IN THE SUPREME COURT OF OHIO

In re Adoption of H.N.R.,	:	Case No: 2014-2201
A minor child	:	
	:	On appeal from the Greene
	:	County Court of Appeals
	:	Second Appellate District
	:	

MERIT BRIEF OF APPELLANT CHRISTOPHER SHAWN MILLER

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STATEMENT OF FACTS

This case arises from the attempt of Appellant, Christopher Shawn Miller (Shawn), to intervene in the adoption of his biological daughter born out of wedlock. The probate court of Greene County denied the intervention and Shawn appealed to the Second District Court of Appeals, which affirmed. Shawn then appealed to this Court.

In 2012, Shawn and the child's mother, Natalie, both unwed, began a romantic relationship that lasted about a year. (TR: 27-28.) Shawn lived in West Virginia. (TR: 26.) A few months into the relationship, Natalie became pregnant, and she and Shawn planned for the birth and to marry and raise the child together. (TR: 27-28; 30-32.) They were still together when the child, whom they named Nicole, was born on August 29, 2013 in West Virginia. (TR: 27-28; Birth Cert.)

During the first few months month of Nicole's life, Shawn helped support and care for Nicole. (TR: 28-30.) That included holding Nicole and watching her at least every couple of weeks, and otherwise being with her to the point where he and Nicole formed a bond. (TR: 29-30.) Shawn also provided support needed for Natalie to care for Nicole. (TR: 28: 14.) Shawn obtained a positive DNA test (99.99%) when Nicole was three and a half weeks old. (TR: 28-29.)

Shawn did not realize that the paternity test was insufficient to prove he was the father under the law. (Appx., 18.) He was also unaware at that time of the Ohio Putative Father Registry (PFR). (Id.) Rather, Shawn believed, from the mother's

representations, that they would marry and raise Nicole together. (Id.; TR: 30-32.) Accordingly, Shawn did not file in the PFR or initiate court or administrative proceedings to establish legal fatherhood at that time. (Appx., 18-19.)

When Nicole was about four months old, Natalie started avoiding Shawn. (TR: 32-33.) Shawn's inquiries were met only with a voice message from Natalie telling Shawn that Nicole had died. (TR: 34-35.) Shawn responded by asking the Sheriff to investigate the matter. (TR: 35.)

In truth, Natalie had permanently surrendered Nicole to Adoption Link, Inc., a licensed child-placing agency. (TR: 34; Permanent Surrender of Jan. 21, 2014.) Nicole was five months old at that time. (DOB: 8/19/13.) Adoption Link, immediately placed Nicole with appellees, D.R. and M.R., who soon petitioned in Greene County probate court to adopt Nicole. (Appx., 23)

Shawn filed custody motions in Lawrence and Greene Counties, Ohio and moved to intervene in the adoption. (TR: 3; 34-36; Mot. to Intervene, Apr. 25, 2014; T.d. 17.) The intervention motion asserted that Shawn was a necessary party to the adoption and that his consent was required under Ohio statutory law and the Fifth and Fourteenth Amendment to the United States Constitution and Article 1, Section 16 of the Ohio Constitution. (Motion to Intervene, pg. 1, T.d. 17.)

The adoption petitioners asked the probate court to strike the intervention motion and to enter a judgment finding that Shawn's consent was not required in the

adoption. (TR: 4; First Amended Petitioner's Motion to Strike, Apr. 29, 2014, T.d. 24.) At the hearing on that motion, Shawn's counsel raised constitutional due process issues while citing case law. (TR: 21.)

The probate court found Shawn's testimony at the hearing to be credible, but nevertheless irrelevant, to whether his consent was required in the adoption. (Appx., 19.) In sustaining the adoption petitioners' motion, the probate court ruled that, despite Shawn's care for Nicole, the DNA test results, and his presence during the pregnancy, his consent was unnecessary because he neither filed in the Ohio PFR within 30 days after the child's birth nor initiated paternity proceedings before the adoption petition was filed. (Appx., 18-21) Two weeks later, without notice to Shawn, the probate court issued a final decree of adoption. (Appx., 23.) Shawn filed his notice of appeal to the Second District Court of Appeals on August 13, 2014. (Notice of Appeal, T.d. 38.)

In his appeal to the second District, Shawn argued that the probate court erred in denying Shawn's intervention because the State of Ohio had shirked its duty to promote the PFR. (Br. of Appellant.) Shawn also argued that the 30-day post-birth deadline for filing in the PFR was unconstitutional as applied to him under Article 1, Sec. 16 of the Ohio Constitution and under the Fifth and Fourteenth Amendments to the United States Constitution. (Id.)

On November 7, 2014, the Second District Court of Appeals affirmed the probate court's judgment. (Appx. 5, 16.) The Court of Appeals ruled that the issue of the State's

promotion of the PFR was waived. (Appx., 10.) The Court of Appeals then ruled that the PFR filing deadline was not unconstitutional as applied to Shawn because Shawn lacked a "developed relationship" with Nicole and because his paternity action was filed after the adoption petition was filed, making it untimely. (Appx., 14-16.)

Shawn filed his notice of appeal to the Supreme Court of Ohio on December 22, 2104. (Appx., 1.) On January 28, 2015, the Supreme Court granted jurisdiction to hear the case and allowed the appeal.

ARGUMENT

Proposition of Law:
The 30-day post-birth deadline for filing in the putative father registry under R.C. 3107.07(B)(1) is unconstitutional as applied to putative fathers of children surrendered for adoption after the filing deadline passes under Article I, Section 16 of the Ohio Constitution and Amendments V and XIV of the United States Constitution.

Summary of Argument

United State Supreme Court precedents show that putative fathers have a constitutional right to qualify for notice of proceedings to adopt their natural children without needing to become legal fathers (i.e. by marrying the mother or establishing paternity formally.) Nevertheless, a State may foreclose a putative father from contesting an adoption if he does not qualify for notice of it under a non-arbitrary statute. A notice statute will be arbitrary if it is likely to omit many responsible putative fathers from having a say in the adoption and if it puts the qualification for notice

beyond a putative father's easy control. Once a notice statute is deemed arbitrary, it is unconstitutional facially, even if the putative father had no personal, financial, or legal relationship with his child. That father, like all fathers, would still need to prevail at the fitness hearing to veto the adoption.

The competing interests of the parties are considered when determining the arbitrariness of the notice statute. Adoption statutes strive to balance a father's interest in parenting his child with the child's need to have a stable and permanent home expeditiously. State statutes therefore strive to avoid belated challenges from putative fathers by requiring them to be easily identifiable to adoption petitioners when the adoption petition is filed. Under Ohio's notice statute, a putative father who does not file in the Ohio PFR within 30 days after his child's birth must become a legal father to contest the adoption, no matter how old the child is when adoption is sought.

The Ohio notice statute is likely to eliminate many responsible putative fathers from adoption proceedings because it lacks alternative methods for notice qualification that correlate realistically with responsible father behavior. The statute does not consider, for example, whether the putative father married the mother soon after the birth, lived with the mother and child, or was named by the mother named him in a sworn statement to the court. Putative fathers who would qualify in those or similar ways but are not inclined to make formal filings will be eliminated summarily despite having taken responsibility for their children.

The 30-day, post-birth filing deadline, in turn, does not balance the child's interest in speedy permanence and the father's interest in being heard better than a deadline commensurate with the date the adoption petition is filed balances them. The date the adoption petition is filed is a critical time point for the shifting of interests between the parties. As long as a putative father is registered in the PFR when the adoption petition is filed, a hearing on his fitness will be timely. Thus, the 30-day PFR filing deadline cuts off a father's opportunity arbitrarily in cases of children surrendered for adoption after that time.

Moreover, the father who is helping the mother tend to the newborn baby is the man most likely to miss the little known filing deadline because he is responsibly focused on the relationship with his child at that time. Not until a serious conflict arises or the relationship sours, does he perceive a need to investigate legal solutions. He then finds that, despite his supportive parental actions, his opportunity interest vanished long ago. Thus, practically, the ability to ensure his own notice is not within a putative father's complete control.

Shawn was disinclined to file formal proceedings, yet he took responsibility for his child. When his relationship soured, it was too late to register. He therefore typifies the many responsible fathers who are likely to be eliminated by the arbitrariness of the PFR filing deadline in R.C. 3107.07(B)(1).

Adoption Law Generally

Whether a father is entitled to notice of an adoption proceeding differs depending on whether he is a legal father or a putative father. The constitutionality of a statute setting forth when notice is required to an unwed father is analyzed under three considerations as established in *Lehr v. Robertson*, 463 U.S. 248, 103 S.Ct. 2985, 77 L.Ed.2d 614 (1983): whether the procedures for notice is likely to eliminate many responsible fathers from being heard; whether the statute puts qualification for notice within the father's easy control; and the need for finality. *Id.* at 263-264 and Maj. n. 20.

Adoption law recognizes two types of fathers in the parental rights context: "legal" and "putative." *Michael H. v. Gerald D.*, 491 U.S. 110, 120-135, 109 S.Ct. 2333, 105 L.Ed.2d 91 (1989). A legal father is a man who has established fatherhood under state law, such as through marriage, adoption, or paternity establishment. See R.C. 3107.01(H). A putative father is a man who may be a child's biological father but who has not established fatherhood in those ways. Id.

Different legal standards apply to the two types of fathers. Legal fathers are entitled to hearings on their fitness as parents before their children can be adopted without their consent. *Armstrong v. Manzo*, 380 U.S. 545, 550, 85 S.Ct. 1187, 14 L.Ed. 2d 62 (1965). Putative fathers, in contrast, are entitled to a fundamentally fair opportunity to "qualify" for notice of an adoption petition, assuming no legal father exists. *Lehr*, 463 U.S. at 263-264; See *Michael H. v. Gerald D.*, 491 U.S. at 121 (State could override a

putative father's interest in rebutting a married man's presumed paternity of the child.) Only after the putative father has qualified for notice and been found fit at the hearing can he veto the adoption. R.C. 3107.07(B)(2).

Accordingly, a State may prevent a putative father who does not qualify for notice from being heard in the adoption, provided the State's notice qualification statute is not arbitrary. *Lehr*, 463 U.S. at 263-264. A notice statute will be arbitrary if it is likely to omit many responsible putative fathers and if it puts the qualification for notice beyond a putative father's easy control. *Id.* Those considerations are balanced with the need for adoption proceedings to be decided expeditiously. *Id.* at 264 and Maj. n. 20.

Ohio Statutes

Ohio law differentiates between legal fathers and putative fathers. A legal father in Ohio is a man who: was married to the mother when the child was conceived or born, has adopted the child, or has established paternity of the child formally by the time an adoption petition is filed. R.C. 3107.01(H). A man establishes paternity formally through (1) mutual acknowledgement, (2) administrative determination, or (3) court adjudication. R.C. 3107.01(H)(3) – (4). The paternity determination must be final (non-rescinded or finally adjudicated) before it has legal effect. R.C. 3107.064(B)(4); 3111.27; 3111.49. Paternity establishment alone does not allocate parental rights and responsibilities, but merely acknowledges a biological relationship. R.C. 3111.381.

Biological fathers who have not established paternity through those ways remain as putative fathers in adoption proceedings. R.C. 3107.01(H); R.C. 3107.06(B) and (C).

Putative fathers have limited ways to protect their rights in adoption proceedings. Putative fathers must file in the Ohio PFR within 30 days after the child's birth to qualify for notice of an adoption petition. R.C. 3107.06(C); 3107.062; 3107.07(B)(1). The statutes consider nothing about the putative father's personal relationship with the child, whether he married the mother soon after the birth, lived with the child, or whether the mother named him for birth certificate purposes or to the court in a sworn statement. R.C. 3107.07(B)(1). The 30-day post-birth filing deadline also applies to putative fathers regardless of how old the child is when adoption is sought and no matter who petitions to adopt her, a stranger, a relative, or a stepparent. Id. The putative father's only recourse should he miss the filing deadline is to become the child's legal father before someone petitions to adopt her. R.C. 3107.01(H)(3) and (4); 3107.07(A) and (B).

Filing in the PFR merely protects the putative father's rights to notice and a fitness hearing before an adoption can proceed. R.C. 3107.07(B). PFR registration does not claim paternity, show responsibility, or measure commitment. Form JFS 01694 (Appx., 34.) It merely identifies the registrant to potential adoption petitioners and entitles him to a fitness hearing if the child has no legal father. R.C. 3107.064(B); 3107.07(B)(2). The fitness hearing focuses on how supportive the putative father was

toward the mother and child before adoption was sought. R.C. 3107.07(B)(2)(b) and (c). If the putative father is fit, he can withhold consent. R.C. 3107.06(C); 3107.07(B). If he is not fit, the adoption can proceed without his consent. Id.

United States Supreme Court Precedents

The Constitution protects putative fathers. The United States Supreme Court has recognized that some unwed men do not seek legal fatherhood, but nevertheless take parental responsibility sufficient to give them substantial constitutional protection of their parental rights. *See e.g. Stanley v. Illinois*, 405 U.S. 645, 657-658, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972) (unwed, non-adjudicated father who had lived with the children for years was entitled to be heard on his fitness before the state could remove the children upon the mother's death.) Even putative fathers who have taken minimal responsibility for their natural children have some constitutional protection. *Lehr*, 463 U.S. at 261 (Biology alone did not merit protection "equivalent" to what an unwed father who had developed a relationship with his child would have.)

Accordingly, the State cannot foreclose an unwed father's ability to parent his children simply because he is unwed or putative. See *Stanley*, 405 U.S. at 658 (Putative father who had lived with his natural children and their mother could not be presumed unfit just because he never married the mother); *In re Adoption of A.N.*, 2013-Ohio-3871, ¶ 26 citing *Lehr*, 463 at 261-265 and *Zschach*, 75 Ohio St.3d at 650-651 ("[T]he Supreme

Courts of the United States and Ohio have recognized a putative father's right to a parental relationship with his offspring.")

In *Stanley*, the United States Supreme Court directly addressed constitutional rights for putative fathers. There, an Illinois law made all unwed fathers presumptively unfit for custody of their children. *Id.* at 646-647. Thus, if an unwed mother died, the State could declare her children dependent and remove them from a putative father summarily. *Id.* A putative father's only recourse was to petition for adoption or guardianship of the child. *Id.* at 647. The statute's goal was to "strengthen the minor's family ties whenever possible, removing him from the custody of his parents only when his welfare or safety or the protection of the public [could] not be adequately safeguarded without removal[.]" *Id.* at 652.

The putative father, Peter Stanley, had lived with the unwed mother intermittently for 18 years, during which they had three children. *Id.* at 646. Peter had never sought to establish legal fatherhood through paternity establishment, marriage, or adoption. *Id.* at 646-647. When the mother died, the children became State wards, with Peter statutorily presumed unfit. *Id.* Feeling unable to petition for guardianship or adoption, Peter challenged the constitutionality of the removal statute. *Id.* at 646.

The United States Supreme Court held that the automatic destruction of the custodial relationship without giving Peter an opportunity to present evidence about his fitness violated the Due Process Clause. *Id.* at 649. Marital status, alone, was an

insufficient basis for removing his children. *Id.* at 649-658. Key to the Court's decision was that the goal of the statute (removing children only when necessary to safeguard the child or the public) was not served by separating children from fit custodial parents, wed or unwed. *Id.* at 652-653. The State's own goal of preserving family attachment was defeated in removing children based solely on the marital status of the parents. *Id.* The Constitution recognized "higher values than speed and efficiency." *Id.* at 656. Thus, the putative father in *Stanley* was entitled to more constitutional protection than the Illinois statute provided. *Id.* at 656.

The Court also addressed whether the existence of alternative ways outside the statute for Peter to protect his rights was sufficient. *Id.* at 647. The statutory ability to seek adoption or guardianship of the children upon removal did not cure the infirmity because, among other reasons, the children would still "suffer from uncertainty and dislocation" while the father pursued those remedies. *Id.* The existence of alternative avenues outside the statute did not adequately protect the putative father. *Id.*

The United States Supreme Court later revisited putative father's rights in *Lehr v. Robertson*, 463 U.S. 248, 103 S.Ct. 2985, 77 L.Ed.2d 614 (1983). Soon after *Stanley*, the New York legislature enacted a statute to "codify the minimum protections for putative fathers which *Stanley* would require" and to "provid[e] clear constitutional statutory guidelines for notice to fathers of out of wedlock children." *Lehr*, 463 U.S. 248, at Maj. n. 20. The statute balanced interests by giving concerned putative fathers a simple way to

protect their right to a hearing while also letting agencies identify those fathers timely. *Id.* Specifically, the statute required that notice of an adoption petition be given to any unwed man who, in summary:

- had been adjudicated to be the child's father in or out of state,
- was named on the birth certificate,
- had lived openly with the mother and held himself out to be the father,
- was identified as the father by the mother in a sworn written statement, or
- had been married to the mother before the child was six months old and before the child was surrendered. *Id.* at 251.

Unwed fathers who fell outside those categories could still qualify for notice, and hence a hearing, by mailing a simple "intent to claim paternity" form to the New York PFR any time before the adoption petition was filed. *Id.*

The New York notice statute was challenged on due process grounds in *Lehr v. Robertson* by an unwed father whose biological daughter was adopted without notice to him. *Id.* at 250. The putative father, Jonathan Lehr, had lived with the mother during the pregnancy and visited her in the hospital after the birth, but he did not appear on the birth certificate. *Id.* at 251-252. After the birth, Jonathan did not live with or support the child, or offer to marry the mother. *Id.* When the child was eight months old, the mother married Robertson who, year or so later, petitioned to adopt her. *Id.*

A month after the adoption petition was filed Johnathan filed a paternity action in another court. *Id.* Meanwhile, the family court searched the New York PFR and, finding no registrants, ordered the adoption without notice to him. *Id.* at 251-253.

Jonathan moved to vacate the adoption, arguing that his paternity action, if not biology alone, gave him a constitutional right to be heard in the adoption case. *Id.* at 253-254. The Family Court denied the motion. *Id.* at 253. After the Appellate Division and Court of Appeals affirmed, Jonathan appealed to the United States Supreme Court, advancing his due process argument. *Id.* at 254-255. In affirming, the Supreme Court set out principles applicable to unwed fathers in adoptions. *Id.* at 257-263.

First, the Court addressed the principle from *Stanley* and *Caban v. Mohammed*, 441 U.S. 380, 99 S.Ct. 1760, 60 L.Ed.2d 297 (1979) that biological connection, by itself, is not enough for substantial constitutional protection. *Lehr*, 463 U.S. at 261. The Court noted that an unwed father acquires substantial protection under the due process clause by "coming forward to participate in the rearing of his child." *Id.* Biological fatherhood alone, on the other hand, did not merit "equivalent" protection. *Id.* Instead, a putative father who lacked a significant "personal, economic, or legal" relationship with his child had to grasp his opportunity to develop a relationship. *Id.* at 262.

The Court then distinguished the case before it as being a different type of review than that in *Stanley* and *Caban*; not a review of whether a relationship had been developed, but whether the *opportunity* to form a relationship had been adequately

protected. *Id.* at 262-263. The Court explained that the issue concerned only a putative father's right to be notified and heard, and not how to judge parental fitness as in *Stanley* or *Caban*:

> "In this case, we are not assessing the constitutional adequacy of New York's procedures for terminating a developed relationship. Appellant has never had any significant custodial, personal, or financial relationship with [the child], and he did not seek to establish a legal tie until after she was two years old. [19] We are concerned *only* with whether New York has adequately protected his *opportunity to form* [that] relationship."
> *Id.* at 262-263. (Emphasis added.)

The Court then set forth a standard for protecting opportunity. Statutes that are likely to omit many responsible fathers and that put the qualifications for notice beyond the control of the father are arbitrary and thus inadequate. *Id.* at 263-264. The Court held that the New York notice statute adequately protected Jonathan's opportunity because though he fit none of the initial notice categories, he could have ensured his right to a hearing by filing in the PFR, an action that was within his complete control. *Id.* at 264. The Court explained that the statute avoided arbitrariness by identifying a range of categorical fathers who were "*likely* to have assumed some responsibility for the care of their natural children" and entitled them to notice. *Id.* at 263. The Court reasoned that if the statute were likely to omit many responsible fathers and if the qualification for notice were beyond a putative father's control, it might be procedurally inadequate. *Id.* at 263-264. The New York notice statute was adequate because it let putative fathers who had not established paternity or been identified through the other

statutory categories, ensure their own notice by filing in the PFR any time before the adoption petition was filed. *Id.* at 264. Thus, the statute was not arbitrary. *Id.*

Because the statute was not arbitrary, Jonathan could not rely on his paternity action to qualify him, since the need to complete adoption proceedings expeditiously justified making parties follow statutory procedures precisely. *Id.* at 264-265. The adoption could therefore proceed without Jonathan being heard. *Id.*

Application of *Lehr*

As in *Lehr*, the standard in this case is not how much responsibility Shawn took toward Nicole, but whether the Ohio statute adequately protected his opportunity to qualify for notice of an adoption petition as a putative father. *Lehr* established that a putative father is constitutionally entitled to a fundamentally fair way to qualify for notice of an adoption petition *as a putative father* while still allowing adoptions to proceed expeditiously. *Lehr* does not stand for the proposition that as long as the State has some interest in whatever procedure the notice statute requires (e.g. PFR filing or paternity establishment), the putative father must do it to the exclusion of any other potential procedures. Because *Lehr* dealt solely with the right of an unwed father to qualify for *notice* of an adoption petition, the issue in that case was not whether Jonathan Lehr had shown parental commitment (because he apparently had not), but whether the notice statute was likely to eliminate responsible fathers arbitrarily. Had Jonathan Lehr filed in the PFR before the adoption petition was filed, he would have

qualified for notice and a hearing despite his apparent lack of action and purely biological relationship with his daughter. Thus, the Court did not hold that a putative father's right to be heard in an adoption attaches only after he takes a certain amount of responsibility for his child. To the contrary, the chance to begin forming a relationship with his child is something the State owes him as a matter of due process, with reasonable limits on time. The *Lehr* Court, in turn, never indicated that adoption policy would have been threatened had Jonathan registered before the adoption petition was filed and been heard. Thus, under the Constitution, biology alone gives a putative father the right to a fundamentally fair (non-arbitrary) way to qualify for notice of an adoption petition *as a putative father*.

The New York notice statute analyzed in *Lehr* differed from Ohio's notice statute. Unlike the Ohio statute, the New York statute did not interfere with the putative father's opportunity to form a relationship with his child. The New York statute was unlikely to omit many responsible fathers because it did not limit PFR registration to 30 days after the child's birth (the statute gave an open deadline for filing) and it provided other ways for him to preserve his rights.

The New York statute achieved fairness by having a range of statutory categories for notice qualification that were based on events the legislature believed *correlated* with responsible father behavior and lead to those fathers' being identified. Because a putative father who had taken personal or financial responsibility for his child could

still fall outside the correlative categories, the statute let putative fathers ensure their own notice by filing in the PFR any time before the adoption petition was filed. The statute did not place an arbitrary 30-day deadline on its PFR filing option. That sufficiently protected *all* putative fathers because a more open-ended method would "threaten the privacy interest of unwed mothers, create the risk of unnecessary controversy, and impair the finality of adoption decrees." *Id.* at 264. In sum, the statutory categories were not intended to *describe* responsible behavior, but only to *correlate* with it. Any putative father, whether he had a developed relationship with his child (like Peter Stanley), somewhat less than that (like Shawn), or no relationship (like Jonathan Lehr), would be entitled to a hearing under the New York statute if he merely qualified for it under *one* of the categories. Alternatively, a putative father could file in the PFR any time before the adoption petition was filed.

The New York statute included several categorical ways a putative father could qualify for notice, thereby ensuring that not many responsible fathers would be omitted from adoption proceedings. Thus, the test for arbitrariness of a notice statute is theoretical and not based on how easy it is for a particular father to qualify for notice or escape a missed deadline. The analysis focuses instead on including as many potentially interested fathers as possible rather than on excluding as many potentially disinterested fathers as possible. It is based not on how easy it is for a particular father to qualify for notice, but on a prediction of how many hypothetically responsible fathers

would likely be eliminated under the statutory procedures, where "responsible" means real-world support and care for the child. Qualified putative fathers then gain a right to be heard on their parental fitness as the State reasonably defines that in real-world terms (e.g. abandonment, failure to support). If they have taken insufficient responsibility, they lose at the hearing.

A considerable State interest is served by an unwed father helping to raise and support his natural child. Thus, making pursuit of legal fatherhood and PFR registration the only predictors of responsibility eliminates those many fathers who support and care for their children but do not make formal filings. Because the State's interest in unwed fathers taking responsibility for their children is fulfilled by those fathers, and those fathers can be identified easily via events other than seeking legal fatherhood or filing in a PFR, eliminating them because they do not make formal filings is arbitrary.

Ohio's scheme is arbitrary

Ohio's notice statute omits many responsible fathers and is thus arbitrary and inadequate under the *Lehr* standard. Ohio ignores unwed fathers who help care for or support their children before an adoption petition is filed unless they have filed in a registry that is not common public knowledge. No consideration is given to unwed fathers who could otherwise be identified timely and easily by, for example, being named by the mother on the birth certificate (informally) or in a written statement,

having married to the mother soon after the birth, or having lived with the mother and child. Because a responsible putative father has a right to a parental relationship as a putative father, PFR registration—especially within 30 days after the birth—cannot be his only method for grasping that opportunity short of becoming a legal father. Otherwise, many responsible putative fathers will be eliminated from the adoption equation by their very nature as responsible, though non-conforming, fathers.

In addition, because PFR registration is an unnatural and non-traditional procedure, many putative fathers are likely to be ignorant of that mechanism. That predictable ignorance, while not a basis for criticizing the notice statute itself, factors into the law's arbitrariness. By using an unnatural registration requirement as the single qualifier for all putative fathers, the statute eliminates the many responsible fathers who fail to register out of ignorance, but who would, under a non-arbitrary statute, qualify for notice through other correlative statutory categories. The range of qualifying events, such as those in the New York statute, therefore helps overcome the unnaturalness of the PFR as a procedural mechanism. As a result, the statute becomes less arbitrary and the PFR serves the last resort purpose it was originally meant to serve when first enacted in New York after *Stanley*. The Ohio notice statute does not achieve that fundamental fairness.

Similar to the case in *Stanley*, the existence of other ways for the putative father to protect his rights outside the statute do not cure the lack of protection under the notice

statute. That a putative father might be able establish paternity fairly easily in Ohio does not cure an arbitrary PFR filing deadline. The measure of a valid notice statute or scheme is not how easily it lets a putative father escape termination by achieving legal fatherhood, but how easily it lets a putative father qualify for notice *without needing* to achieve legal fatherhood. Because R.C. 3107.07(B) uses PFR registration as the lone way for a putative father to qualify for notice of an adoption petition, short of seeking or obtaining legal fatherhood, it is likely to eliminate many responsible fathers.

Unconstitutionality of the 30-day, post-birth filing deadline as applied to putative fathers of children surrendered for adoption after that deadline passes.

When children are surrendered after 30 days of age, the PFR filing deadline alone makes R.C. 3107.07(B)(1) arbitrary by omitting many responsible fathers who learn about the 30-day limit after it passes but before the adoption petition is filed. The notice statute omits putative fathers in that situation from protection. The adoption statutes strive to balance a father's interest in parenting his child with the child's need for a stable and permanent home in an expeditious manner. *P.A.C.*, 126 Ohio St.3d 236, 2010-Ohio-3351 933 N.E.2d 236 at ¶¶ 56-58, Cupp, J. dissenting. The Ohio legislature considers the date the adoption petition is filed a crucial time regarding those interests. Id. at ¶ 58, Cupp, J. dissenting ("The express legislative direction contained within the adoption statutes that requires the *status of the biological father* to be determined at the time the *adoption petition is filed* is one that the legislature has determined advances this goal.") (Emphasis added.) See R.C. 3107.01(H)(3) and (4).

Thus, the omission of those responsible fathers does not serve the interests of any of the parties in expeditiously disposing of the adoption. Because PFR registration concerns only notice, nothing is compromised by letting a man register as a putative father any time before the adoption petition is filed. In all cases, a registered father's status will be determined by the time the petition is filed, and the fitness hearing will still focus on what responsibility the registrant took toward the child and mother before the petition was filed. See R.C. 3107.07(B)(2)(b) and (c).

To make establishment of legal fatherhood the only alternative to early PFR registration insufficiently balances interests. The fitness hearing for all registered putative fathers under both deadlines (30 days after birth versus date of the adoption petition filing) still occurs timely because the identities and statuses of the parties are established by the time the adoption petition is filed. The State's desire to have parentage determined early has—as *Lehr* showed—no relation to preserving privacy, eliminating unnecessary controversy, or avoiding belated challenges by fathers. In fact, the Ohio's statute contemplates a genetic test result regarding a contesting putative father being obtained in the adoption litigation. R.C. 3107.07(B)(2)(a).

Any concern the State may have about a putative father's commitment to the child, in turn, is an issue for the hearing stage. In any case, requiring a putative father to pursue the more burdensome procedure of paternity establishment instead of

allowing later PFR registration is not justified when the issue is merely a putative father's right to notice.

The Ohio PFR filing deadline is arbitrary and inadequate because it is likely to omit many responsible fathers. This case is an example of how the Ohio notice scheme fails to protect the rights of fathers who are responsibly focused on the relationship with their children instead of on an unforeseen threat to their opportunity. The father who is helping the mother tend to the baby in her first month of life is the man most likely to miss the obscure PFR filing deadline because he is distracted from legal considerations. He is likely to believe that he is doing all that a responsible father needs to do. Not until some time goes by, a serious conflict arises, or the relationship sours, does he perceive an immediate need to investigate legal solutions. He then finds that, despite his supportive parental actions, his opportunity interest vanished back when he was helping parent the child, the very criteria that would protect his rights in the fitness hearing. In that case, the fitness hearing never occurs because the notice and opportunity to be heard are withheld under the statute. Instead of letting him register before the adoption petition is filed, the State requires him to establish paternity before an adoption petition is filed, something he has no real control over and which does not measure the actual responsibility he took. Omitting those responsible fathers makes the 30-day, post-birth deadline, and the notice scheme overall, arbitrary and inadequate, especially in the case of children surrendered after the PFR filing deadline passes.

Shawn is a good example. He had obtained genetic testing results and was helping Natalie care for Nicole for the first month of Nicole's life and beyond. Having discussed marriage with Natalie, Shawn never hypothesized an adoption being planned. When Nicole was about four months old, Natalie started avoiding Shawn and soon disappeared, leaving only a voice mail stating that Nicole had died. At that point, Shawn's "opportunity" interest presented by the PFR was long gone and the race to the courthouse was on. Shawn is now considered irresponsible due, at least partially, to his causing a Sheriff's investigation instead of running straight to the courthouse upon being told that his child was dead. It would have been much easier just to file in the PFR in the middle of that difficult time had that option been available. Thus, Shawn is one of the many responsible fathers who are likely to be eliminated by the effect of 30-day PFR filing deadline. Ultimately, however, arbitrariness is based not on Shawn's particular behavior, but on whether many responsible fathers will likely miss the filing deadline. Many responsible fathers will likely miss the deadline because they are busy being responsible and thus do not learn of the filing requirement until it passes even though the adoption petition has not been filed yet.

No rational reason exists in any case for making paternity determination the lone alternative to PFR registration after the child turns a month old. Paternity establishment does not enforce parental obligations, but only acknowledges a biological relationship for status purposes. Even after establishing legal fatherhood, litigation is

required to allocate responsibilities (such as child support). Besides, the State need not enforce parental obligations on a putative father who is raising his child responsibly.

In addition, the State does not apply its supposed interest in paternity establishment to a putative father who registers timely under current law. To the contrary, the State is willing to let an adoption be vetoed by a timely registered putative father who prevails at the hearing solely as a putative father no matter when the adoption is sought. The State has no problem with, for example, a petition to adopt a 17 year old child being challenged by a putative father who registered 17 years before and then remained a putative father. If the State has no overriding interest in paternity being established regarding a child who is the subject of adoption at age seventeen, then it has no overriding interest in paternity being established for a child surrendered for adoption at any age. Thus, failing to establish legal fatherhood by the time an adoption petition is filed is not detrimental enough to justify it being the pivotal reason for denying a hearing to an unwed father in an adoption.

The 30-day post-birth filing deadline serves no interest vital to the mother either. A mother does not need to check a PFR to figure out whether a putative father is inclined to contest an adoption petition, since she knows what parental responsibility the putative father has taken or tried to take. Thus, before she surrenders, the mother knows the putative father's likely inclination to contest an adoption and his likelihood of prevailing in a fitness hearing. A mother's interest in knowing a putative father's

registration status *before* she surrenders the child therefore is to see if the putative father has *lost* his ability to contest the adoption. But a mother's desire to know whether a father has lost his rights does not justify enacting a filing deadline that facilitates the loss she may desire. To avoid arbitrariness, the 30-day post-birth PFR deadline must improve the timeliness of fitness hearings in a way that having a deadline commensurate with the filing of the adoption petition does not. As *Lehr* showed, an early PFR filing cut-off time is not vital to the balancing of interests. Thus, the PFR filing deadline alone will omit many responsible fathers from adoption hearings.

Qualification for notice is not within the putative father's complete control

The opportunity to register within 30 days after the child's birth is not within the putative father's "complete" control either. The Court's conclusion in *Lehr* that PFR registration was within the putative father's complete control was made in the context of the statute's open deadline for registering and the PFR's function as a method of last resort. Qualifying for notice was within the father's complete control in *Lehr* because he could have registered not only easily, but also at any reasonable time.

The arbitrariness of the Ohio registration deadline therefore works against the putative father's control. It is entirely predictable that many responsible putative fathers in Ohio will first learn about the PFR filing requirement after the child turns a month old yet before the adoption petition is filed, as Shawn did. Given that PFR

registration is the only way a putative father can preserve his notice right as a putative father in Ohio, the ability to register is not within his "complete" control.

Accordingly, the 30-day, post-birth deadline for filing in the Ohio PFR violates Article I, Section 16 of the Ohio Constitution and Amendments V and XIV of the United States Constitution both facially and as applied to Appellant as a putative father of a child surrendered for adoption after the filing deadline passed.

CONCLUSION

This Court should reverse the Court of Appeals' decision and remand the case to the Greene County Probate Court instructing it to vacate the decree of adoption and to hold a hearing on the issue of whether Appellant's consent is necessary in the adoption.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I sent a true copy of this Merit Brief by E-mail to Michael Voorhees, counsel for appellees, at < mike@ohioadoptionlawyer.com > on March 13, 2015.

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