

ORIGINAL

IN THE SUPREME COURT OF OHIO

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

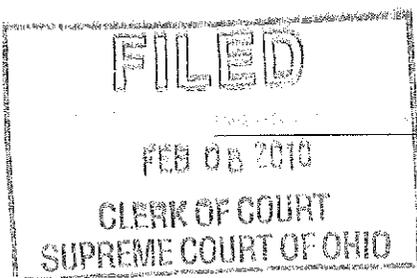
Supreme Court Case No. 2009-1757

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



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Statement of Amicus Curiae

The American Academy of Adoption Attorneys is a not-for-profit national association of attorneys, judges, and law professors who practice, and have otherwise distinguished themselves, in the field of adoption law, with dedication to the highest standards of practice in adoption. The more than 300 members of the Academy are experts in the complexities of adoption law and all varieties of interstate and intercountry adoption regulations. Members must maintain their practice according to the highest standards of professionalism, competence, and ethics. The Academy's mission is: to support the rights of children to live in safe, permanent homes with loving families; to ensure appropriate consideration of the interests of all parties to adoptions; and to assist in the orderly and legal process of adoption. To this end, the Academy's work includes promoting the reform of adoption laws and disseminating information on ethical adoption practices. As an organization, and through its members and committees, the Academy lends pro bono assistance in worthy cases and actively participates in the drafting and passage of adoption legislation. The Academy publishes a newsletter, holds annual and mid-year conferences, and conducts educational seminars for its members and other interested professionals. Academy members are frequently invited to make presentations as adoption experts for organizations throughout the country. The American Academy of Adoption Attorneys is committed to improving the lives of children by advocating for the benefits and stability provided through adoption.

Statement of Case and Facts

Amicus Curiae respectfully adopts and incorporates by reference the Statement of Case and Facts presented by the Appellee.

Argument

Proposition of Law I

The state has a compelling interest in children being raised in stable, permanent homes. When an adoption is necessary to establish such a home, it is in the best

interest of the state that it occurs at the earliest possible date. Putative father registries serve this state interest while protecting the right of the putative father.

Single women deliver nearly 36% of the nation's children every year and form the majority of single custodial parents. *See* Center For Disease Control, Births: Final Data for 2004: Nat'l Vital Stat. Rep. 2 (2006), *available at* http://www.cdc.gov/nchs/data/nvsr/nvsr55/nvsr55_01.pdf; Parents Without Partners, Facts about Single Parent Families, <http://www.parentswithoutpartners.org/Support1.htm> (last visited Apr. 29, 2008). Mothers are always identified on the birth certificates of such children but fathers are harder to identify and do not automatically assume financial and custodial responsibilities. Children who grow up without participating fathers are more likely to commit crimes, abuse substances, earn lower grade point averages, and live in poverty. The National Center for Fathering, The Consequences of Fatherlessness, http://www.fathers.com/content/index.php?option=com_content&task=view&id=391 (last visited Apr. 29, 2008). It is unmarried mothers who are most likely to make adoption plans for their children. National Council for Adoption, Adoption Factbook IV 10 (Thomas C. Atwood et al. eds., 2007). Adoptions, particularly step-parent adoptions, create or legally recognize a two parent home for the child. Hamilton et al., Adoptive Parents, Adoptive Parents: Evaluating the Importance of Biological Ties for Parental Investment (2007), 72 Am. Soc. Rev. 95, 109-10.

American law and policy should and does facilitate adoption. Beck, Toward a National Putative Father Registry Database (2002), 25 Harv. J.L. & Pub. Pol'y 1031, 1035-36. However, formidable obstacles to adoption lie in the court processes and delays that occur when the rights of the birth-father are not expeditiously addressed. Rycus et al., Confronting Barriers to Adoption Success (2006), 44 Fam. Ct. Rev. 210, 212. The most commonly contested adoptions occur where mothers favor adoption and birth-fathers object. Lewin, *Unwed Fathers Fight for Babies Placed for Adoption by Unwed Mothers*, N.Y. Times, Mar. 19, 2006, at A1. The law should protect birth-parents' rights, but that principle is less clear when children lack a participating or legally identifiable father. Resolving the rights of a non-participating birth-father or a birth-father who is not legally identifiable should not impede the adoption of the child. A putative father registry reduces contested adoptions. Beck, A National Putative Father Registry Database (2007), 36 Cap. U.L. Rev. 295.

Public policy should favor a putative father registry, which protects the due process rights of a responsible birth-father and expedites the rights of the child to permanency when the birth-father has not promptly seized his parenting opportunity. *Id.* at 296. The child's opportunities for prompt permanency must be protected. Putative father registries provide such protection for the birth-father and the child when the registry guarantees notice to timely registered fathers, requires fathers to legally establish a parental relationship, and sets registration deadlines to stabilize placement. State registries garner media attention when a father contests a state's registration deadline. *See, e.g.,* Lewin, *Unwed Fathers Fight for Babies Placed for Adoption by Unwed Mothers*, N.Y. Times, Mar. 19, 2006, at A1; *Talk of the Nation: Fathers Fight for Parental Rights* (NPR radio broadcast Mar. 27, 2006), available at <http://www.npr.org/templates/story/story.php%3FstoryId=5303741>; *Anderson Cooper 360: Biological Fathers and Adoption* (CNN television broadcast Mar. 20, 2006), available at <http://transcripts.cnn.com/TRANSCRIPTS/0603/20/acd.01.html>. Unfortunately, the media may focus on the sensational highlights of such a contested adoption and not expose the sound policies behind laws requiring unwed fathers to promptly establish their paternity legally and assume commensurate responsibilities. Beck, *A National Putative Father Registry Database* (2007), 36 Cap. U.L. Rev. 295, 296.

A. Putative father registries allow men who sire children but lack legal status to obtain notice and an opportunity to be heard.

Registries are for men who are putative fathers. The definition of a putative father is “a man who may be a child’s father” but who has not established a legal relationship with the child. R.C.3107.01(H); see also Protecting Rights of Unknowing Dads and Fostering Access To Help Encourage Responsibility (“Proud Father”) Act of 2006, S. 3803, 109th Cong. § 440(8) (2006). The men who have no need to register include those who are presumed fathers (married to the mother), adjudicated fathers (where courts have decreed their paternity), and acknowledged fathers (where fathers have executed an affidavit of paternity and filed it with the appropriate state agency). R.C. 3107.01(H)(1)(2)(3); R.C. 3107.06(B) The rights of these men are already legally protected as they are assumed to be participating

parents or at least can be required to support the child R.C.3107.06(B) Birth-mothers are not required to identify fathers or to notify them of pregnancy or of an adoption petition. R.C. 3107.061. Adoptive petitioners and/or courts are required to serve presumed fathers, adjudicated fathers, and acknowledged fathers, and must search the putative father registry to provide notice to registered putative fathers. R.C. 3107.11(A)(2); R.C. 3107.64. Thus, mothers cannot thwart putative fathers, because fathers' registrations are independent of the mothers' locations or communications.

In 1972, the United States Supreme Court held 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. XIV Amendment, U. S. Constitution, The Supreme Court suggested that notice and an opportunity to be heard were sufficient to resolve a biological father's rights in a custody determination where the father had not legally established paternity. In reaction to *Stanley* and other highly publicized cases, states enacted legislation to address these due process concerns. Thirty-three states have enacted some form of a registry for putative fathers. Beck, *A National Putative Father Registry Database* (2007), 36 Cap. U.L. Rev. 295, 339, App'x 1 (compiled by Lindsay Biesterfeld). The purpose of a putative father registry is protect the rights of a putative father to be heard in an adoption proceeding where he may prove that he has standing as a party, and to allow an adoption to expeditiously proceed without the putative father as a party if he does not have standing.

The United States Supreme Court analyzed how a putative father acquires standing or a constitutionally protected liberty interest at the same time it acknowledged and accepted the legal basis and the constitutionality of New York's 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 did not place "qualification for notice *** beyond the control of an interested putative father." *Id.* at 264. Lehr provided that an unwed father's parental rights acquire constitutional protection when he grasps his opportunity to parent by assuming responsibility for the child. Thus Ohio law passes constitutional muster under Lehr if it provides a putative father the opportunity to establish and prove a relationship with his child that merits constitutional protection. Ohio law allows a father to develop this protected relationship in two ways: he can establish paternity in a court of law prior to the filing of an adoption petition R.C. 3107.06(3) (4) and he can attempt to assume custodial and financial responsibilities for a child (even one in utero) R.C. 3107.07(2c).

The United States Supreme Court 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 did not place "qualification for notice *** beyond the control of an interested putative father." *Id.* at 264.

The consequences for failure to timely file with registries is defined by state law. Ohio law provides that an unregistered putative father is not entitled to notice and is not required to consent. R.C. 3107.07. While some states do require a father to not only file with the putative father registry but to file a paternity action as well; Ohio does not require that a parentage action be filed. R.C. 3107.07(B) Ohio gives

consent rights to the unwed father whose paternity was established by adjudication. R.C. 3107.07.0-6. Ohio law waives consent rights where father fails to register timely or fails to establish a relationship with the child in utero by attempting to supporting the mother during the pregnancy and support the child up to the time the child was placed in the adoptive home. R.C. 3107.07 Ohio's requirement is consistent with other states which recognize prenatal abandonment and Senator Landrieu's national putative father registry bill currently before the Senate. Protecting Adoption and Promoting Responsible Fatherhood Act of 2009. S. 939, 111th Cong. (2009).

Alabama, Arizona, Indiana, Missouri, and Nebraska provide that the father who fails to timely file implies consent to adoption. Ala.Code 26-10C-1(i) (LexisNexis Supp.(2006); Ariz.Rev.Stat.Ann. 8-106.01 (2004); Ind.Code Ann. 31-14-20-2 (West Supp. 2007); Mo.Ann.Stat. 453.030(3) (West 2003 & Supp. 2007); Neb.Rev.Stat. 43-104.02 (2004). Illinois and Minnesota provide that failure to timely file constitutes grounds to terminate parental rights. 750 Ill.Ann.Stat. 50/12.1(h) (West 2004); Minn.Stat.Ann. 259.52, subdiv. 8 (West 2005). Idaho and New Hampshire bar the filing of a paternity action for the father who fails to timely file. Idaho Code Ann., 16-1513(4) (2001); N.H. Rev.Stat.Ann 170-B:6(I)© (LexisNexis Supp. 2006).

A putative father registry provides unsurpassed protection to putative fathers if they register, because they get notice at the address they have provided. R.C.3107.062. Simultaneously, it streamlines the resolution of adoption contests, because it provides a statutory scheme to resolve any litigation and assures the child an expedited and stable placement.

- B. Putative Father registries constitute a balancing of the disparate interests of the father, the state, the mother and the child.

Public policy related to a putative father registry must consider the needs of fathers, mothers, children, and the states. The key consideration is that registries

provide unwed fathers with an avenue to protect their rights in adoption proceedings of which they would otherwise have no notice. Only 20% of fathers whose identity and location were known by child welfare agencies were contacted when a child abuse and neglect case was initiated. Leving & Sacks, Giving Fathers a Chance, Boston Globe, June 8, 2006 at A15; U.S. Dep't of Health & Human Serv., What About the Dads? 54 (2006), <http://aspe.hhs.gov/hsp/06/CW-involve-dads/report.pdf>. No mother, adoption agency, or adoption attorney can intentionally or unintentionally thwart a father from asserting his rights if he files with a putative father registry that must be searched when an adoption petition is filed. R.C. 3107.063; R.C. 3107.11. Additionally, registries protect the privacy of putative fathers in that states would no longer publish service in their names in newspapers, would no longer physically search for them to provide notice, and/or no longer mail letters to them at addresses where their wives (not the mothers of the children) might open them.

While some states do require a father to not only file with the putative father registry but to file a paternity action as well; Ohio does not require that a parentage action be filed. R.C. 3107.07(B) Ohio gives consent rights to the unwed father whose paternity was established by adjudication. R. 3107.06 Ohio law waives consent rights where father fails to register timely or fails to establish a relationship with the child in utero by attempting to support the mother during the pregnancy and support the child up to the time the child was placed in the adoptive home. R.C. 3107.07 Ohio's requirement is consistent with other states which recognize prenatal abandonment and Senator Landrieu's national putative father registry bill currently before the Senate. Protecting Adoption and Promoting Responsible Fatherhood Act of 2009. S. 939.111th Cong. (2009). However Ohio law does require that the father demonstrate that he attempted to support the mother during the pregnancy and support the child up to the time the child was placed in the adoptive home. Ohio's requirement is consistent with other states which recognize prenatal abandonment.

Alabama provides that father must provide financial and emotional support during six months of the pregnancy in order to preserve his parental rights. *Ex parte F.P.* (Ala. 2003), 857 So.2d 125, 131 (citing Alabama Adoption Code § 26-10A-9 (LexisNexis 1992 & Supp. 2006)). States have defined prenatal abandonment in case law, and Utah has defined a failure to register in statutes as prenatal abandonment. Beck, *Toward a National Putative Father Registry Database* (2002), 25 *Harv. J.L. & Pub. Pol’y* 1031, 1055-56, n.91-92; Utah Code Ann. 78-30-4.14(2)(b) (2002) (current version at Utah Code Ann. § 78-30-4.14(6)(c) (Supp. 2007)); Beck. The policy behind a definition of prenatal abandonment is the speedy identification of those men who affirmatively assume the responsibilities of parenthood, and that is key to expediting permanency for children. The Ohio law by requiring “willful” abandonment excuses the failure of a thwarted putative father to support.

From a practical point of view, a man who relies upon a woman to identify his parental rights and protect them misplaces his reliance. A man who wishes to protect his paternal rights should file with the putative father registry if he determines that a woman is pregnant and due to deliver anytime within 10 months of his sexual access to her. R.C. 3107.062. He should also offer her financial support. Where a man cannot determine if a woman became pregnant following his sexual access to her, and he wishes to protect any parental rights he may have, he should register with the registry and document that he has made a credible offer to the woman of financial support during the pregnancy. While these obligations may seem unfair to the man who turns out not to be the genetic father of the child, it is a ‘cost of doing business.’ With no intention to be crude, the unavoidable fact is that sexual intercourse with a woman not one’s wife carries two risks for a man. The first risk is that the woman may become pregnant because pregnancy is a recognized risk of sexual intercourse and no contraceptive is 100% effective. The second risk is that the woman may be sexually active with other men and identifying the genetic father of her fetus in utero requires amniocentesis which carries health risks to both the mother and baby. This second risk was particularly prominent in the instant case

where the woman was at the time of conception married to another man, Jeremy Tuttle, who was actually listed on the P.A.C.'s birth original certificate. It is necessary for society to identify the man who will promptly assume the responsibilities of parenthood to insure the best interests of children even in a marital situation where infidelity results in a child born during a marriage to a non-husband. Additionally, Ohio provides provide paternity establishment services to assist men in uncertain situations. R.C. 3111.04.

The unwed father's filing with the putative father registry ensures legal notice to him; his attempted provision of support during the pregnancy and up until the time the child is placed in the adoptive home ensures the child of a biological father committed to assume financial responsibilities. The unmarried father's failure to timely file and to develop a relationship of support enables the child to have a permanent placement with adoptive parents where the mother's rights have been voluntarily relinquished or involuntarily terminated.R.C.3107.07.

Putative father registration is easy and can be done for the cost of postage. It does not require that a man continue a relationship with the mother of his child. And it relieves his need to contact her for information about a pregnancy, to seek alternate sources of information about her, or even to keep track of her whereabouts. And in this way, it is not inconsistent with current social mores concerning casual sexual encounters. *M.V.S. v. V.M.S.* (Ala.Civ.App. 1999), 776 So.2d 142, 151. However, registration does require the putative father's affirmative action, because nothing requires a mother to locate a putative father to inform him of the pregnancy or of an adoption, to seek his financial or emotional support, or to seek his consent to adoption.

The four biggest drawbacks of a putative father registry for putative fathers are (1) men's traditional reliance on women to tell them of a pregnancy; (2) their lack of knowledge of a putative father registry and its filing requirement; (3) their uncertainty of paternity; and (4) their potential desire to avoid child support

obligations while trying to maintain parental prerogatives. Beck, A National Putative Father Registry Database (2007), 36 Cap. U. L. Rev. 295, 310.

With sexual intercourse comes the father's responsibility to know the woman's name and/or to inquire of her about the possibility of a pregnancy. Proud Father Act, S. 3803, §§ 440(8)-(10). Ohio offers paternity establishment services pursuant to 42 U.S.C. § 666(a)(5), and R.C. 3111.04n96 . The enacting legislation for the putative father registry required the Ohio Department of Job and Family Services to publicize how to access that opportunity with the registry and its filing requirement. R.C. 3107.065. The last drawback, relating to fathers' support obligations, is a benefit to the child. If a father declines to register in order to avoid that support obligation, then the registry paradigm has effectively culled out the man who does not earnestly wish to assume the responsibilities of parenting. Beck, A National Putative Father Registry Database (2007), 36 Cap. U. L. Rev. 295, 311. The putative father of P.A.C. knew of the pregnancy, obtained a timely DNA test and confirmed his biological paternity but did not file a timely registration with the putative father registry, did not file a timely paternity action nor pay child support or otherwise develop a relationship with the child.

Mothers benefit from putative father registries, because registries relieve them of the need to notify men of pregnancy or adoption. Nearly one out of every three American women is abused by her male partner. See Family Violence Prevention Fund, The Facts on Domestic Violence, <http://www.endabuse.org/resources/facts/DomesticViolence.pdf> (last visited Apr. 29, 2008). Thirty-one percent of deaths of pregnant and postpartum women result from domestic violence, and one-third of female homicides result from domestic violence. Fox & Zawitz, U.S. Dep't of Justice, Homicide Trends in the United States, <http://www.ojp.usdoj.gov/bjs/homicide/intimates.htm> (last visited Apr. 29, 2008). One out of every five college women is raped, often while impaired. American Association of University Women (AAUW), Sexual Assault on Campus, http://www.aauw.org/advocacy/laf/lafnetwork/library/assault_stats.cfm (last visited Apr. 29, 2008). “[Seventy-five

percent] of the time, the offender, the victim, or both have been drinking.” AAUW, Statistics Concerning Sexual Assault on Campus, http://www.aauw.org/advocacy/laf/lafnetwork/library/assault_stats.cfm (last visited Apr. 29, 2008). Domestic homicide is the leading cause of death for pregnant women. Medscape Today: Homicide a Leading Cause of Death in Pregnant women, F, at <http://www.medscape.com/viewarticle/411212> last visited January 4, 2010. Women have good reason to fear their partners under routine conditions, and pregnancy escalates abuse. Pregnant women rightly fear telling their partners of a pregnancy because of the prevalence of domestic violence and homicide--especially in this age in which states automatically enforce child support obligations for women receiving Medicaid or cash welfare payments. See U.S. Dep't of Health & Human Serv., Handbook on Child Support Enforcement 4 (2005), http://www.acf.hhs.gov/programs/cse/pubs/2005/handbook_on_cse.pdf. Additionally, a birth-father may push a woman toward abortion, and she may not want that pressure. Child support obligations may evoke men's violence against women, although Congress enabled women to conceal paternal identity in the presence of domestic violence when applying for welfare in order to protect them from just such abuse. See 42 U.S.C.A. § 602(A)(7)(a)(iii) (West 2003). This statute allows state agencies to waive program requirements (including paternal identification/notification) when screening for domestic violence. Additionally, the almost routine date rape of impaired young women and the frequency with which young men and women have multiple sexual partners means that some mothers cannot identify the fathers of their children. The mother who was raped may resist identifying the rapist to foreclose his having any rights in an adoption. A mother may choose not to identify a father, may not be able to identify a father, or may resist doing so. The bottom line is the father who relies upon a woman to notify him of a pregnancy has misplaced his reliance, and the woman who is relieved of a requirement to notify a father is safer. The registry provides a woman with knowledge of whether a man wishes to assume custodial and financial responsibility for a child without putting herself in harm's way to ask him. That information will assist her in planning for her child--whether for adoption,

abortion, or parenting. Beck, *A National Putative Father Registry Database* (2007), 36 *Cap. U.L. Rev.* 295.

The registry protects the privacy of women in that they do not have to identify possible fathers and thus expose their sexual contacts to adoption agencies, courts, or adoptive parents. The registry also eliminates the need for published service on fathers that would broadcast mothers' names and their pregnancy in newspapers or the need to mail such notice letters to homes where this information may be disclosed to persons other than the father. *Id.*

The child is the biggest winner in the use of a putative father registry, because either he is assured of an earnest father who wishes to participate in his custodial care and financial support or he is assured of a prompt placement with an adoptive family with a homestudy attesting to their fitness to parent. It is critical in aiding the child's development that the registry provides for a prompt determination of who will assume the child's permanent parenting. See Mertin, *Maternal Infant Attachment: A Developmental Perspective* (1986), 26 *Austl. & N.Z. J. of Obstetrics and Gynecology* 280, abstract available at http://www.ncbi.nlm.nih.gov/entrez/query.fcgi?cmd=Retrieve&db=PubMed&list_uids=3469995&dopt=Abstract (last visited Apr. 29, 2008).

The states benefit from putative father registries in that their paramount interest in prompt permanency for children is advanced, the parental rights of earnest fathers are protected, the safety rights of mothers are advanced, and the privacy rights of both mothers and father are ensured. Beck, *Toward a National Putative Father Registry Database* (2002), 25 *Harv. J.L. & Pub. Pol'y* 1031.

States also benefit because the putative father registry scheme typically compels fathers to establish paternity and assume parental responsibility or risk losing parental rights. *Id.* at 1052. Putative father registries allow states to thus prioritize the established father who can enroll his child in school, purchase her health

insurance through his employment, authorize her healthcare; and who can be held responsible for her regular and continued financial support and custody. *Id.* at 1055.

Proposition of Law II

Putative Father Registries have been upheld by courts throughout the United States.

Case law decisions regarding putative father registries continue to uphold putative father registry requirements. State courts have overwhelmingly upheld putative father registries. In *The Interest of C.M.D.* 287 SW 3rd 510, 516 FN 3. (Tx 14th Distr. 2009). Birth-fathers who failed to timely register are typically not permitted to be a party in the adoption proceeding. Beck, *Toward a National Putative Father Registry Database* (2002), 25 Harv. J.L. & Pub. Pol’y 1031.at 1056-70 (reviewing case law). The facts in this case validate the policy reasons for which paternity registries are erected. The child was born in July 2005 and the putative father learned one month later that he was the genetic father. He did not assume financial, custodial, or legal responsibility for the child nor did he file with the putative father registry – arguably the easiest means available to him to acquire constitutional protection of his rights. Only after 18 months did father file a paternity action. By then, mother was involved with another man whom she married shortly after. That man promptly filed a step parent adoption petition but after father filed his parentage action and before paternity was established. Father cannot complain of a race to the courthouse because it was he who postponed assumption of parental responsibility for 18 months – a long time in the life of a baby. The Appellate Court reinforced the need to rigidly apply law where the legislature has prioritized prompt assumption of responsibility for babies and children . In *Re Adoption of P.A.C.* 2009 WL 2767744 at 26 & 24.

Arkansas terminated parental rights of a father where he failed to register with the putative father registry or maintain contact with or financially support his son despite father's argument that he had not, at the relevant time, been determined to be the father. *Murphy v. Stone* (Ark.Ct.App. 2003), No. CA 02-1066, 2003 WL 21186553, at *3.

Illinois waived a father's right to intervene in an adoption, barred him from filing a paternity action, and waived his right to notice of an adoption where he filed a paternity action timely but did not file with the putative father registry. *In re D.J.A.C.* (Ill.App.Ct. Feb. 27, 2006), No. 5-05-0369, slip op. at 11, *vacated by* 863 N.E.2d 261 (Ill. 2007) *and* 873 N.E.2d 942 (Ill. 2007). Illinois found against another father appealing the termination of his parental rights in a dependency case where father was not a presumed father, had not established paternity, and had not registered with the putative father registry. *In re Rodney T.* (Ill.App.Ct. 2004), 816 N.E.2d 741, 746. In that case, Illinois held that the father did not fall within any Illinois category of parent and therefore was not entitled to notice of a proceeding to terminate the parental rights of his child's parent. *Id.*

An Indiana father lived with the birth mother and the child for about 21 months before he was arrested for domestic battery. *Mathews v. Hansen* (Ind.Ct.App. 2004), 797 N.E.2d 1168, 1169-70. The court rejected that father's appeal of a stepparent adoption of his child even though he had filed a paternity action prior to the adoption action, because he had not filed with the putative father registry nor followed through with the paternity action he had filed. *Id.* at 1172-73. The Indiana court described the putative father registry statute as a non-claim statute that imposes a condition precedent (registration with the putative father registry) to enforcement of a right (right to file a paternity action) which is not subject to an equitable exception. *Id.* at 1171-72.

New York dismissed a father's paternity petitions and his application to vacate an adoption order where father claimed his lack of awareness of the pregnancy and childbirth caused him to file four years after the birth and one month after the adoption was finalized. *In re Cassidy YY* (N.Y.App.Div. 2005), 802 N.Y.S.2d 520, 521. The New York court's rationale was that the father "had not sought to contact the child's mother or to learn if their sexual relationship may have resulted in a pregnancy until after the child's adoption." *Id.*

New Hampshire implied a father's consent where father failed to file with the New Hampshire or Arizona putative father registries for a child born in Arizona and adopted in New

Hampshire. *In re Baby Girl P.* (N.H. 2002), 802 A.2d 1192, 1198. The Arizona father established his genetic paternity after the adoption action was filed. *Id.* at 1194.

In Alabama, father's determination of genetic but not legal paternity did not retract his implied consent to adoption for failure to file timely with the registry. *L.C.S. v. J.N.F.* (Ala.Civ.App. 2005), 941 So.2d 973, 978-80. A Florida dependency court terminated father's parental rights, because he filed late with the putative father registry. *A.F.L. v. Dep't of Children and Families* (Fla. 2006), 927 So.2d 101, 102. Florida also implied a father's consent where father—who claimed not to know of the pregnancy--provided some supplies and made some visits to the child in the child's first three months of life, but did not file with the putative father registry until nine months after birth and did not file a paternity action until one year after birth. *J.S. v. S.A.* (Fla. 2005), 912 So.2d 650, 660-63.

In Arkansas, a father who claimed not to know of the pregnancy lost his right to notice because he filed late with the registry. *Escobedo v. Nickita* (Ark. 2006), 231 S.W.3d 601, 605, 608. The Arkansas father lost his right to consent to the adoption for his failure to legitimate the child despite his attempts to determine his genetic connection and to file a paternity action, because he filed both after the adoption was filed. *Id.* at 605. Thus, Arkansas delineated father's right to notice and father's right to consent. A concurring opinion stated that father had the “obligation to track [the mother]'s condition after he had unprotected sex with her if he ever planned to claim notice of an adoption....” *Id.* at 608 (Brown, J., concurring).

Proposition of Law III

Allowing exceptions to the registry requirements defeats the purpose of the registry.

Other cases reflect policies of implying fathers' consents to adoption if they assert their paternity after registration deadlines or after the filing of an adoption action, of assigning fathers with the responsibilities to investigate the possibility of conception and to establish paternity, and of relieving mothers of bracing fathers with news of a pregnancy. *See, e.g., In re Adoption of Baby F.* (April 13, 2004), Franklin App. Nos. 03AP-1092, 03AP-1132, 2004 Ohio 1871, at ¶ 11, 2004 WL 771575, at *3.

Utah terminated a North Carolina father's parental rights pursuant to an adoption filed in Utah where father had lived with the birth mother and child for five months in North Carolina without establishing parental rights to the child. *Osborne v. Adoption Center of Choice* (Utah 2003), 70 P.3d 58. The North Carolina father did not take steps to protect his rights in Utah and instead filed a paternity and custody action in North Carolina after birth mother's relinquishment in Utah. *Id.* at 60. Utah did not credit that father with a protective relationship with the child where they had lived together for five months, because father did not legalize the relationship timely. *Id.* at 65. Thus the Utah decision did not create a registry exception conferring consent rights on a man who had lived with his child but who could not at that time be required to support his child.

Allowing exceptions to registry requirements where father establishes legal paternity after the adoption is filed creates opportunities for defensive legal actions by fathers who would not affirmatively establish paternity but only establish paternity defensively as a last resort to losing their rights by adoption. It also opens the door to fraudulent actions by birth-mothers who may make an end run around their otherwise irrevocable consents to termination of parental rights by establishing paternity by affidavit in a man who may or may not be the father. This occurred in the "Baby Jessica" case. *In re Clausen* (Deboer v. Schmidt) 502 N.W. 2d 649 (Mich. 1993).

Arguments to allow exceptions to putative father registry requirements may include paperwork errors, constitutional sufficiency of father child relationships, the protective effect of legally established paternity, the timing of paternity establishment, the effect of prenatal abandonment, and the effect of mothers' thwarting fathers trying to support and/or develop relationships with children. These arguments assume that mothers and courts are relieved of the obligation to advise fathers of adoption and of their rights and responsibilities. In a time where 36% of children are born out of wedlock, fairness requires that publicity campaigns work to inform unmarried fathers of what steps are necessary to assume responsibilities for the children born out of wedlock and how to protect their rights. Ohio has mandated such a campaign. R.C. 3107.062.

Courts have analyzed application of putative father registry requirements with reference to the sequencing of relevant filings including putative father registry filings, paternity action filings, and adoption action filings, such as the one mandated by the legislation enacting the Ohio Putative Father Registry. Illinois preserved a putative father's right to a best interest of the child hearing where he filed a paternity action three years after the birth but prior to the filing of a stepparent adoption action filed by the mother's husband. However the court held further that the filing of a paternity action for a child with a presumed father does not automatically confer legal rights unless and until a determination is made under a best interests of the child hearing. *J.S.A. v. M.H.* (Ill. 2007), 863 N.E.2d 236, 239.

This Illinois putative father litigation occurred in 2007 and is an anomaly. Based upon an apparent conflict of its state laws, the Illinois Supreme Court relieved a father of the putative father registry requirement where he filed to establish paternity before mother's husband, who was the child's legal father, filed for a step parent adoption petition. *J.S.A. v. M.H.* supra. The applicable Illinois law denied the putative father rights to consent under a statute requiring him to establish paternity prior to the filing of an adoption petition, but another Illinois law allowed a man to file paternity for a child up to 20 years of age. The court waived the registry requirement allowing the parentage action to go forward, however the court cautioned that the filing of a paternity action does not automatically confer legal rights incident to paternity until and unless a determination is made that such custody and/or visitation is in the child's best interest. The *JSA* Supreme Court decision did *not* consider the constitutionality of the putative father registry. Instead it weighed two statutes that came into conflict in an unusual fact pattern, ignored the more specific law, and based its holding on its own prioritization of child welfare policy using a best interest of the child hearing as damage control. *J.S. A. et al. v. M.H.* 863 NE 2d 236 (Ill 2007).

What this means is that Illinois waived its putative father registry requirement to permit the late establishment of paternity where it essentially resulted in two fathers for one child. Presumably, one father ended up with parental rights and the other father maintained continued custody of a then twelve year old boy. This decision violated the Illinois law most specific to

the situation and obfuscated legislative intent as plainly expressed in that law which presumably reflects its public policy. The court further ignored facts that the father had not supported the child nor developed a relationship with the child as the dissent pointed out in a later case on the same situation. *J.S.A.* 893 NE 2d 682 (App. 3rd 2008). Those facts which indicate the failure of the Illinois father to establish a custodial and financial relationship with the child parallel his failure to file with the putative father registry and establish paternity timely – which is precisely what the paternity registry paradigm is designed to predict in effort to protect children’s interests in permanency.

Children, natural parents, and de facto parents rely upon the law as it is written when they develop familial bonds. Upending the law to pronounce two fathers for one child is not good policy and can result only where courts take over public policy determinations rather than ruling on the constitutionality of laws. Courts are little suited to develop public policy, because they lack the fact gathering power of the legislature. The facts in P.A.C. are similar in that father had actual knowledge of his genetic paternity timely, did not provide any support obligation nor made more than token visits to the child and failed to file with the registry nor establish legal paternity. The father is P.A.C. did not establish a relationship with the child which merits constitutional protection, and the letter of Ohio law requiring him to establish paternity prior to the filing of an adoption action should apply to these facts. While the Illinois requirement for a best interest finding is consistent with an Ohio adoption proceeding which requires a best interest finding prior to the granting of an adoption, such best interests policy should not exist to do damage control after averting compliance with Ohio law. R.C. 3107.065.

If the filing of the paternity action occurs in the same general timeframe as the adoption, the paternity action should not be used as a means to defeat the intent and purpose of the putative father registry. A paternity action should not provide an easy and convenient way to cure a late putative father registration. Confusion and litigation occur when the paternity action is not concluded before the adoption action is filed or the adoption is not finalized when the father files a defensive paternity action. Ohio has chosen to resolve this issue by fixing the father’s status as of the date the adoption petition is filed. See, *in re* Brooks, 136 Ohio App. 3d 824, 737 N.E. 2d 1062 (2000).

Minnesota provided no exception to a father who filed timely with the putative father registry but filed a paternity action 22 days late. *T.D. v. A.K.* (Minn.Ct.App. 2004), 677 N.W.2d 110, 113. The court indicated that father did not show good cause for failing to commence his paternity action timely, thus he was not given an extension of the 30 day limit under Minnesota's statute. Minn.Stat. Ann. 259.49(1)(b)(8)(iv) (West 2007); *T.D.*, 677 N.W.2d at 113, 116. The court analyzed the statutory exception holding that father would have had to prove that he “lacked the necessary power, authority, or means” to file timely. *T.D.*, 677 N.W.2d at 113-14. Father had claimed that a good cause exception should be provided, because the trial court had wrongly denied him counsel, and that the court breached its duty to correctly inform him of his right to counsel upon proof of indigency. *Id.* at 114. Father argued that had the trial court fulfilled its alleged duty, father would have timely filed his paternity action. *Id.* The court “found no provision in the fathers'-adoption-registry statute that requires the district court to inform a putative father about his rights under the statute” and held that father's lack of knowledge about his rights does not excuse compliance with the putative father registry requirements. *Id.*

The status of fathers' legal parental rights and the adequacy of fathers' relationships with their children are key to determinations of constitutionally-protected paternal rights. The myriad of fact patterns and different state laws make it hard to develop bright line rules except where fathers validly and legally establish paternity prior to the filing of adoption petitions and/or they develop substantial and consistent relationships with children meriting constitutional protection. Such fathers should prevail in adoption contests absent proven detriment to the child. *Lehr v. Robertson* (1983), 463 U.S. 248, 261-62.

Courts have analyzed the status of fathers and contrasted fathers entitled to notice of adoption proceedings with fathers entitled to consent to adoptions. Indiana implied father's consent to adoption where he filed timely with the putative father registry and was thus given notice of the mother's adoption plan, but was not vested with powers to consent because he did not file a paternity action with the 30-day limit provided by state law. *In re Adoption of Infant*

Fitz (Ind. 2004), 805 N.E.2d 1270, 1273. Thus, Indiana contrasted a 'notice father' with a 'consent father' and protected only the father who has formed a legally enforceable relationship.

The Florida Supreme Court recently quashed earlier state decisions and held that courts may terminate parental rights of men who have not legally established paternity to or claimed paternity of their children. *Heart of Adoptions, Inc. v. J.A.* (Fla. 2007), 963 So.2d 189, 203. The Florida case law authorizing the termination of parental rights of men who have not legally established rights to terminate is counterintuitive but is similarly authorized in Tennessee. *In re Adoption of S.M.F.* (Tenn.Ct.App. Aug. 6, 2004), No. M2004-00876-COA-R9-PT, 2004 WL 2804892, at *7.

Alabama implied consent to adoption where father did not file with the putative father registry in either Alabama or Georgia for a child born in Georgia but filed a paternity action in Georgia after being served with notice of the adoption action filed in Alabama where the adoptive parents resided. *Ex parte J.W.B.* (Ala. 2006), 933 So.2d 1081. The birth mother and father disputed the level of the birthfather's prenatal support; mother indicated that he paid for a few meals during dates, paid three co-pays for prenatal care, accompanied her to 3 or 4 prenatal visits out of the 15 to 20 she attended, and never visited the child in the hospital of birth or in the three weeks after birth and before relinquishment. *Id.* at 1083-85. Birth father admitted the lack of visits but asserted that he had spent \$ 200 per month during the pregnancy on the mother and that the mother thwarted his visits after the birth. *Id.* at 1083, 1085, 1090.

Conclusion

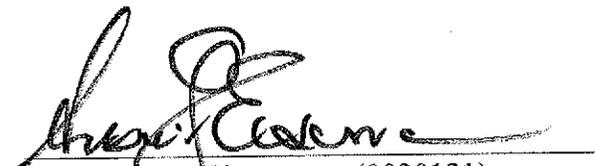
The facts in this case validate the policy reasons for which paternity registries are erected. The child was born in July 2005 and the putative father learned one month later that he was the genetic father. He did not assume financial, custodial, or legal responsibility for the child nor did he file with the putative father registry – arguably the easiest means available to him to acquire constitutional protection of his rights. Despite the existence of the genetic test proving paternity, he declined to file with the child support enforcement. Only after 18 months did father file a

paternity action. By then, mother was involved with another man whom she married shortly after. That man promptly filed a step parent adoption petition but after father filed his parentage action and before paternity was established. Father cannot complain of a race to the courthouse because it was he who postponed assumption of parental responsibility for 18 months – a long time in the life of a baby. The Appellate Court reinforced the need to rigidly apply law where the legislature has prioritized prompt assumption of responsibility for babies and children. In *Re Adoption of P.A.C.* 2009 WL 2767744 at 26 & 24.

For the reasons set forth above, the American Academy of Adoption Attorneys respectfully requests this Supreme Court to AFFIRM the decision of the First Appellate District of Ohio.

Mary Beck *(per telephone authority)*

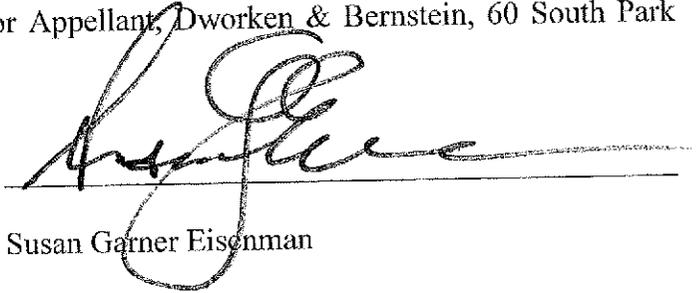
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Certificate of Service

I hereby certify that a copy of the foregoing Amicus Curiae's Brief has been served by regular U.S. mail this 8th day of February, 2010 to the following: Michael R. Voorhees, Attorney for Appellee Kevin Crooks, Voorhees & Levy LLC, 11159 Kenwood Road, Cincinnati, Ohio 45242; Kenneth J. Cahill, Attorney for Appellant, Dworken & Bernstein, 60 South Park Place, Painesville, Ohio 44077.



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