

ORIGINAL

IN THE SUPREME COURT OF OHIO

In re Adoption of: G.V.	:	Case No. 2009-2355
	:	
	:	
	:	On Appeal from the
Jason and Christy Vaughn	:	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
Appellee	:	Lucas County Probate Court
	:	

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MEMORANDUM IN RESPONSE  
OF APPELLEE, BENJAMIN WYREMBEK

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Michael R. Voorhees (0039293)  
 Voorhees & Levy LLC  
 11159 Kenwood Road  
 Cincinnati, OH 45242  
 Phone: (513) 489-2555  
 FAX: (513) 489-2556

Attorney for Appellants,  
 Jason and Christy Vaughn

Alan J. Lehenbauer (0023941)  
 The McQuades Co., L.P.A.  
 P. O. Box 237  
 Swanton, Ohio 43558  
 Phone: (419) 826-0055  
 FAX: (419) 825-3871

Attorney for Appellee,  
 Benjamin Wyrembek

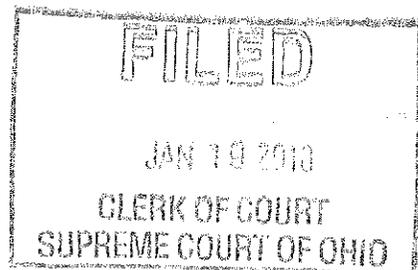
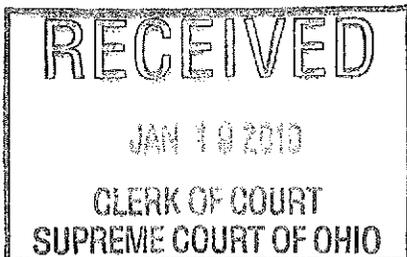


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### STATEMENT OF APPELLEE'S POSITION

This case is not of public or great general interest and is only of interest to the specific parties to this case. Appellants did not raise a constitutional question. Further, the case of *In re Adoption of P.A.C.*, 1st Dist. No. C-081149, 2009 Ohio 4492, which was recently accepted by this Court for review (S.Ct. No. 2009-1757), can be distinguished from the present case and from the decision *In re Adoption of Pushcar* (2006), 110 Ohio St.3d 332, 2006 Ohio 4572, 853 N.E.2d 647. In *P.A.C.*, the biological father did not register with the putative father registry and thereby was not entitled to service of notice and hearing, pursuant to R.C. 3107.11, and was precluded from objecting to the adoption by R.C. 3107.07(B)(1). In contrast, the biological fathers in *Pushcar* and in the instant case, each timely registered with the putative father registry **and** each had a parentage action pending in the juvenile court when the petition for adoption was filed in the probate court. These biological fathers, unlike the man in *P.A.C.*, had taken steps as set forth in Ohio adoption law to safeguard their right to object to the adoption of the child.

The facts in this case are unique to this case alone and the scenario is unlikely to be repeated in the future. The issues related to this adoption would not have arisen but for the fact that the birth mother lied to the domestic relations court at the time of her divorce and advised them she was not pregnant. Then the adoption agency improperly and illegally took possession of this child by presenting a permanent surrender from a person who could not legally surrender this child as the child was not in his custody. This Court has already ruled that such a surrender is not valid in *Adoption Link, Inc. v. Suver*, 112 Ohio St.3d 166, 2006 Ohio 6528, 858 N.E.2d 424. Appellants should never have been

granted possession of this child.

Therefore, this Court should not grant jurisdiction to hear this case on the merits.

**ARGUMENT IN SUPPORT OF APPELLEE'S POSITION**

**Appellee's Response to Appellants' Proposition of Law No.1**

A strict construction of the definition of "putative father" in the adoption statutes of the Ohio Revised Code cannot be applied to deny the fundamental right of the biological father to the care and custody of his child where that father timely registered with the putative father registry within thirty days of the child's birth and filed a parentage action in juvenile court prior to the date on which a petition for adoption was filed. *In re Adoption of Pushcar* (2006), 110 Ohio St.3d 332, 2006 Ohio 4572, 853 N.E.2d 647, followed.

**A. STATEMENT OF THE CASE**

Appellee timely registered with the putative father registry 17 days after the child's birth. Appellee filed a paternity action in juvenile court within 60 days after the child's birth. Appellee served Appellants with a copy of the paternity complaint. Appellants filed their petition for adoption 19 days after Appellee filed his paternity action. Appellants did not serve Appellee with notice of the filing of their adoption petition and of the time and place of the hearing. It is undisputed that on the date on which the adoption petition was filed, the paternity action was pending in juvenile court and a parent-child relationship between Appellee and the child was not yet established, i.e., the juvenile court had not yet declared Appellee to be the child's biological father.

**B. EXPLANATION OF WHY THIS CASE IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND/OR DOES NOT RAISE A SUBSTANTIAL CONSTITUTIONAL QUESTION**

1. R.C. 3107.01(H)(3) cannot be strictly applied if a man has taken steps as prescribed by Ohio adoption law to protect his right to object to the adoption.

Natural parents have a fundamental right to the care and custody of their children. *Stanley v Illinois* (1972), 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551; *Lehr v Robertson* (1983), 463 U.S. 248, 103 S.Ct 2985, 77 L.Ed.2d 614; *In re Masa* (1986), 23 Ohio St.3d 163, 492 N.E.2d 140. The court of appeals in the present case succinctly stated the reasons why Appellants' position must fail. The Sixth Appellate District at ¶18 of its decision in *In re Adoption of G.V.* stated:

"Because adoption terminates a natural parent's fundamental right to the care and custody of his children, 'any exception to the requirement of parent 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."

Appellee did everything legally possible to establish he was the child's father. He should not be treated differently than a man who acknowledged parentage in a situation where the birth mother was cooperative in finalizing a child's parentage. Under Appellants' interpretation of R.C. 3107.01(H)(3), the birth mother and/or the prospective adoptive parents would control whether a man was a parent or a "putative father" as defined in R.C. 3107.01(H)(3). The birth mother would control the consent requirements of an unwed father by either cooperating with the parentage determination or by delaying that determination as long as possible in an attempt to cut off the man's right to object to the adoption. The prospective adoptive parents would be able to impose the "putative father" definition upon the biological father merely by filing their adoption petition in probate court before they produced the child in juvenile court for genetic testing.

Under a strict construction of R.C. 3107.01(H)(3), Appellee is a "putative father." However, Appellee is a "putative father" as result of Appellants filing their adoption petition before

there was a judicial determination in the parentage action. Appellee would be denied "parent" status by Appellants' actions, while Appellee's affirmative actions to protect his right to object to the adoption would go unrecognized under Ohio adoption law. Neither the Ohio legislature, nor this Court in *Pushcar*, intended such an inequitable result.

**2. The decision of *In re Adoption of Pushcar* applies.**

Appellants insist that the *Pushcar* decision does not apply to the instant case. Appellants' position does not make sense. In *Pushcar*, the natural father was on good terms with the mother, signed the child's birth certificate, was thereby automatically registered with the Ohio Registry, entered into a visitation agreement with the mother and, when that agreement failed, sought to establish paternity in juvenile court, 13 months prior to the filing of an adoption petition. In the instant case, Appellee Wyrembek, who had been excluded from the birth process by the child's mother, timely registered with the Ohio Registry and, within sixty days of the child's birth, filed a parentage action in juvenile court, 17 days prior to the filing of an adoption petition.

The relevant, substantive facts in *Pushcar* and in the instant case are identical:

- the man timely registered with the putative father registry
- the man filed a parentage action prior to the filing of the petition for adoption
- the adoption petition was filed before the juvenile court issued a judicial determination that the man was the biological father of the child.

Establishing the parent-child relationship requires "judicial ascertainment of paternity." *In re Adoption of Sunderhaus* (1992),

63 Ohio St.3d 127, 131, 585 N.E.2d 418. Appellee Wyrembek and the natural father in *Pushcar* each commenced judicial proceedings to establish paternity prior to the filing of an adoption petition. The probate courts in the instant case and in *Pushcar* could not apply the adoption consent statutes until the juvenile court established paternity in the *pending* parentage action.

Appellants assert that the Sixth District and the probate court improperly applied R.C. 3107.07(A). Appellants insist that *Pushcar* was a case concerning a parent and the application of R.C. 3107.07(A), and that the instant case is a case concerning a registered "putative father" and the application of R.C. 3107.07(B)(2). Appellants distinction does not make sense. The man in *Pushcar*, just like Appellee Wyrembek, was a "putative father" as defined in R.C. 3107.01(H)(3). Both men had not been judicially determined, prior to the filing of the adoption petition, to be the biological father of the child. The Sixth Appellate District reasonably applied the *Pushcar* decision and R.C. 3107.07(A) to the facts of this case.

Even assuming arguendo that *Pushcar* did not apply, the result reached by the Sixth Appellate District was still correct when one strictly construes the adoption statutes to protect a natural parent's rights to the care and custody of his child.

**3. The Ohio Putative Father Registry will not be rendered meaningless if R.C. 3107.01(H)(3) is not strictly construed.**

Appellants contend that the decision of November 30, 2009, will render the registration requirement meaningless if a putative father can change his status during an adoption proceeding by filing a paternity suit which subsequently determines him to be the biological father. Appellants conclude that the Ohio adoption process will fall apart when thousands of unwed fathers,

registered or unregistered, file parentage actions and claim that each is not a "putative father" under R.C. 3107.01(H)(3) and is not subject to R.C. 3107.07(B)(2), but each is a parent subject to R.C. 3107.07(A). Again, Appellants' position does not make sense. Ohio adoption statutes clearly treat registered putative fathers differently from unregistered or untimely registered putative fathers. In R.C. 3107.11, "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 [adoption] petition." *In re Adoption of P.A.C.*, 1st Dist. No. C-081149, 2009 Ohio 4492, at ¶14. However, "a putative father who timely registers [with the putative father registry] claims paternity of the child from the start of the child's life." *Id.* at ¶16.

Moreover, it is reasonable to treat differently a man who is a registered, "putative father" with a parentage action pending prior to the date the adoption petition is filed, versus a man who is a registered, "putative father" with no pending parentage action. The former man has taken an additional step to safeguard his right to object to the adoption and, if subsequently judicially determined to be the child's father, he is a parent subject to review under R.C. 3107.07(A). In contrast, the latter man is a "putative father" whose consent to the adoption is to be determined under R.C. 3107.07(B)(2).

**Appellee's Response to Appellants' Proposition of Law No.2**

The parties to an adoption proceeding do not have the due process right to have all raised issues to be addressed by the Probate Court. The failure to address the issues in not a due process violation.

"The right to procedural due process is found in the Fourteenth Amendment to the United States Constitution and Section 16, Article I of the Ohio Constitution. *State v. Hayden*, 96 Ohio

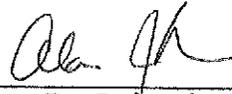
St.3d 211, 2002 Ohio 4169, 773 N.E.2d 502, ¶6. 'Although the concept is flexible, at its core, procedural due process under both the Ohio and United States Constitutions requires, at a minimum, an opportunity to be heard when the state seeks to infringe a protected liberty or property right.' *State v. Cowan*, 103 Ohio St.3d 144, 2004 Ohio 4777, 814 N.E.2d 846, ¶8, citing *Boddie v. Connecticut* (1971), 401 U.S. 371, 377, 91 S.Ct. 780, 28 L.Ed.2d 113." *City of Youngstown v. Traylor*, 123 Ohio St. 3d 132, 2009 Ohio 4184, 914 N.E.2d 1026, ¶8.

Appellants do not have a protected liberty or property right to the adoption of a child. Appellants did have the opportunity to be heard by the probate court on all of their arguments as to why Appellee's consent was not required. The probate court did not decide the issue of Appellee's consent. Rather, the probate court dismissed the adoption petition as prematurely filed under R.C. 3107.07(A). There is no due process violation.

#### **CONCLUSION**

The Sixth Appellate District correctly applied *Pushcar* to the case at bar and thereby properly rejected a strict construction of the definition of "putative father" under R.C. 3107.01(H)(3). The decision of the Sixth Appellate District in the present case creates no conflict or confusion and properly applied the law as required in adoption matters. The facts herein are substantively identical to the facts in *Pushcar*. Appellants have failed to show any public or great general interest, or any substantial constitutional question. This case is only of interest to the specific parties in this case and all relevant issues have been previously addressed by this Court. Appellee requests that this Court decline jurisdiction to hear this case on the merits.

Respectfully submitted,



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Alan J. Lehenbauer  
The McQuades Co., L.P.A.  
P. O. Box 237  
Swanton, Ohio 43558  
Phone: (419) 826-0055  
FAX: (419) 825-3871

Attorney for Appellee,  
Benjamin Wyrembek

PROOF OF SERVICE

I hereby certify that a copy of the foregoing Memorandum in Response of Appellee, was sent by ordinary U.S. Mail this 15<sup>th</sup> day of January, 2010, to: Michael R. Voorhees, 11159 Kenwood Road, Cincinnati, OH 45242.



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Alan J. Lehenbauer  
Attorney for Appellee,  
Benjamin Wyrembek