

**IN THE SUPREME COURT OF OHIO**

**In the Matter of the Adoption of:** :  
**H.N.R.** : **Supreme Court Case No. 2014-2201**  
: :  
**C.S.M., Appellant** : **On Appeal from the**  
: **Greene County Court of Appeals,**  
: **Second Appellate District**  
: :  
**D.R. and M.R., Appellees** : **Court of Appeals Case No. 2014-CA-35**  
: :  
: **Trial No. 10384AD-14-14**  
: :  
: **Adoption Case**

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**MERIT BRIEF OF AMICUS CURIAE  
THE AMERICAN ACADEMY OF ADOPTION ATTORNEYS  
IN SUPPORT OF APPELLEES**

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## STATEMENT OF FACTS

Amicus curiae accepts the statement of the facts of this case recited in the brief by Appellees D.R. and M.R.

## STATEMENT OF INTEREST

The American Academy of Adoption Attorneys is committed to improving the lives of children by advocating for the benefits and stability provided through adoption. As an organization, and through its members and committees, the Academy has lent *Amicus Curiae* assistance in worthy cases, assisted and advised the State Department on implementation of the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption and the federal Intercountry Adoption Act of 2000, participated in the legislative process culminating in the introduction of the Federal adoption tax credit, provided input into the drafting and passage of state and federal adoption legislation, and advised in the drafting of the Uniform Adoption Act. In 2012, the Academy participated in efforts that resulted in the issuance by the Association of Administrators of the Interstate Compact on the Placement of Children of Regulation 12 regarding private/independent interstate adoptions effective October 1, 2012, so that placements in safe and stable permanent homes could occur more quickly. Also in 2012, the Academy worked with Congress to make permanent the Federal adoption tax credit which was set to expire at the end of 2012. In late 2013, the Academy was very

instrumental in the passage by Congress of the "Accuracy for Adoptees Act," which President Obama signed into law on January 16, 2014. This Act requires that a Federal Certificate of Citizenship for a child born outside of the United States reflect the child's name and date of birth as indicated on a State court order or State vital records document issued by the child's State of residence after the child has been adopted in that State, and thereby enables adoptive parents to change their child's date of birth to more accurately reflect the child's chronological age.

The Academy, because of its active involvement in the field of adoption law and practice, has an interest in the development and application of sound legal principles in this area of adoption law. The following is a list of the cases in which the Academy has expressed this interest, and lent assistance to courts as *Amicus Curiae* over the last 20 years: *In re F.T.R.*, 833 N.W.2d 634 (Wis., July 11, 2013); *Adoptive Couple v. Baby Girl*, 570 U.S. 2552, 133 S. Ct. 2552, 185 L. Ed. 2d 570 (US, June 25, 2013); *Adoptive Couple v. Baby Girl*, 398 S.C. 625, 731 S.E.2d 550 (S.C., July 26, 2012); *In re T.L.S.*, Slip Copy, 2012 WL 2708307, 2012-Ohio-3129, Ohio App. 12 Dist., July 09, 2012 (NO. CA2012-02-004); *Copeland v. Todd*, 282 Va. 183, 715 S.E.2d 11 (Va., September 16, 2011); *Arkansas Dept. of Human Services v. Cole*, 2011 Ark. 145, 380 S.W.3d 429 (Ark., April 07, 2011); *In re Adoption of Baby Girl P.*, 291 Kan. 424, 242 P.3d 1168 (Kan., October 29, 2010) ; *In re Adoption of G.V.*, 127 Ohio St.3d 1247, 937 N.E.2d 1285 (Ohio, October 07, 2010); *In re Adoption of P.A.C.*, 126 Ohio St.3d 236, 933

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App. 2 Dist., 1996) review denied, Cal. Sup. Ct., May 15, 1996; U.S. cert. denied; *JDS v Franks*, 182 Ariz. 81, 893 P.2d 732 (1995); *In re Baby Boy W.*, 315 S.C. 535; 446 SE2d 404 (1994); *Gibbs v. Ernst*, 647 A.2d 882, 538 Pa. 193 (Pa. 1994); *In re Clausen*, 442 Mich 648 (1993).

This brief was reviewed and approved to be filed by the Board of Trustees of the Academy.

### ARGUMENT

#### **Proposition of Law No. I:**

**A non-marital father obtains consent rights by filing with the putative father registry before or not later than 30 (now 15) days after the birth of his child under R.C. 3107.062.**

Appellant's real complaint is with the Ohio legislature. R.C. 3107.062 provides unequivocally that "for purposes of preserving the requirement of his consent to an adoption, a putative father shall register before or not later than thirty days after the birth of the child." Appellant asks Ohio's Supreme Court to abrogate a 19 year old existing law, to find unconstitutional a deadline of days in which a father must register that has been upheld routinely in Ohio and other states, and to substitute a law such that a father's registry filing at any time prior to an adoption filing would grant him consent and notice rights.

Appellant challenges registry deadlines which have already been repeatedly held constitutional in Ohio. See *In re Adoption of Snavely*, C.A. Case No. 2000 CA 20, 2000 Ohio App. LEXIS 4963 (Ohio Ct. App., Greene County, October 27, 2000); *In re K.M.S.*, 2005 Ohio 4739 (Ohio Ct. App., Miami County, Sept. 9, 2005); *In re Adoption of Osoro*, 2008 Ohio 6925

(Ohio Ct. App., Stark County, Dec. 30, 2008).

Other state courts echo Ohio's decisions on the constitutionality of registry deadline filings as protecting the states' interests in promptness. In two such cases, fathers challenged registry deadlines in Minnesota and Arizona where both states had 30 day putative father registry deadlines like the one in place in the instant case. In these two cases, fathers each filed one day late in their respective state registries, and each state court found the registry deadline constitutional and held against the fathers. *See Heidbreder v. Carton*, 636 N.W.2d 833, 840 (Minn. Ct. App. 2001); *Marco C. v. Sean C.*, 218 Ariz. 216, 181 P.3d 1137 (Ct. App. 2008).

The *Marco C.* court upheld its' state law, commenting that "the Legislature . . . meant for there to be, [and] everybody [to] be able to count on[,] a certain time period that has to be met." *Marco C. v. Sean C.*, 218 Ariz. 216, 220, 181 P.3d 1137, 1141 (Ct. App. 2008). Additionally, the *Marco C.* court made the point that father had more than 30 days in that "He [father] could have filed the notice at any time before the child was born. *Id.* at 1142. The policy reasons behind these and other similar decisions is to insure promptness for child permanency and finality in adoptions. As early as 1992, courts were clarifying legitimate state interests in creating putative father registries as "adoption procedures possessed of promptness and finality." *In re Robert O.*, 80 N.Y.2d 254, 264 (N.Y. 1992).

Appellant claims that "nothing is compromised by letting a man register as a

putative father any time before the adoption petition is filed.” (Appellant’s Brief, 27). Appellant considers only his own perspective which is reminiscent of other fathers challenging the constitutionality of registry deadlines. The *Marco C.* father also complained that registries “do not afford an unwed father much protection, particularly in the case of newborn adoptions,” *Marco C. v. Sean C.*, 218 Ariz. 216, 218, 181 P.3d 1137, 1139 (Ct. App. 2008).

Registries do not exist solely for fathers. Registries do benefit fathers by protecting their rights to notice and consent without reliance upon birth mothers. But very importantly, registries benefit children by insuring prompt and final permanent placement. Registries also benefit birth mothers by notifying them of fathers who timely signify a serious intent to establish paternity and assume parental responsibilities.

Extending the consent rights for a father whose registry filing is late does not insure that a responsible parent will emerge because a putative father registry filing does not establish paternity. This Court created an exception to Ohio’s registration law whereby a father who is seeking a paternity adjudication forces a stay upon a later filed adoption proceeding. *In re Adoption of P.A.C.*, 126 Ohio St. 3d 236, 933 N.E.2d 236, 2010-Ohio-3351 (2010).; *In re Adoption of Pushcar*, 110 Ohio St. 3d 332, 853 N.E.2d 647, 2006-Ohio-4572 (2006). That exception insures that a father will assume custodial and financial obligations if paternity is confirmed, and if paternity is not confirmed, the adoption action goes forward.

The result of the *Pushcar* exception is that the child ends up with a responsible parent(s). This is not so for the exception that the Appellant now urges upon the court and this is a critical distinction for the welfare of Ohio children.

Mothers benefit from registry deadlines as well. A mother's decisional timeline about an unplanned pregnancy is superimposed upon her by law and by physiology. It is essentially the period of pregnancy. Appellant complained that the timeline after birth is too short for fathers and he decries the need for time after birth to pay support and to demonstrate responsibility. *In re Adoption of H.N.R.*, 141 Ohio St. 3d 1454, Par. 18, 2014-Ohio-4959 (2014). Appellant claimed that fathers may be too distracted and too busy in children's first months of life to register with putative father registries or initiate the establishment of paternity. Such complaints of fathers about brief post birth timelines ignore the fact that fathers have nine full months of pregnancy to assume responsibilities to protect their parental rights. This 9 month plus 30 day timeline is more than ample time for fathers to file with Ohio's putative father registry and it importantly coincides with the crucial decision making period for pregnant women.

Filing with the putative father registry early in the pregnancy informs a mothers' abortion decisions. A woman may obtain a legal abortion until 22 weeks gestation.<sup>1</sup>

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<sup>1</sup> The University of New Mexico Physicians website offers abortion until 22 weeks gestation. Abortions conducted at under 9 weeks gestation are medical; abortions done after 9 weeks must be conducted surgically in a clinic, and abortions done after 12-16 weeks may require an overnight stay. <http://www.unmcrh.org/abortion-care/> (last visited Feb.22, 2015).

However, most women undergo abortion before 12 weeks of gestation.<sup>2</sup> Where a man investigates the possibility of pregnancy, provides support, and registers with the putative father registry in early pregnancy, the mother is able to both forecast a father's seriousness about assuming parental responsibility into her abortion calculus and her ability to act alone in surrendering the child. Ohio law facilitates mother's planning both by requiring prenatal support and by granting consent rights to those putative fathers who register timely. *See* R.C. 3107.07(B)(2)(c); R.C. 3107.062. While a mother may relinquish a child months or even years after birth, postponement of relinquishment for any period of time after birth necessarily exposes mothers and babies to increased opportunities to bond. Relinquishment after increased bonding necessarily severs a relationship that is more developed and involves that much more anguish and adjustment for mother and child. The Ohio legislature has recently moved to decrease the registration time from 30 to 15 days which assists and respects mothers in considering adoption. R.C. 3107.062 (2015).

It is not burdensome to require a father to commit himself within 15-30 days after birth to signify his intention to exercise his consent rights and to assume parental responsibility where a mother has subjected her life, her health and her finances to a

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<sup>2</sup> The Center for Disease Control reports that "In 2009, most (64.0%) abortions were performed at  $\leq 8$  weeks' gestation, and 91.7% were performed at  $\leq 13$  weeks' gestation." <http://www.cdc.gov/mmwr/preview/mmwrhtml/ss6108a1.htm> (last visited Feb. 23, 2015); The Guttmacher Institute reports that 66% of abortions occurred before 8 weeks of pregnancy with another 26% within the 12<sup>th</sup> week. [https://www.guttmacher.org/presentations/abort\\_slides.pdf](https://www.guttmacher.org/presentations/abort_slides.pdf) (last visited Feb. 23, 2015).

pregnancy and a newborn for over nine months. To allow fathers to upend a mother's adoption plans, after the deadline that the legislature has enacted for father's registration, eviscerates a mother's liberty interest in placing her child for adoption and diminishes her post-relinquishment recovery by voiding her choice of an open adoption with a hand-picked adoptive family. All of this is currently protected by the Ohio legislature.

The United States Supreme Court alluded to mothers' liberty interests and to the father's influence upon a mother's decision to relinquish in *Adoptive Couple v. Baby Girl*, 133 S.Ct. 2552, 2564 (2013). In the last paragraph of the opinion after all issues were decided, Justice Alito wrote:

a biological (Indian) father could abandon his child *in utero* and refuse any support for the birth mother—perhaps contributing to the mother's decision to put the child up for adoption—and then could play his ICWA trump card at the eleventh hour to override the mother's decision and the child's best interests. If this were possible, many prospective adoptive parents would surely pause before adopting any child who might possibly qualify as an Indian under the ICWA. Such an interpretation would raise equal protection concerns, but the plain text of §§ 1912(f) and (d) makes clear that neither provision applies in the present context. *Id.*

With these words, the United States Supreme Court respected the need for a pregnant woman's adoption planning and the role played in that planning by a non-marital father. While *Adoptive Couple* was more about prenatal support and the Indian Child Welfare Act, Justice Alito's allusion to equal protection concerns signifies the seriousness with which the high court regards mothers' and children's rights vis-a-vis fathers who would game the

statutory system at the eleventh hour. Appellant urges this Court to allow a similar kind of brinksmanship such that an Ohio putative father could let his rights and obligations lay fallow until he gets the hint that they are to be challenged. Then and only then, Appellant would change Ohio law to require him to file an intent to assert paternity with Ohio's putative father registry, but not to actually make the filing that would bind him to paternal obligations.

The trial court gave Appellant notice and an opportunity to testify, and it gave him chances to qualify for consent rights by proving that he had a developed relationship with the child or that he had made timely filings. But it found that he had not registered timely with the putative father registry, had not timely filed to legally establish his paternity, and did not have a developed relationship with H.N.R. Thus, the trial court held Appellant lacked the grounds to intervene in the adoption. The Appellate Court affirmed, and this Court should affirm both decisions.

The Ohio legislature has enacted a constitutional putative father registry statute with a deadline of days inside of which insures a putative father's consent and notice rights and outside of which works to insure parental accountability and permanency for children as well as facilitating the abortion and adoption planning for pregnant non-marital mothers. This Court should not amend a constitutional law that exists in numerous other states and is informed by sound public policy.

**Proposition of Law No. II:**

**Ohio's entire non-marital birth father statutory scheme in R.C. 3107.062 & 3107.07 & 3107.11 is constitutional and backed by sound public policy addressing the realities of modern relationships.**

The key to whether the Ohio putative father registry deadline may permissibly time limit notice of adoption to non-marital fathers is whether it constitutionally provides men with multiple readily accessible opportunities to form a constitutionally protected relationship with their children. Ohio law does provide such opportunities for non-marital fathers that will effectively stop an adoption at any time prior to filing of the adoption petition. Both Ohio and other states have found such putative father registry laws constitutional.

Ohio's statutory putative father registry scheme has consistently withstood constitutional challenge. See *In re Napier v. Adoptive Parents of Cameron*, 153 Ohio App. 3d 687, 2003 Ohio 4304 (Ohio Ct. App., Hamilton County, Aug. 15, 2003 2008); *In re K.M.S.*, 2005 Ohio 4739 (Ohio Ct. App., Miami County, Sept. 9, 2005); *In re Adoption of Snavely, C.A.* Case No. 2000 CA 20, 2000 Ohio App. LEXIS 4963 (Ohio Ct. App., Greene County, October 27, 2000); *In re Adoption of P.A.C.*, 126 Ohio St. 3d 236, 933 N.E.2d 236, 2010-Ohio-3351 (2010); *In re Adoption of Pushcar*, 110 Ohio St. 3d 332, 853 N.E.2d 647, 2006-Ohio-4572 (2006).

Other states have recognized that putative father registry statutory schemes are routinely upheld. Even with a complaining father, the constitutionality of paternity registry statutes has been overwhelmingly upheld. See, e.g., *Lehr v. Robertson*, 463 U.S. 248,

103 S. Ct. 2985, 77 L. Ed. 2d 614, 249–68 (1983); *A.S.B. v. Dep't of Children & Family Servs.*, 293 Ill.App.3d 836, 228 Ill. Dec. 238, 688 N.E.2d 1215, 1220–25 (1997); *Heidbreder v. Carton*, 645 N.W.2d 355, 372–77 (Minn. 2002); *Friehe v. Schaad*, 249 Neb. 825, 545 N.W.2d 740, 744–48 (1996); *Robert O. v. Russell K.*, 80 N.Y.2d 254, 590 N.Y.S.2d 37, 604 N.E.2d 99, 101–05 (1992); *In re Baby Boy K.*, 546 N.W.2d 86, 90–101 (S.D.1996); *Beltran v. Allan*, 926 P.2d 892, 897–98 (Utah Ct.App.1996). *In re C.M.D.*, 287 S.W.3d 510, 516 (Tex. App. 2009).

Bolstering Ohio's putative father registry are three readily accessible opportunities to establish protectable relationships: (1) voluntary acknowledgement of paternity affidavits (VAPA), (2) adjudication of paternity by petition of mother or father, and (3) administrative determination of paternity.

VAPA's exist in all 50 states by federal law and are free, accessible, and may be easily completed without the assistance of an attorney.<sup>3</sup> These forms are easily accessible online from the Ohio Department of Health.<sup>4</sup> Completing a VAPA does not require an attorney's assistance. VAPAs are often completed in the hospital of birth where the forms are routinely offered to mother (and father) because they are used in completing birth certificates.

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<sup>3</sup> 42 U.S.C. § 666(a)(2) (2006). "Every state is already obligated (as a condition to the receipt of federal funds) to provide most unwed fathers with an opportunity to acknowledge paternity at birth." Jeffrey A. Parness & Zachary Townsend, *The Price of Pleasure: Children Hurt Too*, 14 JOURNAL OF LAW AND FAMILY STUDIES 245, 253 (2012).

<sup>4</sup> Voluntary Acknowledgement of Paternity Affidavits, <http://www.odh.ohio.gov/en/vitalstatistics/legalinfo/pataffid.aspx> (last visited Mar. 21, 2015).

Adjudication of paternity is accomplished in Ohio by filing a petition for paternity. Filing for paternity may be accomplished by completing and filing forms freely available on the internet.<sup>5</sup> Fathers may also retain private counsel or seek the aid of a legal services attorney to draft and file a paternity action. Inexpensive noninvasive (i.e. buccal swab inside the mouth) genetic kits to determine paternity are available at pharmacies or on the internet and do not require a physician's intervention.

The Ohio Department of Health also offers instructions online for an administrative process through Child Support Enforcement to assist parents in determining paternity and in adding father's name to the birth certificate.<sup>6</sup> This free administrative method is available to fathers as well as mothers.

The VAPA, paternity action, and administrative determination establish paternity legally which carries rights and responsibilities. Litigants are required to give notice of an adoption petition to any legally established father or father with consent rights. R.C. 3017.07(B). Additionally, this Court has held that even a pending paternity adjudication forces the probate court to stay adoption proceeding until paternity is determined. *In re Adoption of P.A.C.*, 126 Ohio St. 3d 236, 933 N.E.2d 236, 2010-Ohio-3351 (2010); *In re Adoption of Pushcar*, 110 Ohio St. 3d 332, 853 N.E.2d 647, 2006-Ohio-4572 (2006).

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<sup>5</sup> Father's Petition for Declaration of Paternity Forms, <http://www.selfrepresent.mo.gov/file.jsp?id=43587> (last visited Mar.19, 2015).

<sup>6</sup> Determination of Paternity, <http://www.odh.ohio.gov/vitalstatistics/legalinfo/detpat.aspx> (last visited Mar.21, 2015).

A timely putative father registration carries with it a right to notice of an adoption action and a right to consent. R.C. 3107.07(B)(1). Fathers can register with the Ohio Putative Father Registry online or by mailing a postcard during pregnancy or within 15 days after birth.<sup>7</sup> The pregnancy plus 15 day deadline took effect March 23, 2015. At the time of the instant case, the deadline was still pregnancy plus 30 days. Online registration is free and is easily accessible. The state's website indicates that a registration can be obtained by calling a toll free number and requesting a copy.

No state has a deadline longer than Ohio's generous 30 day deadline imposed at the time of Appellant's case.<sup>8</sup> The trend in limitations periods is moving toward requiring registry filing during the pregnancy or before placement of the child. *Id.* See Idaho, Iowa, Montana, New Hampshire, Oregon, and Utah.

Unlike Ohio, some less generous states do not allow the filing of paternity actions or the acknowledgement of paternity to confer 'presumed father status' that would confer consent rights. *Adoption of A.S.*, 212 Cal. App. 4th 188, 151 Cal. Rptr. 3d 15 (2012) was an interstate California to New York newborn adoption case that discussed non-marital fathers' consent rights in both New York and in California. New York disallows either an order of filiation or a VAPA acknowledgement to confer consent rights upon a non-marital

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<sup>7</sup> Putative Father Registry, *The Putative Father Registry: Frequently Asked Questions*, <http://jfs.ohio.gov/pfr/index.stm> (last visited Mar. 19, 2015).

father who has not “manifested his ability and willingness to assume custody of the child. The considerations bearing on the determination of whether a New York father has done so include his public acknowledgement of paternity, payment of pregnancy and birth expenses, steps taken to establish legal responsibility for the child, and other factors evincing a commitment to the child.” *Id.* at 204-205. To some contrast, California grants consent rights to an acknowledged father but withholds consent rights from an adjudicated father who has not “promptly come forward and demonstrated his ‘full commitment to his paternal responsibilities – emotion, financial and otherwise.’” *Id.* at 206. The trend in limitations on consent rights appears to be in the direction of requiring non-marital fathers to demonstrate a developed relationship during the pregnancy as well as legally establishing paternity – all to the benefit of the child.

Ohio makes establishment of paternity free or inexpensive and easily accessible to today’s computer savvy citizens and even makes fathers’ consent rights available for the filing of registry form. This satisfies the *Lehr* court requirement that states insure that non-marital fathers have easy opportunities to protect their parental rights. 463 U.S. at 252. Ohio began protecting non-marital fathers’ rights nearly 20 years ago by enacting the putative father registry in 1996.<sup>9</sup> This statutory scheme protects birth fathers against anyone who would thwart them by insuring notice and consent to fathers who timely file with the

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<sup>8</sup> Mary Beck, *Toward a National Putative Father Registry*, 25 HARVARD JOURNAL OF LAW & PUBLIC POLICY 1033, 1081 (2002).

registry.

Today 40.8% of American births are non-marital.<sup>10</sup> Ohio's requirement that father establish (or be in the process of establishing) paternity to stop an adoption and its requirement which time limits notice and consent rights beyond 30 (now 15) days only to established fathers (or fathers with pending adjudications) insures to this large number of children either fathers legally obligated to assume financial and custodial responsibilities or adoptive parents similarly obligated. Extending the non-marital fathers registry deadline to any time before an adoption action is filed and/or allowing fathers with an unenforceable and/or under developed relationships with their children to intervene in adoptions would "merely complicate the adoption process, threaten the privacy interests of unwed mothers, create the risk of unnecessary controversy and impair the desired finality of adoption decrees . . . [w]e surely cannot characterize the state's conclusion as arbitrary." *Lehr*, 463 U.S. at 264. With these words 32 years ago, the United States Supreme Court found that limitations on notice to fathers constitutionally advances the interests of children. This policy is even more important today when nearly half of all children have no presumed father with responsibility for their care.

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<sup>9</sup> H.B. No. 274, Section 1, 1996 Ohio Laws 143 (amending R.C. 3107.062).

<sup>10</sup> See Center for Disease Control, *Births: Final Data for 2010*, 61 NAT'L VITAL STATISTICS REPORTS 1, 45 (2012), [http://www.cdc.gov/nchs/data/nvsr/nvsr61/nvsr61\\_01.pdf](http://www.cdc.gov/nchs/data/nvsr/nvsr61/nvsr61_01.pdf); CDC, *Births: Final Data for 2000*, 50 Nat'l Vital Statistics Reports 1, 9 (2002), [http://www.cdc.gov/nchs/data/nvsr/nvsr50/nvsr50\\_05.pdf](http://www.cdc.gov/nchs/data/nvsr/nvsr50/nvsr50_05.pdf).

Appellant urges that putative father registry requirements are unnatural and non-traditional. (Appellant's Brief, 25). While it is true that requiring fathers to register with a state registry is not traditional, neither is the birth of 4 out of 10 babies outside of wedlock traditional. Historically, men may have regarded non-marital pregnancy's as mothers' problems. Caselaw exemplifies this attitude. In *Doe v. Attorney W.*, 410 So. 2d 1312 (Miss. 1982) where father told the mother the pregnancy was not his problem and told her not to notify the welfare agency that he was the father. *State ex rel. Lewis v. Lutheran Soc. Servs. of Wisconsin & Upper Michigan*, 68 Wis. 2d 36, 227 N.W.2d 643 (1975) where father told mother that the pregnancy was her fault and threatened to call the doctor to tell him not to put his name on the birth certificate. Courts have held against the traditional fathers' perspectives. *Id.*

The Ohio legislature has enacted a modern statutory scheme to advance permanency for the non-marital children born today and surrendered for adoption. At least one other state court has quoted an article that supports how fathers' registries address relationships of today, as follows:

The burden placed on putative fathers under Illinois's new legislation is not necessarily out of step with modern mores or the realities of contemporary heterosexual relationships. Neither is it completely unrealistic. To meet the burden which the new legislation places on a putative father, he need neither remain in contact with a woman with whom he has had sexual intercourse, nor turn to other sources of information to determine whether he has conceived a child with her. Under the new legislation, a putative father need only file with the putative father registry based on his knowledge that he has had intercourse with a woman and commence a parentage action within

thirty days of that filing. His interests will not be jeopardized if he ends relations with her, and his social habits are not, therefore, greatly affected. By simply mailing a postcard to the registry and commencing a parentage action, tasks which can hardly be labelled (sic) a burden, a putative father can preserve his rights to notice and consent. *M.V.S. v. V.M.D.*, 776 So. 2d 142, 151 (Ala. Civ. App. 1999).

That Ohio's statutory scheme is not 'traditional' is a good thing in that the Ohio legislature enacted statutes that respond to modern relationships in ways that benefit mothers, fathers, and children,<sup>11</sup> and advance the institution of adoption itself. The bright line rules of putative father registries and prenatal abandonment permit earlier resolution of birth parents rights which advances the orderly processing of adoptions. Ohio like New York in *Lehr* may constitutionally use its statutes to un-complicate the adoption process, reduce the risk of controversy, and advance the finality of adoption decrees. *Lehr*, 463 U.S. at 249, 298. Putative father registries inform adoptive parents in unarguable black and white about the potential for complications in the timely filing and processing of an adoption. Granting Appellant's wish to provide non-marital birth fathers with unlimited time to file with the registry would chill potential adoptive parents from pursuing an adoption less the father file an hour before the adoption petition is filed. This would rob a child of permanency while providing her with no father whose rights and responsibilities are legally

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<sup>11</sup> A recent study published by the *Archives of Sexual Behavior* discovered that sixty percent of college students have participated in a casual relationship. Wayne State University and Michigan State University conducted a similar survey and sixty-six percent of the undergraduates in this study said they had also been in a casual relationship. About half of this sixty-six percent said they were currently in one right now. Study: 'Friends With Benefits' Sex Common in College". Imaginova Corp. 30 November 2011.

enforceable. Ohio's statutory adoption scheme allows adoptions to proceed with certainty at 30 (now 15) days and to run less risk of challenge, less risk of thwarted birth fathers and with the promise of greater finality for the child, the adoptive parents and the state.

Appellant argues that men have no control over the establishment of paternity. (Appellant's Brief, 28). Conversely, he states that he was "disinclined to file formal proceedings." (Appellant's Brief, 11). Lastly, he argues that Ohio's statutory scheme arbitrarily omits responsible fathers and argues that the key is not the ease with which men can protect their rights but rather whether they will predictably do it. (Appellant's Brief, 23). What is predictable is what men who resist formal paternity proceedings do accomplish, and that is the avoidance of child support obligations. It does not make a state's legislative scheme arbitrary that it foists paternal obligations upon fathers nor that it grants higher protection to men with established parental rights who are correspondingly obligated with parental duties. Such a higher bar furthers the state's interests in protecting its children from needless controversy and delayed finality and represents good policy.

In the instant case, Appellant did not complete a VAPA, but he was physically present in the hospital of H.N.R.'s birth where VAPA forms would be available. He completed a genetic test within 3.5 weeks of birth confirming his paternity to H.N.R. whose mother he had been dating for a year prior to the birth. (Appellant's Brief, 6). At no time

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Retrieved 24 April 2012. <sup>11</sup> [http://www.medscape.com/viewarticle/703501\\_2](http://www.medscape.com/viewarticle/703501_2) last visited august 23, 2014.

did Appellant file paternity on his own initiative; rather he filed defensively as a last resort after the adoption petition was filed. (Appellant's Brief, 7). A father who would assert parental rights only defensively leaves open to speculation that he would never have assumed parental obligations absent the filing of the adoption and throws into question how faithful he would be to such obligations if the adoption action were dismissed. That Ohio's statutory scheme does not protect a father who repeatedly declines or avoids formal processes defining paternity and files paternity only defensively advances good policy favoring fathers who would affirmatively assume paternal responsibilities.

Appellant argues that the only way to stop an adoption after the 30 day registry deadline is to establish paternity legally. (Appellant's Brief, 14.) This is as erroneous as is his implication that it is a bad thing.

It is true that any Ohio father can protect his rights against an adoption with the formal filing for paternity. Appellant could have made such filing at any time over the child's five month life prior to the surrender and adoption filing. (Appellant's Brief, 7). But it is also true that an Ohio father can protect his parental rights if he has a developed relationship as described by the United States Supreme Court as "shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child." *Lehr*, 463 U.S. at 248 (quoting *Quilloin v. Walcott*, 434 U.S. 246, 267 (1978)).

Appellant argues he developed such a relationship with his child because he 'held

and watched' HNR every couple weeks. (Appellant's Brief, 6). The trial court had before it ore tenus evidence which is the actual live testimony of the father which historically enjoys the highest deference in appellate review.<sup>12</sup> Upon such evidence, the trial court found father's involvement with H.N.R. "hardly adequate to the task of creating a strong bond with the infant." *In re Adoption of H.N.R.*, 141 Ohio St. 3d at 27. The court also found that the facts Appellant described were less compelling than those facts found lacking in *Cameron*. 795 N.E.2d 707 (OH App. 3d 2003). The trial court's finding comports with United States Supreme Court jurisprudence on the characteristics of a developed relationship. *Lehr*, 463 U.S. at 248 (quoting *Quilloin v. Walcott*, 434 U.S. 246, 267 (1978)).

The importance of setting Ohio's developed relationship bar consistent with United States Supreme Court's 'significant responsibilities for daily care' bar is critically important for all children and particularly for newborns because the parental care during the neonatal period is so intense. Newborn feedings alone number 6-8 times per day.<sup>13</sup> Additionally, newborns notoriously require frequent diaper changes, loads of laundry, walking the floors at night, purchases of diapers, clothes, blankets, formula, etc. Such a bar advances the interests of Ohio children to their realistic needs for care, custody and control.

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<sup>12</sup> *Ex parte C.V.*, 810 So. 2d 700, 719 (Ala. 2001). "Findings of fact based on ore tenus evidence are presumed correct, and a judgment based on those findings of fact will not be reversed unless it is clearly erroneous, manifestly unjust, without supporting evidence, or against the great weight of the evidence."

<sup>13</sup> KidsHealth, *Feeding Your 1 to 3 Month Old*, [http://kidshealth.org/parent/growth/feeding/feed13m.html?tracking=P\\_RelatedArticle](http://kidshealth.org/parent/growth/feeding/feed13m.html?tracking=P_RelatedArticle) (last visited Mar. 23, 2015).

Appellant asserts that his visits every couple weeks kept him too busy to establish paternity, and that generally responsible fathers are too busy in the postnatal period to file with the registry. (Appellant's Brief, 11, 29). This statement ignores the fact that registration is available during the pregnancy and VAPAs are available in birthing hospitals. That Appellant would assert that bi-weekly visits would render him incapable of completing an online acknowledgment form with H.N.R.'s mother or filing an action for paternity connotes his mistaken assumptions about whose time table and needs are relevant in the analysis of a father's rights and obligations.

To conclude that petitioner (father) acted promptly once he became aware of the child is to fundamentally misconstrue whose timetable is relevant. Promptness is measured in terms of the baby's life not by the onset of the father's awareness. The demand for prompt action by the father at the child's birth is neither arbitrary nor punitive, but instead a logical and necessary outgrowth of the State's legitimate interest in the child's need for early permanence and stability. *Robert O. v. Russell K.*, 604 N.E.2d 99, 104 (1992).

The *Robert O.* Court was considering a case where father claimed he did not know of the child's birth which is not the case with Appellant. However, the *Robert O.* sentiment prioritizing a newborn's needs finds a home in the instant case where Appellant claims that biweekly holding and watching H.N.R. rendered him without enough time to establish paternity.

Appellant's few hours of visitation in a 2 week period stands in sharp contrast to H.N.R.'s actual needs for daily supervision or care and support. Ohio's bar for developed

relationship is properly applied when fathers participate informally in parenting and only at their convenience some two times in a month. That Ohio sets its' developed relationship bar high enough to require a parent to assume significant responsibilities for daily care of children is good policy advancing the interests of children.

Thus father's statement that filing paternity was his only way to stop an adoption is erroneous as is the implication that filing paternity is a last resort and a bad thing. The only way a father can obtain health insurance for his child, authorize her health care, and enroll her in school is to formally establish paternity. And these benefits and privileges inure to child as well as to father.

Fathers such as Appellant who claim that a willingness to marry the mother substitutes for developing financial and/or custodial relationships with children do not find favor with state courts. Developing a relationship with a child is independent of marriage.

(An unwed father) must provide support regardless of whether his relationship with the mother-to-be continues or ends. He must do this regardless of whether the mother-to-be is willing to have any type of contact with him whatsoever or submit to his emotional or physical control in any way. He must not be deterred by the mother-to-be's lack of romantic interest in him, even by her outright hostility. If she justifiably or unjustifiably wants him to stay away, he must respect her wishes but be sure that his support does not remain equally distant. *Adoptive Couple v Baby Girl*, 731 S.E.2d 550, 579 (2012) (quoting *In re Adoption of M.D.K.*, 58 P3rd at 750-751 (KS. Ct. App. 2002)).

The solution to non-marital paternity is the legal establishment of paternity and assuming its corresponding responsibilities. Marriage is not necessarily the solution to non-marital

paternity and it certainly requires the consent of the mother.

Appellant asserts that he thought his DNA test conferred legal paternity. In this day, few fathers are unaware that formal paternity filings incur risk of child support enforcement. The claim that a medical test confers legal rights and obligations is flatly disingenuous.

Some men long for the historic norm where fathers of non-marital children were free from shame and parental obligations. Today, the establishment of legal paternity is the only way in which society can enforce custodial and financial obligations upon non-marital fathers. State legislatures such as the Ohio legislature can and should facilitate adoptions where fathers do not timely step up to the plate. This court should affirm the trial and appellate court holdings to continue its legislature's sound statutory non-marital birth father scheme.

### CONCLUSION

Appellant has raised the same issues challenging putative father registries that many other fathers across the United States have raised. Judges have consistently upheld the limitations against those non-marital fathers who have not timely assumed the responsibilities to establish paternity and develop a relationship with the child qualifying them for constitutional protection. The soundness of the policy behind these putative father registry laws is apparent in the demographics of today's relationships. It is essential and

sensible to put the burden of asserting/establishing fathers' rights upon their own shoulders in order to prevent anyone from thwarting them. It is essential to time limit fathers in protecting their rights to protect the liberty interests of non-marital mothers who dedicate their health and finances to continuing a pregnancy unassisted as well as uninformed by fathers' putative father registrations or paternity actions. Lastly, it is critical to advance the potential for children to have parents legally obligated to provide for their care, custody, and control. This Court should uphold Ohio's non-marital birth father laws as they work together to constitutionally protect all parties to adoption.

Respectfully submitted,

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#### **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Merit Brief by Amicus Curiae has been sent by e-mail this 27th day of March, 2015 to: Erik L. Smith, Counsel for Appellant, at [edenstore@msn.com](mailto:edenstore@msn.com); Michael R. Voorhees, Counsel for Appellees, [mike@ohioadoptionlawyer.com](mailto:mike@ohioadoptionlawyer.com).

*/s Susan Garner Eisenman*

Susan Garner Eisenman

## APPENDIX

### Cited Provisions

Ohio Revised Code § 3107.062

Ohio Revised Code § 3107.07(B)(1)

Ohio Revised Code § 3107.07(B)(2)(c)

42 U.S.C. § 666(a)(2)

### § 3107.062 Paternity action by putative father

A putative father who receives a notice as provided in section 3107.067 of the Revised Code may file an action under section 3111.04 of the Revised Code.

### § 3107.07 Consent unnecessary

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

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

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

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

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

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

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

42 U.S.C. § 666(a)(2)

Requirement of statutorily prescribed procedures to improve effectiveness of child support enforcement

(a) Types of procedures required

In order to satisfy section 654 (20)(A) of this title, each State must have in effect laws requiring the use of the following procedures, consistent with this section and with regulations of the Secretary, to increase the effectiveness of the program which the State administers under this part:

(2) Expedited administrative and judicial procedures (including the procedures specified in subsection (c) of this section) for establishing paternity and for establishing, modifying, and enforcing support obligations. The Secretary may waive the provisions of this paragraph with respect to one or more political subdivisions within the State on the basis of the effectiveness and timeliness of support order issuance and enforcement or paternity establishment within the political subdivision (in accordance with the general rule for exemptions under subsection (d) of this section).