

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	:	
	:	
Appellee	:	Trial Court No.2008 ADP 000010
	:	Lucas County Probate Court
	:	

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MERIT BRIEF OF APPELLEE, BENJAMIN WYREMBEK

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## STATEMENT OF FACTS

This case involves the adoption of a child and the objection to the adoption by the adjudicated biological father. The child was born on October 29, 2007, in Lucas County, Ohio. On November 1, 2007, the child's birth mother, Drucilla Bocvarov, executed a permanent surrender of a child, with the last name of Vaughn, to Adoption By Gentle Care, a private child placing agency (the "Agency"). On November 4, 2007, Drucilla's former husband executed a permanent surrender to the Agency for a child with the last name of Vaughn. In her permanent surrender, Drucilla stated that she was a "single parent." In his permanent surrender, Jovan stated that he was "not the biological father" of the child. The Bocvarovs had been divorced by the Lucas County Domestic Relations Court on May 16, 2007. The Bocvarovs' final divorce decree did not state that Drucilla was pregnant and did not find the unborn child to be issue of the Bocvarovs' marriage.

In their respective permanent surrenders, Drucilla and Jovan Bocvarov stated that "I am the Parent/Guardian of [the child] **Vaughn.**" (Emphasis added.) The Agency submitted these permanent surrenders to Lucas County Juvenile Court for filing under the name of Vaughn. There are no permanent surrenders executed or filed concerning a child with the last name of Bocvarov.

The Agency accepted the surrenders and placed the child with the Vaughns for the purpose of adoption. The child has remained with the Vaughns since early November 2007.

On November 20, 2007, Benjamin Wyrembek ("Wyrembek") timely registered with the Ohio Putative Father Registry, seeking to initiate parental rights relative to the child herein. Also, on December 28, 2007, Wyrembek filed a parentage complaint in the Fulton County Juvenile Court.

In January 2008, the clerk of Lucas County Juvenile Court filed the permanent surrenders for the child named Vaughn under Lucas County Juvenile Court Case No. 08-178229. The Vaughns filed in the Lucas County Probate Court, on January 16, 2008, a petition for adoption of the child and a motion for declaratory judgment. On January 17, 2008, a birth certificate for the child was filed by the registrar, naming Jovan Bocvarov as the father of the child.

On January 28, 2008, the Vaughns filed, a motion in Fulton County Juvenile Court requesting the dismissal of Wyrembek's parentage complaint. Fulton County Juvenile Court transferred the proceedings initiated by Wyrembek to the Lucas County Juvenile Court on February 21, 2008.

On March 14, 2008, the Lucas County Probate Court denied the Vaughns' motion for declaratory judgment and specifically ordered the putative father to be served with notice of the adoption petition. Wyrembek was served and thereafter filed an objection to the adoption on April 23, 2008. The probate court ruled on May 19, 2008, that the adoption petition should be deferred until the issue of paternity of the child, which was pending in the juvenile court prior to the filing of this adoption petition, was determined. The probate judge held the adoption in abeyance pending the parentage determination.

On March 17, 2009, the Lucas County Juvenile Court issued a Judgment Entry in Case No. JC08-180254, declaring Wyrembek to be the father of the child who is the subject of the Vaughns' adoption petition.

Wyrembek filed in the Lucas County Probate Court an amended objection to the adoption petition and two complaints for declaratory judgment on April 7, 2009. The probate court then

held a hearing on these legal issues on June 2, 2009, prior to an evidentiary hearing on the adoption petition and the determination of best interest of the child.

On June 4, 2009, the probate judge recognized the findings of the juvenile court in the pending parentage action, granted Wyrembek's complaint for declaratory judgment and found Wyrembek to be a legal father of the child under Ohio adoption law. The probate judge ruled that "[t]he judicial determination of parentage filed prior to the petition for adoption changes [Wyrembek's] status in this matter and he is now a legal father and falls under the provisions of R.C. 3107.07(A)." Wyrembek was no longer a putative father subject to R.C. 3107.07(B), but was a parent subject to the consent requirements of R.C. 3107.07(A). The probate court also found that the Vaughns' adoption petition was filed prematurely since the one-year period prescribed under R.C. 3107.07(A) had not expired. The probate judge dismissed the Vaughns' adoption petition.

On June 5, 2009, Wyrembek filed a declaratory judgment action in Lucas County Juvenile Court Case No. 08-178229, asking that the permanent surrender agreements executed by the Bocvarovs be declared invalid. On December 10, 2009, Wyrembek moved for summary judgment and default judgment on the declaratory judgment. To date, the juvenile court has not ruled on this issue.

On November 30, 2009, the Sixth District, Court of Appeals, affirmed the decision of the probate court.

ARGUMENT

Appellee's Response to Appellants' Proposition of Law No. I:

Where a person has timely registered with the Ohio Putative Father Registry and has filed a parentage and custody action in juvenile court prior to the date on which an adoption petition is filed in probate court, the person has taken sufficient steps to establish and safeguard parental rights with respect to the child. The probate court must defer jurisdiction relative to said child to the juvenile court. Ohio adoption laws, including consent-to-adoption requirements and the definition of "putative father" under R.C. 3107.01(H), must be interpreted to give deference to a subsequent adjudication that the person is the child's parent. In *re Adoption of Pushcar* (2006), 110 Ohio St.3d 332, 2006 Ohio 4572, 853 N.E.2d 647, followed.

The issues in the case at bar are as follows:

(1) whether the probate court has jurisdiction to proceed with an adoption where the legal parents executed permanent surrenders of a child, but where the person claiming to be the child's birth-father timely registered with the putative father registry and where the child involved is subject to orders from that person's parenting case pending in juvenile court; and

(2) whether a person who timely registered with the putative father registry and filed a parenting action prior to the filing of an adoption petition, but who was not adjudicated the birth-father until after the filing of that petition, is (a) a parent subject to the consent-to-adoption requirements of R.C. 3107.07(A), or (b) a "putative father" subject to the consent standards of R.C. 3107.07(B).

## **Jurisdiction**

This Ohio Supreme Court has resolved the issue of jurisdictional conflict between two Ohio courts when fundamental parental rights are involved. In *In re Adoption of Pushcar*, 110 Ohio St.3d 332, 2006 Ohio 4572, 853 N.E.2d 647, this Court stated:

"\* \* \* The issue presented for our review is whether a probate court must refrain from proceeding with the adoption of a child when an issue concerning the parenting of that child is pending in the juvenile court. We hold 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.

"It is well established that the original and exclusive jurisdiction over adoption proceedings is vested in the probate court. *State ex rel. Portage Cty. Welfare Dept. v. Summers* (1974), 38 Ohio St.2d 144, 67 O.O.2d 151, 311 N.E.2d 6, paragraph two of the syllabus. We have therefore held, 'A Probate Court has jurisdiction to hear and determine an adoption proceeding relating to a minor child notwithstanding the fact that the custody of such child is at the time within the continuing jurisdiction of a divorce court.' *In re Adoption of Biddle* (1958), 168 Ohio St. 209, 6 Ohio Op. 2d 4, 152 N.E.2d 105, paragraph two of the syllabus.

"However, we have also recognized 'the bedrock proposition that once a court of competent jurisdiction has begun the task of deciding the long-term fate of a child, all other courts are to refrain from exercising jurisdiction over that matter.' *In re Adoption of Asente* (2000), 90 Ohio St.3d 91, 92, 2000 Ohio 32, 734 N.E.2d 1224. Therefore, we hold that when an issue concerning the parenting of a minor child is pending in the juvenile court, a probate court must refrain from proceeding with the adoption of that child.

"Moreover, this case requires us to again acknowledge that natural parents have a fundamental right to the care and custody of their children. *In re Adoption of Masa* (1986), 23 Ohio St.3d 163, 165, 23 OBR 330, 492 N.E.2d 140, citing *Santosky v. Kramer* (1982), 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599. Because adoption terminates those fundamental rights, any exception to the requirement of parental consent to adoption must be strictly construed. *Id.*" *In re Adoption of Pushcar*, supra, ¶8-¶11.

The crux of the matter in *Pushcar* was a dispute over the actual parentage of the child. The natural father signed the birth certificate which automatically registered him in the paternity registry as the child's legal father in an out-of-wedlock birth. The natural father filed in juvenile court a complaint for visitation with the child. The juvenile court required genetic tests to establish paternity before it would address visitation. The matter was in the early stages of resolution in juvenile court when the stepfather filed an adoption petition in probate court pursuant to R.C. 3107.07(A). This Court held that "[w]hen an issue concerning **parenting** of a minor is pending in the juvenile court, a probate court must refrain from proceeding with the adoption of that child." *Pushcar* at syllabus (emphasis added). The *Pushcar* court reasoned that the ability of the probate court to apply the consent-to-adoption statutes is dependent upon the establishment of the parent-child relationship. Since paternity had not been established, the stepfather could not meet his burden of proving the consent exception under R.C. 3107.07(A).

In the case at bar, like in *Pushcar*, the matter involves an action relative to the parentage of the child, plus demands for parenting time. Appellee Wyrembek took steps to safeguard his fundamental parental rights. He timely registered with the Ohio Putative Father Registry, within 30 days of the child's birth. "[A] putative father who timely registers claims paternity of the child from the start of the child's life." *In re Adoption of P.A.C.*, 184 Ohio App.3d 88, 92-93, 2009 Ohio 4492, 919 N.E.2d 791, at ¶16. Appellee filed a parentage action within 60 days of the child's birth. 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 requested genetic testing, parental rights, parental responsibilities, custody or visitation with the child, prior to an adoption being filed. He provided a stable home environment in which to place his child. Upon notice of the adoption proceeding, Appellee filed objections to Appellants' adoption petition. Appellee's efforts to establish a legal relationship with the child contradicts Appellants' allegations that Appellee abandoned the birth-mother and the child.

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.

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 *Pushcar* and in the instant case could not apply the adoption consent statutes until the juvenile court resolved the **parenting** issues in the **pending** parentage action.

Appellants argue that the instant appeal is distinguishable from the situations presented to this Court in *Pushcar*, *Sunderhaus* and *Asente*. *Appellants' Merit Brief at pages 16 and 17.*

Appellants claim that the instant case is a R.C. 3107.07(B) case and that *Pushcar* and *Sunderhaus* are R.C. 3107.07(A) cases which have no application to the instant case. Appellants distinguish *Asente* from the present case by characterizing *Asente* as merely

involving the validity of consents to terminate parental rights and not part of an adoption proceeding. Appellants are blending and confusing the the issues before this Court. Appellants ignore the fact that court determinations on paternity (e.g., *Pushcar*; *Sunderhaus*) or on the termination of parental rights (e.g., *Asente*) affect the fate of the child involved in a subsequently filed adoption action, and could control whether an adoption may even proceed if custody were awarded to another party.

This Ohio Supreme Court in *Pushcar*, *Sunderhaus* and *Asente* followed "the bedrock proposition that once a court of competent jurisdiction has begun the task of deciding the long-term fate of a child, all courts are to refrain from exercising jurisdiction over the matter." *Asente* at 93; *Pushcar* at ¶10; *Sunderhaus* at 130-131, ftnt.1. In *Asente*, the child's parentage was not at issue. In *Asente*, the issue was strictly jurisdictional, i.e., which court has jurisdiction--a Kentucky court with a pending proceeding on the voluntary termination of parental rights, or an Ohio probate court in a subsequently filed petition for adoption. The *Asente* court found that the Kentucky court had first begun the task of deciding the child's long-term fate and held that the Kentucky court had jurisdiction over the child. In *Pushcar* and *Sunderhaus*, the issue of **parenting** was not resolved in a **pending** juvenile court action when the adoption petition was filed. These cases are on point and are applicable herein to resolve the jurisdictional conflict between the juvenile court and the probate court. There must be a paternity determination by the juvenile court of the **pending** parentage action before the consent requirements in the adoption statutes may be applied by the probate court. The definition of "putative father" and the application of R.C. 3107.07(A) or (B) are not relevant to the

jurisdictional issue, but are relevant to the second issue in this case concerning statutory interpretation.

Appellants claim that the actual parentage of the child is irrelevant to the procedural steps set forth in Ohio adoption laws. *Appellants' Merit Brief at pages 10 through 13.* Appellants assert that the birth-mother's former husband is the presumed natural father of the child pursuant to R.C. 3111.03(A)(1). They contend that the permanent surrenders executed by the birth-mother and her former husband are valid under R.C. 5103.15(B)(2), and that these surrenders determine the long-term fate of the child. Appellants conclude that the probate court should have acknowledged its exclusive jurisdiction and proceeded with the adoption case.

Appellants' position is not supported by either law or facts. Appellants recite the rule that a probate court has original and exclusive jurisdiction to determine an adoption proceeding relating to a minor child notwithstanding the fact that a case involving the child is at the time pending within the continuing jurisdiction of a divorce court or juvenile court. *Appellants' Merit Brief at page 18.* Appellants are again confusing the issue. The fact that the probate court has exclusive jurisdiction in adoptions does not mean that the probate court has exclusive jurisdiction over the fate of the child. Rather, if a parenting action is pending in a divorce or juvenile case, then the probate court must defer jurisdiction and cannot complete the adoption. This distinction was discussed by the Seventh District, Court of Appeals, in *In re Adoption of R.M.*, 7th Dist. No. 07MA232, 2009 Ohio 3252 at ¶38 - ¶45 (finding no parentage issues, no proceedings attempting to litigate the long-term custody of the child and finding exclusive jurisdiction in the probate court).

As noted above, the issue of parenting was pending in the cases of *Pushcar* and *Sunderhaus* when the adoption petition was filed. That parenting issue conferred immediate jurisdiction on the juvenile court and deferred jurisdiction in the adoption proceeding in the probate court.

Appellants rely upon cases where the issue of parenting was previously resolved or irrelevant. *Appellants' Merit Brief at pages 18 and 19.* In *In re Adoption of Biddle*, there had been an initial determination of custody and the continuing jurisdiction of the domestic relations court over custody did not prevent the exclusive jurisdiction of the probate court in the adoption case. In *In re Adoption of Joshua Tai T.*, 6th Dist. No. OT-07-055, 2008 Ohio 2733, the court also held that the continuing jurisdiction of a juvenile court over a custody matter did not preclude a probate from exercising jurisdiction. In *In re T.N.W.*, 8th Dist. No. 98915, 2008 Ohio 1088, the Eighth District, Court of Appeals, recognized that *Pushcar* was not applicable. The appellate court in *T.N.W.* stated:

"We find *Pushcar* to be inapplicable to the case at bar. Here, the issue of parenting was resolved [prior to the filing of the adoption petition.] Both the father's and the mother's parental rights were terminated, and permanent custody was awarded to [the public agency]. Therefore, a ruling by the juvenile court on the issue of parentage was not needed to proceed with the adoptions. *Id.* at ¶15.

Appellants contend that the probate court has exclusive jurisdiction over adoptions because the R.C. 3127.23 Affidavit does not apply to adoption proceedings. *Appellants' Merit Brief at pages 19 and 20.* Appellants' argument is a red herring. Under Ohio adoption laws, the putative father registry accomplishes the same function as an R.C. 3127.23 Affidavit--the disclosure of a person's paternity claim. Of course, Ohio adoption laws require an actual search of the registry and actual notice to the putative

father of the pending adoption. Upon notice, an interested putative father would file objections to the adoption and appear at adoption hearings. In his objections, the putative father would notify the prospective adoptive parents and the probate court of any parenting issue pending in juvenile court. See e.g., Appellee's *Objection to Adoption*, filed on April 23, 2008, at ¶10, and *Amended Objection* filed on April 7, 2009, at ¶10.

In addition, the probate court lacked jurisdiction in this case because the *parents* of the child involved did not enter into permanent surrenders as prescribed by R.C. 5103.15(B)(2). Ohio's adoption statutes are in derogation of the common law and must be strictly construed. *Lemley v. Kaiser* (1983), 6 Ohio St.3d 258, 6 Ohio B. 324, 452 N.E.2d 1304, paragraph one of the syllabus. "Although R.C. 5103.15 is not part and parcel of the adoption statutes, to the extent that it is, in substance, an adoption statute, it is in derogation of the common law and requires strict compliance. See *Lemley*, 6 Ohio St. at 260. (finding that R.C. 5103.16, regarding the placement of a child surrendered for adoption, is, in substance, an adoption statute and strict compliance is required)." *In re E.B.*, 9th Dist. No. 23850, 2008 Ohio 784, at ¶14.

Assuming arguendo that the surrender is even valid because it does not name the child involved in this case, Jovan Bocvarov lacked authority to permanently surrender the rights of this child to the Agency. First, Jovan was not a parent of the child. R.C. 5103.15(B)(2) provides that "[t]he *parents* of a child less than six months of age may enter into an agreement with a private child placing agency surrendering the child into the permanent custody of the agency without juvenile court approval if the agreement is executed solely for the purpose of obtaining the adoption of the

child." (Emphasis added.) The word "parent" is not defined in either R.C. Chapter 5103 or R.C. Chapter 3107. Black's Law Dictionary (7th Ed., 1999), at page 1137, defines "parent" as "[t]he lawful father or mother of someone • In ordinary usage, the term denotes more than responsibility for conception and birth." It denotes more than a person who may be legally presumed to be a father.

The record refutes the legal presumption of Jovan Bocvarov's paternity. The Bocvarovs' divorce decree did not address the birth-mother's pregnancy at the time of the divorce. Their divorce decree did not address the issues of parentage or custody of the unborn child. The Bocvarovs' marital unit did not decide to place the child for adoption. The Bocvarovs' marital unit terminated over five months before the Bocvarovs' execution of the permanent surrenders. Jovan Bocvarov stated in his permanent surrender that he was "not the biological father" of this child. Moreover, Appellee's prompt claim of paternity and his subsequent adjudication as the child's biological father refuted the legal fiction of Jovan's paternity.

Second, Jovan did not have custody of the child. The birth-mother stated in her permanent surrender that she was a "single parent." This Ohio Supreme Court in *Adoption Link, Inc. v. Suver*, 112 Ohio St.3d 166, 2006 Ohio 6528, 858 N.E.2d 424, at ¶9, stated:

"R.C. 5103.15(B)(2) does not permit parents of a child less than six months old who do not have legal custody of the child to enter into an agreement with a private child placing agency surrendering the child to the permanent custody of that agency. To be sure, R.C. 5103.15(B)(2) provides, 'The parents of a child less than six months of age may enter into an agreement with a private child placing agency surrendering the child into the permanent custody of the agency without juvenile court approval if the agreement is executed solely for the purpose of obtaining the adoption of the child.' But that provision must be read in context and be construed in pari materia with

the other provisions of R.C. 5103.15, which manifestly condition any such permanent-surrender agreement on the parents or other specified persons having custody of the child. See, e.g., R.C. 5103.15(A)(1) ('The parents, guardian, or other persons *having the custody of a child* may enter into an agreement with any public children services agency or private child placing agency \* \* \* [emphasis added]); R.C. 5103.15(B)(1) ('Subject to, except as provided in division [B][2] of this section, juvenile court approval, the parents, guardian, or other persons *having custody of a child* may enter into an agreement with a public children services agency or private child placing agency surrendering the child into the permanent custody of the agency' [emphasis added])."

When the purported legal parent, Jovan Bocvarov, attempted to permanently surrender his rights to this child to the Agency, he lacked authority to do so because he did not have custody of the child. The birth-mother was unmarried and the sole residential parent and legal custodian of the child pursuant to R.C. 3109.042.

Appellants further contend that the sole purposes to the Ohio Putative Father Registry is to expedite the prompt stable placement of children in adoptive homes and to preclude unwed fathers from interfering with the adoption process. Contrary to Appellants' position, the registry was not designed to protect the interests of prospective adoptive parents. The registry protects the parental rights of earnest unwed fathers against termination by adoption and expedites the prompt stable placement of children with that earnest unwed father, or, where there is no such natural father, with an appropriate adoptive family.

As a registrant with the putative father registry, Appellee had rights in a voluntary surrender under R.C. 5103.15(B)(2). The applicable version of Section 5101:2-48-02 of the Ohio Administrative Code, eff. 9-1-03 to 5-15-09, provides in part:

"(I) A person claiming to be the father of a child born to a single mother who is not named on the birth certificate, and has not signed an acknowledgment of paternity pursuant to Chapter 3111, of the Revised Code

or who has not been declared a parent by a court of law, does not have rights in a voluntary surrender under division (B)(2) of section 5103.15 of the Revised Code unless he is registered with the Putative Father Registry. A single mother of a child is presumed to be the sole legal custodian. Therefore, review of the father registry is sufficient to satisfy the requirements of voluntary surrender in section 5103.15 of the Revised Code." (Emphasis added.)

Appellee Wyrembek claimed to be the father of a child born to a single mother. Appellee was not named on the birth certificate. Appellee did not sign an acknowledgment of paternity under R.C. Chapter 3111. At the time of the Bocvarovs' signing of the permanent surrenders, Appellee had not been declared a parent by a court of law. Appellee was timely registered with the putative father registry. Appellee therefore had rights in a voluntary surrender agreement. See OAC 5101:2-48-02(I). Appellee never entered into a surrender agreement with the Agency. The Agency nevertheless filed Jovan's invalid permanent surrender in the juvenile court, improperly obtained approval from the State of Ohio for an out-of-state placement and placed the child with Appellants.

Appellants ask that this Court recognize substantive rights for the child involved herein. Appellants' Merit Brief at page 6 and 7. Appellants claim that the misinterpretation and misapplication of Ohio adoption laws have protracted the litigation in this case and that "[t]hese delays have resulted in the child becoming fully integrated as a family member in the prospective adoptive [Appellants'] family." *Id.* at page 6. There has been no factual determination by the probate court as to the alleged integration of the child into Appellants' home. Rather, the record shows that Appellants have spent more than two-and-one-half years denying the child a relationship with his natural

father. Such a child would not acquire a real and stable sense of belonging to this family. Such a child cannot be "fully integrated" into Appellants' family.

Finally, the record contains numerous examples of misrepresentations, manipulations and delays by the birth-mother, the Agency and Appellants. The birth-mother lied to the divorce court and testified that she was not pregnant at the time of the divorce. The birth-mother denied Appellee an actual, social relationship with the child by placing the child for adoption immediately after birth. The permanent surrenders were executed and filed in the juvenile court by the Agency under "Vaughn," the name of the adoptive parents, and not under "Bocvarov," the name of the birth-mother and legal father. Appellee knew the birth-mother's name and would reasonably expect to find permanent surrenders under the name Bocvarov. Instead, the surrenders were effectively hidden under the name of Vaughn. Jovan stated on November 4, 2007, in his permanent surrender that he was "not the biological father" of the child. However, on January 17, 2008, a birth certificate for the child was filed, naming Jovan Bocvarov as the father of the child. The Agency and Appellants delayed, for over two years, genetic testing and the establishment of a parent-child relationship between Appellee and the child. Appellants then tried to conditionally agree to genetic testing based upon *State ex rel. Furnas v Monnin*, 120 Ohio St.3d 279, 2008 Ohio 5569, 898 N.E.2d 573. *Monnin* was a post-adoption juvenile court proceeding to obtain the natural father's social and medical history pursuant to R.C. 3107.09 and R.C. 3107.091. Appellants' condition was a blatant attempt to deny Appellant his constitutional parental rights, to prevent the juvenile court from exercising jurisdiction on the parenting issue and to restrict the

juvenile court's jurisdiction to obtaining Appellee's social and medical history. Appellants filed multiple Writs of Prohibition in the Sixth District, Court of Appeals, and in this Supreme Court, challenging the jurisdiction of the juvenile court to determine the parenting issue. The courts denied each of Appellants' jurisdictional challenges.

The birth-mother denied Appellee Wyrembek an actual, social relationship with his child. Appellee acted promptly to establish a legal relationship with his child through the registry and the parentage action. Appellee acted earnestly to safeguard his fundamental parental right to the care and custody of his child. His conduct matched the legislative intent of the registry and should have expedited prompt determinations on parentage in the juvenile court and on the consent statutes in the adoption case in probate court. Instead, Appellants delayed the proceedings in the juvenile and probate courts and denied Appellee his fundamental parental right to a relationship with his child.

The juvenile court acquired jurisdiction over the parenting issue on December 28, 2007. The probate court did not receive the petition for adoption until January 16, 2008. Under these circumstances, the probate court properly deferred to the juvenile court the issue of defining Appellee's parental status. See *Pushcar* at ¶8. Also, based upon *Pushcar*, the probate court was precluded from exercising any jurisdiction over this child as proceedings had commenced in the juvenile court prior to the adoption.

**Statutory Interpretation: Plain Language versus Substantive Rights**

Appellants contend that the term "putative father," as defined in R.C. 3107.01(H) and as used in the consent-to-adoption statutes, is plain and unambiguous. Appellants state "[t]he November 30, 2009 decision by the Sixth District failed to address this clear and unambiguous statutory language, claiming that the decision of the Court of Appeals ignored the word "PRIOR" in R.C. 3107.01(H)3)[.]" *Appellants' Merit Brief at p. 13*. Appellants rely upon the well-settled rule that "when the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no need to apply the rules of statutory interpretation." *State ex rel. Jones v. Conrad* (2001), 92 Ohio St.3d 389, 392, 2001 Ohio 207, 750 N.E.2d 583. According to Appellants, the adoption statutes at issue here are not ambiguous and therefore the rules of statutory construction do not apply. Appellants conclude that Appellee is a "putative father" under R.C. 3107.01(H)(3) and is therefore subject to the factual determinations of "abandonment" as set forth in R.C. 3107.07(B)(2).

R.C. 1.47 states as follows:

- "In enacting a statute, it is presumed that:
- (A) Compliance with the constitutions of the state and of the United States is intended;
  - (B) The entire statute is intended to be effective;
  - (C) A just and reasonable result is intended;
  - (D) A result feasible of execution is intended."

Here, Appellants' proposed interpretation would create an unconstitutional difference between fathers who are forced to pursue parentage actions and those who are allowed to consent to parentage with a cooperative mother. Appellants' proposed construction would produce an unfair and unjust result.

"It is an axiom of judicial interpretation that statutes be

construed to avoid unreasonable or absurd consequences." *State ex rel. Cook v. Seneca Cty. Bd. of Commrs.*, 175 Ohio App.3d 721, 2008 Ohio 736, ¶28, 889 N.E.2d 153, quoting *State ex rel. Dispatch Printing Co. v. Wells* (1985), 18 Ohio St.3d 382, 384, 18 Ohio B. 437, 481 N.E.2d 632. "The General Assembly will not be presumed to have intended to enact a law producing unreasonable or absurd consequences. It is the duty of the courts, if the language of a statute fairly permits or unless restrained by the clear language thereof, so to construe the statute as to avoid such a result." *Prem v. Cox* (1983), 2 Ohio St.3d 149, 152, 2 Ohio B. 694, 443 N.E.2d 511, quoting *Canton v. Imperial Bowling Lanes* (1968), 16 Ohio St.2d 47, 242 N.E.2d 566, paragraph four of the syllabus.

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 Adoption of Masa*, supra. 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 on this case 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."

*In re Adoption of G.V.*, 6th Dist. No. L-09-1160, 2009 Ohio 6338.

In the case at bar, the paternity issue was pending in juvenile court when Appellants' filed their adoption petition and the parentage of Appellee was established prior to a determination on Appellants' petition for adoption. As a result, the plain language of the term "putative father" under R.C. 3107.01(H)(3)

and the consent-to-adoption statutes of R.C. 3107.06 and R.C. 3107.07 must be read *in pari materia* with the parentage statutes in R.C. Chapter 3111. See *Sunderhaus*, supra, at 130, ftnt. 1 (“[T]he paternity action was instituted prior to the filing of the petition for adoption and the parentage of [birth-father] was established prior to the date that the petition for adoption was granted by the probate court. Accordingly, any reference to the statutory provisions governing the rights of the putative father of the minor is unnecessary.”), applying former versions of R.C. 3107.06 and 3107.07.

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. Such a different treatment would violate the equal protection guarantees of the Ohio and United States Constitutions. 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.

Appellants cite to two case to support their position that the plain language of the definition of “putative father” applies: *In re Adoption of P.A.C.*, supra, and *In re Adoption of Baby Boy*

*Brooks* (2000), 136 Ohio App.3d 824, 737 N.E.2d 1062. *Appellants' Merit Brief* at pages 14 and 15. The decision in *Baby Boy Brooks* established an exception to the requirement that a birth-father timely register with the putative father registry. The birth-father in *Baby Boy Brooks*, unlike Appellee Wyrembek, did not timely register with the putative father registry. Since Appellee timely registered, the exception established in *Baby Boy Brooks* is irrelevant to the case at bar. The case of *P.A.C.* has been accepted for review by this Court and is similar to the case at bar in that a parentage action was filed prior to the filing of the petition for adoption, and the adoption petition was filed before there was a judicial ascertainment of paternity. However, the birth-father in *P.A.C.*, unlike Appellee Wyrembek, did not timely register with the putative father registry, but had a genetic test result, obtained with the birth-mother's consent, which identified him to be the biological father. The appellate court in *P.A.C.* held at its syllabus as follows:

Where a biological father did not timely register on the putative father registry or otherwise safeguard his right to object to the adoption of his child before the adoption petition was filed, the probate court erred by holding that the father was entitled to object to the adoption; under R.C. 3107.062 and 3107.07(B), the father's consent to the adoption was not required even though a parentage action was pending at the time the adoption petition was filed, and that action later resulted in the recognition of the father's status as the biological father of the child.

Based on the syllabus law in *P.A.C.*, the appellate court concluded that the birth-father was a "putative father" subject to R.C. 3107.07(B) because he did not timely register *and* did not obtain a judicial determination of paternity prior to the filing of the adoption petition. The appellate court in *P.A.C.* clearly viewed the positive genetic test and the filing of a paternity action prior to the filing of the adoption petition as insufficient steps

to establish and safeguard parental rights as prescribed by the United States Supreme Court in *Lehr v. Robertson*.

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." *P.A.C.*, 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).

Under the plain language rule, Appellee could be construed a "putative father" under R.C. 3107.01(H)(3). However, Appellee is only a "putative father" because Appellants filed their adoption petition before there was a judicial determination in the pending 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.

Assuming arguendo that the courts below had jurisdiction to proceed in the adoption case, these courts correctly applied R.C. 3107.07(A) to the present case.

#### CONCLUSION

For the foregoing reasons, the Appellee respectfully requests that this Supreme Court AFFIRM the decision of the Sixth Appellate District Court, and hold that in the case presented herein that the Lucas Count Juvenile Court had jurisdiction over the child involved herein to the exclusion of the Lucas County Probate Court.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Merit Brief of Appellee was sent by ordinary U.S. Mail this 9<sup>th</sup> day of April, 2010, to: Michael R. Voorhees, 11159 Kenwood Road, Cincinnati, OH 45242; Susan Garner Eisenman, 3363 Tremont Rd., Ste. 304, Columbus, OH 43221; and Mary Beck, Univ. of Missouri at Columbia, 104 Hulston Hall, Columbia, MO 65211.



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