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EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

This case is one of public and great general interest that should be decided by the Ohio Supreme Court to resolve the conflicts and end the confusion caused by the Court of Appeals decision below which is in direct conflict with decisions by the Ohio State Supreme Court. This case is in conflict with *In Re Adoption of Pushcar*, 110 Ohio St.3d 332, 2006-OHIO-4572 and *In re Adoption of Asente (2000)*, 90 Ohio St.3d 91, 92, 2000 Ohio 32. In *Pushcar* the Ohio State Supreme Court held that when 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. In *Asente* the Court held 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.

The Ohio Supreme Court should also take this case to clarify whether an adoption petition is brought under O.R.C. 3107.7(A), which was the case in *Pushcar*, or under paragraph (B), which is the present case, is of no consequence when an action for paternity and custody is pending in Juvenile Court.

Further, the Ohio Supreme Court should take this case to establish that a juvenile court's original jurisdiction to determine the custody of a minor child pursuant to O.R.C. 2151.23(B)(2) is not abrogated by the 30-day filing requirement prescribed in O.R.C. 3107.062 which states a putative father must register with the putative father registry within 30-days of the child's birth and O.R.C. 3107.07(B)(1) which states the putative father's consent is not required if the putative father has not timely registered as a putative father. O.R.C. 3107.062 is a notice requirement statute. Yet this registration becomes unnecessary and sufficient notice of putative father's intent to establish a relationship is presented by him if a putative father files a complaint

in juvenile court to establish paternity and custody. Otherwise, if the 30-day deadline is missed even by one day the juvenile court's original jurisdiction to determine custody pursuant to O.R.C. 2151.23(B)(2) can be defeated.

The Ohio State Supreme Court should provide clear and unambiguous guidance regarding parental termination decisions to facilitate uniform determinations of children's custody, support, and adoption in a prompt, reasonable, cost effective, and dignified matter.

STATEMENT OF THE CASE AND FACTS

A. STATEMENT OF THE CASE: On January 29, 2007 Appellant (Gary D. Otten) filed a complaint for allocation of parental rights and responsibilities and/or reasonable visitation or companionship rights in the Clermont County, Ohio Juvenile Court regarding his daughter P.A.C. On February 13, 2007 Appellee-Mother filed a complaint to determine parentage also in the Clermont County, Ohio Juvenile Court in which she named Appellant as the Father of said minor child. Prior to a hearing set March 26, 2007 for both complaints to be pretried Appellee-Mother moved to continue the March 26, 2007 hearing by filing a motion for continuance on March 19, 2007. The continuance was granted and the pretrial set for March 26, 2007 was continued until May 11, 2007.

On April 13, 2007 Appellee married Kevin Crooks and on April 20, 2007 Mr. Crooks filed a petition to adopt said minor child in the Hamilton County Probate Court.

On April 27, 2007 Appellee filed a motion to dismiss Appellant's complaint for allocation of parental rights and responsibilities and/or reasonable visitation or companionship rights in the Clermont County Juvenile Court.

On June 6, 2007 the Hamilton County Probate Court stayed any further proceedings on the petition for adoption pending the outcome of the parentage action that was currently pending in the Clermont County Juvenile Court.

The Clermont County Juvenile Court issued a magistrate's decision on June 4, 2007 and an amended decision with findings of fact and conclusions of law on August 22, 2007 both which were affirmed in their entirety by the trial court on December 11, 2007.

On January 7, 2008 Appellant filed a notice of appeal from the Clermont County Juvenile Court's final order of December 11, 2007. On February 6, 2008 the First District Court of Appeals dismissed the appeal filed January 7, 2008 for want of a final appealable order.

On March 10, 2008 the Clermont County Juvenile Court issued a final appealable order granting Appellee-Mother custody and Appellant-Father was granted visitation and ordered to pay child support.

On July 16, 2008 the Hamilton County Probate Court issued a magistrate's decision dismissing Appellee's petition to adopt the minor child. On November 5, 2008 the trial court affirmed the magistrate's decision dismissing Appellee's petition to adopt minor child. On November 10, 2008 Appellee filed a timely notice of appeal of the Hamilton County Probate Court's Judgment Entry dismissing Appellee's petition for adoption.

On September 2, 2009 the First District Court of Appeals issued a decision reversing the Hamilton County Probate Court's judgment and remanded the case for a best interests hearing on the adoption petition.

B. STATEMENT OF FACTS: This matter relates to the step-parent adoption of Paityn Alexa Tuttle, a minor born on July 13, 2005 in Cincinnati, Ohio. On August 9, 2005 Appellant-Father and Appellee-Mother took said minor child for a DNA test. On August 12, 2005 a DNA report was issued which reflected that Appellant was the natural biological father of said minor child. For the next 12+ months both litigants parented the child together and made joint decisions regarding her upbringing. Appellant financially support and spent a great deal of time with his daughter.

By the end of 2006 the parents' romantic relationship lessened markedly. On January 29, 2007 Appellant filed a complaint to determine custody in the Clermont County, Ohio Juvenile Court. Attached to this complaint was the DNA test verifying that Appellant was the natural biological father of said minor child. Within weeks Mother filed her own complaint to determine parentage in the same juvenile court admitting in her pleadings that Appellant was the natural biological father of their daughter. These competing complaints were set for pretrial on March 26, 2007. However on March 19, 2007 the Appellee moved to continue the March 26, 2007 hearing which it was until May 11, 2007.

On April 13, 2007 Appellee married a man by the name of Kevin Crooks. One week later on April 20, 2007 Mr. Crooks, as husband of Appellee, filed to adopt the minor child in Hamilton County, Ohio Probate Court. Appellant requested that the probate court stay the adoption proceeding until the Clermont County Juvenile Court had issued a decision in the parties competing complaints which were still pending. The Hamilton County Probate Court stayed its proceedings on Mr. Crooks' petition for adoption on June 6, 2007. The probate court found that since an action relative to the same child before it had already been filed in the Clermont County, Ohio Juvenile Court that that action should first be decided before any action on the adoption petition should occur.

On March 10, 2008 the Clermont County Juvenile Court issued a judgment finding that Appellant was the natural biological father of said minor child and the court also issued orders relevant to custody, child support, and visitation between the parties.

On November 5, 2008 the judge of the Hamilton County Probate Court issued a decision dismissing Kevin Crooks' petition for adoption noting that the Clermont County Juvenile Court had come to a final determination finding that Appellant was the natural biological father of said

minor child as well as issuing orders relative to custody, child support, and visitation. Of interest the Probate Court noted that Appellee, herself, acknowledged Appellant's status as biological father prior to her husband filing the adoption petition. The judge in the probate court stated, "Prior to the adoption petition, [Appellee] filed a complaint to determine parentage in juvenile court that alleges that [Appellant] is the biological father of the minor, that no other man is presumed to be the father, and that she requests the juvenile court to declare him to be the father.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law: The probate court properly stayed the appellee's adoption petition proceeding, even though appellant had not timely registered with the putative father registry within thirty days of the child's birth as required by O.R.C. 3107.062, thereby allowing appellant's previously filed paternity and custody complaint in the Juvenile Court to proceed to a conclusion since O.R.C. section 2151.23(B)(2) grants the Juvenile Court original jurisdiction in such cases and the Ohio Supreme Court has mandated in *Pushcar* that once a Juvenile court has asserted jurisdiction over a minor child a Probate court should stay any adoption proceeding.

The Court of Appeals erroneously reversed the Hamilton County Probate Court, holding that since Appellant had not timely registered with the putative father registry within thirty (30) days of the child's birth, then his consent was not required for an adoption pursuant to O.R.C. §3107.07(B)(1) irrespective of the fact that Appellant had previously filed a complaint to establish paternity and custody which was pending at the time the adoption petition was filed.

The Ohio Supreme Court has addressed this issue in *In Re Adoption of Pushcar, 110 Ohio St.3d 332, 2006-OHIO-4572*, which held that when an issue concerning parenting of a minor is pending in juvenile court, a probate court must refrain from proceeding with the adoption of that child. In addition to this holding the Ohio Supreme Court further stated in *Pushcar*,

“...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.” *In re Adoption of Asente (2000), 90 Ohio St.3d 91, 92, 2000 Ohio 32, 734 N.E.2d 1224.*

Moreover, this case requires us to again acknowledge that natural [***650] parents have a fundamental right to the care and custody of their children. *In re Adoption of Masa (1986), 23 Ohio St.3d 163, 165, 23 OBR 330, 492 N.E.2d 140, citing Santosky v. Kramer (1982), 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599.* Because adoption terminates those fundamental rights, any exception to the requirement of parental consent to adoption must be strictly construed. *Id.*”

The Court of Appeals attempts to distinguish the present case from *Pushcar* by citing that the adoption petition was filed under 3107.07(B) and not under paragraph (A). This seems to be nothing more than a distinction without a difference. At this point the Clermont Juvenile Trial Court's analysis is particularly compelling:

“Though the adoption petition in *Pushcar* was filed under RC 3107.07(A), for the reasons discussed below, this Court finds that *Pushcar*'s holding applies to the instant case.

The holding in *Pushcar* is broad, and nowhere in the decision does the Court limit its holding to cases where the petitioner alleges that the father's consent is not required under RC 3107.07(A). The petitioner's counsel acknowledged as much. At the hearing, the Court asked petitioner's counsel if *Pushcar* states that there is a distinction between (A) and (B) cases, and petitioner's counsel responded “I don't think they even addressed the issue.”

In addition, in both *Pushcar* and the instant case, the individuals contesting the adoption met the statutory definition of “putative father” at the time the respective adoption petition was filed. In *Pushcar*, the Supreme Court found that the petitioner did not carry his burden of establishing paternity. This means that the man contesting the adoption necessarily held the status of a “putative father” because, had the petitioner carried his burden, the Supreme Court undoubtedly would have found that the man was the “father,” and there would have been no reason to stay the paternity proceedings in juvenile court.

The petitioner's counsel acknowledged that the man contesting the adoption in *Pushcar* was in fact a “putative father.” The Court asked petitioner's counsel: “in *Pushcar* you had a putative father, too, right?” The petitioner's counsel responded “Yes, you did,” and “Exactly right.” In addition, at the hearing, the Court commented that, in *Pushcar*, there was no determination that the man contesting the adoption was the father, that this is the whole reason for *Pushcar*, and that the Supreme Court waited for the juvenile court to step in. Petitioner's counsel responded, “Exactly.”

The Court finds that the fact that the man who contested the adoption in *Pushcar* constitutes a “putative father” under the statute is of importance. It means that the Supreme Court did not strictly construe the statutory requirement that, to be considered a “father” under RC 3107.06(B)(3), paternity must have been established *prior to the date the adoption petition was filed*.

This is apparent because, despite the fact that the paternity action was *pending* in *Pushcar* when the adoption petition was filed, and thus, paternity was not established *prior to the filing of the adoption petition*, the Supreme Court *did*

not find that it was too late for the paternity action to render the man contesting the adoption a “father” under RC 3107.06(B)(3). If the Supreme Court had strictly construed the statute, given that paternity was not established *prior to the filing of the adoption petition*, the man contesting the adoption would not have been afforded the opportunity to be proven to be a “father” under RC 3107.06(B)(3). Instead of denying the man the ability to be established as the father under RC 3107.06(B)(3), the Supreme Court found that the probate court should have refrained from proceeding with the adoption until the juvenile court adjudicated the paternity matter. See *Pushcar* 110 Ohio St. 332 at 335.

A similar result occurred in the prior Ohio Supreme Court case of *In re Adoption of Sunderhaus*, which is factually similar to *Pushcar* and which *Pushcar* cited. In both cases, a paternity action was pending at the time of the filing of the adoption petition, but paternity had not yet been established. In *Sunderhaus*, in a footnote, the Supreme Court stated, “the paternity action was instituted prior to the filing of the petition for adoption and parentage of appellee was established prior to the date that the petition for adoption was granted by the probate court. Accordingly, any reference to the statutory provisions governing the rights of the putative father of the minor is unnecessary.” See *In re Adoption of Sunderhaus (1992) 63 Ohio St.3d 127, 128.*

Therefore, in both *Pushcar* and *Sunderhaus*, the Ohio Supreme Court allowed for recognition of a man’s status as “father” even though the judicial determination of paternity was not made prior to the date the petition for adoption was filed.

The only real difference between *Pushcar* and our case is the petitioner’s allegation in the adoption petition. In *Pushcar*, the petitioner alleged that the biological father held the status of father and that his consent was not necessary under RC 3107.07(A). In our case, the adoption petition itself does not actually make any allegation regarding Mr. Otten. In subsequent pleadings, the petitioner alleges that the consent of Mr. Otten is not necessary under RC 3107.07(B) because he is a putative father who failed to timely register with the putative father registry.

If this Court interpreted *Pushcar* to be inapplicable to the instant case, it would mean that the status of a biological father, whose paternity action is pending when an adoption petition is filed, can be changed from “putative father” to “father” only if the petitioner alleges that the man is the “father,” but does not apply to similar cases where the petitioner instead alleges that the man is the “putative father.” In other words, it would mean that a paternity action that is pending when the adoption petition was filed would only have bearing in the former case, not the latter.

This Court finds that the Supreme Court in *Pushcar* did not intend such an inequitable result, especially in a case like the instant one, where the minor’s

mother, [Appellee], delayed the paternity action in juvenile court by requesting a continuance, where she subsequently got married less than three weeks after the scheduled hearing date in juvenile court, and where her new husband one week later filed an adoption petition prior to the juvenile court's adjudication of the pending paternity action. If [Appellee] had not filed for a continuance of the parentage action, and had that hearing taken place as originally scheduled on March 26, 2007, the juvenile court would have had the ability to have adjudicated [Appellant] to have a parent and child relationship with the minor *prior to the date the petition to adopt the minor was filed*; i.e. April 20, 2007. If the judicial determination of parentage had so been made, [Appellant] would have undeniably constituted a "father" under RC 3107.06(B). [Appellee's] filing of the continuance, which resulted in the subsequent delay of the paternity action, was likely the factor that caused [Appellant's] judicial determination of paternity to occur after the date the adoption petition was filed.

Moreover, [Appellee] *even acknowledged [Appellant's] status as biological father prior to the petitioner's filing of the adoption petition*. Prior to the adoption petition, [Appellee] filed a complaint to determine parentage in juvenile court that alleges that [Appellant] is the biological father of the minor, that no other man is presumed to be the father, and that requests the juvenile court to declare him to be the father."

Therefore, since Appellant is attempting to establish his substantive rights and responsibilities toward the minor child pursuant to O.R.C. 2151.23(B)(2) the procedural requirement of O.R.C. §3107.07(B)(1) cannot be invoked which would be a direct contradiction of the Ohio Supreme Court's holding in *Pushcar*. Further, O.R.C. §3107.062 seeks to expedite adoptions so young children are not left without a stable and loving family. This goal is not hampered or impeded especially when an action has already been commenced pursuant to O.R.C. §2151.23(B)(2) to address these very concerns. Further, O.R.C. 3107.062 was enacted to insure putative fathers received notice of adoption proceedings involving their children. The appellant did not need to avail himself of this statute since he already had proof he was the natural biological father and he availed himself of O.R.C. 2151.23(B)(2) to determine paternity and custody.

CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interest and a substantial question as to whether a major distinction and modification to a Supreme Court case will stand. The Appellant requests this Court grant jurisdiction and allow this case to be heard so that the important issues presented in this case will be reviewed on the merits.

Respectfully Submitted,

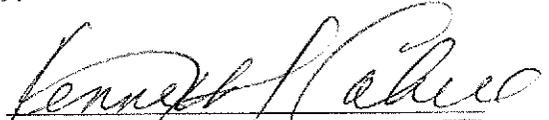


KENNETH J. CAHILL #0056207
DWORKEN & BERNSTEIN CO., L.P.A.
60 South Park Place
Painesville, Ohio 44077
Ph: (440) 352-3391
Fax: (440) 352-3469
kcahill@dworkenlaw.com

COUNSEL FOR APPELLANT,
GARY D. OTTEN

PROOF OF SERVICE

I certify that a copy of this Memorandum In Support of Jurisdiction was sent by ordinary U.S. mail to counsel for appellee, Michael R. Voorhees (RN0039293), 11159 Kenwood Road, Cincinnati, OH 45242 on October 16th, 2009.


KENNETH J. CAHILL #0056207
DWORKEN & BERNSTEIN CO., L.P.A.

COUNSEL FOR APPELLANT,
GARY D. OTTEN

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.

Appendix A-1

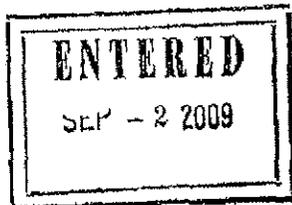
CUNNINGHAM, Judge.

{¶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 Tuttle's 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

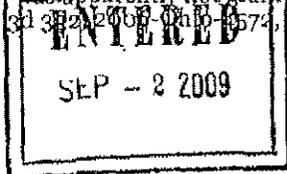
{¶6} After Otten learned of the adoption petition, he moved as P.A.C.'s "father" to dismiss or stay the adoption proceedings pending the conclusion of the parentage action in juvenile court. Otten relied on another adoption case, *In re Adoption of Pushear*, where the Ohio Supreme Court held that "[w]hen 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 *Pushear* 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, 2007-0190, 2007 Ohio 4574, 853 N.E.2d 647, syllabus.



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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

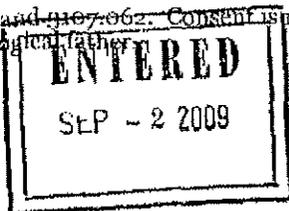
{¶15} To register, the putative father completes a registration form, created by the department of job and family services, that includes his name, the address or telephone number where he wishes to receive notice of a petition to adopt the minor he

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.

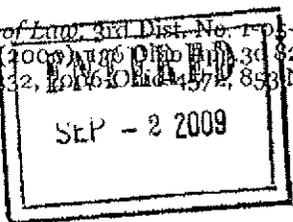
¹¹ R.C. 3107.062.

¹² R.C. 3107.063.

¹³ R.C. 3107.064.

¹⁴ *In re Adoption of Lora*, 3rd Dist. No. 1-05-64, 2006-Ohio-600, at ¶15, citing *In re Adoption of Baby Boy Brooks*, 2009 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.

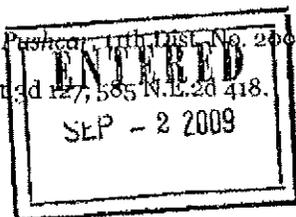
¹⁹ Id. at ¶14.

²⁰ Id. at ¶6.

²¹ *In re Adoption of Pushcar*, 11th 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

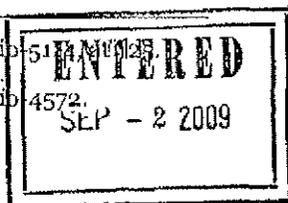
Pushcar Distinguished

{¶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-5141, ¶123.

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.

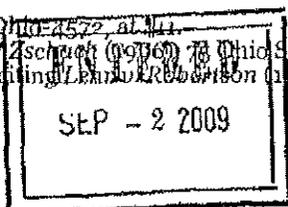
{¶26} Our adherence to the procedural mandates may appear inequitable in this case, but it is required in light of the statutory language. We follow the Ohio Supreme Court's holding in *In re Adoption of Zschach*, where the court strictly adhered to a different procedural mandate against a putative father 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* (1976), 78 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.

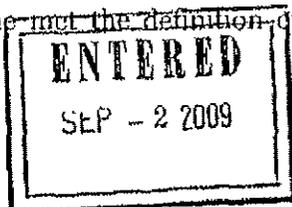
{¶28} We conclude that the General Assembly could have easily worded the statutes differently, but it did not. Because of the wording of the statutes, on the date the petition was filed, Otten's status was that of a "putative father" who had not timely registered. Thus, we conclude that his consent was 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



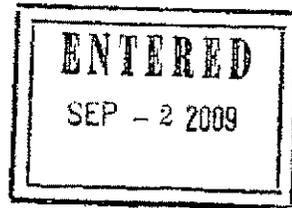
on the adoption petition.

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.



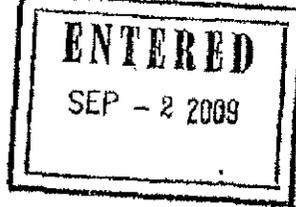
Appendix A-13

E-2A11

**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.

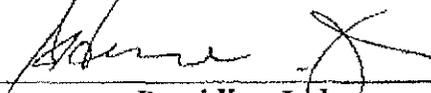
The judgment of the trial court is reversed and cause remanded for the reasons set forth in the Opinion filed this date.

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.

PROBATE COURT OF HAMILTON COUNTY, OHIO
JAMES CISSELL, JUDGE

FILED

NOV 05 2008

JAMES CISSELL
JUDGE & EX-OFFICIO CLERK

IN RE ADOPTION OF PAITYN ALEXA CROOKS
CASE NO. 2007001743

BY _____

ENTRY SUSTAINING MAGISTRATE'S DECISION

This matter came to be heard before Judge Cissell on petitioner Kevin Crooks' Objections to the Decision of Magistrate entered on July 16, 2008. The Decision of Magistrate found Gary D. Otten to be the father of Paityn Alexa Crooks ("the minor"), that his consent to the adoption is therefore required, that he does not consent to the adoption, and therefore dismissed the petition for adoption. Present before the Court at the hearing on the Objections were Michael Voorhees, representing the petitioner, Kevin Crooks; Edwin Hoseus, representing the minor's mother, Susan Crooks; Kevin and Susan Crooks; and J. Stephen Cox, representing Gary D. Otten.

I. FINDINGS OF FACT AND PROCEDURAL POSTURE

The relevant facts are undisputed. The Court hereby adopts section I of the Decision of Magistrate, entered July 16, 2008, which is entitled "Factual and Procedural Background," and incorporates it herein. In addition, the Court makes the following findings of fact:

1. Following Mr. Otten's complaint to determine parentage, which was filed in the Clermont County Juvenile Court on January 29, 2007, Susan Crooks (fka Susan Tuttle), the minor's mother, filed a complaint to determine parentage in Clermont County Juvenile Court on February 13, 2007. Her complaint alleges that Gary Douglas Otten is the father of the minor, that no other man is presumed to be the father, and requests the juvenile court to declare him to be the father.¹ Mr. Otten

¹ See "Complaint to Determine Parentage," attached as Exhibit A to Mr. Otten's Memorandum of Law in Support of Magistrate's Decision to Stay Adoption Petition, filed in the probate case on October 12, 2007.

filed an answer admitting that he is the father of the minor and requesting the court to enter judgment on the parentage complaint.²

2. The parentage actions were consolidated and scheduled for hearing on March 26, 2007. However, the hearing did not occur on March 26, 2007. This is because Susan Crooks, through counsel, filed a Motion for Continuance.³ A few weeks later, on April 13, 2007, the petitioner and Ms. Crooks were married in Gatlinburg, Tennessee.⁴ The petition for adoption was filed one week after the marriage, on April 20, 2007.⁵
3. The petition for adoption alleges that the consent of Jeremy Tuttle, Ms. Crooks' former husband whose name appears on the minor's birth certificate, is not required because Mr. Tuttle is not the biological father of the minor and because the dissolution decree of Ms. Crooks and Mr. Tuttle states that Mr. Tuttle is not the biological father.
4. The petition for adoption is silent as to any information regarding Gary Otten. It does not indicate whether Mr. Otten's consent to the adoption is required, and does not provide a basis for any allegation as to why Mr. Otten's consent would not be required.
5. The petitioner's RC 3127.23 affidavit, which discloses, among other things, whether the petitioner has any information regarding any pending parenting proceeding concerning the minor, and which was filed in the adoption case on April 20, 2007, states: "putative father may have filed- information not yet available."
6. Pleadings filed by the petitioner subsequent to the petition, in response to Mr. Otten's motion to dismiss the adoption petition, allege that Mr. Otten's consent to the adoption is not required pursuant to RC 3107.07(B)(1).
7. This Court stayed the adoption proceeding pending the outcome of the Clermont County Juvenile Court litigation.⁶ On May 16, 2008, the Clermont County Juvenile Court entered a judgment finding that Gary Otten is the biological father of Paityn Alexa Crooks and granted parenting time with her.⁷ Because the parentage action in Clermont County Juvenile Court has concluded, the stay of

² See "Defendant Gary D. Otten's Confession of Judgment," attached as Exhibit B to Exhibit A to Mr. Otten's Memorandum of Law in Support of Magistrate's Decision to Stay Adoption Petition, filed in the probate case on October 12, 2007.

³ See "Motion for Continuance," attached as Exhibit E to Mr. Otten's Memorandum of Law in Support of Magistrate's Decision to Stay Adoption Petition, filed in the probate case on October 12, 2007.

⁴ See "Petition for Adoption of Minor," filed in the probate case on April 20, 2007.

⁵ See "Petition for Adoption of Minor," filed in the probate case on April 20, 2007.

⁶ See Entry Staying Adoption, dated 6/6/07; Magistrate's Order, dated 9/25/07; and Entry Sustaining Magistrate's Decision, dated 11/7/07.

⁷ See "Entry on Objections," and "Magistrate's Amended Decision," attached to Mr. Otten's "Amended Motion to Dismiss Petition for Adoption," filed in the probate case on May 22, 2008.

the adoption proceeding is lifted and Mr. Otten's motion to dismiss the petition for adoption is ripe for decision.

II. CONCLUSIONS OF LAW

1. In re Adoption of Pushcar

The syllabus of In re Adoption of Pushcar, (2006) 110 Ohio St. 332 states: "When 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."

2. RC 3107.01(H): definition of "putative father"

Under RC 3107.01(H), a " 'putative father' means a man, including one under age eighteen, who may be a child's father and to whom all of the following apply:

- (1) He is not married to the child's mother at the time of the child's conception or birth;
- (2) He has not adopted the child;
- (3) He has not been determined, prior to the date a petition to adopt the child is filed, to have a parent and child relationship with the child by a court proceeding pursuant to sections 3111.01 to 3111.18 of the Revised Code, a court proceeding in another state, an administrative agency proceeding pursuant to sections 3111.38 to 3111.54 of the Revised Code, or an administrative agency proceeding in another state;
- (4) He has not acknowledged paternity of the child pursuant to sections 3111.21 to 3111.35 of the Revised Code."

3. RC 3107.07(B): When "putative fathers" need not consent to an adoption:

RC 3107.07(B)(1) provides that consent to an adoption is not required of a "putative father" if he fails to registers as the minor's putative father with the putative father registry not later than 30 days after the minor's birth.

4. RC 3107.06(B): When "fathers" must consent:

RC 3107.06(B) provides that, unless consent is not required under RC 3107.07, the consent of the father of the minor is required 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 acknowledgment has become final pursuant to section 2151.232, 3111.25, or 3111.821 of the Revised Code.

III. DISCUSSION

The issue before the Court is whether Mr. Otten's status is that of a "putative father" under RC 3107.01(H), or a "father" under RC 3107.06(B). If he is a "putative father," then pursuant to RC 3107.07(B)(1), his consent to the adoption would not be required because he failed to timely register with the putative father registry. If he is a "father," then pursuant to RC 3107.06(B), his consent to the adoption is required.

Mr. Otten was not married to the minor's mother at the time of the minor's conception or birth; has not adopted the minor; was not judicially determined to be the minor's father *prior to the date the petition to adopt was filed*; and has not acknowledged paternity pursuant to RC 3111.21, et seq. Therefore, under strict application of RC 3107.01(H), and not considering the Ohio Supreme Court's decision in In re Adoption of Pushcar, (2006) 110 Ohio St. 332, Mr. Otten would qualify as a "putative father." Further, given that he did not timely register with the putative father registry, his consent to the adoption would not be required under RC 3107.07(B)(1).

However, under the holding of In re Adoption of Pushcar, the Court finds that other factors must be considered before determining whether Mr. Otten is a "putative father" whose consent to the adoption is not required, or a "father" whose consent to the adoption is required.

In the syllabus of In re Adoption of Pushcar, (2006) 110 Ohio St. 332, the Ohio Supreme Court held that: "When 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." Under the plain language of this holding, given that Mr. Otten's paternity action was pending in juvenile court at the time that the petition for adoption was filed, this Court was required to refrain from proceeding with the adoption petition until the paternity determination was made.⁸ Further, unless this Court were to find that the stay required in Pushcar has no meaning, then we would be required to give effect to the paternity determination made by the juvenile court.

The petitioner disagrees with this approach. The petitioner argues that, given that paternity was not established prior to the filing of the adoption petition, Mr. Otten constitutes a "putative father," pursuant to RC 3107.01(H), whose consent to the adoption is not required as a matter of law under RC 3107.07(B)(1) because he failed to timely register with the putative father registry.⁹

The petitioner further argues that Pushcar is not applicable to this adoption proceeding as this proceeding involves an allegation that Mr. Otten's consent is not required under RC 3107.07(B) because he is a putative father who failed to timely

⁸In fact, this Court stayed the adoption petition pending the outcome of the parentage action in Clermont County Juvenile Court. See Entry Staying Adoption, dated 6/6/07; Magistrate's Order, dated 9/25/07; and Entry Sustaining Magistrate's Decision, dated 11/7/07.

⁹ See Petitioner's Memorandum in Opposition to the Amended Motion to Dismiss, filed May 30, 2008, at 1.

register, while Pushcar involved an allegation that the consent of the father was not required pursuant to RC 3107.07(A) based upon his failure to communicate with the child for the one year period.¹⁰ The petitioner also argues that two appellate court cases that distinguish Pushcar support his position, namely In re Adoption of Joshua Tai T. (Ohio Appellate 6 Dist 2008) 2008 WL 2315901, and In re T.N.W. (Ohio App. 8 Dist. 2008) 2008 WL 660534.¹¹

Mr. Otten, on the other hand, asserts that Pushcar is the keystone to the instant case.¹² He argues that the two appellate cases cited by the petitioner are not relevant because they deal with custody proceedings where determination of paternity is not involved.¹³ He asserts that, to argue that Pushcar mandates that when a parentage action is pending in juvenile court, the probate court has to wait until the juvenile court determines parentage, but when that determination is made, the probate court does not have to recognize the juvenile court's determination of paternity "renders Pushcar meaningless and absolutely makes no sense."¹⁴ He argues that such an interpretation would mean that Pushcar mandates that we "burn the court's time," given that the juvenile court determination of paternity "doesn't matter anyway."¹⁵

Though the adoption petition in Pushcar was filed under RC 3107.07(A), for the reasons discussed below, this Court finds that Pushcar's holding applies to the instant case.

¹⁰ See Petitioner's Objection to Decision of Magistrate Dismissing Petition for Adoption, filed July 25, 2008, at 2-3.

¹¹ See Petitioner's Supplemental Memorandum in Support of Petitioner's Objection to Decision of Magistrate, filed July 30, 2008.

¹² See Transcript of Hearing of August 15, 2008 at 21.

¹³ See Transcript of Hearing of August 15, 2008 at 18.

¹⁴ See Transcript of Hearing of August 15, 2008 at 18-19.

¹⁵ See Transcript of Hearing of August 15, 2008 at 22.

The holding in Pushcar is broad, and nowhere in the decision does the Court limit its holding to cases where the petitioner alleges that the father's consent is not required under RC 3107.07(A). The petitioner's counsel acknowledged as much. At the hearing, the Court asked petitioner's counsel if Pushcar states that there is a distinction between (A) and (B) cases, and petitioner's counsel responded "I don't think they even addressed the issue."¹⁶

In addition, in both Pushcar and the instant case, the individuals contesting the adoption met the statutory definition of "putative father" at the time the respective adoption petition was filed. In Pushcar, the Supreme Court found that the petitioner did not carry his burden of establishing paternity.¹⁷ This means that the man contesting the adoption necessarily held the status of a "putative father" because, had the petitioner carried his burden, the Supreme Court undoubtedly would have found that the man was the "father," and there would have been no reason to stay the paternity proceedings in juvenile court.

The petitioner's counsel acknowledged that the man contesting the adoption in Pushcar was in fact a "putative father." The Court asked petitioner's counsel: "in Pushcar you had a putative father, too, right?" The petitioner's counsel responded "Yes, you did," and "Exactly right."¹⁸ In addition, at the hearing, the Court commented that, in Pushcar, there was no determination that the man contesting the adoption was the father, that this is the whole reason for Pushcar, and that the Supreme Court waited for the juvenile court to step in. Petitioner's counsel responded, "Exactly."¹⁹

¹⁶ See Transcript of Hearing of August 15, 2008 at 6.

¹⁷ See Pushcar 110 Ohio St. 332 at 335.

¹⁸ See Transcript of August 15, 2008 Hearing at 4.

¹⁹ See Transcript of August 15, 2008 hearing at 33.

The Court finds that the fact that the man who contested the adoption in Pushcar constitutes a "putative father" under the statute is of importance. It means that the Supreme Court did not strictly construe the statutory requirement that, to be considered a "father" under RC 3107.06(B)(3), paternity must have been established *prior to the date the adoption petition was filed*.

This is apparent because, despite the fact that the paternity action was *pending* in Pushcar when the adoption petition was filed, and thus, paternity was not established *prior to the filing of the adoption petition*, the Supreme Court *did not find* that it was too late for the paternity action to render the man contesting the adoption a "father" under RC 3107.06(B)(3). If the Supreme Court had strictly construed the statute, given that paternity was not established *prior to the filing of the adoption petition*, the man contesting the adoption would not have been afforded the opportunity to be proven to be a "father" under RC 3107.06(B)(3). Instead of denying the man the ability to be established as the father under RC 3107.06(B)(3), the Supreme Court found that the probate court should have refrained from proceeding with the adoption until the juvenile court adjudicated the paternity matter. See Pushcar 110 Ohio St. 332 at 335.

A similar result occurred in the prior Ohio Supreme Court case of In re Adoption of Sunderhaus, which is factually similar to Pushcar and which Pushcar cited. In both cases, a paternity action was pending at the time of the filing of the adoption petition, but paternity had not yet been established. In Sunderhaus, in a footnote, the Supreme Court stated, "the paternity action was instituted prior to the filing of the petition for adoption and parentage of appellee was established prior to the date that the petition for adoption was granted by the probate court. Accordingly, any reference to the statutory

provisions governing the rights of the putative father of the minor is unnecessary.” See In re Adoption of Sunderhaus (1992) 63 Ohio St.3d 127, 128, footnote 1.

Therefore, in both Pushcar and Sunderhaus, the Ohio Supreme Court allowed for recognition of a man’s status as “father” even though the judicial determination of paternity was not made prior to the date the petition for adoption was filed.

The only real difference between Pushcar and our case is the petitioner’s allegation in the adoption petition. In Pushcar, the petitioner alleged that the biological father held the status of father and that his consent was not necessary under RC 3107.07(A). In our case, the adoption petition itself does not actually make any allegation regarding Mr. Otten. In subsequent pleadings, the petitioner alleges that the consent of Mr. Otten is not necessary under RC 3107.07(B) because he is a putative father who failed to timely register with the putative father registry.

If this Court interpreted Pushcar to be inapplicable to the instant case, it would mean that the status of a biological father, whose paternity action is pending when an adoption petition is filed, can be changed from “putative father” to “father” only if the petitioner alleges that the man is the “father,” but does not apply to similar cases where the petitioner instead alleges that the man is the “putative father.” In other words, it would mean that a paternity action that is pending when the adoption petition was filed would only have bearing in the former case, not the latter.

This Court finds that the Supreme Court in Pushcar did not intend such an inequitable result, *especially* in a case like the instant one, where the minor’s mother, Ms. Crooks, delayed the paternity action in juvenile court by requesting a continuance, where she subsequently got married less than three weeks after the scheduled hearing

date in juvenile court, and where her new husband one week later filed an adoption petition prior to the juvenile court's adjudication of the pending paternity action. If Ms. Crooks had not filed for a continuance of the parentage action, and had that hearing taken place as originally scheduled on March 26, 2007, the juvenile court would have had the ability to have adjudicated Mr. Otten to have a parent and child relationship with the minor *prior to the date that the petition to adopt the minor was filed*; i.e. April 20, 2007. If the judicial determination of parentage had so been made, Mr. Otten would have undeniably constituted a "father" under RC 3107.06(B). Ms. Crooks' filing of the continuance, which resulted in the subsequent delay of the paternity action, was likely the factor that caused Mr. Otten's judicial determination of paternity to occur after the date the adoption petition was filed.

Moreover, *Ms. Crooks even acknowledged Mr. Otten's status as biological father prior to the petitioner's filing of the adoption petition*. Prior to the adoption petition, Ms. Crooks filed a complaint to determine parentage in juvenile court that alleges that Mr. Otten is the biological father of the minor, that no other man is presumed to be the father, and that requests the juvenile court to declare him to be the father.

Finally, the Court finds that the cases the petitioner cites as supporting his position are not relevant to the question of whether Pushcar applies to the instant case. Those cases are In re Adoption of Joshua Tai T. (Ohio App 6 Dist. 2008) 2008 WL 2315901 and In re T.N.W. (Ohio App. 8 Dist. 2008) 2008 WL 660534. In neither case was a paternity action pending when the adoption petition was filed, and neither case addresses whether Pushcar applies to RC 3107.07(B) cases. Instead, they deal with a mother and maternal grandmother who argued that, under Pushcar, the probate court

was required to stay an adoption proceeding because custody proceedings were pending in juvenile court. The respective courts rightfully found Pushcar to be inapplicable, given that the issue of paternity was not pending in juvenile court at the time the petition for adoption was filed in probate court.

For the foregoing reasons, the Court finds that Pushcar applies to the instant case; that under Pushcar, this Court was required to refrain from proceeding with the adoption petition until the Clermont County Juvenile Court's adjudication of the parentage action; that this Court should give effect to the Clermont County Juvenile Court's determination of the existence of a parent-child relationship; and that given said determination of paternity, Mr. Otten's status is that of "father."

Under RC 3107.06, Mr. Otten's consent to the adoption is necessary, unless his consent is not required under RC 3107.07. RC 3107.07(A) applies to parents, and thus, to Mr. Otten, given the Court's determination that he is the minor's "father." Under 3107.07(A), the consent of a parent to an adoption is not required if the parent failed without justifiable cause to communicate with the minor or to provide for the maintenance and support of the minor for a period of one year, which period, under Pushcar, does not begin to run until the judicial ascertainment of paternity. See In re Adoption of Pushcar, (2006) 110 Ohio St. 332, 334-335, citing In re Adoption of Sunderhaus (1992) 63 Ohio St.3d 127, 130.

On May 18, 2008, the Clermont County Juvenile Court entered a judgment finding that Gary Otten is the biological father of Paityn Alexa Crooks and granted parenting time with her. May 18, 2008 is therefore the date of judicial ascertainment of paternity,

and thus the date that begins the running of the one-year period. Less than one-year had passed since that date.

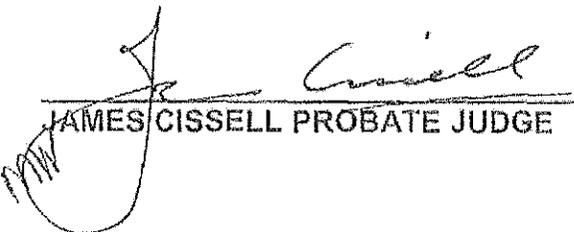
The Court finds that, under RC 3107.06, Mr. Otten is a "father" whose consent to the adoption is required. The Court further finds that the exception to the consent requirement under RC 3107.07(A) has not, and cannot, be established at this point, given that the requisite one-year period has not yet run.

IV. CONCLUSION

For the foregoing reasons, the Court sustains the magistrate's decision and overrules the Objections. The Court finds that Mr. Otten's consent to the adoption is required and that he does not consent. The Court hereby dismisses the petition for adoption.

IT IS SO ORDERED.

cc: Michael Voorhees, Esq.
J. Stephen Cox, Esq.



JAMES CISSELL PROBATE JUDGE

A COPY OF THIS ENTRY
WAS MAILED TO THE PARTIES
LISTED AT LEFT ON 11-5-08
BY Susana Trumpi
DEPUTY CLERK

