

IN THE SUPREME COURT OF OHIO

IN RE: THE ADOPTION OF: : Court Case No. 2022 –22-0159  
: On Appeal from the Van Wert  
: County Court of Appeals,  
H.P., : Third Appellate District  
: Court of Appeals  
JEFFREY AND NICOLE P. : Case No.: 15-21-03  
AND JOSEPHINE D. – :  
APPELLANTS :  
vs. :  
: **Adoption Involved**  
KAIDIN W., ET AL. – APPELLEE :

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BRIEF ON THE MERITS –  
AMICUS CURIAE, OHIO ADOPTION LAW ROUNDTABLE

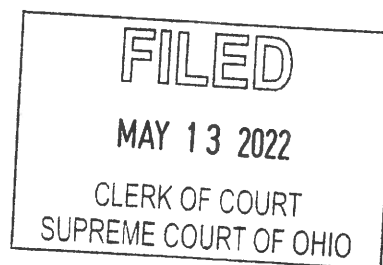
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Jerry M. Johnson (#0006509)  
Christine M. Bollinger (#0075665)  
Attorneys at Law  
400 W. Worth Street  
Lima, Ohio 45801  
Telephone: (419) 222-1040  
Facsimile: (419) 227-1826  
E-mail: [jc@hjlaw.biz](mailto:jc@hjlaw.biz)  
Attorneys for Appellants Pohlman

John C. Huffman (#0041925)  
Attorney at Law  
540 W. Market Street  
Lima, Ohio 45801  
Telephone: (419) 227-3423  
Facsimile: (419) 221-3592  
E-mail: [jch@540westmarket.com](mailto:jch@540westmarket.com)  
Attorney for birthmother, Josephine D.

Elizabeth M. Mosser (#0090068)  
Attorney at Law  
110 South Main Street  
Marysville, Ohio 43040  
Telephone: (937) 644-3849  
Email: [emosser@marysvillelawfirm.com](mailto:emosser@marysvillelawfirm.com)  
Attorney for Appellee – Kaidin Whitrock

Susan Garner Eisenman (#0020121)  
Attorney at Law  
4900 Reed Road  
Suite 204  
Columbus, Ohio 43220  
Telephone: (614) 326-1200  
Facsimile: (614) 326-1205  
E-mail: [adoptohio@aol.com](mailto:adoptohio@aol.com)  
Attorney for Amicus Curiae, Ohio Adoption  
Law Roundtable



## TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities	i-ii
I. Identity of Amicus Curiae – Interest of Amicus Curiae	1
II. Statement of Facts	2
III. Argument in Support of Propositions of Law	2
<u>Proposition of Law No. 1</u>	2
<b>The clear bright-line deadline to alter a father’s status in the adoption by obtaining a determination of parentage is the date the adoption petition is filed. This deadline is an important part of the adoption code which is intended to facilitate prompt adoption adjudications and finalizations.</b>	
<u>Proposition of Law No. 2</u>	6
<b>R.C. Chapter 3107 – Adoptions – was designed to balance the rights of the adoption triad members and to promote the child’s best interest. The appellate decision is not consistent with that purpose.</b>	
<u>Proposition of Law No. 3</u>	9
<b>If the <u>In re the Adoption of H.P.</u> decision is allowed to stand, it will apply to all adoption including stepparent, grandparent, and legal custodian adoptions. The result will be inequitable to children and caregivers.</b>	
IV. Conclusion	11
V. Signature and Certificate of Service	13

## TABLE OF AUTHORITIES

<u>The United States Supreme Court Cases</u>	<u>Page</u>
In re Gault 387 U.S. 1, 13; 18 L. Ed. 2d 527, 538; 87 S. Ct. 1428, 1436 (1967)	8
Lehr v. Robertson 463 U.S. 248 (1983)	5
Planned Parenthood of Central Mo. V. Danforth (1976), 428 U.S. 52, 74; 49 L. Ed. 2d 788; 96 S. Ct. 2831	7
<u>Ohio Supreme Court Cases</u>	<u>Page</u>
In re Adoption of Sunderhaus, 63 Ohio St. 3d 127 (1992)	4
In re Adoption of Zschach, 75 Ohio St. 3d 648-652 (1996)	2, 4
In re Adoption of S.L.C., 2005 Ohio 7067	8
<u>Ohio Court of Appeals</u>	<u>Page</u>
Adoption of A.B. 2019 – Ohio-5383 (3 <sup>rd</sup> )	8
In re Adoption of Groh, 2003 Ohio 3087 (2003)	10
In re Brooks, 2003 Ohio 6348	3
In re L.G., 2019 Ohio 2422 (Sandusky County)	9
In re Adoption of P.K.H. 2019 Ohio 2680 (Scioto County) (4 <sup>th</sup> )	9
In re B.M.S. 2011 Ohio 714 (Franklin County)	9
In re Adoption of K.M.T., 2019 Ohio 4988 (5 <sup>th</sup> )	9
In re Adoption of Wagner, 87 Ohio St. 3 <sup>rd</sup> 1425 (1999)	9
In re Adoption of C.B., 2013 Ohio 1354	9

<b>Ohio Revised Code</b>	<b>Page</b>
R.C. 2151.414	2
R.C. Chapter 3107	6
R.C. 3107.01 (H)	12
R.C. 3107.05 (A)	2
R.C. 3107.061	2, 4
R.C. 3107.06 (B) (2)	3, 12
R.C. 3107.0614	2
R.C. 3107.062	12
R.C. 3107.065	4
R.C. 3107.067	2
R.C. 3107.07	2, 3
R.C. 3107.11	2
R.C. 3107.15	2

<b>The United States Constitution and Ohio Constitution</b>	<b>Page</b>
U.S. Constitution	6, 7
14 <sup>th</sup> Amendment, U.S. Constitution	7, 8
U.S. Constitution, Bill of Rights	9

<b>Non-Ohio Cases</b>	<b>Page</b>
<i>In Re Petition of Doe, (Baby Richard Case)</i> 159 III. 2d347 (1994)	3
<i>In re Clausen, (Baby Jessica case)</i> 442 Mich 648 (1993)	3

<b><u>Ohio Administrative Code</u></b>	<b><u>Page</u></b>
OAC 5101:2-42-05 (G)	2

<b><u>Miscellaneous</u></b>	<b><u>Page</u></b>
Beverly Sylvester, “The Revised Law of Adoption in Ohio”, 7 Cap. U.L.R. 219 (1977)	2
Rachel Shaw, National Counsel on Adoption website, “Putative Father Registries, Adoption Advocate #96 (2016)	12

**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 and Assisted Reproduction 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 reversal of the decision of the third appellant district in this matter. 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.

## **II. STATEMENT OF FACTS**

The Ohio Adoption Law Roundtable adopts the Statement of Facts contained in both of the appellants' briefs.

## **III. ARGUMENT**

### **Proposition of Law No. 1**

**The clear bright-line deadline to alter a father's status in the adoption by obtaining a determination of legal parentage is the date the adoption petition is filed. This deadline is an important part of the adoption code which is intended to facilitate prompt adoption adjudications and finalizations.**

Ohio law requires that in order to obtain a right to veto an adoption, a non-marital father must register with the putative father registry within 15 days of birth or file a parentage action prior to the filing of the adoption. R.C. 3107.05 (A); R.C. 3107.061; R.C. 3107.0614; R.C. 3107.067; R.C. 3107.07; Beverly Sylvester. "The Revised Law of Adoption in Ohio", 7 Cap. U.L.R. 219Z (1977). (Emphasis added)

This requirement facilitates a prompt adjudication and finalization of an adoption.

The state has a compelling interest in promoting early permanency for children in need of appropriate and stable homes. In re Zschach, 75 Ohio St. 3d 648 (1996)

It is the stated national child welfare policy that adoption is a positive option for providing such permanency. The Ohio administrative code, likewise, states that adoption is the preferred / least restrictive option for these children. OAC 5101:2-42 – 05 (G). The Ohio legislature has mandated prompt permanency for children in public agency custody and allows for involuntary termination of the rights of abandoning birthparents in private adoptions. R.C. 2151.414; R.C. 3107.11; R.C. 3107.15.

Allowing exceptions to the putative father registry requirements where father establishes legal paternity after the adoption is filed creates opportunities for defensive legal actions by fathers who would not affirmatively establish paternity but only establish paternity defensively as a last resort to losing their rights by adoption. It also opens the door to fraudulent actions by birthmothers who may make an end run around their otherwise irrevocable consents to termination of parental rights by establishing paternity in a man who may or may not be the father. E.g., (Baby Jessica case) *In re Clausen*, 442 Mich 648 (1993); (Baby Richard case) *In re Petition of Doe*, 159 Ill. 2d 347 (1994); *In re Brooks*, 2003 Ohio 6348.

If the filing of the paternity action occurs in the same general timeframe as the adoption, the paternity action should not be used as a means to defeat the intent and purpose of the putative father registry. A paternity action should not provide an easy and convenient way to cure a late putative father registration. Confusion and litigation occur when the paternity action is not concluded before the adoption action is filed, or the adoption is not finalized when the father files a defensive paternity action. Ohio has chosen to resolve this issue by fixing the father's status as of the date the adoption petition is filed. *See, e.g. In re Brooks, supra; R.C. 3107.06 (B) (3).*

Arguments for permitting exceptions to putative father registry requirements previously propounded have included paperwork errors, constitutional sufficiency of father-child relationships, the protective effect of legally established paternity, the timing of paternity establishment, the effect of prenatal abandonment, and the effect of mothers' thwarting fathers trying to support and/or develop relationships with children. None of these excuses have been found sufficient to set aside the putative father provisions.



Ohio has mandated that publicity campaigns work to inform unmarried fathers of what steps are necessary to assume responsibilities for the children born out of wedlock and how to protect their rights. R.C. 3107.065. Ignorance of the law is not an excuse. R.C. 3107.061.

Because of the *In re the Adoption of Saunderhaus* decision-allowing a late change in legal status not only allows the unregistered putative father standing to withhold consent, it also restarts the timeframe for a finding of abandonment and forgives all neglect prior to the parentage adjudication, in effect allowing the change creates a “do-over” for the putative father. *Saunderhaus*, 63 Ohio St., 3d 127 (1992)

The available “do-over” creates a higher, more protective, status for the belatedly adjudicated father than that enjoyed by marital fathers.

Since 1997, the proper application of the Ohio Putative Father Registry has been instrumental in providing early permanency for a countless number of Ohio children. Altering the legislation to provide relief to one non-marital father would cause injury to many children and families. The appellate decision should not be allowed to stand.

This Supreme Court has stated that the ultimate goal in the adoption process is to protect the best interests of children and ensuring that the adoption process is completed in an expeditious manner. See *In re Adoption of Zschach* (1996), 75 Ohio St. 3d648, 665 N.F.2d 1070; *In re Adoption of Ridenour* (1991), 61 Ohio St. 3d 319, 574 N.E.2 1055; Also see *In re Adoption of Baby Girl Hudnall* (1991), 71 Ohio App. 3d 376, 594 N.E2d 45. The Ohio Revised Code, which includes the provisions relating to a putative father, sets forth a statutory scheme in which an adoption may be completed in an expeditious manner. When the statutory adoption process is not followed, the entire matter becomes convoluted with inappropriate stays, irrelevant proceedings in courts without jurisdiction, and protracted litigation. If the statutory adoption

process is followed, then this Supreme Court's stated goal of completing the process in an expeditious manner will be met.

The United States Supreme Court acknowledged and accepted the legal basis and the constitutionality of the putative father registry in *Lehr v. Robertson* (1983), 463 U.S. 248, 771., Ed. 2d614,103 S. Ct. 2985. In *Lehr*, the Supreme Court rejected the putative father's claim that, even if the statutory scheme adequately protected a putative father's opportunity to establish a relationship with his child in the "normal case", he was nonetheless entitled to "special notice" because the trial court and the birthmother knew that he had filed an affiliation proceeding in another court. In rejecting this argument, the Supreme Court stated:

(t)his argument amounts to nothing more than an indirect attack on the notice provisions of the statute. The legitimate state interests in facilitating the adoption of young children and having the adoption proceeding completed expeditiously that underlie the entire statutory scheme also justify a trial judge's determination to require all interested parties to adhere precisely to the procedural requirements of the statute. The Constitution does not require either a trial judge or a litigant to give special notice to nonparties who are presumptively capable of asserting and protecting their own rights. Since the statutes adequately protected appellant's inchoate interest in establishing a relationship with the child, we find no merit in the claim that his constitutional rights were offended because the Family Court strictly complied with the notice provisions of the statute.

*Lehr*, 463 U.S. at 265

The ignoring of the clear statutory language relating to an adoption proceeding, allowing the establishment of paternity after the adoption petition is filed, and the allowing of the birthfather to retroactively change his status with the adoption proceeding, is "nothing more than an indirect attack" on the adoption process set forth in the putative father's provisions of the Ohio Revised Code. This is exactly what the U.S. Supreme Court would not permit in *Lehr*. "The

legitimate state interests in facilitating the adoption of young children and having the adoption proceeding completed expeditiously that underlie the entire statutory scheme” justifies the requirement that the court adhere precisely to the procedural requirements of the Ohio statutes.

Proposition of Law No. 2

**R.C. Chapter 3107 – Adoptions – was designed to balance the rights of the adoption triad members and to promote the child’s best interest. The appellate decision is not consistent with that purpose.**

To provide clarity and integrity to the adoption process, to balance the rights of all parties in the adoption process, and to protect the best interests of the children, state legislatures have enacted statutory schemes to address these issues. The true purpose of all of these statutory schemes, including the states that include a putative father registry, is to expeditiously secure the permanency for the child. The putative father must take some responsibility to even become a party in the adoption process. If he fails to timely register, or whatever the state statute requires, the putative father has failed to demonstrate his interest. If he does register, or otherwise secure his right to be heard pursuant to the state statute, there may be additional requirements that the state may impose relating to the putative father’s full commitment. The Ohio legislature decided that the putative father is entitled to notice if he timely registers, but his consent may not be required if he abandons the birthmother during pregnancy or if he failed to care for and support the child. This is the statutory scheme enacted by the Ohio legislature. This is the statutory scheme that must be followed in adoption proceedings in all Ohio courts.

The Ohio Adoption Law Roundtable believes that children should be recognized as individuals possessed of their own interests and rights, including the right to be part of a stable

and permanent family, and the right to remain part of that family once it is established with an expectation that the status will be permanent. These rights are constitutionally founded and are at the core of all liberties. The child's inalienable right to life and liberty in the family context must be protected. These constitutional interests are both procedural and substantive. Therefore, they should not be disturbed absent a compelling established competing interest that is entitled to constitutional protection. Even then, if the constitutionally protected interest is in conflict and evenly balanced, the conflict should be resolved in favor of the child.

Courts have increasingly recognized that children have rights under the United States Constitution, and it is unreasonable to remedy any purported breach of a biological parent's rights by curtailing the fundamental rights of the child. In the present case, the child has been in a proper legal adoptive placement. The delays in this litigated matter have been caused by the failure to follow the clear statutory adoption process. These delays have resulted in the child becoming fully integrated as a family member in the prospective adoptive family. The rights of the child must be addressed and protected. The appellate court in the present case failed to follow the statutory adoption process and failed to even consider the rights of the child. Only the rights of the birthfather were considered, which has created an equal protection issue under the 14th Amendment. A reversal of this case by this Supreme Court is critical to ensure that the rights of all parties in adoption proceedings in Ohio, most importantly the child's rights, are addressed.

It has long been recognized that children are persons with rights protected by the United States Constitution. "Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights." *Planned Parenthood of Central Mo. V. Danforth* (1976), 428 U.S. 52, 74; 49 L. Ed. 2d 788; 96 S. Ct. 2831. "[N]either the Fourteenth Amendment

nor the Bill of Rights is for adults alone.” *In re Gault*, 387 U.S. 1, 13; 18 L. Ed 2d 527,538; 87 S. Ct. 1428, 1436 (1967). By not following the statutory adoption process, the rights, and best interests of the child are being ignored.

In the present case, the appellate court would disregard the statutory adoption process and did not allow the prospective adoptive parents to present any evidence as to the allegation that the birthfather abandoned or failed to care and support the birthmother and the child. The third district appellate court has elevated the rights of the birthfather above the rights of all other parties in the adoption proceeding. This has created an imbalance in the adoption process, which is in contradiction to the balance created by the Ohio legislature. If the statutory adoption process is followed, the rights of all parties can be addressed. If the process is not followed, the whole system breaks down with lengthy delays occurring and additional issues arising.

A finding that the biological father’s consent was not necessary did not terminate the father’s parental rights.

[The] interest involved is the right to withhold consent to the adoption of the child. [This] does not constitute consent to the adoption of the child. *See Hess v. Bolden*, 5<sup>th</sup> Dist. Tuscarawas No. 2001AP080084, 2002 WL 54758, \*3 (Jan. 8, 2002). Rather, [the provision in question] “merely ‘provides for cutting off the statutory right of a parent to withhold his consent to the adoption of the child,’ leaving all other parental rights and obligation intact.” *Id. See also In re Adoption of Jorgensen*, 33 Ohio App.3d 207, 209 (3d Dist. 1986). Accordingly, until the court enters a final decree of adoption, the parent retains the rights and obligations of parenthood.<sup>1</sup> *In re Adoption of Jorgensen* at 209. If the probate court does not find that the adoption is in the best interest of the child, any parental rights that the parent lost due to the operation of R.C. 3107.07(K) are “necessarily restored.” *Id In re Adoption of A.B. 2019 – Ohio 5383*. (Emphasis added)

Thus Mr. Kaidin W’s rights are still open to adjudication at the best interest of the child hearing in which he is entitled to participate. *In re Adoption of S.L.C 2005 Ohio 7067*.

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<sup>1</sup> If there has been a determination of parenthood. In this case the Juvenile Court noted there was biological parentage but did not yet find legal parentage.

Cases in which the father's right were not terminated in spite of a finding that consent was unnecessary include *In re L.G.*, 2019 Ohio 2422 (Sandusky County); *In re Adoption of P.K.H.*, 2019 Ohio 2680 (Scioto County); *In re Adoption of K.M.T.*, 2019 Ohio 4988; *In re Adoption of C.B.*, 2013 Ohio 1354 and; *In re B.M.S.* 2011 Ohio 714 (Franklin County.)

Evidence at the best interest of the child hearing is not limited to the one-year "look back" period but can consider events prior to that time and events after the adoption was filed such as the "biological father" filing of paternity in this case, *In re Adoption of Wagner*, 87 Ohio St. 3 of 1474 (1999)

A finding that the putative father's consent is not necessary does not end the court's consideration. Rather, the finding that father's consent is not necessary, permits the court to move ahead with the consideration of and balancing of the best interests of the child and the rights of the parents. This allows the putative fathers' input and the possibility of defeating the adoption without granting them an absolute right to veto the adoption.

### Proposition of Law No. 3

**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. *In re 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 stepfather 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 stepfather 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 stepfather 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 stepfather 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 when 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.

#### **IV. CONCLUSION**

The Appellate court’s proposed revision in Ohio adoption law is not in the best interest of Ohio children and families.



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 operable putative father registries, this is a viable option. Rachel Shaw, National Council on Adoption Website, “Putative Father Registries” Adoption Advocate #96 (2016).

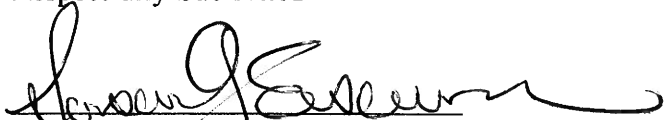
An eighteen month to two year “at risk” period prior to finalization is an unacceptable risk to many birthmothers and families.

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.

Respectfully Submitted



Susan Garner Eisenman (#0020121)  
Attorney for Amicus Curiae  
Ohio Adoption Law Roundtable

V. **CERTIFICATE OF SERVICE**

I hereby certify that I have served a copy of the foregoing Merit Brief – *Amicus Curiae, Ohio Adoption Law Roundtable* by United States Postal Service Mail this day of 2022, upon the following:

**Elizabeth M. Mosser, Esq.**  
Attorney at Law  
110 South Main Street  
Marysville, Ohio 43040  
*Attorney for Appellee – Kaidin W.*

**John C. Huffman, Esq.**  
540 W. Market Street  
Lima, Ohio 45801  
*Attorney for Appellani – Josephine D.*

**Jerry M. Johnson, Esq.**  
**Christine M. Bollinger, Esq.**  
400 W. North Street  
Lima, Ohio 45801  
*Attorney for Appellants – Jeffrey P. and Nicole P.*



Susan Garner Eisenman (#0020121)  
Attorney at Law  
4900 Reed Road  
Suite 204  
Columbus, Ohio 43220  
Telephone: (614) 326-1200  
Facsimile: (614) 326-1205  
E-mail: [adoptohio@aol.com](mailto:adoptohio@aol.com)  
Attorney for Amicus Curiae, Ohio Adoption  
Law Roundtable