

IN THE SUPREME COURT OF OHIO

In the Matter of the Adoption of:
P.A.C.

Supreme Court Case No. 2009-1757

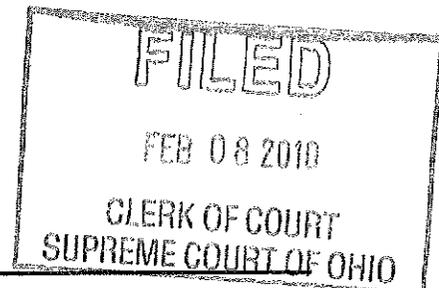
Gary D. Otten, Appellant

On Appeal from the
Hamilton County Court of Appeals,
First Appellate District

Kevin M. Crooks, Appellee

Court of Appeals Case No. C-081149

Trial No. 2007-001743



MERIT BRIEF OF APPELLEE KEVIN CROOKS

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Statement of Facts

Appellant's Statement of Facts contains many statements that are not in the record, that are not relevant, or that are false, some of which are blatantly false. Appellant refers to the Mother of the child as Appellee-Mother. This is a step-parent adoption and the Appellee is the step-father, Kevin Crooks, not the mother, Susan Crooks. For the purpose of correcting and clarifying the record, Appellee submits the following:

Appellant states that on August 12, 2005 a DNA report was issued. This is not relevant. Appellant acknowledged in his Brief that paternity was not established at the time the petition for adoption was filed.

Appellant states that for the next 12+ months he parented the child together with the Mother and made joint decisions regarding her upbringing. This statement is totally false. At no time has Appellant ever made any decisions regarding the child. Appellant's contact with the child has always been very limited.

Appellant states that he financially supported the child. This statement is totally false. Appellant has never provided any support for this child. In fact, there is an existing support order and Appellant is currently in arrears in the amount of approximately \$ 8,000.00. Even prior to the support order, Appellant refused the Mother's request for support, which prompted her to request the child support enforcement agency to file. Appellant also refused the request by the child support enforcement agency to acknowledge paternity and accept the support obligation.

Appellant states that he spent a great deal of time with the child. This statement is false. The child has always lived with her Mother. Appellant and Mother never lived together. Appellant has only seen the child on a few occasions and, at most, only for a few hours per occasion.

Appellant never took the opportunity to establish a relationship with the child. Appellant's persistent litigation has everything to do with his infatuation with the Mother and nothing to do with the child. Appellant has demonstrated no interest in meeting any obligations to the child. Appellant has made these misleading statements in an effort to gain sympathy and to suggest that he once had a relationship with this child. In reality, Appellant never even made the effort to develop a relationship.

Although some of the attachments to Appellant's Brief are documents not in the record in this case, the documents do contain information that contradicts Appellant's Statement of the Facts or are otherwise not relevant to the issues before this Supreme Court. Appellee submits that it is the discretion of this Supreme Court to strike the attachments or to otherwise disregard or consider the attachments.

In addition to the above, Appellant's Brief also contains several obvious mistakes. Throughout the Brief, Appellant refers to the Appellee as if the Appellee is Susan Crooks, not Kevin Crooks. On page 5, Appellant refers to the "Clermont Juvenile Trial Court" where the reference should be to the "Hamilton County Probate Court." On page 12, Appellant refers to the "Second District" where the reference should be to the "First District." Also on page 12, Appellant refers to the "Clermont County Juvenile Court" where the reference should be to the "Hamilton County Probate Court."

Appellee hereby submits the following as the Statement of Facts:

This matter relates to the step-parent adoption of P.A.C., a minor born on July 13, 2005 at Christ Hospital, Cincinnati, Ohio. On April 20, 2007, Appellee Kevin Crooks filed a Petition for Adoption in the Hamilton County Probate Court to adopt his step-daughter. (Appellant's Appx. 53) On the date the Petition for Adoption was filed, Appellant Gary Otten was the putative father of

the child. A paternity action was filed in the Clermont County Juvenile Court. Appellant filed to dismiss or stay the adoption proceeding. The Probate Court entered a stay on the adoption. The entry staying the adoption was appealed. The appeal was dismissed based on the lack of a final appealable order. Appellant filed an Amended Motion to Dismiss. The Probate Court granted the Amended Motion to Dismiss, which was appealed to the First Appellate District. (Appellant's Appx. 24) The relevant and decisive facts before the First District were as follows: the Petition for Adoption was filed in the Hamilton County Probate Court on April 20, 2007; on the date the Petition was filed, it is undisputed that paternity was not yet established and that Appellant was a putative father as defined in R.C. 3107.01(H); and Appellant failed to register with the Putative Father Registry. Based upon these relevant and decisive facts, the First District applied the clear statutory language of R.C. 3107.01(H) and R.C. 3107.11 and held that the consent of Appellant is not required pursuant to R.C. 3107.07(B)(1) because he is a putative father who failed to register with the Putative Father Registry. (Appellant's Appx. 4) The decision of the First District was appealed and is now before this Supreme Court.

Argument

Appellee's Response to Appellant's Proposition of Law No. 1

If the birth-father is a putative father, as defined in R.C. 3107.01(H), on the date the petition for adoption is filed, and the birth-father has failed to register with the Putative Father Registry pursuant to R.C. 3107.062, then the consent of the putative father is not required as a matter of law pursuant to R.C. 3107.07(B)(1) and he is not entitled to notice of the adoption proceeding and he is not entitled to be a party to the adoption proceeding.

Appellant's argument ignores the clear statutory language and again attempts to misapply the case of *In re Adoption of Pushcar* (2006), 110 Ohio St. 3d 332, 2006 Ohio 4572, 853 N.E.2d 647. Appellant admits that on the date the petition for adoption was filed, paternity had not yet been established and that he was a putative father on that date. R.C. 3107.01(H)(3) requires that

paternity be established prior to the filing of the petition. Appellant is a statutorily defined putative father in this adoption proceeding. *Pushcar* addressed the one-year requirement under R.C. 3107.07(A) and the consent of a parent, not the consent of the putative father, and simply does not apply to the present case.

The Ohio Putative Father Registry has been in effect since January 1, 1997. In 1972, the United States Supreme Court found in *Stanley v. Illinois* (1972), 405 U.S. 645, 31 L. Ed. 2d 551, 92 S. Ct. 1208, that there are certain due process considerations relating to unmarried birth-fathers. In reaction to *Stanley*, states enacted legislation to address these due process concerns. The majority of states, including Ohio, have now enacted putative father registries. The purpose of a putative father registry is to allow an adoption to expeditiously proceed without the putative father as a party, unless the putative father has secured his right to be heard in the adoption proceeding. Under Ohio law, the putative father must timely register or his consent is not required pursuant to R.C. 3107.07(B)(1) and he is not entitled to notice of the adoption under R.C. 3107.11.

In this adoption proceeding, Appellant is the putative father of the child. A “putative father” is defined in Section 3107.01(H) of the Ohio Revised Code as follows:

(H) "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.

(emphasis added)

Subsections (H)(1), (2), (3) and (4) of R.C. 3107.01 all clearly apply to Appellant. Under subsection (H)(3), the actual finding of a parent and child relationship was required to be determined prior to the date a petition to adopt the child was filed. The Petition for Adoption was filed on April 20, 2007. There was no determination of a parent and child relationship prior to April 20, 2007. Any determination of a parent-child relationship made after April 20, 2007 is meaningless in the adoption proceeding. Appellant had over 21 months from the date of the child's birth to establish paternity, but he did not.

As a putative father, Appellant was on notice, as a matter of law pursuant to R.C. 3107.061, that the child may be adopted without his consent. This statutory notice is set forth in R.C. 3107.061 as follows:

§ 3107.061 Putative father on notice consent unnecessary.

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 pursuant to division (B) of section 3107.07 of the Revised Code.

The State of Ohio, like many other states, has established a statutory scheme to balance the rights of the child, the adoptive parent or parents, the mother, and the putative father. The consent to adoption is not required of the putative father, pursuant to R.C. 3107.07(B)(1) as follows:

§ 3107.07 Who need not consent.

Consent to adoption is not required of any of the following:

* * *

(B) The putative father of a minor if either of the following applies:

(1) The putative father fails to register as the minor's putative father with the putative father registry established under section 3107.062 [3107.06.2] of the Revised Code not later than thirty days after the minor's birth; * * *

Pursuant to R.C. 3107.07(B)(1), a putative father is required to register not later than thirty days after the birth of the child. The Ohio Putative Father Registry Certification dated April 23, 2007 was filed with the Probate Court. The final search of the Registry verified that no putative father registered. Therefore, Appellant failed to register with the Putative Father Registry as required by R.C. 3107.062 within the required time of not later than thirty days after the birth of the child. The child was born on July 13, 2005. A putative father, such as Appellant, was required to register with the Putative Father Registry by no later than August 12, 2005. Having failed to register, Appellant's consent to the adoption of the child is not required, *as a matter of law*, pursuant to R. C. 3107.07(B)(1). All issues raised by the putative father are moot as a result of his failure to register with the Ohio Putative Father Registry and his failure to establish paternity prior to the filing of the petition for adoption.

The Supreme Court of the United States has acknowledged and accepted the legal basis and the constitutionality of the putative father registry in *Lehr v. Robertson* (1983), 463 U.S. 248, 103 S. Ct. 2985, 77 L. Ed. 2d 614. In *Lehr*, the U.S. Supreme Court rejected a due process challenge to the New York putative father registry that required notice of an adoption petition to a putative father only if the putative father fell into one of seven categories, which included putative fathers who had registered with New York's adoption registry. The Supreme Court concluded that the statutory scheme adequately protected a putative father's opportunity to establish a relationship with his child because the statutory procedure was unlikely to omit most responsible fathers and did not place "qualification for notice *** beyond the control of an interested putative father." *Id.* at 264. The Supreme Court noted that ignorance of the law does not relieve a putative father from having to comply with the statutory requirement to register. The Supreme Court found no due process violation, even though the statutory scheme denied a putative father who had expressed an

interest in the child because:

[t]he right to receive notice was completely within appellant's control. By mailing a postcard to the putative father registry, he could have guaranteed that he would receive notice of any proceeding to adopt Jessica. The possibility that he may have failed to do so because of his ignorance of the law cannot be a sufficient reason for criticizing the law itself. The New York Legislature concluded that a more open-ended notice requirement would merely complicate the adoption process, threaten the privacy interests of unwed mothers, create the risk of unnecessary controversy, and impair the desired finality of adoption decrees.

Id. at 264.

The Supreme Court also rejected the putative father's claim that, even if the statutory scheme adequately protected a putative father's opportunity to establish a relationship with his child in the "normal case," he was nonetheless entitled to "special notice" because the trial court and the mother "knew that he had filed an affiliation proceeding in another court." *Id.* at 264-265. The Supreme Court stated:

[t]his argument amounts to nothing more than an indirect attack on the notice provisions of the New York statute. The legitimate state interests in facilitating the adoption of young children and having the adoption proceeding completed expeditiously that underlie the entire statutory scheme also justify a trial judge's determination to require all interested parties to adhere precisely to the procedural requirements of the statute. The Constitution does not require either a trial judge or a litigant to give special notice to nonparties who are presumptively capable of asserting and protecting their own rights. Since the New York statutes adequately protected appellant's inchoate interest in establishing a relationship with Jessica, we find no merit in the claim that his constitutional rights were offended because the Family Court strictly complied with the notice provisions of the statute.

Id. at 265.

Appellant cannot change his status in the adoption proceeding or it would be an indirect and impermissible attack against the Putative Father Registry that the United States Supreme Court did not allow in *Lehr*. An unregistered putative father is not a party in the adoption proceeding pursuant to the clear requirements under Ohio law. Any involvement of the putative father in the

adoption proceeding would render the Ohio Putative Father Registry meaningless. The Ohio state legislature determined that for a putative father to be entitled to notice of an adoption proceeding, the putative father must register with the Putative Father Registry not later than thirty days after the birth of the child. There is no other filing, procedure, or mechanism for the putative father to assert his rights in an adoption proceeding in Ohio. There must be strict compliance with the statutory requirements, so that the adoption process fulfills its intended goal of protecting the best interests of the child. Appellant failed to register. Adoption is a process that needs procedures to ensure that the child will be allowed to thrive in a permanent and stable home. In the State of Ohio, the procedure relating to a putative father is clear and Appellant failed to preserve any right to be heard in this matter.

The notice requirements of the hearing on the petition for adoption are set forth in R.C. 3107.11. The pertinent part of R.C. 3107.11 that applies to Appellant is as follows:

§ 3107.11 Hearing on petition; who is entitled to notice.

* * * Notice *shall not* be given to a person whose consent is not required as provided by division (B), (C), (D), (E), (F), or (J) of section 3107.07

* * * (*emphasis added*)

Since the consent of the putative father is not to be required pursuant to R.C. 3107.07(B), Appellant is not entitled to notice of the hearing pursuant to R.C. 3107.11. The statute is clear that notice *shall not* be given to a person whose consent is not required as provided by R.C. 3107.07(B). It is not in the discretion of the court, but it is a matter of law that notice shall not be provided to the putative father who fails to register. Therefore, Appellant had no standing to file an objection in the Probate Court. Appellant never had the right to be a party in this proceeding. Further, pursuant to R.C. 3107.17, adoption proceedings are confidential. Only a party to the adoption proceeding may have access to any information relating to this adoption proceeding.

The law requires strict adherence to the adoption statutes. Adoption statutes are in derogation of common law and therefore must be strictly construed. The integrity of the statutory process is an absolute necessity. See *Lemley v. Kaiser* (1983), 6 Ohio St. 3d 258, 452 N.E.2d 1304. “While strict adherence to the procedural mandates of R.C. 3107.07(B) might appear unfair in a given case, the state's interest in facilitating the adoption of children and having the adoption proceeding completed expeditiously justifies such a rigid application. See *Lehr*, 463 U.S. at 265, 103 S. Ct. at 2995, 77 L. Ed. 2d at 629.” *In re Adoption of Zschach* (1996), 75 Ohio St. 3d 648, 665 N.E.2d 1070, 1074.

In the present case, Appellant failed to establish paternity during the 21 months of the child's life prior to the filing of the Petition for Adoption and failed to register with the Putative Father Registry. Appellant has failed to timely register and has failed to timely establish paternity. Appellant cannot show that R.C. 3107.07(B)(1) does not apply to him. Many Ohio courts have correctly applied R.C. 3107.07(B)(1). See *In re Adoption of Osoro* (2008), 2008 Ohio 6925, 2008 Ohio App. LEXIS 5847 (Ohio Ct. App., Stark County Dec. 30, 2008); *In re Adoption of A.N.L.* (2005), 2005 Ohio 4239, 2005 Ohio App. LEXIS 3852 (Ohio Ct. App., Warren County Aug. 16, 2005); *In re K.M.S.* (2005), 2005 Ohio 4739, 2005 Ohio App. LEXIS 4249 (Ohio Ct. App., Miami County Sept. 9, 2005); *Napier v. Adoption Parents of Cameron* (2003), 153 Ohio App. 3d 687, 2003 Ohio 4304, 795 N.E.2d 707; *In re Adoption of Snavely* (2000), 2000 Ohio App. LEXIS 4963 (Ohio Ct. App., Greene County Oct. 27, 2000). The consent of Appellant is not required as a matter of law.

The Hamilton County Probate Court's confusion and error in this case is mainly attributed to its misinterpretation and misapplication of *Pushcar*. The *Pushcar* case involved a step-parent adoption where the Probate Court found that the consent of father was not required pursuant to R.C. 3107.07(A) based upon his failure to communicate with the child for a one year period.

The father was named on the birth certificate, but had not yet established paternity. (This aspect of Ohio law changed in 2001. The putative father can now only be named on the birth certificate if the Affidavit of Paternity is executed by mother and putative father. The Affidavit of Paternity establishes paternity.) The Appellate Court in *Pushcar* held that the Probate Court could not allow the adoption to proceed under R.C. 3107.07(A) because there had been no judicial determination of paternity. This Supreme Court affirmed and held that, in such circumstances, the Probate Court must defer to the Juvenile Court and refrain from addressing the matter until adjudication in the Juvenile Court. This Court did not hold that the adoption proceeding must be dismissed, but rather it must be stayed until the establishment of paternity. Therefore, when *Pushcar* is applicable, it can only be a basis for a stay and not a dismissal. *Pushcar* has never had any application to this adoption proceeding. *Pushcar* is only applicable to R.C. 3107.07(A) cases, and has no application to R.C. 3107.07(B) cases. The entire basis of the decision in *Pushcar* was that the requisite one-year statute for failure to communicate did not begin to run until the date of the establishment of paternity. The one-year statute and *Pushcar* do not apply to the present case. The establishment of paternity is not relevant in the present case. Appellant is a putative father in this adoption proceeding and his consent is not required pursuant to R.C. 3107.07(B)(1), and not pursuant to R.C. 3107.07(A) as in *Pushcar*.

A pending case may be considered relevant to the adoption proceeding if it directly relates to a substantive issue in the adoption proceeding. To hold otherwise is a failure to acknowledge the original and exclusive jurisdiction of the Probate Court. If the allegation is that a parent's consent is not required pursuant to R.C. 3107.07(A) because that parent failed to communicate or support for the one-year period, a paternity action that establishes the starting point for the one-year period may be relevant. However, a paternity action has no relevance to the allegations relating to a

putative father pursuant to R.C. 3107.07(B). The Probate Court also cited *In re Adoption of Sunderhaus* (1992), 63 Ohio St. 3d 127, 585 N.E.2d 418. *Sunderhaus* is no different than *Pushcar* and likewise does not apply to this adoption proceeding. *Sunderhaus* was also a R.C. 3107.07(A) case. The holding in *Sunderhaus* was “the one-year period of nonsupport prescribed by R.C. 3107.07(A) which obviates the requirement to obtain parental consent to an adoption pursuant to R.C. 3107.06 commences on the date that parentage has been judicially established.” *Id.* at 132. The Court stated that “[t]he ability to dispense with the consent requirement under R.C. 3107.07(A) is dependent upon two factors: (1) the establishment of the parent-child relationship, and (2) the failure to satisfy the support obligation arising therefrom.” *Id.* at 130. The Court also noted the distinction between the parental consent and the putative father as follows:

This distinction is illustrated by a comparison of the provisions governing a judicial determination of paternity contained in R.C. 3111.08(B) and 3111.12 with the less stringent standards governing the demonstration necessary to establish one as a "putative father" from whom consent to the adoption is not required pursuant to R.C. 3107.07(B). *Id.* at 131, fn. 3

The above language of the *Sunderhaus* case is clear. The holding in *Sunderhaus* does not apply to putative fathers and does not apply to this adoption proceeding.

Appellee’s Response to Appellant’s Proposition of Law No. II

It is the obligation of the unmarried birth-father to secure and protect his parental rights by complying with all relevant statutory provisions, which include timely registering with the putative father registry or establishing paternity prior to the filing of the petition for adoption.

Appellant attempts to bypass the statutory requirements and to gain sympathy by presenting misleading and false information to this Supreme Court. Appellant argues that he had a relationship with the child, which renders the statutory requirements inapplicable. This argument of Appellant fails both factually and legally. Appellant had more than sufficient time to establish paternity

before the adoption was filed. Appellant affirmatively avoided his support obligations. Appellant refused the Mother's requests for support. Appellant refused to acknowledge paternity when requested by the child support enforcement agency. Appellant only took action when it became clear that any relationship he had with the Mother was ending. The reality in the present case is that Appellant failed to step up and meet his obligations to the child.

Appellant admittedly had not established paternity prior to the adoption filing. Legally, Appellant was a putative father and was not a person with parental rights to protect. The law allows a putative father with the opportunity to develop a relationship with his biological child. In this case, Appellant failed to take that opportunity as required by law.

The Ohio Putative Father Registry has fulfilled its intended purpose in this present case. On April 20, 2007, the date the Petition for Adoption was filed, the child was nearly 2 years old and Appellant had not secured any right to be heard in the adoption proceeding. On the other hand, Appellee voluntarily stepped up with the desire to assume the parental obligations and to provide the child with a stable and permanent two-parent home. Appellee has supported and care for this child for the past three years, while Appellant has provided no support. Appellant failed to seize his opportunity to develop a relationship with the child. Appellant has failed to assume any parental responsibility and the Putative Father Registry was rightfully applied by the First District.

On April 20, 2007, Appellant had not established paternity. Therefore, Appellant is a putative father in this adoption proceeding. Appellant has no parental rights that need to be addressed in the adoption proceeding. In any event, even the rights of a "parent" are not without limits. The United States Supreme Court addressed such limitations as follows:

A parent's rights with respect to her child have thus never been regarded as absolute, but rather are limited by the existence of an actual, developed relationship with a child, and are tied to the presence or absence of some embodiment of family. These limitations have arisen, not simply out of the definition of parenthood itself, but

because of this Court's assumption that a parent's interests in a child must be balanced against the State's long-recognized interests as *parens patriae*, see, e.g., *Reno v. Flores*, 507 U.S. 292, 303-304, 123 L. Ed. 2d 1, 113 S. Ct. 1439 (1993); *Santosky v. Kramer*, 455 U.S. at 766; *Parham*, 442 U.S. at 605; *Prince v. Massachusetts*, 321 U.S. 158, 166, 88 L. Ed. 645, 64 S. Ct. 438 (1944), and, critically, the child's own complementary interest in preserving relationships that serve her welfare and protection, *Santosky*, 455 U.S. at 760.

Troxel v. Granville (2000), 530 U.S. 57, 88; 147 L. Ed. 2d 49; 120 S. Ct. 2054.

Appellant never established a relationship with the child. Appellant has never “parented” the child, has never been involved in making decisions regarding the child, and has never attempted to meet his support obligations. The clear and applicable statutory language in R.C. 3107.01(H), R.C. 3107.07(B)(1), and R.C. 3107.11 cannot be ignored. Further, there is not even a valid reason to suggest that it should be ignored.

Appellant could have protected his right to be heard in the adoption proceeding by timely registering with the Putative Father Registry or by establishing paternity prior to the filing of the adoption. Ohio law protects Appellant’s due process rights by affording him these statutory rights. Appellant could have established paternity in a timely manner and he would have then been a parent in the adoption proceeding and his consent would have initially been required, unless he failed to support or communicate for the requisite one-year period. Having failed to take advantage of his right to establish paternity, Appellant is an unregistered putative father whose consent is not required.

The United States Supreme Court has stated that “the mere existence of a biological link does not merit equivalent constitutional protection.” *Lehr*, 463 U.S. at 261. In fact, at the onset of its opinion in *Lehr*, the Supreme Court noted that it “disagreed” with Appellant Lehr's assertion that *Stanley v. Illinois* and *Caban v. Mohammed* (1979), 441 U.S. 380, 60 L. Ed. 2d 297, 99 S. Ct. 1760,

"gave him an absolute right to notice and an opportunity to be heard before the child may be adopted." *Lehr*, 463 U.S. at 250. The Court in *Lehr* made it clear that there are no absolute rights for putative fathers, when it cited with approval the dissent of Justice Stewart in *Caban* as follows:

Even if it be assumed that each married parent after divorce has some substantive due process right to maintain his or her parental relationship, ... it by no means follows that each unwed parent has any such right. Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring.

Lehr, 463 U.S. at 260.

The United States Supreme Court has addressed the rights of the putative father in *Stanley v. Illinois*, *Quilloin v. Walcott* (1978), 434 U.S. 246, 54 L. Ed. 2d 511, 98 S. Ct. 549, *Caban v. Mohammed*, *Lehr v. Robertson*, and *Michael H. v. Gerald D.* (1989), 491 U.S. 110, 105 L. Ed. 2d 91, 109 S. Ct. 2333. From these cases, a distinction can be drawn between a "developed parent-child relationship", which was implicated in *Stanley* and *Caban*, and the "potential relationship" involved in *Quilloin* and *Lehr*. The common factor in the holdings from these cases is that a putative father must have a developed relationship with his biological child to be entitled to due process protection. However, factoring in *Michael H.*, that understanding of the putative father's rights is debatable, as the putative father in *Michael H.* did not receive any favored status even after maintaining a substantial relationship with his child. The Court in *Michael H.* found that any claimed rights of the putative father must succumb to the rights of the marital family. In the present case, Appellant has never had a substantial relationship with the child. Nevertheless, the statutory provisions of the Ohio Revised Code protected his due process rights.

Appellee's Proposition of Law No. III

The Probate Court has original and exclusive jurisdiction over adoption proceedings and any proceeding in another court that does not affect the substantive issues of the adoption is not relevant and, unless the putative father timely registers with the putative father registry, he is not entitled to notice of the adoption proceeding, he is not entitled to be a party to the adoption proceeding, and his consent to the adoption is not required as a matter of law.

It is well established that the Probate Court has original and exclusive jurisdiction over any adoption filed in its court. This Supreme Court has held that “original and exclusive jurisdiction over adoption proceedings is vested specifically in the Probate Court pursuant to R.C. Chapter 3107” *State ex rel. Portage Co. Welfare Dept. v. Summers* (1974), 38 Ohio St. 2d 144, 151; 67 O.O.2d 151, 311 N.E.2d 6. It has also long been established that adoption “embraces not only custody and support but also descent and inheritance and in fact every legal right with respect to the child.” *In re Adoption of Biddle* (1958), 168 Ohio St. 209, 214; 6 O.O.2d 4, 152 N.E.2d 105. On April 20, 2007, the exclusive jurisdiction over the adoption of this child by Appellee became vested in the Hamilton County Probate Court.

All other pending cases are not relevant to the adoption proceeding, unless such pending case directly relates to a substantive issue in the adoption proceeding. In this adoption proceeding, the consent of Appellant is not required, as a matter of law, pursuant to R. C. 3107.07(B)(1), because he is a putative father that failed to timely register. The paternity case has no legal effect upon this adoption proceeding. In this adoption proceeding, the putative father must always be an unregistered putative father whose consent is not required. No extraneous proceeding can change that status.

The Sixth Appellate District in the case of *In re Adoption of Joshua Tai T.* (2008), 2008 Ohio 2733, 2008 Ohio App. LEXIS 2292 (Ohio Ct. App., Ottawa County June 2, 2008) distinguished *Pushcar* as follows:

Appellant has argued that the trial court was required to refrain from consideration of the adoption petition under the Ohio Supreme Court's decision of *In re Adoption of Pushcar*, 110 Ohio St.3d 332, 2006 Ohio 4572, 853 N.E.2d 647.

The trial court overruled the motion and held that the decision of *In re Adoption of Pushcar* was distinguishable. We agree. In *Pushcar*, the issue of paternity of the child was pending in juvenile court at the time the petition for adoption was filed in probate court. The *Pushcar* court recognized that establishing paternity was a

necessary element of the petitioner's case for adoption as the adoption in the case was being sought without the consent of the father under *R.C. 3107.07(A)*. *Id.*, P 13. The court reasoned that establishing paternity was a necessary element of petitioner's case for adoption. In view of that fact, the probate court should have deferred proceeding on the adoption until the juvenile court had adjudicated paternity. Here, however, paternity is not disputed and the juvenile court's involvement in prior proceedings was limited to continuing jurisdiction over custody.

In *Pushcar*, the Ohio Supreme Court reaffirmed that original and exclusive jurisdiction over adoptions in Ohio is vested in probate court. *Id.*, P 9. Furthermore, probate courts have jurisdiction to proceed with adoptions even where the involved child is subject to custody orders within the continuing jurisdiction of domestic relations or juvenile courts. *In re Adoption of Biddle (1958)*, 168 Ohio St. 209, 152 N.E.2d 105, paragraph two of syllabus (continuing jurisdiction of domestic relations court); *In re Hitchcock (1996)*, 120 Ohio App.3d 88, 103-104, 696 N.E.2d 1090 (continuing jurisdiction of juvenile court). Accordingly, appellant's argument that the trial court should have deferred proceeding with the adoption due to the pending jurisdiction of juvenile court over custody of Joshua is without merit. *Id.* at 13-14.

The case of *In re Adoption of Joshua Tai T.* is directly on point with the present case. The allegation in this adoption proceeding is that the consent of the putative father is not required pursuant to R.C. 3107.07(B)(1). The case that was pending in the Clermont County Juvenile Court did not bar the Probate Court from proceeding with the adoption. The Probate Court has original and exclusive jurisdiction over this adoption. The establishment of paternity in the Clermont County Juvenile Court case was not a "necessary element" of the Petitioner's case in this adoption proceeding. The establishment of paternity is not a "necessary element" and is not relevant in this adoption proceeding.

The Eight Appellate District in the case of *In re T.N.W.* (2008), 2008 Ohio 1088, 2008 Ohio App. LEXIS 929 (Ohio Ct. App., Cuyahoga County Mar. 13, 2008) also found *Pushcar* to be inapplicable. The Court rejected the argument that the adoption should have been enjoined from proceeding and held that "a ruling from the juvenile court on the issue of parentage was not needed to proceed with the adoptions." *Id.* at 7.

In further support of the Probate Court's exclusive jurisdiction over this adoption is the fact that the R.C. 3127.23 Affidavit does not apply to this adoption proceeding. Ohio probate courts have required the filing of this Affidavit in adoption proceedings for years, which requires disclosure of other pending cases. The former Ohio code section is R.C. 3109.27, which was part of the Uniform Child Custody Jurisdiction Act ("UCCJA"). In 2005, Ohio passed the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"), which superseded the UCCJA. The Ohio code section for the Affidavit is now R.C. 3127.23. Where the UCCJA was not clear as to its applicability to adoption proceedings, the UCCJEA is now very clear. R.C. 3127.02 states that UCCJEA provisions do not govern adoption proceedings. Therefore, other proceedings are not relevant if such proceedings do not affect the substantive issues in the adoption.

Appellant may not change his status from a "putative father" to a "father" inside the adoption proceeding. This is contrary to the original and exclusive jurisdiction of the Probate Court over adoption proceeding. If the decision of the First District is not affirmed, the jurisdiction of the Probate Court over any and all adoption proceedings will be questionable. The decision must be affirmed to maintain the integrity of the Probate Court and of the adoption process.

In addition to the jurisdictional issue, if the decision of the First District is not affirmed, the entire statutory scheme that includes the Putative Father Registry will become meaningless. There can be no question that the decision of the Probate Court creates an exception to the requirements of the Putative Father Registry. Once one exception is created, there can be no further reliance on the Registry and the entire process falls apart. The decision of the Probate Court is in clear contradiction of the intent of the Registry.

A summary of the legislative history and the legislative intent of the Putative Father Registry was detailed in *In the Matter of Adoption of Baby Boy Brooks* (2000), 136 Ohio App. 3d 824, 737

N.E. 2d 1062 as follows:

The Ohio Legislative Service Commission prepared an analysis of Am.Sub. H.B. No. 419, which provides insight into the legislative intent behind the changes to the adoption statutes. 3 Baldwin's Ohio Legislative Service (1996), L-336. The Legislative Service Commission cautions that the final version of bills may be different from the legislative analysis because they are subject to floor amendments and conference committee changes. *Id.* According to the analysis, the changes to the adoption laws require a putative father to register with the putative father registry within thirty days of the child's birth or his consent will not be required. *Id.* at L-336, L-346. The original version of *R.C. 3107.07(B)(1)*, as amended by Am.Sub.H.B. No. 419, contained an exception to the requirement of registration within thirty days if the putative father was not able to register within the thirty-day time period for reasons beyond his control, other than a lack of knowledge of the child's birth, but the putative father must register within ten days after it becomes possible for him to register or his consent will not be required. *Id.* at L-287, L-346. However, this exception in *R.C. 3107.07(B)(1)* was removed from the final version of Am.Sub.H.B. No. 419. See *R.C. 3107.07(B)(1)*, effective September 18, 1996. Thus, the General Assembly determined that there would be no exceptions to the thirty-day filing requirement.

Given that the legislature did not intend for there to be any exceptions to the registration requirement, that the purpose of the adoption laws is to provide children with a stable home in an expeditious manner, and that adoption laws are to be strictly construed, I conclude that the General Assembly intended in *R.C. 3107.07(B)(1)* to eliminate the necessity of a putative father's consent to an adoption if he fails to register with the putative father registry within thirty days of the child's birth.

Id. at 834.

Appellant is a putative father who failed to register. There are no exceptions to the thirty-day filing requirement. Given there are no exceptions to this statutory requirement, Appellant can offer no excuse. The consent of Appellant is not required, as a matter of law, pursuant to *R. C. 3107.07(B)(1)*. The failure of the Probate Court of not entering a finding that the consent of Appellant is not required, creates an impermissible exception to the Putative Father Registry, which would render the entire statutory scheme set forth in the Ohio Revised Code as meaningless.

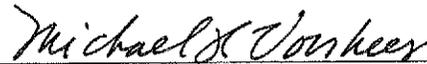
Appellant also cited the case of *In re Adoption of Asente* (2000), 90 Ohio St. 3d 91, 2000 Ohio 32, 734 N.E.2d 1224. As with *Pushcar*, *Asente* is likewise not applicable to the present case.

Asente involved an interstate adoption where the child was placed by Kentucky birth-parents with Ohio adoptive parents. The case was litigated all the way to both this Ohio Supreme Court and the Kentucky Supreme Court. This Ohio Supreme Court declined jurisdiction in Ohio because there was a specific proceeding pending in Kentucky that was part of the adoption process and proceeding. The central issue being litigated in Kentucky was whether or not the consents for adoption executed by the birth-parents were valid under Kentucky law. The present case does not involve a parental consent or a case pending in another court that is part of the adoption process and proceeding. The present case involves the application of the clear statutory mandate relating to a putative father and *Asente* does not apply.

Conclusion

For the reasons set forth above, the Appellee respectfully requests this Supreme Court to AFFIRM the decision of the First Appellate District.

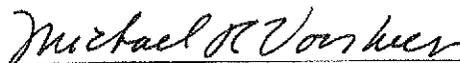
Respectfully submitted,



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Certificate of Service

I hereby certify that a copy of the foregoing Appellee's Merit Brief has been sent by regular U.S. mail this 5th day of February, 2010 to: Kenneth J. Cahill, Attorney for Appellant, Dworken & Bernstein, 60 South Park Place, Painesville, Ohio 44077.



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