

IN THE SUPREME COURT OF OHIO

IN RE: : CASE NO. _____

S.M., : Appeal from the
: Hamilton County Court of Appeals,
: First Appellate District

: Court of Appeals
: Consolidated Appeal No. C1600588

**MEMORANDUM IN SUPPORT OF
JURISDICTION OF APPELLANTS ALEX RODGER AND MARTHA CARTER**

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I. THIS CASE IS OF GREAT PUBLIC INTEREST AS IT INVOLVES THE LONG TERM FATE OF A CHILD, STATUTORY INTERPRETATION AND A MATTER OF FIRST IMPRESSION

In the last two decades adoption law in Ohio has changed dramatically. The General Assembly amended Ohio's adoption laws in 1996 "to streamline the adoption process and to reduce the time needed to finalize an adoption." *In the Matter of the Adoption of T.L.S.*, 2012-Ohio-3129, ¶12, 2012 WL 2708307 (12th Dist. July 9, 2012) (citing *In re Adoption of P.A.C.*, 126 Ohio St.3d 236, 2010-Ohio-3351, 933 N.E.2d 236, ¶ 56 (Cupp, J., dissenting)). Additionally, the amendments sought to "prevent children from being forcibly removed from their adoptive families after a biological father belatedly exercised parental rights." *Id.* (citing *P.A.C.*, 126 Ohio St.3d at ¶56). Accordingly, courts applying Chapter 3107 of the Revised Code must do so in manner consistent with the General Assembly's legislative intent. This is especially critically when a court is determining the long term fate of a child.

However, Ohio courts have applied Chapter 3107 inconsistently post this Court's decision in *In Re Adoption of Pushcar*, 110 Ohio St. 3d 332, 2006-Ohio-4572, 853 N.E. 2d 647. In *Pushcar*, this Court determined that once a putative father has been deemed the biological father by virtue of a paternity test, his status changes from putative father to legal father. This distinction changes what standard to apply to determine whether the father's consent to the adoption is necessary. Because the standard is different, this Court explained that "When an issue concerning parenting of a minor is pending in the juvenile court, a probate court must refrain from proceeding with the adoption of that child." *Id.* at syllabus.

It is the application of this Court's holding in *Pushcar*, and its interplay with the statutory mandates that has been left unresolved and has resulted in conflicts between the district courts. First, this Court has never addressed how the holding in *Pushcar* affects the probate court's statutory duty to set a hearing and send notice pursuant to R.C. 3107.11. Specifically, R.C.

3107.11(A)(1) mandates that Ohio probate courts shall set a hearing upon the filing of a petition for adoption and issue notice to all parties entitled to notice of the hearing. Although *Pushcar* is clear that the Probate Court may not finalize the adoption at such a hearing unless and until a companion paternity action has concluded, the statutory obligation to set the hearing and issue the notice has never been abrogated. Second, this Court has not addressed the statutory duty of those receiving the notice, to object to the petition for adoption. R.C. 3107.07(K) obligates any person or entity whose consent to an adoption is required, to timely file written objections or forever waive the right to contest the adoption. Requiring written objections applies to a father regardless of his status and is not inconsistent with the holding in *Pushcar*.

As addressed more thoroughly below, the Twelfth District and Third Districts respectively have found that scheduling a hearing and providing notice thereof, pursuant to R.C. 3107.11, and requiring written objections pursuant to R.C. 3107.07(K), is proper even when a paternity action is pending in juvenile court consistent with the holding in *Pushcar*. Conversely, the First District in the instant matter found that the probate court should not have scheduled a hearing or sent notice thereof simply because a paternity action was pending in juvenile. This clarification is critical so that biological parents can understand what they must do, and when they must do it, to protect their parental rights. Similarly, prospective adoptive parents must know whose consent is required in order to proceed with an adoption. Finally, the need for clarity is particularly pertinent here as it is not just future parties to an adoption who must understand what procedures they must follow, but all Ohio probate courts as well. It is a probate court's actions, the setting of a hearing and sending notice thereof, that trigger the duty to object pursuant to R.C. 3107.07(K).

As a result of this unresolved question, a 2 ½ year old child still remains in limbo without a determination of whether he will be adopted by virtue of the birth father's failure to object to the

petition for adoption as required by RC 3107.07(K), or whether the parties to this appeal must proceed to a custody trial in the juvenile division of the Court of Common Pleas.

This Court should also grant review to insure that the conflict between the districts, as set forth below, is resolved.

II. STATEMENT OF THE CASE AND FACTS

This case revolves around a child that was placed for adoption by a private adoption agency at birth after the birth mother signed a permanent surrender. The Child was born on May 30, 2015. The biological mother signed a permanent surrender on June 2, 2016 and the Child was placed in the home of Appellants Alex Rodger and Martha Carter (“Adoptive Parents”). The birth father, Christian Beasley (“Beasley”) registered with the Ohio Putative Father Registry on June 9, 2015. On July 20, 2015, while only 17 years of age, Beasley filed a custody action and a paternity action in Juvenile Court. (J.C.T.d. 1). An initial hearing was scheduled on September 15, 2015. Adoption Professionals LLC, a private adoption agency, as the permanent custodian of the Child, appeared along with Beasley and the child’s biological mother represented by her own counsel. No other parties entered an appearance. At the hearing counsel for the mother and counsel for Adoption Professionals orally raised the notion that the court lacked jurisdiction to proceed with the minor’s petition. At that time, the Juvenile Court simply continued the matter until October 19, 2015 awaiting the determination of paternity.

On September 16, 2015, promptly after receiving all necessary paperwork from the State of Ohio, Adoptive Parents filed a petition for adoption along with other supporting documents. (P.C.T.d. 1). At that time, the Probate Court reviewed the petition and set the matter for hearing pursuant to the mandate of R.C. 3107.11 (the Probate Court “shall fix a time and date for hearing of the petition”). (P.C.T.d. 2) The hearing was scheduled for December 3, 2015. Also on

September 16, 2015, and also in compliance with R.C. 3107.11, Probate Court issued notice to Beasley at the address he listed on the putative father registry that a petition for adoption had been filed and that a hearing on the petition had been scheduled. (Id.) Proof of service on Beasley was filed with the Probate Court on September 28, 2015. (P.C.T.d. 16).

On October 19, 2015 Adoption Professionals, Beasley and biological mother appeared before the Juvenile Court at which time it was entered upon the record that Beasley is the biological father of the Child. (J.C.T.d. 25) At that time, the Juvenile Court ordered that the Probate Court proceed with the adoption proceedings and that the parties report the status of the Probate Court proceeding when an order or decision was entered. (Id.).

On October 20, 2016 Beasley's counsel made the first filing of record for Beasley in the Probate Court, filing a Notice of Appearance. (P.C.T.d. 17). On November 9, 2015 Beasley filed a Motion to Dismiss the petition for adoption which were deemed his objections to the petition for adoption. (P.C.T.d. 21) On November 19, 2015 Adoptive Parents filed a Motion to Finalize the adoption pursuant to Civ. R. 56. (P.C.T.d. 25). On November 23, 2015 Adoptive Parents filed a Memorandum in Opposition to Beasley's Motion to Dismiss. (P.C.T.d. 30).

On December 3, 2016 Beasley and Adoptive Parents appeared in the Probate Court. At that time, the Probate Court magistrate afforded Beasley additional time to respond to Adoptive Parents Motion to Finalize. The matter was set for February 17, 2016. (P.C.T.d. 38). The matter was later continued by the Probate Court until March 3, 2016. (P.C.T.d. 42). The magistrate conducted a hearing on March 3, 2016 and issued a decision on March 28, 2016.

The magistrate's decision found, based on the magistrate's interpretation of *Pushcar* and its progeny, that the Probate Court should have never scheduled a hearing pursuant to R.C.

3107.11. And, therefore, no notice of the hearing should have been sent either. The magistrate concluded that if the hearing should not have been set, and notice should not have been sent, that Beasley's duty to object was never triggered. The trial court adopted the magistrate's decision over Adoptive Parents objections.

The First District explained that the trial court held that, "because it had failed to immediately stay the adoption proceedings as required by *Pushcar*, everything that followed had been done in error." Dec. at 5. The First District affirmed, but, as stated by the First District, "albeit on slightly different grounds." Id. The First District held that, "the probate court should have immediately stayed the adoption action upon its filing because the putative father's paternity action was pending; once paternity is established, any adoption without the consent of the father must be commenced under Division A of R.C. 3107.07; and when a juvenile court proceeding regarding custody of a child is first in time, a probate court must refrain from exercising its jurisdiction over an adoption proceedings regarding the same child until the juvenile court custody proceeding is terminated." Id. at 2.

The First District relied upon this Court's refining of the *Pushcar* decision in *In re Adoption of G.V.*, 126 Ohio St.3d 249, 2010-Ohio-3349, 933 N.E. 2d 245, as the basis for affirming the trial court. Dec. at 6-7. However, both *Pushcar* and *G.V.* focused on what status the father occupies at the time of the consent hearing and the different standards that apply to determine whether a father's consent was necessary. However, those standards only apply to a father who has preserved his right to consent by filing written objections. A father, putative or legal, that fails to file timely written objections after proper notice of a hearing has been served need not consent to an adoption. Accordingly, such a father's status is immaterial. This Court

must clarify *Pushcar*'s application to the statutory duty to file written objections after proper notice of a hearing has been served.

III. ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law I: Whether, when a juvenile court, agency, or person given notice of the petition pursuant to R.C. 3107.11(A)(1) fails to file an objection to the petition within fourteen days after proof is filed pursuant to R.C. 3107.11(B), their consent to the adoption is unnecessary regardless of whether a paternity action is pending.

The law in Ohio is that a probate court must refrain from proceeding with the adoption of child while a paternity action is pending in juvenile court. *In Re Adoption of Pushcar*, 110 Ohio St. 3d 332, 2006-Ohio-4572, 853 N.E. 2d 647, syllabus. There is an open question, however, regarding whether *Pushcar* and its progeny override the statutory mandates of R.C. 3107.11. This Court should grant review to clarify the interplay between the common law procedural principles in *Pushcar* and the statutory procedure mandated in Chapter 3107 of the Revised Code. In so doing, this Court should hold that *Pushcar* and its progeny, which make no mention of R.C. 3107.11 or R.C. 3107.07(K), do not override the statutory mandates of Chapter 3107.

Certainly, *Pushcar* proscribes finalizing an adoption while an objecting father's status between putative father and legal father remains unresolved due to a pending paternity action. This status is crucial for determining which standard to apply before abrogating the objecting father's consent. But, the statutory obligation to schedule the adoption hearing and provide notice requiring either a putative father or legal father to file written objections to preserve his due process rights has not been so proscribed. As is the case here, the status of a father that fails to file timely written objections is meaningless. Beasley's status, as determined by the paternity petition, became meaningless when he failed to satisfy the requirements of R.C. 3107.07(K) and this Court's prior mandate requiring written objections. See *In re Adoption of Zschach*, 75 Ohio St. 3d at 650, 665 N.E.2d 1070 (1996); *In Re Adoption of A.N.*, 2013-Ohio-3871, 997 N.E.2d

1244, (3rd Dist.); *Matter of the Adoption of T.L.S.*, 12th Dist. Fayette No. CA2012-02-004, 2012-Ohio-3129.

The General Assembly has carefully crafted, and amended, Chapter 3017 in order to “streamline the adoption process and to reduce the time needed to finalize an adoption.” *T.L.S.*, *supra*. In so doing, the General Assembly has created mandates that probate courts must follow. Specifically, R.C. 3107.11 requires, without limitation, that “[a]fter the filing of a petition to adopt...a minor, the [Probate Court] **shall** fix a time and place for hearing of the petition.” R.C. 3107.11(A) (emphasis added). “The hearing may take place at any time more than thirty days after the date the minor is placed in the home of the petitioner.” *Id.* The statute further requires that “[a]t least twenty days before the date of the hearing, notice of the petition and the time and place of the hearing shall be given.”¹ Despite these mandates, the First District found that the probate court was not obligated to act as instructed by the statute. Instead, the lower courts here held that this Court’s decision in *Pushcar* overrides the statutory mandate. It is this interpretation of *Pushcar* that creates significant procedural ambiguity.

This Court has long held that the “main consideration in construing a statute is the legislative intent based on a review of the language used.” *In re Adoption of Koszycki*, 133 Ohio App. 3d 434, 437–38, 728 N.E.2d 437, 439 (1st 1999) (citing *Wachendorf v. Shaver*, 149 Ohio St. 231, 236, 78 N.E. 2d 370 (1948)). Accordingly, “it is the duty of the courts to give a statute the interpretation its language calls for where this can reasonably be done, and the general rule is that no intent may be imputed to the Legislature in the enactment of a law, other than such as is supported by the language of the law itself.” *Id.* (internal citation omitted). This principle is

¹ The notice procedures of R.C. 3107.11 have been held to sufficiently protect the due process rights of all parties entitled to notice of a petition to adopt and notice of the time and place for hearing. See *In re Adoption of Walters*, 2007-Ohio-7, 112 Ohio St. 3d 315, 859 N.E.2d 545 (“[t]he due process rights of the parent have been protected once that parent has been given notice of the hearing” pursuant to R.C.3107.0661).

based on “the presumption that the legislature knows the meaning of words and chooses the specific words contained in a statute to express its intent. Consequently.....a court may not ignore the plain language of the statute ‘under the guise of statutory interpretation or liberal or narrow construction.’” *Id.* (internal citation omitted). “[S]trict construction does not require that we interpret statutes in such a manner that would mandate unjust or unreasonable results.” *Id.*

Applying this principle to the mandates of R.C. 3107.11, the First District’s decision affirming the probate court, ignores the plain language of the statute. It must be presumed that the legislature intended the use of the word “shall” to be mandatory in both instances. By deciding that *Pushcar* creates a stay on all action, even action that the probate court indicated was the procedure it followed for years before issuing its decision in this case, R.C. 3107.11 has been ignored. Reading R.C. 3107.11 together with *Pushcar*, the only logical result is that *Pushcar* prevents the finalization of an adoption while a paternity action is pending, but it does not circumvent the statutory mandates of R.C. 3107.11 and the duties placed on the parties that flow therefrom. This is consistent with the expressed intent of the General Assembly to reduce the time needed to finalize an adoption.

This Court’s most recent decision addressing the limitations on probate courts following *Pushcar* rejects any notion that a probate court cannot act to reduce the time needed to finalize an adoption while a paternity action is pending by scheduling a finalization hearing and issuing the statutory notice to the putative father as required by R.C. 3107.11. *State ex rel. Allen Cty. Children Servs. Bd. v. Mercer Cty. Common Pleas Court, Prob. Div.*, 2016-Ohio-7382, ¶ 37 (October 20, 2016). In *Allen County*, this Court rescinded a peremptory writ of prohibition against a probate court proceeding with an adoption petition due to the Juvenile Court’s continuing jurisdiction over the same child. *Id.* at ¶ 37. *Allen County* reconciled the Court’s prior

opinion in *Pushcar* and the “bedrock proposition” that the first court of competent jurisdiction addressing the long-term fate of a child retains exclusive jurisdiction in finding that the Probate Court does, in fact, have exclusive jurisdiction to proceed with an adoption despite a Juvenile Court’s concurrent jurisdiction. *Id.* The only limit on a Probate Court’s jurisdiction is that it may not *finalize* an adoption until the Juvenile Court has determined paternity.²

Similarly, this Court specifically addressed the duty of a putative father to “file an objection within 14 days after he has been given notice of the filing of an adoption petition.” *In re Adoption of H.N.R.*, 2015-Ohio-5476, ¶ 18, 145 Ohio St. 3d 144, 149, 47 N.E.3d 803, 808, *reconsideration denied*, 2016-Ohio-899, ¶ 18, 145 Ohio St. 3d 1411, 46 N.E.3d 704.³ This Court, 10 years after issuing its decision in *Pushcar*, made no effort to carve out an exception to the notice requirement that triggered the duty to object. Quite to the contrary, this Court reiterated the statutory duty to object, without exception. *Id.*

This result is consistent with cases from multiple districts after the *Pushcar* decision that hold that the sending of notice pursuant to R.C. 3107.11 prior to paternity being established is proper. In the *Matter of the Adoption of T.L.S.*, 12th Dist. Fayette No. CA2012-02-004, 2012-Ohio-3129, ¶17, the birth father of the child filed a paternity action in juvenile court on September 16, 2011. On September 21, 2011 the petition for adoption was filed. *Id.* ¶18. Notice of the hearing and petition for adoption was received by the birth father on October 11, 2011. *Id.* ¶11. The court did not make a final finding of paternity until October 26, 2011. *Id.* ¶17. Again, the probate court issued the notice pursuant to R.C. 3107.11 prior to the determination of

² This holding is consistent with the direct mandate of R.C. 3107.11 which states specifically states that [a]fter the filing of a petition to adopt...a minor, the [Probate Court] shall fix a time and place for hearing of the petition.” R.C. 3107.11(A).

³ Appellants’ research has revealed only one court that has cited *Pushcar* in its decision and R.C. 3107.07(K). That decision was H.N.R. which states that the statutory requirement to object remains unchanged by *Pushcar*.

paternity. The court found that the birth father's consent was not required, in part, because he failed to timely object to the petition pursuant to R.C. 3107.07(K) after having received notice under R.C. 3107.11. *Id.* ¶¶12, 26.

Similarly, in *In Re Adoption of A.N.*, 2013-Ohio-3871, ¶ 2, 997 N.E.2d 1244, 1253 (3rd Dist.), a petition for adoption was filed on February 15, 2012. Prior to the birth of the child, the birth father registered with the Ohio Putative Father Registry. *Id.* ¶3. After filing the petition, the adoptive parents moved the probate court to stay DNA testing pending a hearing on the issues of consent and best interest. The probate court denied the motion. *Id.* ¶¶3-4 On April 24, 2012 the birth father of the child filed a paternity action in juvenile court. *Id.* ¶4.⁴ On July 2, 2012 the adoptive family filed an amended petition for adoption and requested that the matter be set for a consent hearing all while the paternity action was still pending. *Id.* ¶5. On July 5, 2012, even though, as here, the custody action was fully disclosed to the court and was pending, the probate court sent notice of the hearing to the birth father pursuant to R.C. 3701.11. *Id.* ¶6. The court ultimately determined that the notice was deficient because it failed to inform the birth father of the time and place of the hearing. *Id.* ¶32.⁵ But, the court took no issue with the notice having been sent even though a paternity action was pending at the time. A second notice was sent on August 20, 2012 to which the birth father failed to timely object. *Id.* ¶¶12, 14. Ultimately, the probate court found that the consent of the birth father was required despite his failure to file timely objections. *Id.* ¶17. But, the Third District found that the trial court had erred and that the birth father's failure to file timely objections rendered his consent unnecessary. *Id.* ¶31.

⁴ The birth father was a minor at the time the paternity action was filed and properly filed the action through his parents granting him standing before the Court. *A.N.*, ¶4.

⁵ The probate court ultimately issued a second notice that the birth failed to object to and as a result his consent to the adoption was not required pursuant to R.C. 3107.07(K). *A.N.*, 2013-Ohio-3871, ¶33.

Yet another appellate court found that notice pursuant to R.C. 3107.11 is permissible prior to the conclusion of a paternity action in *In re Adoption of G.B.* 3rd Dist. Seneca No. 13-10-01, 2010-Ohio-5059. In *G.B.*, a paternity action was filed in juvenile court on December 6, 2006. *Id.* ¶6. On February 7, 2007 a petition for adoption was filed and a notice pursuant to R.C. 3107.11 was sent to the birth father that same day. *Id.* ¶2, 6.⁶ On April 26, 2007 paternity was established. *Id.* Accordingly, a probate court may permissibly send notice pursuant to R.C. 3107.11, thereby triggering the duty to object, while a paternity action is pending. The Supreme Court of Ohio has chosen not to extend the holding of *Pushcar* in the 12 years since the decision was issued. (See *H.N.R.*, ¶18 (Holding that a putative father must file objections as required by R.C. 3107.07(K). This duty is only invoked if the putative father has received notice pursuant to R.C. 3107.11. The holding places no limitation on the category of putative fathers that must object. Instead, the Supreme Court of Ohio finds that all putative fathers must file written objections.

Importantly, the practical application of the First District's decision here, which out of step with this state's other districts, creates tremendous uncertainty. A probate court cannot not reject the filing of a petition for adoption at the time of filing as it would be a denial of Constitutional access to the courts; and, requiring some sort of *sua sponte* stay would run directly contrary to the plain language of the General Assembly in R.C. 3107.11. Until the General Assembly amends Chapter 3107, or the Supreme Court specifically extends the holding of *Pushcar* consistent with the General Assembly's legislative intent, Ohio appellate courts should apply the plain language of the Chapter 3107 in accordance with the instruction of the Supreme Court. A probate court is

⁶ After receiving notice, despite the pending paternity action, the birth father timely objected. *In re Adoption of G.B.* 2010-Ohio-5059, ¶2.

not free to disregard its statutory mandates in reliance of a stay reference from this Court in *Pushcar* that is neither codified nor crystalline.

IV. CONCLUSION

For the foregoing reasons this case is of great public interest and this Court should exercise jurisdiction over the Adoptive Parents proposition of law.

Respectfully submitted,

Dated: September 5, 2017

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Memorandum in Support of Jurisdiction of Appellant's has been served via regular mail and email upon the following counsel of record, this 5th day of September, 2017:

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