

IN THE SUPREME COURT OF OHIO

IN RE: THE ADOPTION OF:

: Case No. 2021 - 22-0159

: On Appeal from the Van Wert
County Court of Appeals,
Third Appellate District

H.P.,

JEFFREY P. POHLMAN AND NICOLE D.
POHLMAN, AND JOSEPHINE G. DAVIS -
APPELLANTS

: Court of Appeals
Case No.: 15-21-03

vs.

:
Adoption Involved

KAIDIN WHITROCK, ET AL. - APPELLEE

MEMORDANDUM IN SUPPORT OF JURISDICTION AS REQUESTED BY
APPELLANTS – AMICUS CURIAE, OHIO ADOPTION LAW ROUNDTABLE

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I. IDENTITY OF AMICUS CURIAE- INTEREST OF AMICUS CURIAE

OHIO ADOPTION LAW ROUNDTABLE

The Ohio Adoption Law Roundtable is an association of attorney-fellows who are nationally recognized for their competence in and dedication to the field of adoption law. The Roundtable meets regularly to discuss the complexities of Ohio adoption law, to promote adoption law reform, and to support the highest standards of ethical practice.

Founded in 1998, the Ohio Adoption Law Roundtable subscribes to the code of ethics and membership rules of the American Academy of Adoption Attorneys, although it is a separate and distinct organization. The fellows of the Roundtable are all fellows in AAAA. The ultimate goal of the Roundtable is to promote the best interests of children and families.

The Ohio Adoption Law Roundtable offers an ongoing program of continuing legal education, not only for its own fellows and Roundtable attendees, but for the bench and the general bar as well. Its members testify regarding pending legislation and submit amicus briefs for consideration by courts.

STATEMENT OF AMICUS CURIAE

Amicus Curiae – the Ohio Adoption Law Roundtable – urges the court to hear this appeal. The appellate decision in this case below if allowed to stand will have a massive impact on Ohio adoption law and practice. It will complicate the process, delay litigation, and increase the costs to the petitioners. It will not promote the best interests of children or families. It will create a conflict between the Ohio appellate districts.

I. STATEMENT OF PUBLIC INTEREST

This case is part of a series of Ohio cases over the last twenty-five years dealing with the parental rights of non-adjudicated fathers. The case below will render the putative father registry which has been in effect for the last twenty-five years inoperable. R.C. 3107.061-.069

Originally under the 14th amendment of the U.S. Constitution, for a child born out of wedlock the choice to surrender that child to adoption was solely the decision of the biological mother. But a series of cases before the U.S. Supreme Court (in the 1970s and 1980s) ruled that even though a child may have been born out of wedlock, the father's paternal rights should be constitutionally protected, provided the father can establish a biological link to the child. See, Stanley v. Illinois, 405 U.S. 645 (1972), Quillion v. Walcott, 434 U.S. 246 (1978), Caban v. Mohammed, 441 U.S. 380 (1979); Lehr v. Robertson, 463 U.S. 248 (1983)

Because domestic adoption is handled at the state level, responsibility lies with each state to have in place a system for establishing paternal rights. Every state has a provision for fathers to voluntarily acknowledge paternity or the possibility of paternity of a child born outside of a marriage. The Federal Social Security Act requires states to have in place procedures for mothers and putative fathers to acknowledge paternity of a child, including a hospital-based program for the voluntary acknowledgment of paternity that focuses on the period immediately before or after the birth of the child. The procedures must include that, before they can sign an affidavit of paternity, the mother and putative father will be given notice of the alternatives and legal consequences that arise from signing the acknowledgment. Currently there is no Federal law in place regulating father registries or creating a national registry.

At least 24 states have established paternity registries where putative fathers can indicate their intention to claim paternity including Alabama, Arizona, Arkansas, Delaware, Florida,

Georgia, Illinois, Indiana, Iowa, Louisiana, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Mexico, New York, Ohio, Oklahoma, Tennessee, Texas, Utah, Virginia, and Wyoming.

These registries were put in place to protect the non-marital father from fraud by providing him with legal notice of a planned adoption of a child, provided he registers within a limited timeframe. In Ohio that time frame is any time after conception up to 15 days after the birth of the child (i.e. 9 months (40 weeks) plus 15 days or approximately 295 days after copulation). *See*, R.C. 3107.06 (B).

The 2014 legislation hearings on this issue/statute brought forth testimony from numerous sources including prolife groups and the adoption bar.

Adoption is an important issue, in light of the current national discussion on the availability of abortion to deal with unwanted pregnancies -- the need for a workable and timely adoption alternative is clear.

Because of the COVID-19 and drug addiction crises in this country, there are an increasing number of children in foster care who are in need of permanent placement. One in nine children are now being raised by a grandparent. This number has increased in recent years due to the drug crises. These families may after years of no parental involvement seek grandparent adoption.

The number of children in foster care who are in need of permanent placement has increased. Given the recent pattern of children's services agencies to merely place children in the legal custody of their non parental caregiver rather than terminating parental rights and doing an agency adoption, more and more caregivers are being forced to bring private adoptions to secure the child's future through adoption.

Likewise as an increasing number of children are non-marital and the number of stepparent adoption are on the rise.

The need for simplified adoption procedure for the benefit of children in need of a permanent home was even discussed by his Holiness Pope Francis in a recent address. General Audience of 5 January 2022, www.vatican/content/Francesco/en/audience. App. A This is an important issue.

III. STATEMENT OF FACTS

The Amicus Curia adopts the statement of facts contained in the Appellant Pohlman's brief.

IV. ARGUMENT

Proposition of Law No. 1

The brightline deadlines set forth in Ohio's adoption statutes must be enforced to provide the birthmother with the ability to make prompt long-term decisions regarding the minor child on a timely basis and ensure equal treatment under the law.

A. The early determination of the biological father's legal status serves to expedite and simplify the adoption process.

For at least the last forty-five years, Ohio law has determined the legal status of the biological father as either the putative father or the legal father as of the time of the adoption petition. Beverly Sylvester. "The Revised Law of Adoption in Ohio", 7 Cap. U.L.R. 219 (1977). This determination then shapes how the adoption will be plead, how service will be made, and

how the court will determine whether the father's consent can be excused. R.C. 3107.05 (A) (10); R.C. 3107.061; R.C. 3107.0614; R.C. 3107.067; R.C. 3107.17.

A putative father is a party to the adoption only if he has timely registered with the putative father registry. A putative father's consent is necessary only if he has not willfully abandoned the birth mother "during the pregnancy up to the time of surrender of the minor, or the minor's placement of the home of the petitioners.

Thus as of fourteen days after the filing of the petition, plus the time the return of service on the putative father is docketed by the probate court, all of the events necessary for a determination of the putative father's consent status have occurred, with the exception of the completion of any parentage action, pending prior to the petition.

In contrast, a legal father's consent is necessary unless he has without justifiable cause failed to provide more than the de minimis contact with the child or provide for maintenance and support for period of at least one year prior to the filing of the petition. Obviously if the child is under age one, a legal father's consent cannot be excused. This standard is more stringent than the putative father standard.

If as In Re the Adoption of H.P. suggests birthfather can file for parentage after the petition is filed, he can increase the petitioner's burden of proof in order to excuse his consent. He can also invalidate the requirement that he needed to file with the putative father registry. Legal fathers need not register. R.C. 3107.61.

In addition under Ohio case law upon being found to be the legal father, the one year "look back" period is restarted and all prior failings as a parent are forgiven.

Thus the adjudication of the necessity of the biological father's consent is pushed out for at least a year and the pleadings must be refiled and service made again, In re Adoption of

Sunderhaus, 63 Ohio St. 3d 127 (1992). The litigation expands to include a second court, the juvenile court. A motivated father can then take the necessary corrective actions to guarantee his right to withhold his consent. Even if the father does not then support and participate in the child's life during the second one year "look back" period, the petition cannot be heard for a year. Sunderhaus, supra. In effect the biological father has an iron clad means of blocking the adoption and any kind of balancing of the child or birthmother's interests and needs against his needs is dispensed with.

Allowing a putative father to establish legal parentage after the filing of an adoption petition is contrary to the state's compelling interest in early permanence for children. In re Adoption of Zschach, 75 Ohio St. 3d 648, 650-652 (1996) and In re Adoption of H.N.R., 145 Ohio St. 3d 144.

The change in the process of adjudicating the need for father's consent should not be made by a single district appellate court.

B. If the In re the Adoption of H. P. decision is allowed to stand, it will apply to all adoptions including stepparent, grandparent, and legal custodian adoptions. The result will be inequitable to children and caregivers.

While the In re the Adoption of H.P. case is a private infant adoption, most adoptions do not involve infants, but rather older children being adopted by their relatives, grandparents, stepparents, or legal custodians.

In these circumstances, the absent, non-participatory fathers and the child have benefited from the petitioner's devotion and gratuitous care of the child for an extended period prior to the

adoption filing. The child may well be bonded to the petitioners and consider them to be his/her parents. However, if the non-adjudicated father can bring a parentage action after the filing of the petition and before the consent hearing, he will be forgiven his previous failings as a parent and can block the adoption. Sunderhaus, supra.

The probate court can only consider and balance the rights and needs of the child against the interests of the father after a finding that the father's consent has been given or excused. See e.g. In re Adoption of Groh, 2003 Ohio 3087 (2003). Allowing the additional one year "look back" period will result in these children being stuck and being unable to move into a permanent family configuration.

In effect the Third District Court of Appeals' opinion in this matter would impact any future adoption cases which involve a putative father, including but not limited to, the following types of cases:

1. An infant has an unregistered putative father. The birthmother places the infant for adoption and an adoption petition based upon R.C. 3107.07(B) is filed. A search of the putative father registry is conducted and finds no registration. Notice is not required as the putative father has not registered in the timeframes required. See, R.C., 3107.11 Fourteen days after the petition for adoption the putative father files to establish paternity with a juvenile court and seeks to intervene in the adoption he learned from a friend was pending. The matters are set for pretrials and hearings in both Probate Court and Juvenile Court and litigation in both courts commence. Note: this litigation can occur in separate counties if the birthfather lives in a county different than the birthmother or adoptive couple. Prior to the final adoption hearing, the putative father is determined to be the legal father by the juvenile court. Under the Third District Court of Appeal's ruling, the adoptive couple must now amend their adoption petition to reflect that the putative father is now a legal father, the Notice of Adoption must now also be served on the father (See R.C. 3107.11), and time is given for the father to object (see R.C. 3107.07[K]). The father files an objection. As the determination of paternity was less than one year old at the time of the final hearing on adoption the exception in R.C. 3107.07(A) does not apply and the adoption fails as the consent of the father is necessary. (see Adoption of Sunderhaus 63 Ohio St.3d 127, [1992]) The father did not have to register, provide any support or communication to the birthmother during her pregnancy, or provide any support to the minor child for the adoption to fail. See, R.C. 3107.07(B). However, the child is now almost a year or older, the adoption case must be dismissed and the matter proceeds in juvenile court. Custody will be determined between the birthmother and birthfather, as neither is "unfit" as that

term is defined in juvenile court, the adoptive couple at best may be awarded some limited visitation if they pursue that option.

2. The birthfather was put on the birth certificate by the birthmother at birth as they were dating. Shortly thereafter, the birthparents break up and the birthfather stops helping with the child. The birthmother eventually marries when the child is four (4) years old. Things go well and the step-father desires to adopt the minor child as he has become the child's pseudo parent and the child is self-conscious that her siblings have a different last name than her. The step-father when the child is six (6) years old files for adoption. The putative father is notified as he is on the birth certificate (being on the birth certificate is similar to being on the putative father registry and entitles him to notice). He files an objection and files with the juvenile court to establish paternity. There is a hearing on consent and a hearing on best interest finding consent under R.C. 3107.07(B) is unnecessary and the adoption is in the best interest of the child; however, paternity is established two (2) days prior to the final hearing of adoption. The step-father must due to the Third District Court of Appeals' decision now amend the adoption petition to reflect that the putative father is now a legal father, the Notice of Adoption must again be served on the father. The father's original objection (typically stands as against the amended petition but some father's file a second objection). As the determination of paternity is less than one year from the new hearing on consent, the exception in R.C. 3107.07(A) does not apply and the adoption fails as the consent of the father is necessary even though he failed to communicate and support for over six (6) years. If the father continues to ignore the child, the step-father must wait a year to try again. If the father files for visitation, the juvenile court will grant it and force the child to accept the birthfather into the child's life whether the child wants that option or not. There will then be no adoption unless it is filed as an adult adoption when the child turns eighteen (18).

3. The birthmother has a child out of wedlock while in college and does not stay with the putative father who she only knows casually. The child is two (2) years old with the birthmother dies in a car accident. The maternal grandparents obtain guardianship or legal custody without any issue. A year later they file for adoption. The birthfather discovers that an adoption has been filed, he files to intervene in the adoption and files to establish paternity, he also files to terminate the guardianship and/or to obtain legal custody. The putative father is established to be the biological father prior to the final adoption hearing. As paternity was less than one year from being established, the exception in R.C. 3107.07(A) does not apply and the adoption fails as the consent of the father is necessary. The adoption is dismissed. The grandparents cannot prove the birthfather is unfit as he has never had the child in his care custody or control. The guardianship is terminated and/or legal custody is awarded to the father.

The costs of having to fight the father both in probate and juvenile court, the delays of the second one-year "look back" period and the multiple adoption petitions would certainly

discourage the petitioners from bringing an adoption. This result would be counter to the child's best interests. In re Zschach, *suora*

The inability to ever make the child a permanent part of the family unit might well discourage the legal custodians from becoming involved with the child. This is also not in the public interest. Ohio children deserve and need permanent homes. In re Zschach, *supra*; In re H.N.R., *supra*

C. The proposed "new" system for dealing with the rights of non-consenting but non-participatory fathers may well set up a jurisdiction shopping and "adoption tourism" scenarios.

If the various Ohio appellate jurisdictions have different interpretations of R.C. 3107.06 (B)(3), prospective adoptive families and birthparents may seek out an adoption match which will allow them to litigate in a more friendly court and avoid the more stringent requirements which follow the In Re the Adoption of H.P. precedent.

If the In Re the Adoption of H.P. holding is implemented statewide, families and birthmothers may well seek out matches which can be finalized in other states with more favorable laws and more timely finalization options. See, R.C. 5103.20 (Interstate Compact) As more than 34 states have some form of putative father registries, this is a viable option. Rachel Shaw, National Council on Adoption Website, "Putative Father Registries" Adoption Advocate #96 (2016).

An eighteen month to two year "at risk" period prior to finalization is an unacceptable risk to many birthmothers and families.

Unfortunately this will result in fewer families' seeking to adopt Ohio's children who need permanent homes.

D. The implementation of the proposed changes in the Ohio's putative father law will create considerable chaos as courts and perhaps the legislature struggle to react to the changes.

Changing Ohio's adoption laws as suggested in In Re the Adoption of H.P. will require a number of other changes in the adoption code as a whole. A number of sections of the adoption code would need to be amended to integrate the changes into the code. See, e.g. R.C. 3107.062; R.C. 3107.06 (B) (3); R.C. 3107.01 (H), R.C. 3107.07 (B).

It is unclear how long these changes would take to complete. In the meantime children and families would experience uncertainty and anxiety.


If the law is to change it should occur through the legislative process which could weigh all the parties' interest and re-integrate the various legal provisions.

IV. CONCLUSION

The appellate opinion in In Re the Adoption of H.P. has the potential to make a significant change in Ohio adoption law. The rights of families, birthmothers and children are at stake.

For reasons discussed above, Appellants request that this Court accept jurisdiction in this case so that the important issues can be reviewed on their merits. This case is of Statewide interest and public policy interest.

Respectfully Submitted,

BY: 
Susan Garner Eisenman (#0020121)
The Ohio Adoption Law Roundtable

CERTIFICATE OF SERVICE


I hereby certify that I have served a copy of the foregoing *Memorandum in Support of Jurisdiction as Requested by Appellants – Amicus Curiae, Ohio Adoption Law Roundtable* by United States Postal Service Mail this 10th day of February, 2022, upon the following:

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APPENDIX A

Pope Francis

General Audience

Paul VI Audience Hall

Wednesday, 5 January 2022

POPE FRANCIS

GENERAL AUDIENCE

*Paul VI Audience Hall
Wednesday, 5 January 2022*

[Multimedia]

Catechesis on Saint Joseph - 6. Saint Joseph, Jesus' foster father

Dear brothers and sisters, good morning!

....
(Portion of Text Omitted)

I hope that the institutions will always be prepared to help with adoptions, by seriously monitoring but also simplifying the necessary procedures so that the dream of so many children who need a family, and of so many couples who wish to give themselves in love, can come true.

....