IN THE SUPREME COURT OF OHIO

In re Adoption of: G.V.	**Supreme Court Case No. 2009-2355**
Jason and Christy Vaughn	**On Appeal from the Lucas County Court of Appeals, Sixth Appellate District**
Appellants	**Court of Appeals Case No. L-09-1160**
Benjamin Wyrembek	**Trial Court No. 2008 ADP 000010 Lucas County Probate Court**
Appellee	

REPLY BRIEF OF APPELLANTS JASON AND CHRISTY VAUGHN

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Appellants' Argument in Reply

The central flaw in Appellee's argument is his claim that he has met all requirements to establish and safeguard parental rights with respect to the child. The right to parent, and even the right to an opportunity to parent, requires full commitment to the child. For an unwed birth-father, this commitment requires full compliance with all of the statutory requirements. This commitment that Ohio law requires includes: 1) not to willfully abandon or fail to care for and support the minor pursuant to R.C. 3107.07(B)(2)(b); and 2) not to willfully abandon the mother of the minor during her pregnancy pursuant to R.C. 3107.07(B)(2)(c). These are the allegations that were made in the adoption petition, which the Probate Court refused to hear. If Appellants can prove either one of these allegations, then the birth-father has not demonstrated a full commitment to the child that is required by Ohio law and his consent will not be required. At the very least, Appellants must be afforded the due process and opportunity to present evidence on these allegations.

Appellee made his appearance and filed his objection in the adoption proceeding as the registered putative father, not as the adjudicated biological father. Pursuant to R.C. 3111.03(A)(1), Jovan Bocvarov was the legal father of the child and signed his permanent surrender as the child's legal father. Appellee makes irrelevant and incorrect arguments relating to the surrenders based on documents not even in the record. The child is known by both surnames of Bocvarov and Vaughn, which is typical in an adoptive placement, and Appellee and Appellants agreed to conform the pleadings to reflect both names of the child. The permanent surrenders were properly executed and there was full compliance with R.C. 5103.15(B)(2). Procedural and substantive errors were made by the Lucas County Juvenile Court, which continue to be challenged, including the jurisdiction of that court and the validity of the paternity determination. However, those errors are not part of

this appeal. This appeal concerns the errors made by the Probate Court and the right of Appellants to have the allegations in the petition heard. Appellee's arguments are without merit.

The central issue in this appeal is the misapplication of the paternity determination in the adoption proceeding. The filing of the adoption petition established the original and exclusive jurisdiction over the adoption proceeding in the Probate Court. The filing of the adoption petition also established the parties to the adoption proceeding. The status of each of the parties were set by Ohio law on the date the adoption petition was filed. The Probate Court clearly erred by changing the rules of the "game" after the "game" had already begun.

The original and exclusive jurisdiction of the Probate Court over adoption proceedings is unquestioned. *State ex rel. Portage Co. Welfare Dept. v. Summers* (1974), 38 Ohio St. 2d 144, 67 O.O.2d 151, 311 N.E.2d 6. Appellee wrongfully argues that the fact the probate court has exclusive jurisdiction over the adoption proceeding does not mean that the probate court has exclusive jurisdiction over the fate of the child. It has long been established that adoption "embraces not only custody and support but also descent and inheritance and in fact every legal right with respect to the child." *In re Adoption of Biddle* (1958), 168 Ohio St. 209, 214, 6 O.O.2d 4, 152 N.E.2d 105. The final decree of adoption terminates the parental rights of the biological parents pursuant to R.C. 3107.15. The adoption terminates parental rights and legally establishes new parent-child relationships. There is nothing more significant and important to the fate of the child than the granting of the adoption, which is in the exclusive jurisdiction of the Probate Court.

Appellee continues to argue that the case of *In re Adoption of Pushcar* (2006), 110 Ohio St. 3d 332, 2006 Ohio 4572, 853 N.E.2d 647 applies to this case. The applicable statute in the adoption proceeding in *Pushcar* was always R.C. 3107.07(A). Contrary to Appellee's statement, the Putative Father Registry was never mentioned in *Pushcar*. There was no registered putative

father in *Pushcar*. For all of the reasons previously stated, *Pushcar* simply has no application to the present case. To find that *Pushcar* applies to the adoption proceeding in the present case, this Supreme Court must totally ignore R.C. 3107.07(B). Further, to find that *Pushcar* applies, this Supreme Court must also totally ignore the statutory definition of "putative father" set forth in R.C. 3107.01(H). Still further, to find that *Pushcar* applies, this Supreme Court and must also totally ignore the fact that this child has been in a proper "adoptive" placement since November 4, 2007, which is prior to any action taken by Appellee.

If Appellee had not timely registered with the Putative Father Registry, then his consent would not have been required pursuant to R.C. 3107.07(B)(1) and he would not have been entitled to notice. Appellee did timely register and the Probate Court found that he was entitled to notice because he was a putative father who timely registered. Therefore, the only reason that he was made a party to the adoption proceeding was because Appellee understood he was a putative father and took advantage of the statutory procedure that would allow him to become a party in the adoption proceeding. Having been made a party, Appellee then argued that the court should disregard the very statutory scheme that gave him a right to be heard in the adoption proceeding. There must be compliance with the entire statutory scheme, including R.C. 3107.07(B)(2)(b) and R.C. 3107.07(B)(2)(c). All applicable portions of the entire statutory scheme either do apply or do not apply. Appellee cannot take advantage of one applicable portion and then argue that the entire rest of the statutory scheme does not apply. If Appellee is permitted to become a party by registering with the Putative Father Registry, then R.C. 3107.07(B) applies and the Court must hear the allegations made under this applicable statutory provision.

Appellee now argues that his efforts to establish a legal relationship with the child contradicts Appellants' allegations that Appellee abandoned the birth-mother and the child. This

argument by Appellee is support for a remand to the Probate Court to hear this very argument. Appellants believe that there is abundant evidence to present to support the allegations that Appellee abandoned both the birth-mother and the child. The issue in this appeal is not the veracity of this evidence, which has yet to be presented. The issue is the right to present this evidence. This Supreme Court is not the trier of fact and the matter must be remanded to the Probate Court to allow for the presentation of this evidence.

Appellee claims to have rights in the voluntary surrender process, which relates to the placement of the child. The surrender process was completed on November 4, 2007. The ICPC approval was obtained on November 7, 2007. Appellee registered on November 20, 2007. As a putative father, Appellee has no rights whatsoever unless and until he timely registers. By the time Appellee registered, the child was in a proper adoptive placement in the State of Indiana. The placement was complete as of November 7, 2007. The registration by Appellee only became relevant when the adoption petition was filed.

Appellee argues that it is acceptable to treat differently a man who is a registered putative father with a pending parentage action versus a man who is not registered with a pending parentage action. Appellee claims that the additional step of registering safeguards his right to object to the adoption and to have the parental standard under R.C. 3107.07(A) apply. First, as stated above, Appellee has not demonstrated a full commitment to the child that is required by Ohio law based on the allegations made under R.C. 3107.07(B)(2) that he abandoned both birth-mother and child. Second, there is a profound difference between a "parent" and a "putative father" and different standards apply. If there was no distinction between a "parent" and a "putative father," then there would not be a separate statutory definition for putative father and there would no different treatment of the two. However, the law does treat a "parent" and a "putative father" differently and

the distinction is valid and constitutional. The U.S. Supreme Court has stated that "the mere existence of a biological link does not merit equivalent constitutional protection." *Lehr v. Robertson* (1983), 463 U.S. 248, 261, 77 L. Ed. 2d 614, 103 S. Ct. 2985. In fact, at the onset of its opinion in *Lehr*, the Supreme Court noted that it "disagreed" with Lehr's assertion that *Stanley v. Illinois* (1972), 405 U.S. 645, 31 L. Ed. 2d 551, 92 S. Ct. 1208 and *Caban v. Mohammed* (1979), 441 U.S. 380, 60 L. Ed. 2d 297, 99 S. Ct. 1760 "gave him an absolute right to notice and an opportunity to be heard before the child may be adopted." *Lehr*, 463 U.S. at 250. The Court in *Lehr* made it clear that there are no absolute rights for putative fathers, when it cited with approval the dissent of Justice Stewart in *Caban* as follows:

> Even if it be assumed that each married parent after divorce has some substantive due process right to maintain his or her parental relationship, ... it by no means follows that each unwed parent has any such right. Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring.
>
> *Lehr*, 463 U.S. at 260.

Appellee's cite of *Stanley v. Illinois* as support for his "parental rights" is inappropriate and misconstrues the U.S. Supreme Court cases that have addressed birth-father rights. The cases actually stand for the following: due process must be afforded to the <u>*established*</u> parent-child relationship that a birth-father may possess. See *Stanley v. Illinois; Quilloin v. Walcott* (1978), 434 U.S. 246, 54 L. Ed. 2d 511, 98 S. Ct. 549; *Caban v. Mohammed*; *Lehr v. Robertson*; *Michael H. v. Gerald D.* (1989), 491 U.S. 110, 105 L. Ed. 2d 91, 109 S. Ct. 2333. The Supreme Court cases protect the due process rights of the parties relating to the <u>*established*</u> relationships. In this case, the due process rights of the parties were actually violated because the Probate Court failed to follow the clear statutory adoption process set forth in the Ohio Revised Code.

Conclusion

For the reasons set forth above, in prior filings, and in the record, Appellants respectfully requests this Supreme Court to REVERSE the decision of the Sixth Appellate District and REMAND the matter for further proceedings.

Respectfully submitted,

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Certificate of Service

I hereby certify that a copy of the foregoing Appellants' Reply Brief has been sent by regular U.S. mail this 21st day of April, 2010 to: Alan J. Lehenbauer, Attorney for Appellee, The McQuades Co. LPA, 105 Lincoln Ave., P.O. Box 237, Swanton, Ohio 43558; Susan Garner Eisenman, 3363 Tremont Rd., Suite 304 Columbus, Ohio 43221 and Mary Beck, University of Missouri at Columbia, 104 Hulston Hall, Columbia, Missouri 65211, Counsel for Amicus Curiae, American Academy of Adoption Attorneys.

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Cited Provisions of the Ohio Revised Code

§ 3107.01. Definitions

As used in sections 3107.01 to 3107.19 of the Revised Code: . . .

(H) "Putative father" means a man, including one under age eighteen, who may be a child's father and to whom all of the following apply:

(1) He is not married to the child's mother at the time of the child's conception or birth;

(2) He has not adopted the child;

(3) He has not been determined, prior to the date a petition to adopt the child is filed, to have a parent and child relationship with the child by a court proceeding pursuant to sections 3111.01 to 3111.18 of the Revised Code, a court proceeding in another state, an administrative agency proceeding pursuant to sections 3111.38 to 3111.54 of the Revised Code, or an administrative agency proceeding in another state;

(4) He has not acknowledged paternity of the child pursuant to sections 3111.21 to 3111.35 of the Revised Code.

§ 3107.07. Who need not consent

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

(A) A parent of a minor, when it is alleged in the adoption petition and the court, after proper service of notice and hearing, finds by clear and convincing evidence that the parent has failed without justifiable cause to provide more than de minimis contact with the minor or to provide for the maintenance and support of the minor as required by law or judicial decree for a period of at least one year immediately preceding either the filing of the adoption petition or the placement of the minor in the home of the petitioner.

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

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

(2) The court finds, after proper service of notice and hearing, that any of the following are the case:

(a) The putative father is not the father of the minor;

(b) The putative father has willfully abandoned or failed to care for and support the minor;

(c) The putative father has willfully abandoned the mother of the minor during her pregnancy and up to the time of her surrender of the minor, or the minor's placement in the home of the petitioner, whichever occurs first.

§ 3107.15 Effect of adoption

(A) A final decree of adoption and an interlocutory order of adoption that has become final as issued by a court of this state, or a decree issued by a jurisdiction outside this state as recognized pursuant to *section 3107.18 of the Revised Code*, shall have the following effects as to all matters within the jurisdiction or before a court of this state, whether issued before or after May 30, 1996:

(1) Except with respect to a spouse of the petitioner and relatives of the spouse, to relieve the biological or other legal parents of the adopted person of all parental rights and responsibilities, and to terminate all legal relationships between the adopted person and the adopted person's relatives, including the adopted person's biological or other legal parents, so that the adopted person thereafter is a stranger to the adopted person's former relatives for all purposes including inheritance and the interpretation or construction of documents, statutes, and instruments, whether executed before or after the adoption is decreed, which do not expressly include the person by name or by some designation not based on a parent and child or blood relationship;

(2) To create the relationship of parent and child between petitioner and the adopted person, as if the adopted person were a legitimate blood descendant of the petitioner, for all purposes including inheritance and applicability of statutes, documents, and instruments, whether executed before or after the adoption is decreed, and whether executed or created before or after May 30, 1996, which do not expressly exclude an adopted person from their operation or effect;

(3) Notwithstanding division (A)(2) of this section, a person who is eighteen years of age or older at the time the person is adopted, and the adopted person's lineal descendants, are not included as recipients of gifts, devises, bequests, or other transfers of property, including transfers in trust made to a class of persons including, but not limited to, children, grandchildren, heirs, issue, lineal descendants, and next of kin, for purposes of inheritance and applicability of statutes, documents, and instruments, whether executed or created before or after May 30, 1996, unless the document or instrument expressly includes the adopted person by name or expressly states that it includes a person who is eighteen years of age or older at the time the person is adopted.

(B) Notwithstanding division (A) of this section, if a parent of a child dies without the relationship of parent and child having been previously terminated and a spouse of the living parent thereafter adopts the child, the child's rights from or through the deceased parent for all purposes, including inheritance and applicability or construction of documents, statutes, and instruments, are not restricted or curtailed by the adoption.

(C) Notwithstanding division (A) of this section, if the relationship of parent and child has not been terminated between a parent and that parent's child and a spouse of the other parent of the child adopts the child, a grandparent's or relative's right to companionship or visitation pursuant to *section 3109.11 of the Revised Code* is not restricted or curtailed by the adoption.

(D) An interlocutory order of adoption, while it is in force, has the same legal effect as a final decree of adoption. If an interlocutory order of adoption is vacated, it shall be as though void from its issuance, and the rights, liabilities, and status of all affected persons that have not become vested are governed accordingly.

§ 3111.03. Presumption of paternity

(A) A man is presumed to be the natural father of a child under any of the following circumstances:

(1) The man and the child's mother are or have been married to each other, and the child is born during the marriage or is born within three hundred days after the marriage is terminated by death, annulment, divorce, or dissolution or after the man and the child's mother separate pursuant to a separation agreement.

§ 5103.15. Agreement for temporary custody or surrender of permanent custody

...(B)(2) 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. The agency shall, not later than two business days after entering into the agreement, notify the juvenile court. The agency also shall notify the court not later than two business days after the agency places the child for adoption. The court shall journalize the notices it receives under division (B)(2) of this section.