

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE EX REL. JOHN DOE,
et al.,
Relators,

vs.

JUDGE THOMAS J. CAPPER,
Respondent.

CASE NO. 2012-0133

Original Action
In Prohibition

MERIT BRIEF OF RESPONDENT,
JUDGE THOMAS J. CAPPER OF THE CLARK COUNTY COMMON PLEAS COURT,
DOMESTIC RELATIONS DIVISION, JUVENILE SECTION

D. ANDREW WILSON #0073767
Clark County Prosecuting Attorney
ANDREW P. PICKERING #0068770
Assistant Prosecuting Attorney
(Counsel of Record)
50 East Columbia Street, 4th Floor
P.O. Box 1608
Springfield, OH 45501
(937) 521-1770
Fax (937) 328-2657
E-mail: apickering@clarkcountyohio.gov

MICHAEL R. VOORHEES #0039293
Voorhees & Levy LLC
11159 Kenwood Road
Cincinnati, OH 45242
(513) 489-2555
Fax (513) 489-2556
E-mail: mike@ohioadoptionlawyer.com

COUNSEL FOR RELATORS

COUNSEL FOR RESPONDENT

FILED
APR 10 2012
CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES CITED	ii
STATEMENT OF FACTS	1
ARGUMENT	4
I. A juvenile court patently and unambiguously lacks jurisdiction to order the genetic testing of a child in a parentage action when the child was not named as a party in the action and good cause was not shown for her absence, and the child has not been served with summons.....	4
II. A juvenile court does not patently and unambiguously lack subject matter jurisdiction in a parentage action filed by an alleged biological father, for the purposes of determining the alleged father’s rights to file social and medical histories pursuant to R.C. 3107.09 and 3107.091, even if the child at issue in the parentage action has been adopted.....	7
CONCLUSION	9
CERTIFICATE OF SERVICE	10
APPENDIX	<u>Appx. Page</u>
<u>STATUTES:</u>	
R.C. 3111.07	A-1

TABLE OF AUTHORITIES

CASES:

Page

<i>B.W. v. D.B.-B.</i> , 193 Ohio App.3d 637, 2011-Ohio-2813 (6 th Dist.)	5
<i>Dantzig v. Biron</i> , 4 th Dist. No. 07CA1, 2008-Ohio-209	4-5, 5
<i>Fraiberg v. Cuyahoga Cty. Ct. of Common Pleas, Domestic Relations Div.</i> , 76 Ohio St.3d 374 (1996)	6
<i>Kauffman Racing Equip., L.L.C. v. Roberts</i> , 126 Ohio St.3d 81, 2010-Ohio-2551	6
<i>Maryhew v. Yova</i> , 11 Ohio St.3d 154 (1984)	5
<i>State ex rel. Ballard v. O'Donnell</i> , 50 Ohio St.3d 182 (1990)	5
<i>State ex rel. Connor v. McGough</i> , 46 Ohio St.3d 188 (1989)	6
<i>State ex rel. Furnas v. Monnin</i> , 120 Ohio St.3d 279, 2008-Ohio-5569	2, 7, 8
<i>State ex rel. Smith v. Smith</i> , 75 Ohio St.3d 418 (1996)	4
<i>State ex rel. Stone v. Ct. of Common Pleas of Cuyahoga Cty., Juv. Div.</i> , 14 Ohio St.3d 32 (1984)	6
<i>State ex rel. Willacy v. Smith</i> , 78 Ohio St.3d 47 (1997)	7

STATUTES:

R.C. 3107.09	2, 7, 8
R.C. 3107.091	2, 7, 8
R.C. 3111.07	4
R.C. 3111.07(A)	4, 5

MISCELLANEOUS:

Ohio Jurisprudence 3d, Courts and Judges, Section 243 (2003)	5
--------------------------------------------------------------------	---

STATEMENT OF THE FACTS

This case arises from a parentage suit filed by an alleged biological father of a child adopted by the Relators.

On November 12 or 13, 2009, Baby Doe was born to Rachel Arnold in Dayton, Montgomery County, Ohio. (Relators' Evidence, Statement of Facts ["Doe Stat.,"], at ¶5; Respondent's Evidence, Exhibit E ["Capper Ex. ____"], at p. 2.) On November 15, 2009, Ms. Arnold signed a permanent surrender of custody to a private adoption agency. (Capper Ex. E, at p. 2.) Baby Doe was then immediately placed with Relators, John and Jane Doe. (*Id.*) Relators' adoption of Baby Doe took place in a probate court in Ohio and was finalized on May 26, 2010. (Doe Stat., at ¶3; Relators' Evidence, Exhibit A ["Doe Ex. ____"].) It is alleged that Relators and Baby Doe have not resided in Ohio since the commencement of the case at bar. (Complaint, at ¶9; Doe Stat., at ¶2.)

On October 6, 2010, Todd S. "Tad" Roccaro filed a complaint to determine parentage in the Clark County Court of Common Pleas, Domestic Relations Division, Juvenile Section, Case No. 2010-JUV-0536. (Capper Ex. A.) The complaint, which also sought custody and resolution of support issues, named Ms. Arnold (originally named in the parentage complaint as Rachel Roccaro) as the only defendant in the case. (*Id.*) Respondent Judge Capper has exercised jurisdiction over the underlying parentage case.

In the underlying parentage case, Mr. Roccaro claimed to be the biological father of Baby Doe, who was conceived in another state (possibly Colorado or Wyoming). (*Id.*, Capper Ex. E, at p. 3; Capper Ex. F, at p. 2.) Mr. Roccaro did not file with the putative father registry of the State of Ohio. (Doe Stat., at ¶3; Capper Ex. E, at p. 3.) There is no evidence that Mr. Roccaro registered with the putative father registry of any other state.

On June 1, 2011, after a pre-trial conference, the magistrate assigned to the underlying case issued an order requesting that Mr. Roccaro and Ms. Arnold brief the question of the juvenile court's power to determine paternity after an adoption. (Capper Ex. D.) Ms. Arnold moved to dismiss the underlying case, and Mr. Roccaro filed a memorandum in opposition to the motion. (Capper Ex. E, F, and I.)

On August 23, 2011, the magistrate issued a decision. (Capper Ex. K.) The magistrate denied Ms. Arnold's motion to dismiss and ruled that the juvenile court had jurisdiction to determine paternity, solely for the purpose of allowing a putative father to file social and medical histories pursuant to R.C. 3107.09 and 3107.091, under this Court's decision in *State ex rel. Furnas v. Monnin*, 120 Ohio St.3d 279, 2008-Ohio-5569. (*Id.*) The magistrate also denied Mr. Roccaro's requested relief for custody and support. (*Id.*) The magistrate's decision also ordered Ms. Arnold to furnish Mr. Roccaro with the identity of the private adoption agency and the identity of Relators. (*Id.*)

Ms. Arnold filed objections to the magistrate's decision. (Capper Ex. N.) Mr. Roccaro filed a memorandum in opposition to Ms. Arnold's objections; Mr. Roccaro did not file his own objections to the magistrate's decision. (Capper Ex. O.)

On November 9, 2011, Respondent issued an entry in the underlying case. (Capper Ex. P.) The entry deferred ruling on Ms. Arnold's objections, but did order that Ms. Arnold, Mr. Roccaro, and Baby Doe submit for genetic testing. (*Id.*) Respondent further ordered that the identity of Baby Doe not be disclosed to Mr. Roccaro or his attorney. (*Id.*)

At no time after the filing of the complaint in the underlying case did Mr. Roccaro seek to add Baby Doe as a party or give good cause why Baby Doe should not be a party to the case.

Relators filed the instant action in prohibition on January 25, 2012. Respondent issued a stay in the underlying case on February 1, 2012. (Capper Ex. R.) Respondent filed an answer in this case on February 2, 2012.

On February 24, 2012, this Court issued an order granting an alternative writ and setting a schedule for filing of evidence and briefs. This Court further ordered that the parties brief additional jurisdictional issues.

After the Court's order, Respondent filed a motion to amend his answer, with the consent of counsel for Relators. In that answer, Respondent admitted that he lacked jurisdiction and requested that this Court grant the requested writ of prohibition.

ARGUMENT

I. A juvenile court patently and unambiguously lacks jurisdiction to order the genetic testing of a child in a parentage action when the child was not named as a party in the action and good cause was not shown for her absence, and the child has not been served with summons.

Relators assert in their First Proposition of Law that Respondent patently and unambiguously lacks personal jurisdiction in the underlying paternity case, and that a writ of prohibition should be issued. Respondent agrees that under the facts of the case at bar, a writ of prohibition should issue for lack of jurisdiction under R.C. 3111.07 and for lack of personal jurisdiction.

To be entitled to a writ of prohibition, Relator must show by clear and convincing evidence that Respondent was about to exercise judicial authority, that Respondent's exercise of that power was unauthorized by law, and that the denial of the writ would result in injury for which no other adequate remedy exists. *State ex rel. Smith v. Smith*, 75 Ohio St.3d 418, 419 (1996). It is uncontested that Respondent has exercised judicial authority in the underlying parentage case.

A. Jurisdiction over Parties under R.C. 3111.07

R.C. 3111.07(A) mandates who must be a party to a parentage action, and states in relevant part: "The natural mother * * * and each man alleged to be the natural father shall be made parties to the action[.] * * * The child shall be made a party to the action unless a party shows good cause for not doing so." Thus, in all parentage actions, absent any showing of good cause to the contrary, the plaintiff must make the child a party.

" '[W]here jurisdiction of the subject matter exists, but a statute has prescribed the mode and particular limits within which it may be exercised, a court must exercise jurisdiction in accordance with the statutory requirements[.]' " (First alteration *sic.*) *Dantzig v. Biron*, 4th Dist.

No. 07CA1, 2008-Ohio-209, at ¶15 (quoting Ohio Jurisprudence 3d, Courts and Judges, Section 243 [2003]), *appeal not allowed*, 117 Ohio St.3d 1462, 2008-Ohio-1635. Where a necessary party under R.C. 3111.07(A) (including the child in a parentage action) has not been joined as a party, the juvenile court lacks jurisdiction over the matter. *Dantzig* at ¶¶15 and 17. “A trial court is without jurisdiction to render judgment or to make findings against a person who was not served summons, did not appear, and was not a party to the court proceedings.” *State ex rel. Ballard v. O’Donnell*, 50 Ohio St.3d 182, paragraph one of the syllabus (1990).¹

It is clear in the case at bar that Mr. Roccaro did not name Baby Doe as a party to the underlying parentage action, nor did he show good cause why she should not be a party. Absent her presence in the underlying case, Respondent was without jurisdiction to order that Baby Doe be subjected to genetic testing or otherwise determine parentage. Therefore, Respondent patently and unambiguously lacks jurisdiction to proceed in the underlying case.²

B. Personal Jurisdiction Acquired by Service of Process

In *Maryhew v. Yova*, 11 Ohio St.3d 154, 156 (1984), this Court stated:

It is rudimentary that in order to render a valid personal judgment, a court must have personal jurisdiction over the defendant. This may be acquired either by service of process upon the defendant, the voluntary appearance and submission of the defendant or his legal representative, or by certain acts of the defendant or his legal representative which constitute an involuntary submission to the jurisdiction of the court. The latter may be more accurately be referred to as a waiver of certain personal defenses, including jurisdiction over the person under the Rules of Civil Procedure.

¹ In *Ballard*, this Court issued a writ of mandamus compelling the vacation of the trial court’s judgment. *Id.* at paragraph two of the syllabus. Given the patent and unambiguous lack of jurisdiction in such a case, a writ of prohibition would be another, and perhaps more appropriate, remedy.

² Because the writ may be granted solely on the basis of Baby Doe not being named as a party, Respondent will not address whether the Relators are necessary parties. See *B.W. v. D.B.-B.*, 193 Ohio App.3d 637, 2011-Ohio-2813, at ¶37 (6th Dist.), *appeal not allowed*, 130 Ohio St.3d 1416, 2011-Ohio-5605.

(Footnote omitted.) Thus, service of summons or a waiver of the affirmative defense are prerequisite to a court obtaining jurisdiction over an individual.

Baby Doe has not been named as a party in the underlying parentage action. As a result, she was not been served with summons, and Baby Doe has done nothing to demonstrate a waiver of any affirmative defenses she may have. Accordingly, under *Mayhew*, personal jurisdiction over Baby Doe is lacking in the underlying parentage case.³

Respondent acknowledges that this Court has “rarely issued or affirmed the issuance of a writ of prohibition based on an alleged lack of personal jurisdiction.” *Fraiberg v. Cuyahoga Cty. Ct. of Common Pleas, Domestic Relations Div.*, 76 Ohio St.3d 374, 378 (1996). However, the facts of this case should constitute just such a rare instance. A child who has been adopted is the subject of a parentage action, in which the child was never named as a party and never served with process, and in which the child has been ordered to have genetic testing performed on her. Though the biological father of Baby Doe may have the right to seek a declaration of paternity for the purposes of submitting social and family histories, his desire does not confer on a juvenile court the power to subject that child to genetic testing when the child, a necessary party to the action, has not been named as a party or served with process.

³ To the extent that personal jurisdiction rests on “minimum contacts,” e.g., *Kauffman Racing Equip., L.L.C. v. Roberts*, 126 Ohio St.3d 81, 2010-Ohio-2551, at ¶45, *cert. denied*, ___ U.S. ___, 131 S.Ct. 3089, 180 L.Ed.2d 913 (2011), this Court need not reach the question. In previous cases where a writ of prohibition was sought based on a lack of minimum contacts, the relator had been served with a copy of the complaint. See *State ex rel. Connor v. McGough*, 46 Ohio St.3d 188, 188 (1989); *State ex rel. Stone v. Ct. of Common Pleas of Cuyahoga Cty., Juv. Div.*, 14 Ohio St.3d 32, 32 (1984). As stated previously, that prerequisite has not occurred in this case. Because the case at bar may be disposed of on other grounds, there is no need to resolve the case on the basis of minimum contacts.

C. Lack of a Remedy in the Ordinary Course of Law

This Court has held:

Absent a patent and unambiguous lack of jurisdiction, a court having general subject-matter jurisdiction can determine its own jurisdiction, and a party challenging the court's jurisdiction possesses an adequate remedy by appeal. Conversely, appeal is immaterial in prohibition and mandamus actions where the court patently and unambiguously lacks jurisdiction to act. In this latter circumstance, extraordinary relief lies to prevent the excesses of jurisdiction and to invalidate orders previously made that engage in such excesses.

(Citations omitted.) *State ex rel. Willacy v. Smith*, 78 Ohio St.3d 47, 51 (1997).

In this case, Respondent has conceded that he patently and unambiguously lacks jurisdiction. As such, there is no need for further analysis, and a writ of prohibition should issue.

D. Conclusion

For the reasons stated above, this Court should sustain the First Proposition of Law.

II. A juvenile court does not patently and unambiguously lack subject matter jurisdiction in a parentage action filed by an alleged biological father, for the purposes of determining the alleged putative father's rights to file social and medical histories pursuant to R.C 3107.09 and 3107.091, even if the child at issue in the parentage action has been adopted.

Relators contend in their Second Proposition of Law that Respondent also lacks subject matter jurisdiction over the underlying paternity case. This Court should overrule the Second Proposition of Law, because under this Court's precedent, Respondent clearly has subject matter jurisdiction.

In *State ex rel. Furnas v. Monnin*, 120 Ohio St.3d 279, 2008-Ohio-5569, at ¶23, this Court held that a putative father can use a parentage action to establish that he is the biological father of a child who has been adopted, solely for the purpose of providing social and medical histories under R.C. 3107.09 and 3107.091. Respondent has denied Mr. Roccaro's requests for

custody and support, and Mr. Roccaro has, by his responses in the underlying parentage case, conceded that the adoption of Baby Doe terminated his rights to either custody or support. Therefore, Respondent has the basic statutory jurisdiction over Mr. Roccaro's parentage action under *Furnas*.

Relators claim that *Furnas* is distinguishable because the putative father intervened in the adoption in that case. (Relator's Brief at p. 4.) But nothing in *Furnas* indicates that the biological parent's right to submit social and medical histories is conditioned on whether the biological parent objected to the adoption, and Relators cannot point to any portion of *Furnas* to support their argument. "[B]iological parents have the right to request forms to provide their social and medical history even *after* an adoption decree has been finalized." (Emphasis *sic*.) *Furnas*, at ¶18. This Court's decision did not rest on whether the alleged biological father had intervened in or objected to the adoption.

Furnas should not be overturned or limited to the facts of that case. The adoption process exists only by statute. The Ohio General Assembly, by its enactment of R.C. 3107.09 and 3107.091, has made the conscious policy decision to grant biological parents of adopted children the right to supplement the adoption records with their social and medical histories. Neither statute has been amended since *Furnas*, and Relators have not pointed to any other statute or amendment that alters the analysis. The statutory rights of the Relators, Baby Doe, and her biological parents (Ms. Arnold and whoever the biological father may be) are the same as were reviewed in *Furnas*.

Relators claim that the underlying parentage action endangers the adoption, seeks to replace Relator John Doe on Baby Doe's birth certificate with Mr. Roccaro, and otherwise threatens to tear Baby Doe from the bosom of Relators. (Relators' Brief at p. 3.) The fact is that

the underlying parentage action (or any future parentage action) will not, and cannot, do any of these things. Even if a parentage action results in a finding that Mr. Roccaro, or some other man, is Baby Doe's biological father, Relators will continue to be Baby Doe's legal parents. The biological father will only be able to submit social and medical histories for the adoption file, and nothing more. The adoption is not endangered, despite Relators' protestations to the contrary.

In sum, Respondent has the basic legal jurisdiction to hear a parentage action of this nature, under this Court's decision in *Furnas*. Relators have presented no good reasons for this Court to deviate from its precedent. Accordingly, Relators' Second Proposition of Law should be overruled.

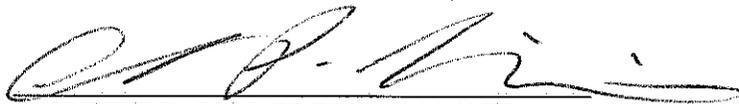
CONCLUSION

For the foregoing reasons, the Supreme Court of Ohio should:

- (1) GRANT Respondent's motion to amend his answer;
- (2) make a new determination under S.Ct.Prac.R. 10.5; and
- (3) GRANT the writ requested by Relators, for the reasons stated above, and order

Respondent to dismiss the underlying case.

Respectfully submitted,



ANDREW P. PICKERING #0068770
ASST. CLARK COUNTY PROSECUTOR
50 East Columbia St., 4th Floor
P.O. Box 1608
Springfield, OH 45501
(937) 521-1770
Fax (937) 328-2657
E-mail: apickering@clarkcountyohio.gov
Counsel for Respondent

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Brief of Respondent was served upon Michael R. Voorhees, Esq., Counsel for Relators, by e-mailing a copy to mike@ohioadoptionlawyer.com, on this 10th day of April, 2012.



ANDREW P. PICKERING #0068770
ASST. CLARK COUNTY PROSECUTOR
Counsel for Respondent

Page's Ohio Revised Code Annotated:
Copyright (c) 2012 by Matthew Bender & Company, Inc., a member of the LexisNexis Group.
All rights reserved.

Current through Legislation passed by the 129th Ohio General Assembly
and filed with the Secretary of State through File 88
*** Annotations current through January 9, 2012 ***

TITLE 31. DOMESTIC RELATIONS -- CHILDREN
CHAPTER 3111. PARENTAGE

Go to the Ohio Code Archive Directory

ORC Ann. 3111.07 (2012)

§ 3111.07. Proper parties to action; intervention by public agency

(A) The natural mother, each man presumed to be the father under *section 3111.03 of the Revised Code*, and each man alleged to be the natural father shall be made parties to the action brought pursuant to *sections 3111.01 to 3111.18 of the Revised Code* or, if not subject to the jurisdiction of the court, shall be given notice of the action pursuant to the Rules of Civil Procedure and shall be given an opportunity to be heard. The child support enforcement agency of the county in which the action is brought also shall be given notice of the action pursuant to the Rules of Civil Procedure and shall be given an opportunity to be heard. The court may align the parties. The child shall be made a party to the action unless a party shows good cause for not doing so. Separate counsel shall be appointed for the child if the court finds that the child's interests conflict with those of the mother.

If the person bringing the action knows that a particular man is not or, based upon the facts and circumstances present, could not be the natural father of the child, the person bringing the action shall not allege in the action that the man is the natural father of the child and shall not make the man a party to the action.

(B) If an action is brought pursuant to *sections 3111.01 to 3111.18 of the Revised Code* and the child to whom the action pertains is or was being provided support by the department of job and family services, a county department of job and family services, or another public agency, the department, county department, or agency may intervene for purposes of collecting or recovering the support.

HISTORY:

139 v H 245 (Eff 6-29-82); 141 v H 476 (Eff 9-24-86); 141 v H 428 (Eff 12-23-86); 143 v H 591 (Eff 4-12-90); 144 v S 10 (Eff 7-15-92); 147 v H 352 (Eff 1-1-98); 148 v H 471 (Eff 7-1-2000); 148 v S 180. Eff 3-22-2001; 151 v H 136, § 1, eff. 5-17-06.