

ORIGINAL

IN THE SUPREME COURT OF OHIO

In re Adoption of : G.V.

09-2355

Jason and Christy Vaughn

On Appeal from the  
Lucas County Court of Appeals,  
Sixth Appellate District

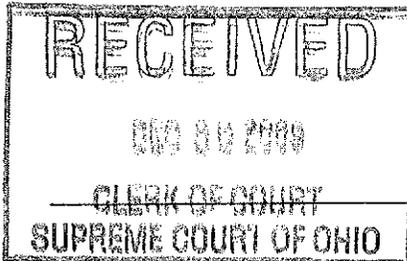
Appellants

Court of Appeals  
Case No. L-09-1160  
(Entry Date: November 30, 2009)

Benjamin Wyrembek

Trial Court No. 2008 ADP 000010  
Lucas County Probate Court

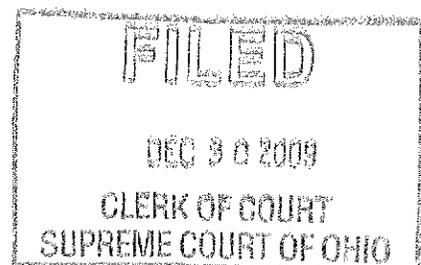
Appellee



NOTICE OF APPEAL  
OF APPELLANTS JASON AND CHRISTY VAUGHN

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**Notice of Appeal of Appellants Jason and Christy Vaughn**

Appellants Jason and Christy Vaughn hereby give notice of appeal to the Supreme Court of Ohio from the Decision of the Lucas County Court of Appeals, Sixth Appellate District of Ohio, entered on November 30, 2009 in the case captioned *In re Adoption of G.V.*, Lucas County Court of Appeals Case No. L-09-1160. This appeal involves the adoption of a minor child.

This appeal involves substantial constitutional questions and involves a case of public or great general interest, as set forth more fully in the Memorandum in Support of Jurisdiction of Appellants Jason and Christy Vaughn, which is being filed herewith. Pursuant to S. Ct. Prac. R. II, Section 1(A)(2), this appeal is taken as a claimed appeal of right based on the substantial constitutional questions involved in this case. Pursuant to S. Ct. Prac. R. II, Section 1(A)(3), this appeal is also taken as a discretionary appeal because it is a case of public or great general interest. The Decision entered by the Court of Appeals on November 30, 2009 in this case is attached hereto.

Respectfully submitted,



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**Certificate of Service**

I hereby certify that a copy of the foregoing Notice of Appeal has been sent by regular U.S. mail or by fax this 29<sup>th</sup> day of December, 2009 to: Alan J. Lehenbauer, Attorney for Benjamin Wyrembek, The McQuades Co. LPA, P.O. Box 237, Swanton, Ohio 43558(fax # 419-825-3871).



Michael R. Voorhees (0039293)

FILED  
COURT OF APPEALS

2009 NOV 30 A 9 25

COMMON PLEAS COURT  
BERNIE OULTER  
CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO  
SIXTH APPELLATE DISTRICT  
LUCAS COUNTY

In the Matter of:  
The Adoption of G.V.

Court of Appeals No. L-09-1160

Trial Court No. 2008 ADP 000010

DECISION AND JUDGMENT

Decided: NOV 30 2009

\* \* \* \* \*

Michael R. Voorhees, for appellants.

Alan J. Lehenbauer, for appellee.

\* \* \* \* \*

OSOWIK, J.

{¶ 1} This is an appeal from a judgment of the Lucas County Court of Common Pleas, Probate Division, that dismissed appellants' petition to adopt minor child G.V. as having been filed prematurely. For the following reasons, the judgment of the trial court is affirmed.

**E-JOURNALIZED**

{¶ 2} The following undisputed facts are relevant to the issues raised on appeal. Minor child G.V. was born in October 2007. On November 1, 2007, the child's birth mother executed a permanent surrender in accordance with R.C. 5103.15 and asked a private adoption agency to take permanent custody of the infant. On November 4, 2007, J.B., the child's legal father, executed a permanent surrender in which he indicated that he was not the child's biological father. At the time the permanent surrenders were executed, the child's mother and J.B. were recently divorced. J.B. was presumed to be the legal father pursuant to R.C. 3111.03(A)(1) because he was married to the child's mother at the time the child was conceived. On November 8, 2007, G.V. was placed with appellants for the purpose of adoption.

{¶ 3} On November 15, 2007, appellee B.W. timely registered with the Ohio Putative Father Registry, seeking to initiate parental rights relative to G.V. On December 28, 2007, appellee filed a "Parentage Complaint: Petition to Establish Parental Rights and for Other Relief" in the Fulton County Court of Common Pleas, Juvenile Division. In response, appellants filed a motion requesting dismissal of the parentage complaint.

{¶ 4} On January 16, 2008, appellants filed a petition for adoption in the Lucas County Court of Common Pleas, Probate Division. On February 21, 2008, the Fulton County Juvenile Court transferred the parentage proceedings initiated by appellee to the Lucas County Court of Common Pleas, Juvenile Division, pursuant to Juv.R. 11.

{¶ 5} On April 23, 2008, appellee filed objections to the adoption. On May 19, 2008, the Lucas County Probate Court stayed the adoption proceedings pending determination of paternity by the Lucas County Juvenile Court. Thereafter, the juvenile court directed appellants, appellee, the child's birth mother and the individuals or agency with possession of G.V. to present themselves and the child for genetic testing as directed by the court. On March 17, 2009, the juvenile court issued a judgment entry declaring appellee to be the father of G.V. The juvenile court then dismissed the proceedings in that court due to the pending adoption.

{¶ 6} On June 2, 2009, a hearing was held in the probate court to address appellee's objections to the adoption. On June 4, 2009, the probate court issued the judgment entry which is the subject of this appeal dismissing the petition for adoption. In its decision, the trial court noted that the parties disagreed as to which adoption statute should be applied relative to the issue of whether or not appellee's consent to the adoption was necessary. Appellants asserted that R.C. 3107.07(B)(2), which addresses the circumstances under which the consent of a putative father is not required, should apply because appellee was a putative father when the petition to adopt was filed. Appellants asserted that appellee could not be elevated to the position of legal father once the adoption case had commenced. In response, appellee argued that, in light of the juvenile court's finding of parentage, the probate court should apply the provisions of R.C. 3107.07(A), which sets forth the circumstances under which the consent of a legal parent is not required.

{¶ 7} In response to these claims, the probate court found, pursuant to *In re Adoption of Pushcar* (2006), 110 Ohio St.3d 332, that while an issue concerning parenting of a minor child is pending in juvenile court – as was the case herein – a probate court must defer to the juvenile court and refrain from proceeding with the adoption of that child. The trial court reasoned, based on *Pushcar*, that the Supreme Court of Ohio intended the probate court to consider the findings of a juvenile court that are made while an adoption proceeding is being held in abeyance. In the case before us, appellee was found to be G.V.'s legal father while the probate case was stayed. Therefore the probate court ruled for purposes of determining the necessity of appellee's consent to the adoption that appellee is to be deemed a legal father and that the case falls under the provisions of R.C. 3107.07(A). Pursuant to R.C. 3107.07(A), a parent's consent to the adoption of a minor child is not necessary if the parent has failed without justifiable cause to communicate with the minor or to provide for the maintenance and support of the child as required by law or judicial decree for a period of at least one year immediately preceding either the filing of the petition for adoption or placement of the minor in the home of the petitioner.

{¶ 8} The trial court concluded, based on the holding in *In re Adoption of Sunderhaus* (1992), 63 Ohio St.3d 127, paragraph two of the syllabus, that the one-year statutory period of nonsupport which obviates the requirement to obtain parental consent to an adoption began to run on March 17, 2009, the date that appellee's parentage was judicially established. The court further reasoned that since the one-year period did not

begin to run until judicial ascertainment of paternity, appellants could not prove, pursuant to R.C. 3107.07(A), that appellee had failed to communicate with the child for one year prior to the filing of the petition because the petition was filed prior to the date paternity was established. The trial court therefore found that the petition for adoption was filed prematurely. It is from that judgment that appellants filed a timely appeal.

{¶ 9} Appellants set forth the following assignments of error:

{¶ 10} "Appellants' First Assignment of Error

{¶ 11} "The Probate Court erred by finding that Appellee was no longer a putative father in the adoption proceeding.

{¶ 12} "Appellants' Second Assignment of Error

{¶ 13} "The Probate Court erred in finding that it did not have exclusive jurisdiction over the adoption proceeding.

{¶ 14} "Appellants' Third Assignment of Error

{¶ 15} "The Probate Court erred by allowing Appellee to be a party to the adoption proceeding.

{¶ 16} "Appellants' Fourth Assignment of Error

{¶ 17} "The Probate Court erred by refusing to consider all allegations set forth in the Petition that were stated as separate grounds for finding the consent of the putative father is not required."

{¶ 18} Because adoption terminates a natural parent's fundamental right to the care and custody of his children, "any exception to the requirement of parental consent [to

adoption] must be strictly construed so as to protect the right of natural parents to raise and nurture their children." *In re Schoeppner's Adoption* (1976), 46 Ohio St.2d 21, 24. Further, the finding of the probate court in adoption proceedings "will not be disturbed on appeal unless such determination is against the manifest weight of the evidence." *In re Adoption of Bovett* (1987), 33 Ohio St.3d 102, 204. A determination is not against the manifest weight of the evidence when it is supported by competent, credible evidence. *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279.

{¶ 19} In support of their first assignment of error, appellants assert that the trial court erred by finding that it was required by *Pushcar* to consider the juvenile court's determination of parentage made while the probate case was stayed. As explained above, *Pushcar* held that the probate court must defer to the juvenile court and refrain from addressing the matter until after adjudication in the juvenile court. Appellants cite the holding of the First District in *In the Matter of the Adoption of P.A.C.* In *P.A.C.*, the court held that where a biological father did not timely register with the putative father registry before the adoption petition was filed or otherwise safeguard his right to object to the adoption of his child, his consent to the adoption was not required even though a parentage action was pending at the time the petition was filed. In the case before us, however, appellee registered on the putative father registry 17 days after the child was born, well within the 30-day time limit allowed by law. Within two months after the child's birth, appellee filed a parentage action; appellants filed their petition to adopt 18 days later.

{¶ 20} After appellee's paternity was established, the probate court in this case correctly acknowledged the juvenile court's finding and proceeded with the adoption case and consideration of whether appellee's consent was required for the adoption.

{¶ 21} Based on the foregoing, we find that the trial court did not err by finding that appellee was no longer a putative father in the adoption proceeding. Accordingly, appellants' first assignment of error is not well-taken.

{¶ 22} In their second assignment of error, appellants assert that the probate court erred by finding that paternity was relevant to the adoption proceeding and staying the adoption until the juvenile court determined the paternity issue. Appellants assert that since they withdrew from their petition the allegation that appellee was not the child's biological father, the issue of paternity was irrelevant to the adoption proceeding. Pursuant to *Pushcar*, however, the probate court in this case correctly determined that it could not proceed with the adoption until paternity was established by the juvenile court. Appellee's status as either a putative father or biological father would control which statutory provision would be applied to determine under what circumstances his consent would be required. In this case, if appellee were found merely to be a putative father, pursuant to R.C. 3107.07(B)(2), appellants would only have to show that he willfully abandoned or failed to support the minor child, or that he willfully abandoned the mother during her pregnancy and until the time of the surrender or placement of the child in appellants' home. Because the issue of paternity clearly was relevant in this case, the

probate court properly stayed the case pending the juvenile court's determination.

Accordingly, appellants' second assignment of error is not well-taken.

{¶ 23} In their third assignment of error, appellants assert that the probate court erred by allowing appellee to be a party to the adoption proceeding. Appellants base their argument on the undisputed fact that J.B. was the child's legal father at the time that the adoption petition was filed, as he was married to mother at the time that G.V. was conceived. Appellants state correctly that since both legal parents executed permanent surrenders, their consent is not necessary for an adoption. Appellants then claim that since J.B. was the child's legal father, appellee had no legal authority either to register with the putative father registry or to file objections in the adoption case. Referring to J.B. and appellee, appellants further claim that it is a due process violation to require adoptive parents to seek the consent of "multiple classifications of fathers," at different points in time.

{¶ 24} Appellants' arguments have no merit. At no time during the pendency of this case was it asserted that appellants had to obtain the consent of the legal father. J.B. executed a permanent surrender of his parental rights when the child was six days old. In the permanent surrender, J.B. stated, "I am not the biological father." Appellants' argument as to the unfairness of adoptive parents being burdened with having to seek the consent of "multiple classifications of fathers" simply cannot be applied to the facts of this case. Should the petition to adopt G.V. be refiled, based on the probate court's ruling, the only individual whose consent appellants would potentially need would be

appellee. Appellants also incorrectly claim that appellee was not entitled to receive notice of the adoption proceeding, stating that in Ohio the only means for a putative father to be entitled to receive notice of an adoption proceeding is to timely register with the putative father registry. Since that is exactly what appellee did, this argument simply has no merit. Further, pursuant to R.C. 3107.11, appellee had a right to receive notice of the adoption petition and of the time and place of the hearing. Appellants did not give him such notice. On March 14, 2008, the probate court ordered appellants to serve appellee, as putative father, with notice of the petition. As appellants' arguments have no merit, their third assignment of error is not well-taken.

{¶ 25} In support of their fourth assignment of error, appellants assert that the probate court erred by refusing to consider all of their arguments as to why appellee's consent was not required. Ultimately, the probate court did not reach a decision as to whether appellee's consent was or was not required. This is because the court dismissed the petition to adopt as prematurely filed, for the reasons set forth above. Accordingly, this argument has no merit and appellants' fourth assignment of error is not well-taken.

{¶ 26} On consideration whereof, the judgment of the Lucas County Court of Common Pleas, Probate Division, is affirmed. Costs of this appeal are assessed to appellants pursuant to App.R. 24.

JUDGMENT AFFIRMED.

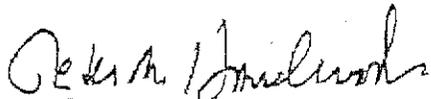
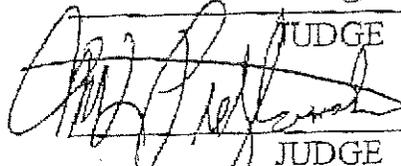
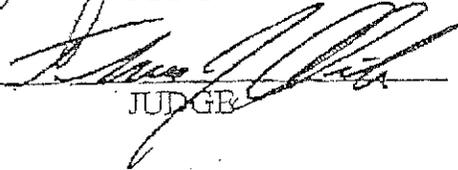
In the Matter of:  
The Adoption of G.V.  
C.A. No. L-09-1160

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, P.J.

Mark L. Pietrykowski, J.

Thomas J. Osowik, J.  
CONCUR.

  
\_\_\_\_\_  
JUDGE  
  
\_\_\_\_\_  
JUDGE  
  
\_\_\_\_\_  
JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:  
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.

FILED  
LUCAS CO. PROBATE COURT  
JACK R. PUFFENBERGER, JUDGE

2009 JUN -4 P 36

IN THE COMMON PLEAS COURT OF LUCAS COUNTY, OHIO  
PROBATE DIVISION

IN THE MATTER OF:

THE ADOPTION OF  
GRAYSON THOMAS VAUGHN

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CASE NO. 2008 ADP 000010

JUDGMENT ENTRY

This matter comes before the Court pursuant to a Petition For Adoption of Minor filed January 16, 2008 by Attorney Michael R. Voorhees on behalf of petitioners Jason and Christy Vaughn (Vaughns).

The child who is the subject of this adoption petition was born on October 29, 2007 in Lucas County, Ohio. On November 1, 2007 the child's birth mother, Drucilla Rose Bocvarov, executed a permanent surrender of this child to Adoption By Gentle Care, which is a private child placing agency (PCPA). Her former husband, Jovan Bocvarov, also executed a permanent surrender to the PCPA on November 4, 2007. Drucilla's permanent surrender indicated that at the time of surrender she was a "single parent" and Jovan's permanent surrender indicated that he was "not the biological father" of this child. The Bocvarovs had been divorced during the time of Drucilla's pregnancy, however since they were married at the time of conception of this child, Mr. Bocvarov is deemed to be the presumed natural father of this child. R.C. 3111.03(A)(1): Adoption By Gentle Care accepted the surrenders and forthwith placed the child with the Vaughns for purpose of adoption. The child has remained with the Vaughns since early November of 2007.

On November 20, 2007, Benjamin Wyrembek timely registered with the Ohio Putative Father Registry, seeking to initiate parental rights relative to the child herein. Also, on December 28, 2007, Mr. Wyrembek filed a Parentage Complaint; Petition to Establish Parental Rights and for other relief in the Fulton County Court of Common Pleas, Juvenile Division. The Vaughns filed a motion in Fulton County Juvenile Court on January 28, 2008 requesting dismissal of Benjamin Wyrembek's parentage complaint. Fulton County Juvenile Court

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transferred the proceedings initiated by Benjamin Wyrembek to the Lucas County Court of Common Pleas, Juvenile Division, pursuant to Juvenile Rule 11 on February 21, 2008.

Petitioners herein filed a Motion for Declaratory Judgment on January 16, 2008 which was denied by this Court. In denying this motion in its Judgment Entry of March 14, 2008, the Court specifically ordered the putative father to be served with notice of the Petition for Adoption. Benjamin Wyrembek was served and thereafter filed an objection to the adoption in the Lucas County Probate Court on April 23, 2008.

This Court further ruled on May 19, 2008 that this adoption matter should be deferred until the issue of paternity of the child, which was pending in juvenile court prior to the filing of this adoption petition, was determined. *In re Adoption of Joshua Tai T*, OT-07-055, Ohio Sixth Appellate District, 2008. Accordingly, the Court held this matter in abeyance pending the parentage determination. On March 17, 2009, the Lucas County Court of Common Pleas, Juvenile Division, issued a Judgment Entry declaring Benjamin Wyrembek to be the father of the child who is the subject of this adoption petition. (JC08-180254)

This Court then conducted a telephonic pre-trial on April 2, 2009, wherein all legal arguments and evidentiary hearings were to commence June 2, 2009.

This matter comes before the Court pursuant to an amended objection and two complaints for declaratory judgment filed April 7, 2009 by Attorney Alan J. Lehenbauer on behalf of Benjamin Wyrembek. Responsive pleadings were filed by Attorney Michael Voorhees on behalf of petitioners Jason Edward Vaughn and Christy Lynn Vaughn. In addition, Mr. Lehenbauer filed a Supplemental Memorandum in Support of Complaint for Declaratory Judgment on May 27, 2009. Pursuant to this Court's order of April 2, 2009, these legal issues were scheduled for hearing on June 2, 2009, prior to an evidentiary hearing on the petition and determination of best interest of the child.

Case called for hearing. Attorney Michael R. Voorhees present with petitioners Jason Edward Vaughn and Christy Lynn Vaughn. Attorney Alan J. Lehenbauer present with Benjamin J. Wyrembek. Attorney Heather Fournier, who was appointed by this Court as guardian ad litem of the child, also present. Arguments held relative to all pending legal issues.

After due consideration of the legal arguments presented, the Court hereby finds as follows: The parties have provided voluminous cases and statutes for the Court to consider in rendering a decision relative to the pending legal motions. In addition to the well known cases of *In re Adoption of Sunderhaus*, (1992) 63 Ohio St.3d, 127, and *In re Adoption of Pushcar*, (2006) 110 Ohio St.3d 332, the Court has considered numerous other relevant cases. The case of *Nale v. Robertson*, (1994) 871 S.W.2d 674, was decided by the Supreme Court of Tennessee. The *Nale* case provides an excellent history of various aspects of adoption law in the United States. The *Nale* case tracks many of the cases cited by counsel in this matter including *Stanley v. Illinois*, (1972) 405 U.S. 645 and *Lehr v. Robertson*, (1983) 463 U.S. 248. As stated in the *Nale* case, *supra*, parents, including parents of children born out of wedlock, have a fundamental liberty interest in the care and custody of their children. The United States Supreme Court has addressed several cases relating to the issue of a father's liberty in his relationship with a child born out of wedlock. *Stanley, supra*, and *Lehr v. Robertson, supra*. Specifically the *Nale* case stated, "no parent should be denied the privilege of parenthood merely because of birth out of wedlock." In the *Nale* case, the court found that Robertson had made every reasonable effort to establish a personal as well as legal relationship between himself and his son. He therefore has established fundamental liberty interests in the child. The right of a natural parent to the care and custody of his children is one of the most precious and fundamental in law. *Santosky v. Kramer* (1982), 455 U.S. 745, 753, 102 S.Ct. 1388. Adoption terminates those fundamental rights. See 3107.15(A)(1). For this reason, "any exception to the requirement of parental consent (to adoption) must be strictly construed so as to protect the right of natural parents to raise and nurture their children". *In re Schoeppner's Adoption* (1976), 46 Ohio St.2d 21, 24. The Court of Appeals for the Sixth District of Ohio has stated in the case of *In re Smith* (1991), 77 Ohio App.3d 1,16, that the termination of parental rights is the family law equivalent of the death penalty in a criminal case. The parties to such an action must be afforded every procedural and substantive protection the law allows.

The parties in this matter have agreed that the probate court has original and exclusive jurisdiction over this adoption proceeding. This Court relied on the *Pushcar* decision in its order of May 19, 2008 and specifically reiterates that the parentage action in this matter was filed prior to and was pending at the time the adoption petition was filed in this court. Accordingly, the Court refrained from proceeding with the adoption petition during the pendency of the parentage action. It is the opinion of this Court that it now has jurisdiction to consider the petition for adoption since the juvenile court has adjudicated the parentage matter to its conclusion. In this matter, the parties have a difference of opinion in relation to which adoption statute should be applied relative to the necessity of Mr. Wyrembek's consent. Petitioners allege that R.C. 3107.07(B)(2)(c) applies since Mr. Wyrembek was a putative father when the petition was filed. Petitioners further allege that Mr. Wyrembek is unable to elevate himself to the

level of a legal father once the adoption case has been commenced. Counsel for Mr. Wyrembek argues that this Court should consider the finding of parentage in the juvenile court, and therefore utilize the provisions of R.C. 3107.07(A) in determining whether Mr. Wyrembek's consent is required. It should be noted that R.C. 3107.07(B) relates to the consent of putative fathers and Section 3107.07(A) relates to the consent of legal fathers. Were the Court to proceed in this matter under R.C. 3107.07(B), the issue would be whether Mr. Wyrembek abandoned the birth mother during the time of her pregnancy and up to her time of her surrender of the child. Should the Court rule that Section 3107.07(A) applies, the issue would be whether Mr. Wyrembek failed to communicate with the minor or to provide for the maintenance and support of the minor as required by law or judicial decree for a period of at least one year immediately preceding the filing of the adoption petition without justifiable cause.

This Court finds the facts in the instant matter strikingly similar to the facts *In the Matter of the Adoption of JLM*, Case Number 200678, decided in the Probate Court of Stark County, Ohio on April 8, 2008. In *JLM*, as in this case, the father timely registered with the Putative Father Registry and filed a complaint to establish paternity prior to the filing of the Petition for Adoption. The Probate Court in *JLM* deferred to the juvenile court to establish paternity pursuant to *Pushcar, supra*. Upon the order of the juvenile court finding the parent-child relationship, the probate court dismissed the Petition for Adoption applying *Sunderhaus, supra*. The court held that the duty to communicate and support referred to in R.C. 3107.07(A) commenced upon the establishment of paternity. Since one-year had not passed since the paternity determination, the petition was considered premature and therefore dismissal was required.

This Court finds that when a parentage action is pending prior to the filing of the adoption petition, the Court must apply *Pushcar*. It must be logically assumed that the Supreme Court of Ohio intended the probate court to consider the findings of the juvenile court made while the adoption proceeding is being held in abeyance. In this case, the juvenile court has ruled that Mr. Wyrembek is the father of the child who is the subject of this adoption proceeding, therefore the Court hereby rules that for purposes of determining the necessity of Mr. Wyrembek's consent, he is to be deemed a legal father.

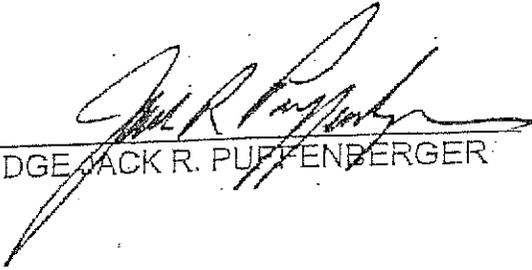
Accordingly, the Court rules that Section 3107.07(B) no longer applies to Mr. Wyrembek although he was a putative father when the petition was filed by virtue of his putative father registration. The judicial determination of a parentage action filed prior to the petition for adoption changes his status in this matter and he is now a legal father and falls under the provisions of R.C. 3107.07(A). In this regard, the Court notes that the one-year period prescribed by Revised Code Section 3107.07(A) commenced on the date that parentage has been judicially

established. *In re Adoption of Sunderhaus (1992), 63 Ohio St.3d 127, 132.*  
Since one year had not expired prior to the placement of the child or the filing of the petition and one year has not expired since the paternity finding, it is impossible to show that Mr. Wyrembek's consent is not required pursuant to Section 3107.07(A). Accordingly, the Court finds the Petition for Adoption has been filed prematurely and therefore it is hereby dismissed.

Therefore, the Court hereby grants Mr. Lehenbauer's Complaint for Declaratory Judgment in part; specifically ruling that Mr. Wyrembek is now a legal father subject to the provisions of Section 3107.07(A) in this adoption proceeding. The Court further finds that all other legal issues pending, including the constitutionality of Chapter 3107, to be moot based upon the above ruling.

It is so ordered.

6/4/09  
DATE

  
JUDGE JACK R. PUFFENBERGER

Copies mailed this date to:

Attorney Alan J. Lehenbauer  
Attorney Michael R. Voorhees  
Attorney Heather J. Fournier