declared it would recognize. As this case shows, the court of appeals' interpretation of *Pushcar* facilitates the very jurisdictional tug-of-war and time delay

that the holding in *Pushcar* sought to inhibit. At the very least, adoption petitioners should be unable to attack valid, final parentage orders collaterally.

The public has a great interest in unwed fathers being able to step up to the plate and take responsibility for their children. That interest is sacrificed where unwed fathers who have taken that responsibility are denied fitness hearings because they did not file in a registry before forming the relationship society demanded they form. The PFR is not promoted to the point where its existence is common knowledge. Thus, many responsible fathers will not know of the registry in time to file in it. While ignorance of the law is no excuse, no state interest is served by applying the PFR filing deadline to a known, locatable father who took responsibility for his child and sought a legal tie before any adoption plan was made or contemplated. Nor is any state interest served by letting the mother decline to appeal the parentage adjudication and instead rely on a PFR filing requirement that the unwed father cannot retroactively fulfill.

This case also presents a substantial constitutional question. Substantial due process protection attaches where an unwed father shows a full commitment to parenthood by coming forward to participate in raising his child. *Lehr v. Robertson* (1983), 463 U.S. 248, 261, 103 S.Ct. 2985, 2993, 77 L.Ed. 614, 627. This unwed father came forward to participate in raising his child from birth, and kept supporting and raising the child for over a year. When he feared being thwarted in that responsibility, he sought, and obtained, a legal tie to the child, and resumed supporting and visiting the child after obtaining it. Letting the appeals court's decision stand thwarts both the United State's Supreme Court's longstanding rule of law and the stability, expediency, and permanency the Ohio adoption and parentage laws strive to achieve.

## STATEMENT OF THE CASE AND FACTS

This matter arises from the attempted stepparent adoption of the female child, Paityn Crooks, born July 13, 2005, in Cincinnati, Ohio. The Hamilton County Probate Court dismissed the adoption petition, concluding that the biological father's consent to the adoption was necessary. The court of appeals reversed.

Appellant, Gary D. Otten, is Paityn's biological father. Paityn was born in the mother's marriage to Jeremy Tuttle. But Jeremy Tuttle was not the child's biological father, as acknowledged in the Tuttle's divorce decree of November 2, 2005. From birth, Otten treated Paityn as his own child and on August 12, 2005 received DNA testing results showing his biological relationship. That day, the deadline for filing in the PFR ran, but Otten did not register. Instead, for the next 16 months, Otten continued co-parenting Paityn and paying for her health insurance. In January 2007, Otten filed a complaint for parentage in the Clermont County Juvenile Court.

Starting in February 2007, the mother refused to let Otten see or speak to Paityn despite Otten's numerous requests to do so. Nevertheless, Otten kept paying Paityn's health insurance, which the mother knew about. Two weeks after Otten filed his paternity complaint, the mother filed a complaint for parentage against Otten in the same court. The cases were consolidated and set for a hearing on March 26, 2007.

One week before that hearing, the mother requested a continuance, which was granted. Two weeks later she married the stepfather. A week after that, the stepfather petitioned the Hamilton County Probate Court to adopt Paityn. The stepfather attached his jurisdictional affidavit to his petition stating that he had knowledge of a parentage proceeding concerning Paityn but only that the "putative father may have filed-- information not yet available." The adoption petition alleged that the consent of the

biological father was unnecessary under R.C. 3107.07(B) for failure to file in the PFR. The mother immediately moved to dismiss or stay all of the actions in juvenile court on the ground that the probate court in Hamilton County had taken exclusive jurisdiction over the "issue." A month later, in May 2007, Otten confessed to the judgment of paternity in juvenile court. The juvenile court magistrate ordered a stay.

Otten then moved the Hamilton County Probate Court to stay the adoption pending resolution of the proceedings in Clermont County Juvenile Court. The probate court granted the stay based on *In re Adoption of Pushcar*. The probate court stated in its order that it would give full credit to the juvenile court's orders in deciding whether Otten would be treated as a putative or legal father in the adoption.

But the juvenile court judge, upon objections, adopted the magistrate's stay order. So Otten petitioned this Court for a writ of procedendo to compel the juvenile court to proceed. The juvenile court eventually lifted the stay and Otten let the procedendo petition be dismissed by operation of law. *State ex rel. Otten v. Wyler*, Sct. Case No. 2008-0054.

The stepfather, in turn, neither petitioned for a writ of procedendo to compel the probate court to proceed nor sought to intervene in the parentage action. Instead, he appealed the probate court's stay to the First District Court of Appeals, which that court dismissed for lack of a final order. The mother continued denying Otten visitation. After a hearing, the Clermont County Juvenile Court found Otten's paternity, awarded him standard visitation, and ordered him to pay child support.

The mother appealed the juvenile court's visitation order to the 12th District Court of Appeals, arguing that Otten should have transitional visitation. The mother did not appeal the paternity order. The Hamilton County Probate Court then lifted its stay

and, recognizing the Clermont County Court's judgment, dismissed the adoption, finding that, because Otten was a legal parent, Section (A) rather than (B) of R.C. 3107.07 applied. Because the statutory time for abandonment under 3107.07(A) had not run, Otten's consent as a legal parent was needed for the adoption to proceed. Otten withheld consent.

The stepfather appealed to the First District Court of Appeals, arguing that Otten was putative despite the juvenile court's judgment, leaving him subject to the PFR requirement. Before the court of appeals ruled, the stepfather amended his adoption petition to allege that Otten's consent was unnecessary as a parent under R.C. 3107.07(A). On June 29, 2009, the 12th district affirmed the juvenile court's decision and ordered the juvenile court to implement visitation immediately. *Otten v. Tuttle*, Clermont County, Case No. CA2008-05-053, 2009-Ohio-3158, ¶ 17. The juvenile court complied and Otten resumed visiting Paityn. The mother did not appeal further.

On September 2, 2009, the First District reversed the probate court's dismissal of the adoption, reasoning that 3107.07(B) applied to Otten despite the resolved parentage. The court of appeals concluded that Otten's consent to the adoption was unnecessary because, as a putative father, he failed to file in the PFR before Paityn turned 31 days old. The court remanded for a hearing on the child's best interest. Otten timely filed his notice of appeal in this Court with a motion for stay of the court of appeals judgment.

The First District Court of Appeals erred in holding that Otten's consent was unnecessary. In support of that issue, the amicus presents the following argument.

## ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

### **Proposition of Law 1: A juvenile court's final order of paternity, obtained without fraud or jurisdictional defect, cannot be attacked collaterally in an adoption proceeding.**

The "collateral attack doctrine" disfavors courts revisiting judgments of other courts. *Ohio Pyro, Inc. v. Ohio Dept. of Commerce*, 115 Ohio St.3d 378, 2007-Ohio-5024, 875 N.E.2d 550, ¶ 1. A "collateral attack" is an attempt to "defeat the operation of a judgment in a proceeding where some new right derived from or through the judgment is involved." *Id.* at ¶ 16. Typically, a collateral attack tries to undermine a judgment through a judicial proceeding in which the ground of the proceeding is that the judgment is ineffective. *Id.* at ¶ 17 citing Black's Law Dictionary (8th Ed. 2004) 278. While the collateral attack doctrine does not forbid all collateral attacks, *Id.* at ¶ 19, final judgments in Ohio are meant to be "just that--final." *Id.* at ¶ 22. Thus, save rare exceptions, the primary way to challenge civil judgments is by direct appeal. *Id.*

The two principle circumstances in which collateral attacks are allowed are when the issuing court lacked jurisdiction or the order was procured by fraud. *Id.* at ¶ 23. Typically then, a judgment cannot be attacked collaterally unless it was invalid, void, or fraudulently procured. *Id.* citing *Lewis v. Reed* (1927), 117 Ohio St. 152, 159, 5 Ohio Law Abs. 420, 157 N.E.2d 897. In that sense, the collateral attack doctrine resembles the question of whether a judgment is void or voidable. *Ohio Pyro* at ¶ 25. A judgment not void for lack of jurisdiction or for fraud, remains valid even if perhaps flawed, and thus not generally subject to collateral attack. *Id.*

The paternity judgment operated to make Otten a legal father in the adoption proceeding, giving Otten a new right to withhold consent to the adoption he would not have had statutorily as a putative father. The stepfather's entire argument was that the

paternity judgment was ineffective in the adoption. The stepfather did not intervene in the paternity action, and the mother did not appeal the paternity judgment.

Accordingly, the stepfather collaterally attacked the paternity judgment in the adoption.

Nothing shows that the paternity judgment was invalid, void, or fraudulently procured, and the court of appeals did not find so. The Clermont County Juvenile Court had jurisdiction over the paternity claim under R.C. Chap. 2151, and the paternity issue was fully litigated. Because the paternity judgment was not void for lack of jurisdiction or for fraud, it remained valid even if perhaps flawed, thus not subject to collateral attack in the adoption.

Moreover, the stepfather did not seek a writ of procedendo to compel the probate court to proceed or try to intervene in the paternity action. Instead, knowing the probate court's intent to follow the juvenile court, the stepfather subjected the child to two years of litigation so he could later contest the paternity determination on appeal to the first district. That was improper. *See, e.g., In re Adoption of A.N.S.*, 741 N.E.2d 780 (Ind. Ct. App. 2001) at n. 5 ("[The stepfather] could not sit idly by during the paternity proceeding and allow a judgment of paternity to be entered and later attempt to contest the paternity determination in adoption court.") Accordingly, the court of appeals in this case erred in reversing the probate court, as its ruling improperly vacated a valid paternity judgment collaterally.

**Proposition of Law 2. The putative father registry provisions do not apply where a paternity action regarding the child is filed before an adoption is reasonably anticipated.**

An unwed father remains putative in the adoption proceeding where he has not established a parent-child relationship by mutual acknowledgment or court order when the adoption petition is filed. R.C. 3107.01(H)(3)-(4). To secure a right to contest an

adoption, a putative father must file in the PFR within 30 days of that child's birth. R.C. 3107.07(B)(1). A judgment of paternity, however, is determinative for all purposes. R.C. 3111.13(A). And a proceeding to determine paternity may be brought any time before the child turns 23 years old. R.C. 3111.05.

Thus, the paternity statutes enforce the child's right to the physical, mental, and monetary support of her parents. In contrast, the PFR filing requirement promotes finality and stability in adoptions. The registry does so by quickly determining the putative father's identity and interest so he may receive notice of the adoption proceeding. Construing those statutes to achieve their full effects requires an adoption proceeding be contemplated before the adoption statutes can govern over an earlier-filed parentage complaint. Requiring the father to register when no adoption is contemplated does not further the PFR's purpose. Otherwise, a putative father who had not registered within 30 days of the birth could never qualify for notice of an adoption petition no matter his personal relationship with the child or the child's age. The mother could short-circuit a parentage proceeding simply by having the stepfather petition to adopt. The legislature could not have intended those results when enacting the PFR. Rather, the PFR and parentage statutory schemes must have separate and distinct purposes that generally do not overlap with the other, especially when the paternity adjudication is sought before the adoption is sought. *See, e.g., J.S.A. v. M.H.*, 863 N.E.2d 236, 250 (Ill. 2007) (making the father register where no adoption was contemplated when the parentage action was filed did not further the PFR's purpose.)

Otten had a personal and financial relationship with Paityn and sought parentage adjudication before the stepfather married the mother. The mother countered with her own paternity complaint against Otten when Paityn was 18 months old. The purpose of

the Ohio PFR in promoting stability in adoptions is not furthered under these facts. Thus, the court of appeals erred in not construing the parentage and adoption statutes to avoid an absurd or unconstitutional result.

**Proposition of Law 3. An unwed father who has formed a substantial personal and financial relationship with his child is entitled to be heard on his parental fitness in a proceeding to adopt that child.**

Where an unwed father comes forward to participate in the rearing of his child, his interest in personal contact with his child acquires substantial protection under the Due Process Clause. *Lehr v. Robertson*, 463 U.S. at 261, 103 S.Ct. at 2993, 77 L.Ed. at 627 citing *Caban v. Mohammed* (1979), 441 U.S. 380, 392. Thus, "if the unwed father grasps that opportunity, and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development." *Lehr*, 463 U.S. at 262. Accordingly, in *In re Adoption of Holt*, the putative father's yearlong cohabitation with the child entitled him to due process even though the father missed the deadline for objecting to the adoption. 75 Ohio App.3d 450, 452, 599 N.E.2d 812, 813 (Ohio Ct. App. 1991).

Otten formed, and always sought to maintain, his personal and financial relationship with Paityn and filed his parentage complaint before the mother married the stepfather. Thus, Otten grasped his right to be heard on his parental fitness in the adoption regardless of his failure to file in the PFR before Paityn was a month old.

#### CONCLUSION

Accordingly, this case involves matters of public and great general interest and a substantial constitutional question. Erik L. Smith urges this Court to accept jurisdiction so that the important issues presented will be reviewed on the merits.



Erik L. Smith  
329 Firwood Drive, Apt. B  
Dayton, Ohio 45419  
Tel: (937) 298-1368  
Email: edenstore@msn.com

AMICUS CURIAE, PRO SE

Proof of Service

I certify that I sent a copy of this Amicus Brief by ordinary U.S. Mail to counsel for appellee, Michael R. Voorhees, 11159 Kenwood Road, Cincinnati, Ohio 45242 and to counsel for appellant, Kenneth Cahill, 60 South Park Place, Painesville, Ohio 44077 on October 16, 2009.



Erik L. Smith  
AMICUS CURIAE, PRO SE