

IN THE SUPREME COURT OF OHIO

In re Adoption of: P.A.C.

Supreme Court No. 2009-1757

Gary D. Otten

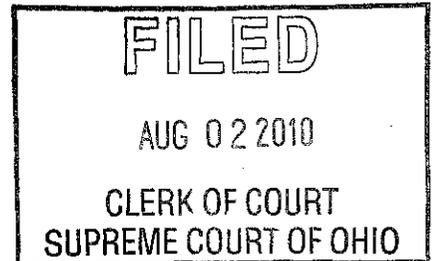
**On Appeal from the
Hamilton County Court of Appeals,
First District Court of Appeals**

Appellant

**Court of Appeals
Case No. C-081149**

Kevin Michael Crooks

Appellee



**Amicus Curiae, the American Academy of Adoption Attorneys,
Memorandum of Support for Motion for Reconsideration**

Kenneth J. Cahill (RN0056207)
Dworken & Bernstein Co., L.P.A.
60 South Park Place
Painesville, Ohio 44077
(440) 352 – 3391 phone
(440) 352 – 3469 fax
kcahill@dworkenlaw.com
Counsel for Appellant Gary D. Otten

Michael R. Voorhees (0039293)
Voorhees & Levy LLC
11159 Kenwood Road
Cincinnati, Ohio 45242
(513) 489-2555 phone
(513) 489-2556 fax
mike@ohioadoptionlawyer.com
Counsel for Appellee Kevin M. Crooks

Susan Garner Eisenman (0020121)
3363 Tremont Rd., Suite 304
Columbus, Ohio 43221
(614) 326-1200 phone
(614) 326-1205 fax
adoptohio@aol.com
Counsel for Amicus Curiae,
American Academy of Adoption Attorneys

Mary Beck
University of Missouri at Columbia
104 Hulston Hall
Columbia, Missouri 65211
(573) 446-7554 phone
(573) 446-7559 fax
beckm@missouri.edu
Counsel for Amicus Curiae,
American Academy of Adoption
Attorneys

MEMORANDUM

Now comes Amicus Curiae, the American Academy of Adoption Attorneys, and offers the following memorandum in support of appellee's motion for reconsideration of the majority's slip opinion rendered July 22, 2010.

I. The slip opinion of this court focuses not on the best interest of the child but upon the competing rights of the courts and judges.

The slip opinion of this court dealt with this matter as a traffic control problem between courts. Great deference was given to implementing the decisions of various courts and maintaining judicial dignity. The majority in the slip opinion then went beyond the role of reconciling conflicting provisions of Ohio law and rewrote the Ohio adoption law.

The rewriting of the adoption consent law was unnecessary to accomplish the reconciliation of the parentage and adoption statutes. As Justice Cupp notes in his dissent, merely allowing a parentage action pending prior to the filing of an adoption complaint to conclude prior to the adoption being heard would implement the mandates of Pushcar. In re Pushcar, 110 Ohio St. 3d 332. Registered putative fathers who have supported during the pregnancy have every right that an adjudicated father has. Altering the statutorily-mandated timelines for establishing status of a legal or putative father and eliminating the requirement of pre-birth and pre-placement support is both unwarranted and unjustified.

The majority bases its decision on Pushcar. However its interpretations of Pushcar is in direct conflict with the clear statutory language in regard to putative fathers. R.C. 3107.07 conditions the need for putative father's consent on his registration prior to the filing of an adoption petition and support of the birthmother and child prior to placement. R.C. 3107.01 (H) (3) clearly states that a father's status—

putative vs. legal—is determined on the day the adoption petition is filed. See, In re Brooks, 136 O App 3d 824 (2000).

The legislature—which acted pre-Pushcar—enacted R.C. 3107.01(H)(3) obviously came to a different but equally logical conclusion that the father's legal status should not change once the petition was filed.

Justice Cupp, in his opinion, found a different way to reconcile *Pushcart* which did not disrupt the putative father timeframes. Other courts have limited the effect of post-petition adjudications of paternity to allowing the father to participate in the social and medical history compiled for the child. Counsel for the appellee has suggested that a logical consequence of the adjudication could be to allow the newly adjudicated father to participate in the best interest portion of the adoption. All of these varying options are as “logical.”

Logic is based upon applying agreed fundamental principles to a given fact pattern. In a pluralistic society in which there may not be an agreed upon common set of interests, values, or mores, logic is not always a reliable way to make legal decisions. Michel Rosenfeld, The Rule Of Law and The Legitimacy of Constitutional Democracy. So. Calif. Law Review, Vol.74:13072001.

In constitutional government like the state of Ohio, the people have agreed to allow an elected legislature to make choices for the group through legislation. The putative father registry law currently before the court is such a decision. If the legislation is unclear or if various provisions of the law disagree, the judicial system is empowered to interpret the law. However, the Ohio law that “the legal status of putative father is determined at the time the adoption petition is filed” is not ambiguous. Judicial interpretation is not necessary, appropriate or justified.

When the court pre-empts the clear, unambiguous enactments of the legislature, the rule of law breaks down. The rule of law requires:

- That the law be in clear written form and open to all,

- That the law be applied fairly and prospectively,
- That all person including government officials abide by the written law,
- That citizens can be aware of the law and rely upon it.

What is the Rule of Law, U of Iowa Center for International Finance and Development,

<http://www.uiowa.edu/ifdebook/faq/> Rule of Law (2004)

When the majority decides cases in direct contravention of the written law—the rule of law has broken down. No one—not courts, attorneys, agencies, adoptive families or birthmothers—can rely upon the law.

The court within the month In the Adoption of JAS found the mandate to construe adoption legislation strictly to be the gravamen of that case. It is unclear why the majority feels that a similar mandate should not apply in this case.

Naturally if the legislature violates the constitution, it would be appropriate for the court to alter the law. If the majority feels that the legislature overstepped its constitutional authority, the justices should tell the public and the legislature. However in this case, the appellant did not argue the constitutionality of the law. The United States Supreme Court has held a similar putative father process constitutional in Lehr v. Robinson, 463 V.S. 248 (1983).

II. The putative father registry is a well-reasoned, logical and common sense based process.

The adoption law set aside by this decision was based upon an intensive legislative process undertaken by the Ohio legislature which was specific to the subject matter of the rights of non-marital and non-adjudicated fathers. R.C. 3107.061 – 3107.066; see Cupp dissent. This process was informed by the work of the Commission on Uniform State Laws which had also done a multi- year study of the topic. The work of the Commission has been well received and enacted in various forms by more than

thirty states. See American Academy of Adoption Attorneys Amicus Brief in this matter. Thus this logic/understanding is widely accepted .

The logic of the Ohio legislature was based upon the express understandings that

- 1) men are on notice that an act of intercourse could result in a child. R.C. 3107.061,
- 2) that a child's need for support begins pre-birth, In re Adoption, 105 Ohio App 3d 574 (1995 R.C. 3107.07 (C), and
- 3) that past conduct is a reliable indicator of future conduct, e.g. R.C. 3107.161 (B)(5).

Because of these understandings, the putative father provisions begin the non-support/ abandonment clock running at the time of conception. R.C. 3107.061. The act presumes that men who have not made any effort for the child pre-birth are unlikely to provide post birth. Therefore if the male progenitor fails to act prior to birth and up to the time of placement, the law allows the mother who has provided pre-birth to make her own adoption plan for the child without consultation with the male progenitor. R.C. 3107.07 (c).

The concept that a biological progenitor, who does not seize his opportunity to parent the child created by his gametes but instead abandons the child, can lose his parental rights is also a bedrock principal of law. This principal was recognized by the United States Supreme Court in Lehr v. Robinston, supra, which was a putative father case similar to the present case. It is also recognized by much Ohio case law.

The concept is also recognized by other provisions of Ohio legislative law which allow for termination of parental rights and adoption without parental consent, for example, in the permanent court commitment or safe haven provisions of the juvenile court code R.C. 2151.414; R.C. 2151.3515 to R.C. 2151.3520; OAC 5101-2-1-01 (B) (1).

The ten-month time frame afforded putative fathers to seize their parenting opportunity is far more generous than the statutory time frame of ninety days without parental contact for abandonment under the juvenile code permanent court commitment statute. OAC 5101.2-01 (B) (1); R.C. 2151.414.

The revised standard established by the majority slip opinion would afford non-marital putative fathers a longer grace period for non-support than marital fathers. An unregistered putative father would have not only the nine months of pregnancy plus one year afforded to non-supporting marital fathers but the additional time necessary to establish paternity prior to the finalization of an adoption. This could easily stretch the possible period of nonsupport without the possibility of termination for non-support up to twenty-four months post birth. It is unclear what would happen to the child during this period of time. The first two years of a child's life is a very significant time.

This revised provision flies in the face of the recent mandates for early permanency for children. This mandate recognizes that children need stability and permanency in order to achieve optimum growth and development. R.C. 3107.161. The Ohio legislature recognized this need in the best interest statute applicable to contested adoptions, in the provision which mandates that a permanent court commitment freeing a child for adoption be brought if the parent fails to contact or support for 90 days (abandons) the child or if a child spends twelve of twenty-two consecutive months in foster care and in the provisions which mandate that a permanent commitment be brought if the parents fail to resume the care of the child after eighteen months of commitment to a children's services agency. R.C. 3107.01 (H) (3); R.C. 3107.07 (B); R.C. 2151.414; OAC 5101.2-1-01 (B) (1).

The early permanency statutes are all based upon the bedrock or touchstone principal of adoption law—the best interest of the child. See R.C. 3107.161, In re Ridenour 61 Ohio St 3d 319 (1991). This early permanency concept is national child welfare policy as well as Ohio legislative policy. The receipt of Title IV-E funding by a state government from the federal government has been

conditioned upon the states enacting such early permanency provisions as part of the child welfare code.

The concurrent opinion of Justice Stanton comments with appropriate pride on the “expedited docket” mandates enacted by this court and a number of other states’ judicial systems to assure early permanency. Thus this court has previously acted to facilitate early permanency. It is unclear why this concern did not mitigate against the “logic” of the trial judge in this matter.

III. Impact of Slip Opinion on Adoption Practice

The majority opinion will greatly impact the practice of adoption law in Ohio.

- Placement of children who have not been supported by their non-marital, non-adjudicated male progenitors will be delayed and at risk for up to twenty-four months.
- Toddlers will be disrupted from their homes, both biological and adoptive.
- Birthmothers’ options will be limited. They may opt to abort rather than deal with a non-supporting and uncooperative birthfather throughout the child’s minority. They may also opt to place across state lines to benefit from the functional putative father registries of thirty plus other states. The law applicable to the adoption is the law of the finalizing state which could be the law of the out-of-state couple’s state.
- Ohio prospective adoptive families may seek placement options from one of the thirty plus states with working putative father registries. This will significantly increase the costs of adopting for these families.
- Ohio prospective adoptive families may seek to undergo costly medical treatments for infertility rather than adoption.
- Putative fathers may be encouraged to deny support during the pregnancy and file a paternity determination at the time of birth.

- Attorneys, agencies and courts will all attempt to function without clear guidelines.

IV. The touchstone of adoption law is the best interest of the child. The putative father registry process promotes the best interests of the child.

In re P.A.C. is an adoption case involving a living, breathing child in need of prompt and consistent care and protection in order to flourish and survive. R.C. 3107.161. The human infant is a vulnerable individual who must rely on others to meet his basic needs. These needs begin even before birth. Failure to promptly meet these needs can result in a lifelong stunting of the child's growth and development, if not death. For such an infant, time is of the essence. The majority abused its discretion by failing to base an adoption decision of the best interests of the child. In re Ridenour, 61 Ohio St. 3rd 319 (1991).

A non-marital progenitor wishing to guarantee his parental rights can do so by spending 44 cents on a stamp to complete a simple form registering with the putative father registry and providing support to the birthmother prior to the birth. R.C. 3107.07 and R.C. 3107.061. The registration process is designed to be a simple, pro se process. The father need not establish parentage to fully participate in the adoption decision-making process. R.C. 3107.06; R.C. 3107.07. The importance of supporting the mother of one's child is clear. There is nothing mysterious or difficult about these requirements. It is not advanced logic but rather common sense.

The putative father registry process does not involve a "race to the courthouse." A putative father can register at any time from conception up to the child's thirtieth day of life from any mailbox in the world. R.C. 3107.07 (B) (1). Likewise, the male progenitor can choose a great variety of means to provide support to the birthmother at any time during those ten months. R.C. 3107.07 (B) and (C). The level of support can be relatively minor—a few groceries or a single doctor's bill. In re Adoption, 105 Ohio App 3. 574 (1995); In re Adoption of Williams, 117 Ohio Misc. 2d 39 (2002). This process involves

not a race to the courthouse but merely standing alongside the woman who is carrying one's child. At most it requires a leisurely stroll to the local grocery store and U.S. mail box sometime during the pregnancy or neo-natal period. Completing this process affords the male progenitor every right he would have as a legally established father. R.C. 3107.07 (A); R.C. 3107.07(B).

When a male progenitor fails to stand by the woman pregnant with his child, the mother may be forced to plan for the child on her own. If she determines that she is unable to meet the child's needs without the male progenitor's assistance, she may decide to place the child for adoption. If the father has failed to provide for ten months and invest in a 44 cent stamp, the Ohio legislature decided that the mother can make an independent plan for "her" child. R.C. 3107.07(B). This is the gravamen of the putative father registry process.

By limiting the father's time for action to ten months, the process allows the child to be placed promptly at birth and to begin developing the emotional bonding necessary for optimal growth and development.

The putative father registry promotes the best interests of the child while providing male progenitors a ten-month timeframe to seize his opportunity to parent. It frees the mother who has alone provided for the child during the pregnancy to act in the child's best interests.

The slip opinion of this court destroys this carefully balanced process and places the child at risk—not only of deprivation but also of disruption of his emotional bonding. It allows men who failed to support during pregnancy a second opportunity to stop the adoption.

The slip opinion fails to even mention the impact of the decision on the child or the birthmother. Instead it chooses to cast the birthfather as a victim in need of protection for "his rights" which he failed to protect during the child's first ten months. Where in the slip opinion are the best interests of the child considered? Surely the child's best interests must be the gravamen of all adoption decisions. In re Ridenour, supra.

V. Conclusion

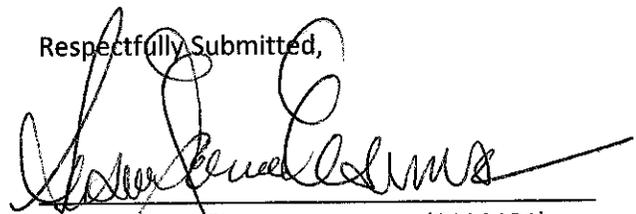
This court In re the Adoption of Zschach stated:

“There must be compliance with a clear statutory law and the directive of this Ohio Supreme Court the ‘[u]ltimately, the goal of adoption statutes is to protect the best interests of children. In cases where adoption is necessary, this is best accomplished by providing the child with a permanent and stable home... and ensuring that the adoption process is completed in an expeditious manner.’ *Zschach* at 665 N.E.2d 1073. By following the clear statutory language and the clear adoption process set forth in the Ohio Revised Code, the adoption process will be completed expeditiously, which will be in the best interest of all parties, especially the child.”

In re the Adoption of Zschach (1996), 75 Ohio St. 3d 648, 665 N.E.2d 1070.

The court is urged to reconsider its slip decision and to uphold the provisions of the putative father registry. The court is urged to support the best interests of the child.

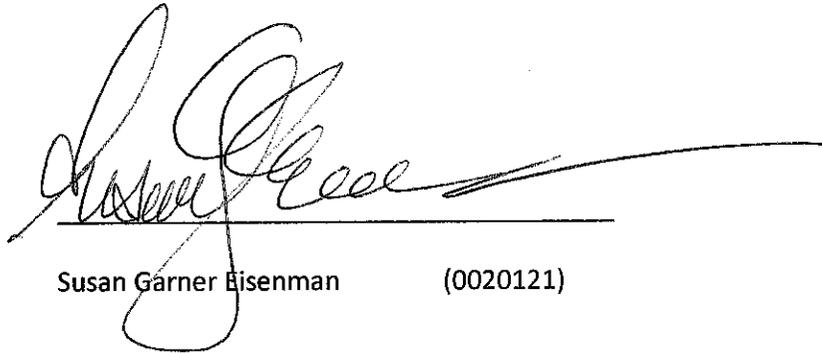
Respectfully Submitted,



Susan Garner Eisenman (0020121)
For the American Academy of
Adoption Attorneys
3363 Tremont Road, Suite 304
Columbus, Ohio 43221

Certificate of Service

I hereby certify that a copy of the foregoing Memorandum of Support for Motion for Reconsideration Amicus Curiae has been sent by regular U.S. mail, postage prepaid, this 2nd day of August, 2010 to: Kenneth J. Cahill, Dworken & Bernstein Co., L.P.A., 60 South Park Place, Painesville, Ohio, 44077; Michael Voorhees, Voorhees & Levy LLC, 11159 Kenwood Road, Cincinnati, Ohio 45242; Mary Beck, University of Missouri at Columbia, 104 Hulston Hall, Columbia, Missouri 65211; and Erik Smith, 518 E. Town St., #308, Columbus, OH 43215.



Susan Garner Eisenman (0020121)