

ORIGINAL

IN THE SUPREME COURT OF OHIO

<b>In the Matter of the Adoption of:</b>	:	<b>Case No. 09-1757</b>
<b>P. A. C.</b>	:	
	:	
<b>Gary D. Otten,</b>	:	<b>On Appeal from the</b>
	:	<b>Hamilton County Court</b>
<b>Appellant</b>	:	<b>of Appeals, First</b>
	:	<b>Appellate District</b>
<b>v.</b>	:	
	:	
<b>Kevin M. Crooks,</b>	:	<b>Amicus Curiae Brief</b>
	:	<b>Supporting Appellant</b>
<b>Appellee.</b>	:	<b>Urging Reversal</b>
	:	

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**BRIEF ON THE MERITS OF AMICUS CURIAE ERIK L. SMITH**

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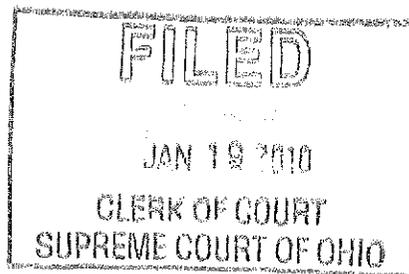


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## STATEMENT OF INTEREST OF AMICUS CURIAE

Erik L. Smith presented a statement of interest in the Memorandum in Support of Jurisdiction filed earlier and will not repeat it here. Erik L. Smith supports the Appellant and urges the Court to reverse the court of appeals' decision.

## STATEMENT OF THE CASE AND FACTS

This matter arises from the attempted stepparent adoption of the female child, Paityn Crooks, born on July 13, 2005. The Hamilton County Probate Court dismissed the adoption petition, concluding that the biological father's consent to the adoption was necessary. (Ct. of Appeals Op., ¶ 10.) The court of appeals reversed. (Id., ¶ 30.) The biological father timely appealed to this Court.

Appellant, Gary D. Otten, is Paityn's biological father. (Id., ¶ 2). Paityn was born in the mother's marriage to Jeremy Tuttle, but Jeremy Tuttle was not the child's biological father, as acknowledged in the Tuttle's divorce decree of November 2, 2005. (Id.) On August 12, 2005, Otten obtained DNA testing results showing his paternity. (Id.) That day, the deadline for filing in the PFR ran, but Otten did not register. (Id., ¶¶ 2-3); *see, Otten v. Tuttle*, Clermont County, Case No. CA2008-05-053, 2009-Ohio-3158, ¶ 2; R.C. 3107.07(B).) Instead, for the next 16 months, Otten continued co-parenting Paityn and, for some time, living with her. *Otten v. Tuttle*, ¶ 4. In January 2007, Otten filed a complaint for parentage in the Clermont County Juvenile Court. (Prob. Ct's Entry Sustaining Magistrate's Decision, Nov. 5, 2008, at p. 1, Fact 1.)

Starting in February 2007, the mother refused to let Otten see or speak to Paityn despite Otten's numerous requests to do so. *See, Otten v. Tuttle*, ¶ 4. Yet, two weeks after Otten filed his paternity complaint, the mother filed a complaint for parentage

against Otten in the same court. (Prob. Ct's Entry Sustaining Magistrate's Decision, Nov. 5, 2008, at p. 1, Fact 1.) The cases were consolidated and set for a hearing on March 26, 2007. (Id. at p. 2, Fact 2.)

One week before that hearing, the mother requested a continuance, which was granted. (Id.) Two weeks later she married the stepfather, and a week after that, the stepfather petitioned the Hamilton County Probate Court to adopt Paityn. (Id.) The stepfather attached his jurisdictional affidavit to his petition stating that he had knowledge of a parentage proceeding concerning Paityn but only that the "putative father may have filed--information not yet available." (Id. at Fact 5.) The stepfather argued in later pleadings that the biological father's consent was unnecessary under R.C. 3107.07(B) for failure to file in the putative father registry (PFR). (Id. at Fact 6.) The mother, having withdrawn her paternity complaint, moved to dismiss or stay all of the actions in juvenile court on the ground that the probate court in Hamilton County had taken exclusive jurisdiction over the "issue." (Ct. of Appeals Op., ¶ 5.) A month later, in May 2007, Otten confessed to the judgment of paternity in juvenile court. *Otten v. Tuttle*, ¶ 2.

The Hamilton County Probate Court, however, stayed the adoption pending resolution of the proceedings in Clermont County Juvenile Court. (Prob. Ct's Entry Sustaining Magistrate's Decision, Nov. 5, 2008, at p. 1, Fact 7.) The probate court stated in its order that it would give full credit to the juvenile court's orders in deciding whether Otten would be treated as a putative or legal father in the adoption. (Ct. of Appeals Op., ¶ 8.)

But the juvenile court judge stayed the parentage proceedings, inducing Otten to petition this Court for a writ of procedendo to compel the juvenile court to proceed. *See, State ex rel. Otten v. Wyler*, Sct. Case No. 2008-0054. The juvenile court eventually lifted the stay and Otten let the procedendo petition be dismissed. *Id.*

The stepfather, in turn, did not petition for a writ of procedendo to compel the probate court to proceed or seek to intervene in the parentage action. Instead, he appealed the probate court's stay to the First District Court of Appeals, which that court dismissed. *See, Otten v. Tuttle*, at n. 1. After a hearing, the Clermont County Juvenile Court found Otten's paternity, awarded him standard visitation, and ordered him to pay child support. *Id.* at ¶ 7.

The mother appealed the juvenile court's order of "standard" visitation, but not the paternity or support order, to the 12th District Court of Appeals. *Id.* at ¶¶ 6-10. The Hamilton County Probate Court then lifted its stay and, recognizing the Clermont County Court's judgment, dismissed the adoption, finding that, because Otten was a legal parent, Section (A) rather than (B) of R.C. 3107.07 applied. (Prob. Ct's Entry Sustaining Magistrate's Decision, Nov. 5, 2008.) Because the statutory time for abandonment under 3107.07(A) had not run, Otten's consent as a legal parent was needed for the adoption to proceed. (*Id.*) Otten withheld consent. (Ct. of Appeals Op., ¶ 10.)

The stepfather appealed to the First District Court of Appeals, arguing that Otten was a putative father despite the juvenile court's judgment, leaving Otten subject to the PFR requirement. (*Id.* at ¶ 11.) On June 29, 2009, the 12th district affirmed the juvenile court's decision and ordered the juvenile court to implement visitation immediately.

*See, Otten v. Tuttle*, ¶ 17. The mother did not appeal that decision. *Id.*

On September 2, 2009, the First District reversed the probate court's dismissal of the adoption, reasoning that 3107.07(B) applied to Otten despite the resolved parentage. (Ct. of Appeals Op., ¶¶ 24-30.) The court of appeals concluded that Otten's consent to the adoption was unnecessary because, as a putative father, he failed to file in the PFR within 30 days after Paityn's birth. (*Id.*) The court remanded for a hearing on the child's best interest. (*Id.* at ¶ 30.) Otten timely filed his notice of appeal in this Court.

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

#### ARGUMENT

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

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

judgments is by direct appeal. *Id.*

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

Ohio has no case on-point with this one. But the Court should find *In re Adoption of A.N.S.*, 741 N.E.2d 780 (Ind. Ct. App. 2001) persuasive, as it is indeed on-point with this case. There, the court concluded that a paternity judgment, even if incorrect under the adoption notice statute, was a final order foreclosing litigation of it in the adoption proceeding. *Id.* at 784. In *A.N.S.*, the unwed mother gave the biological father notice of her intent to place the child for adoption. *Id.* at 782. Indiana law required an unwed father in that case to file a paternity action within 30 days of receiving notice, lest his consent to the adoption be implied and irrevocable. *Id.* When the father filed his action in the paternity court eight days late, the mother moved for summary judgment in the paternity court. *Id.* The paternity court denied the mother's motion and proceeded. *Id.* The mother then married another man who petitioned in the adoption court to adopt the child, arguing that the father's consent was unnecessary. *Id.* The adoption court agreed. *Id.* The paternity court, meanwhile, found the father's paternity and ordered child support and visitation. *Id.* at 783. The mother did not

appeal that judgment. *Id.* The adoption court then reconsidered its judgment, concluding that finding the father's consent irrevocable would be inequitable. *Id.*

The mother and stepfather appealed, arguing that the father's consent was irrevocably established by operation of the adoption notice statute. *Id.* at 784. The appeals court disagreed, holding that the paternity court's judgment, even if incorrect, foreclosed relitigation of paternity through a collateral attack in the adoption case. *Id.* That was partly based on statutory law that required paternity actions to proceed first when an adoption was also pending. *Id.* But in a separate analysis, the court held that the adoption court could not dispose of the paternity judgment where the mother did not appeal it from the paternity court. *Id.* at 785. In addition, the stepfather, though not a party in the paternity case, was bound by the judgment because he did not intervene in the paternity case. "[The stepfather] could not sit idly by during the paternity proceedings and allow a judgment of paternity to be entered and later attempt to contest the paternity determination in the adoption court." *Id.* at n. 5. Similarly, the mother "could not ignore the finality of the order and later turn to the adoption court to mount a collateral attack on the paternity court's judgment by relitigating paternity." *Id.* at 785. The appeals court concluded that the mother and stepfather's continued action in the adoption proceedings presupposed that the paternity judgment was a nullity. *Id.* Because the paternity court did not lack jurisdiction and the parties fully adjudicated the paternity issue, the paternity order was only voidable, not void. *Id.* at 785-86. Thus, the appeals court could offer no relief. *Id.* at 787.

Here, the paternity judgment operated to make Otten a legal father in the adoption proceeding, giving Otten a new right to withhold consent to the adoption he

would have lacked statutorily as a putative father. As in *A.N.S.*, the stepfather argued that the paternity judgment was ineffective in the adoption. The stepfather did not intervene in the paternity action, and the mother did not appeal the paternity judgment. She appealed only the amount of visitation Otten was awarded. Accordingly, the stepfather collaterally attacked the paternity judgment in the adoption.

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

Moreover, the stepfather did not seek a writ of procedendo to compel the probate court to proceed or try to intervene in the paternity action. Instead, knowing the probate court's intent to follow the juvenile court, the stepfather subjected the child to two years of litigation so he could later contest the paternity determination on appeal to the first district. That was improper. The words of the *A.N.S.* court apply equally here: "[The stepfather] could not sit idly by during the paternity proceedings and allow a judgment of paternity to be entered and later attempt to contest the paternity determination in the adoption court." *A.N.S.*, 741 N.E.2d at 780, n.5.

The mother's actions do not save the stepfather's claim. Like the mother in *A.N.S.*, who moved for summary judgment in the paternity court and was denied, the mother here moved to dismiss the juvenile court proceedings and was denied. Like the mother in *A.N.S.*, the mother did not appeal the paternity or child support orders.

Instead, as in *A.N.S.*, she relied on the stepfather to argue in the adoption proceeding that the juvenile court judgment was a nullity by virtue of the adoption notice statute. As in *A.N.S.*, that constituted an improper collateral attack on the paternity judgment. Accordingly, the court of appeals in this case erred in reversing the probate court, as its ruling improperly vacated a valid paternity judgment collaterally.

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

When enacting the PFR, the Ohio legislature could not have intended parentage to be forever foreclosed where, at the time the father seeks formal parentage, he has a personal relationship with the child and an adoption is neither contemplated nor possible. An unwed father remains a putative father in the adoption proceeding where he has not established a parent-child relationship by mutual acknowledgment or court order when the adoption petition is filed. R.C. 3107.01(H)(3)-(4). To secure a right to contest an adoption, a putative father must file in the PFR within 30 days of that child's birth. R.C. 3107.07(B)(1). A judgment of paternity, however, is determinative for all purposes. R.C. 3111.13(A). And a proceeding to determine paternity may be brought any time before the child turns 23 years old. R.C. 3111.05.

Thus, the paternity statutes enforce the child's right to the physical, mental, and monetary support of her parents. In contrast, the PFR filing requirement promotes finality and stability in adoptions. The registry does so by quickly determining the putative father's identity and interest so he may receive notice of the adoption proceeding. Construing those statutes to achieve their full effects requires an adoption proceeding be contemplated before the adoption statutes can govern over an

earlier-filed parentage complaint. In turn, requiring the father to register when no adoption is contemplated does not further the PFR's purpose. Otherwise, a putative father who had not registered within 30 days of the birth could never qualify for notice of an adoption petition no matter his personal relationship with the child or the child's age. The mother could short-circuit a parentage proceeding simply by having the stepfather petition to adopt. The legislature could not have intended those results when enacting the PFR. Rather, the PFR and parentage statutory schemes must have separate and distinct purposes that generally do not overlap with the other, especially when the paternity adjudication is sought before the adoption is sought.

Again, Ohio has no on-point case. But the Illinois Supreme Court reasoned similarly in 2007 in a case virtually identical to this one. *J.S.A. v. M.H.* 863 N.E.2d 236 (Ill. 2007). In *J.S.A.*, the unwed father of the child missed the PFR filing deadline, which the law set at 30 days after the birth. Statutorily, the putative father lost any right to "maintain any action to assert any interest in the child." *Id.* at 243 citing 750 ILCS 50/12.1 (b) and (g). When the child was three years old, the putative father petitioned to establish parentage and to gain visitation. *Id.* at 239. Before the court adjudicated those issues, the stepfather petitioned to adopt, arguing that the father's failure to file in the PFR defeated him in the adoption by voiding all orders in the parentage proceeding. *Id.* at 243.

The Illinois Supreme Court disagreed, noting that the Illinois Parentage Act intended to enforce the "right of every child to the physical, mental and monetary support of his or her parents under the Act." *Id.* at 249 citing 750 ILCS 45/1.1. Accordingly, the Parentage Act let a man initiate parenting proceedings until the child

was 20 years old. *Id.* citing 750 ILCS 45/8(a)(1). In contrast, the PFR filing requirement aimed to avoid the injection of uncertainty and instability into the adoption process, and to promote finality and stability in adoptions. *Id.* at 249. The registry's purpose was to "determin[e] the identity and location of a putative father of a minor child who is, or is expected to be, the subject of an adoption proceeding, in order to provide notice of such proceeding to the putative father." *Id.* quoting 750 ILCS 50/12.1.

The court held that the statutes let the father contest the adoption because making him register where no adoption was contemplated when the parentage action was filed did not further the PFR's purpose. *Id.* at 250. Otherwise, a putative father who had not registered within 30 days after the birth could never establish parentage. *Id.* at 252. In turn, every putative father would have to file timely in the PFR even lacking a reason to believe the PFR would ever apply to him. *Id.* The legislature could not have intended those results when enacting the PFR. *Id.* Rather, each statute had a separate and distinct purpose that generally did not overlap with the other, and which applied in different fact situations. *Id.* at 249. "We find that not only are the specific facts which trigger the application of the Putative Father Registry provisions nonexistent in the matter before us, but also that the specific purpose of the Putative Father Registry is not furthered by requiring [the father] to comply with its provisions." *Id.* at 249-250. Thus, the parentage action had to proceed on the merits. *Id.* at 253. Should the father's paternity be established, his custody and visitation rights could be granted upon finding them to be in the child's best interest. *Id.* That would not apply where the adoption petition preceded the parentage complaint. *Id.* at n. 1.

As in *J.S.A.*, the father here sought parentage before the stepfather petitioned to adopt. (Prob. Ct's Entry Sustaining Magistrate's Decision, Nov. 5, 2008, at p. 1-2, Facts 1-2.) The purposes behind Ohio's parentage and adoption statutes presumably parallel those in Illinois. And Ohio's PFR filing requirement, deadline, and consequence of non-compliance are identical to Illinois law--failure to file within 30 days after the birth waives the putative father's interest in the adoption unless he gets paternity adjudicated before an adoption petition is filed. As in *J.S.A.*, when the father here filed his parentage action, no stepparent adoption petition was contemplated or possible. (The mother was not married then.) Thus, when enacting the PFR, the Ohio legislature could not have intended parentage to be subject to later veto where, at the time the father seeks formal parentage, he has a personal relationship with the child and the adoption is neither contemplated nor possible. Like the purpose of the Illinois PFR in *J.S.A.*, the purpose of the Ohio PFR in promoting stability in adoptions is not furthered under these facts.

Moreover, unlike the father in *J.S.A.*, Otten sought parentage adjudication before the stepfather even married the mother. *See, Otten v. Tuttle*, 2009-Ohio-3158, ¶¶ 1-4. In addition, the mother countered with a paternity complaint against Otten before marrying the stepfather. (Prob. Ct's Entry Sustaining Magistrate's Decision, Nov. 5, 2008, at p. 1, Fact 1.) The stepfather's adoption petition, therefore, was merely an attempt to short-circuit Otten's parentage complaint. And had the mother not sought an eleventh-hour continuance, the juvenile court well have adjudicated Otten's mutually-acknowledged paternity before the later adoption petition, as the hearing was set originally for March 26, and the mother married in mid-April. (Prob. Ct's Entry Sustaining Magistrate's Decision, Nov. 5, 2008, at p. 1-2, Facts 1-2.)

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

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

Where an unwed father comes forward to participate in the rearing of his child, his interest in personal contact with his child acquires substantial protection under the Due Process Clause. *Lehr v. Robertson*, (1983), 463 U.S. 248, 261, 103 S.Ct. 2985, 2993, 77 L.Ed. 2d 614, 627 citing *Caban v. Mohammed* (1979), 441 U.S. 380, 392. Thus, "if the unwed father grasps that opportunity, and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development." *Id.* at 262.

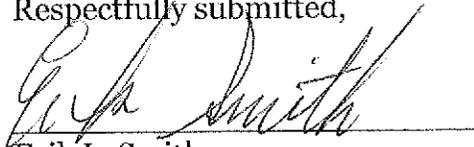
Accordingly, in *In re Adoption of Holt* (1991), the unwed father's yearlong cohabitation with the child entitled him to due process despite his having missed the deadline for objecting to the adoption. 75 Ohio App.3d 450, 452, 599 N.E.2d 812, 813.

Otten formed, and always sought to maintain, his personal and financial relationship with Paityn and filed his parentage complaint before the mother married the stepfather. *Otten v. Tuttle*, 2009-Ohio-3158, ¶¶ 1-4. He testified that he co-parented the child and lived with the child for an extended time. *Id.* The juvenile court also found parentage and standard visitation to be in Paityn's best interest. *Otten v. Tuttle*. Thus, Otten grasped his right to be heard on his parental fitness in the adoption despite not filing in the PFR.

CONCLUSION

For those reasons, and because the juvenile court already determined Otten's parental fitness and the child's best interest, this Court should reverse the court of appeals' decision fully.

Respectfully submitted,



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