

Correction: The author wishes to make the following correction regarding her analysis on page 598 of this Article: Previously unavailable sealed court filings provided to the author after publication indicate that Messrs. Wyrembek and Otten provided a greater level of familial and material support to their children in G.V. and P.A.C. than was suggested.

CROSSING THE LINE FOR UNWED FATHERS' RIGHTS: A STATE OF CHAOS IN THE STATE OF OHIO

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I. INTRODUCTION

Imagine that the law requires one course of action, but a state supreme court creates another. Imagine that in choosing to create this contradictory course, the court does so under the belief that it is acting fairly according to the Constitution and the jurisprudence of the Supreme Court of the United States. Now complete this image by placing this chaotic scenario in the context of family law. More specifically, consider it in a situation where the court is forced to choose between a father's fundamental right to parent his biological child, and allowing a child to remain with his future adoptive family, the only parents he has ever known. The results are guaranteed to be tragic, regardless of which of the two options the court chooses. It is sure to be even more tragic, however, if in making its decision the court dismisses the policy directives given to it by the state legislature after careful thought and consideration, and instead inserts its own policy initiatives into its decision. The sheer chaos that ensues highlights an issue in desperate need of clarification. The situation described above is exactly what happened in a recent set of adoption cases in the Supreme Court of Ohio.

This set was composed of two adoption cases where unwed biological fathers had paternity actions pending, but not yet determined in juvenile court, when petitions for adoption of their children were filed in probate court.¹ One of the fathers had filed with the putative father registry;² the other had not.³ One case involved a step-parent adoption,⁴ and the other was an adoption through a private agency by a family with no relation.⁵

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¹ See discussion *infra* Parts III.A.1–III.A.2.

² *In re Adoption of G.V.*, 933 N.E.2d 245, 246 (Ohio 2010).

³ *In re Adoption of P.A.C.*, 933 N.E.2d 236, 237 (Ohio 2010).

⁴ *Id.*

⁵ *In re G.V.*, 933 N.E.2d at 246.

Neither father had his paternity legally determined before the adoption proceedings began.⁶ In both cases, the biological fathers preserved their rights as fathers by halting the adoption proceedings during the pendency of the juvenile proceedings.⁷

In both cases, the Supreme Court of Ohio held that when an issue concerning parenting of a minor is pending in juvenile court, a probate court must refrain from proceeding with the adoption of that child.⁸ Furthermore, it held that the determination of a parent-child relationship in the juvenile court proceeding must be given effect in the stated adoption proceeding.⁹ This seems, on the surface, to be a fair result. Yet the significance of these two holdings lies not in their fairness, but rather in their incorrect result. The Supreme Court of Ohio has given these putative fathers more protection than provided to them statutorily by the Ohio General Assembly, excusing their failure to demonstrate commitment to their children, as required by Ohio law. In both cases, the court considered a biological father's right to parent with the state's interest in using adoption to further the best interests of the child. These rulings tip the scale in favor of the father's rights, ignoring the harmful effects they have on the best interests of the child. In an effort to avoid a harsh result, the court overstepped its boundaries. It therefore left the legislature no other option to recapture and reiterate its initial policy goals than to revisit and reform the current adoption structure in Ohio. Without this kind of reform, Ohio's collection of cases and statutes remain in conflict with each other, leaving a system of confusion and "chaos."¹⁰

This note dissects this chaos through an examination of Ohio's statutory adoption scheme as it relates to consent requirements and the rights of putative fathers in adoptions. It examines whether a putative father's consent should be required depending on the actions he has taken to establish his role as a father. It does this through an analysis of these two recent cases, both of which draw attention to a struggle between the courts and the state legislature in deciding the limits of these potential rights.

This article begins with the constitutional foundation underlying states' actions in this area, presented through a discussion of an important line of

⁶ *Id.*; *In re P.A.C.*, 933 N.E.2d at 236.

⁷ *In re G.V.*, 933 N.E.2d at 246; *In re P.A.C.*, 933 N.E.2d at 237.

⁸ *In re G.V.*, 933 N.E.2d at 247-48; *In re P.A.C.*, 933 N.E.2d at 238.

⁹ *In re G.V.*, 933 N.E.2d at 247-48; *In re P.A.C.*, 933 N.E.2d at 238.

¹⁰ See Rita Price, *Adoption Challenges: Rulings May Boost Paternal Rights*, COLUMBUS DISPATCH, Aug. 9, 2010, at B1.

United States Supreme Court cases.¹¹ These cases help provide the constitutional framework upon which Ohio's statutes were based, and provide guidance on what is and should be required of putative fathers to legally assert their parental rights.

Next, this article provides an overview and analysis of Ohio's statutory scheme, setting forth the consent requirements and legal statuses involved under Ohio's adoption law.¹² It also provides a discussion of important case law which guided the court throughout these two decisions.¹³ This article then explores the policies and goals that motivated the legislature when it enacted this statutory framework, as those policies and goals are relevant in the analysis of why the court erred in its holding.¹⁴

Finally, this article thoroughly examines the two cases, including both the factual similarities and differences between the two fathers' actions, as well as the overarching holding as applied to both.¹⁵ It explains the few strengths in the majority's opinion, as well as why the weaknesses in the majority's holding ultimately dominate. It concludes by offering possible explanations for why the court felt the need to rule in favor of the fathers, why that was wrong, and how Ohio should move forward in light of these recent decisions.¹⁶

II. BACKGROUND

A. *History of Parental Rights in the United States*

The Supreme Court first acknowledged the right to raise children in 1923, when it held that the liberty referred to in the Fourteenth Amendment of the United States Constitution is "not merely freedom from bodily restraint but also the right of the individual to . . . establish a home and bring up children . . ." ¹⁷ The Court later elaborated when it noted that "[t]he liberty interest . . . of parents in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized by this Court." ¹⁸ This fundamental right has long found substantial protection under various provisions of the Constitution,

¹¹ See discussion *infra* Part II.A.

¹² See discussion *infra* Parts II.B.1–II.B.2.

¹³ See discussion *infra* Parts II.B.3–II.B.5.

¹⁴ See discussion *infra* Parts II.B.3–II.B.5.

¹⁵ See discussion *infra* Parts III.A–III.B.2.

¹⁶ See discussion *infra* Parts III.B.3–III.B.7.

¹⁷ *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

¹⁸ *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

including the Due Process and Equal Protection Clauses of the Fourteenth Amendment, as well as under the Ninth Amendment.¹⁹

1. *The Hierarchy of Parental Rights*

Once a biological parent is recognized as having these parental rights, the rights are considered fully protected and fundamental.²⁰ In making this initial determination, courts may either presume these rights or scrutinize the point at which these rights vest, depending on a parent's gender or marital status.²¹ Courts have been less likely to analyze and scrutinize these rights when the parents involved are married.²² It is when the parents are unmarried, however, that the court will dissect the interests more closely to determine the point at which these parental rights gain protection.²³ This suggests that there is a hierarchy in play, affording married parents the strongest presumption that the fundamental right exists.²⁴ Unmarried biological parents enjoy a similar, albeit weaker, presumption that the fundamental right to parent exists for them also.²⁵ It is clear from the Court's jurisprudence that biological (and unwed) mothers, by nature of their instant and obvious relationship with their children at birth, have almost always enjoyed this favorable presumption and thus hold a position of heightened protection.²⁶ Unwed biological fathers, however, have not been as fortunate at the outset.

The status of unwed fathers' rights, while evolving over the years, is still not as straightforward and guaranteed as those of unwed mothers. The Supreme Court of the United States' view that "the mere existence of a biological link does not merit equivalent constitutional protection"²⁷ has created a jurisprudence requiring an analysis of other factual evidence

¹⁹ See *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 505 (1977); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); *Meyer*, 262 U.S. at 399.

²⁰ See *Troxel*, 530 U.S. at 66.

²¹ See, e.g., *Lehr v. Robertson*, 463 U.S. 248, 256–62, 266–68 (1983).

²² *Id.* at 263.

²³ See generally *id.* at 263–65; *Caban v. Mohammed*, 441 U.S. 380 (1979); *Quilloin v. Walcott*, 434 U.S. 246 (1978); *Stanley v. Illinois*, 405 U.S. 645 (1972).

²⁴ Toni L. Craig, *Establishing the Biological Rights Doctrine to Protect Unwed Fathers in Contested Adoptions*, 25 FLA. ST. U. L. REV. 391, 402–03 (1998) (noting that the interests of foster and adoptive parents are considered secondary to a biological parent's claimed interest).

²⁵ *Id.* at 403.

²⁶ *Caban*, 441 U.S. at 397 (Stewart, J., dissenting).

²⁷ *Lehr*, 463 U.S. at 261.

before deciding whether fathers are granted the fundamental right to parent. A leading line of Supreme Court cases has addressed this very issue, establishing a rough framework by which to determine the rights of unwed, biological fathers.²⁸ Under this framework, unwed fathers are left in a “precarious position,”²⁹ as they may or may not have rights similar to married fathers depending on what actions they have taken, whether they have succeeded in those actions, what legal status they have with respect to the mother of the child, and other compelling interests the state may have.³⁰ Fathers who take sufficient actions as determined by a court will find themselves in less precarious of a position than fathers who take little or no action at all to enable their potential rights.

2. *The Evolution of Fathers Rights in the Supreme Court of the United States*

The Supreme Court first addressed the issue of unwed fathers’ rights in *Stanley v. Illinois*.³¹ In *Stanley*, the Court ruled that a statute determining the fitness of a father based solely on his marital status to a mother was unconstitutional under the Equal Protection and Due Process Clauses.³² The Court held that a father who had created and maintained a substantial relationship with his children for over eighteen years could not be precluded from exercising his parental rights upon the death of the mother.³³ According to the Court, the state could not disregard the father’s parental role and relationship regardless of its interest in protecting the children.³⁴ This was a rather extreme case, as the long-standing commitment demonstrated by the father appeared to be an integral part of the Court’s decision.³⁵ The Court’s implicit emphasis on the relationship presented under these facts left certain questions unanswered in the realm of unwed fathers’ rights.

²⁸ See generally *Lehr*, 463 U.S. 248; *Caban*, 441 U.S. 380 (examining the rights of unwed fathers under different fact patterns); *Quilloin*, 434 U.S. 246; *Stanley*, 405 U.S. 645.

²⁹ Craig, *supra* note 24, at 401.

³⁰ See Mark Strasser, *The Often Illusory Protections of “Biology Plus:” On the Supreme Court’s Parental Rights Jurisprudence*, 13 TEX. J. C.L. & C.R. 31, 32–33 (2007).

³¹ *Stanley*, 405 U.S. 645.

³² *Id.* at 657–58.

³³ *Id.* at 652.

³⁴ *Id.* at 657–58.

³⁵ *Id.* at 650 n.4 (“It is undisputed that [Stanley] is the father of these children, that he lived with the two children whose custody is challenged all their lives, and that he has supported them.”).

The Court addressed some of these unanswered questions in cases following *Stanley*. In *Quilloin v. Walcott*,³⁶ the Court again addressed the extent to which an unwed father's commitment is a determinative factor, especially regarding the state's countervailing interests.³⁷ There, a step-parent adoption was challenged under a law requiring only the mother's consent to adoption.³⁸ The child in question had lived with the mother and step-father as a family unit for seven of the eleven years of his life.³⁹ The state's argued interest in requiring only the mother's consent "was based on a preference to have children raised in a traditional family setting."⁴⁰

The Supreme Court gave deference to this argument and supported the "family unit already in existence."⁴¹ It held that an unwed biological father's right to consent did not outweigh the state's interest in protecting the welfare of the child, especially where the father failed to demonstrate his commitment to the child.⁴²

These two cases presented together demonstrate both extremes on the Court's scale of commitment. The Court emphasized a strong, custodial relationship when determining if the level of commitment was sufficient to outweigh competing interests.⁴³ Although the Court did not offer an objective formula by which to measure commitment, it is evident from both cases that something more than simple biological ties was required to justify protecting the father's interests.

The Supreme Court subsequently took up a case where the custodial relationship fell between the two prior extremes. In *Caban v. Mohammed*,⁴⁴ the Court analyzed an unwed biological father's rights under a statute which permitted the adoption of his child without his consent unless he could show that "the best interests of the child would not permit the child's adoption."⁴⁵ The statute required the mother's consent

³⁶ 434 U.S. 246 (1978).

³⁷ *Id.* at 248.

³⁸ *Id.* at 248-49.

³⁹ *Id.* at 247.

⁴⁰ Alexandra R. Dapolito, *The Failure to Notify Putative Fathers of Adoption Proceedings: Balancing the Adoption Equation*, 42 CATH. U. L. REV. 979, 988 (1993).

⁴¹ *Quilloin*, 434 U.S. at 255.

⁴² *Id.* at 256.

⁴³ Strasser, *supra* note 30, at 42.

⁴⁴ 441 U.S. 380 (1979).

⁴⁵ *Id.* at 387.

regardless of her marital status⁴⁶ and that consent “was adequate . . . even against the unwed father’s will.”⁴⁷

The father in *Caban* had “established a substantial relationship with the child and ha[d] admitted his paternity.”⁴⁸ The Court held that to deprive a father of the relationship he had established, while still protecting the mother’s relationship under all circumstances, was a constitutional violation.⁴⁹ The statute there treated unwed fathers differently from unwed mothers.⁵⁰ “[T]he State’s interest” the Court stressed “can be protected by means that do not draw such an inflexible gender-based distinction” as that which was present in *Caban*.⁵¹

3. *The States’ Involvement in the Issue of Commitment*

The previous cases seem to suggest that an unwed father’s constitutional right to parent is afforded strong protection where he has established a relationship with his child. In doing so, the Supreme Court established a baseline, leaving the state courts broad discretion in determining how to measure a father’s commitment and relationship to his child and how much commitment would suffice to afford him this great protection. Keeping in mind the constitutional nature of these parental rights issues, the Supreme Court gave some leeway to the states to establish a statutory scheme with which to measure parental commitment.⁵² Following these decisions and with this discretion, states began the process of amending their statutes to provide for putative father notification, consent, or both with regard to subsequent adoption proceedings.⁵³ They did this through the enactment of putative father registries or other state notification schemes.⁵⁴ Although these schemes attempted to provide a starting point from which a father could begin to demonstrate his commitment, they often created new questions necessitating new answers from the Supreme Court of the United States.

⁴⁶ *Id.* at 386.

⁴⁷ Dapolito, *supra* note 40, at 989 (citing *Caban*, 481 U.S. at 385–87).

⁴⁸ *Caban*, 481 U.S. at 393.

⁴⁹ *Id.* at 394.

⁵⁰ *Id.*

⁵¹ *Id.* at 392.

⁵² Dapolito, *supra* note 40, at 990.

⁵³ *Id.*

⁵⁴ *Id.* at 991–92.

The Supreme Court first addressed a state notification statute in the form of a Putative Father Registry in *Lehr v. Robinson*.⁵⁵ In *Lehr*, the court was faced with the question of “whether New York ha[d] sufficiently protected an unmarried father’s inchoate relationship with a child whom he ha[d] never supported and rarely seen in the two years since her birth.”⁵⁶ The father there had not lived with the child, visited the child, provided for the child at all, nor did his name appear on the birth certificate.⁵⁷ He also did not file in the Putative Father Registry as required under New York law.⁵⁸ The Court found that because the father did not file or complete any of the other tasks he could have completed to establish a relationship, he failed to demonstrate his commitment to his child.⁵⁹ The father’s biological connection offered only the opportunity to possess fully-vested parental rights, the Court noted, stating:

If he grasps that opportunity and accepts some measure of responsibility for the child’s future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child’s development. If he fails to do so, the Federal Constitution will not automatically compel a State to listen to his opinion of where the child’s best interests lie.⁶⁰

This “opportunity interest” provides the unwed father the ability to form a meaningful relationship with his child through support, visits or other contacts, or filing with the registry.⁶¹ Failure to take advantage of that interest may result in lost rights, as it did in *Lehr*.⁶² In articulating this new emphasis, the Court was unclear as to whether merely a good faith effort at establishing this type of a relationship was sufficient, or whether a putative father must actually succeed in creating a relationship.

These cases form a framework under which states are permitted to effectuate their own statutory scheme in the name of the best interests of the child.⁶³ The schemes are permitted to trump a father’s potential parental rights when the father has nothing other than a biological tie, or an

⁵⁵ 463 U.S. 248 (1983).

⁵⁶ *Id.* at 249–50.

⁵⁷ *Id.* at 252.

⁵⁸ Dapolito, *supra* note 40, at 993.

⁵⁹ *Lehr*, 463 U.S. at 262, 264–65.

⁶⁰ *Id.* at 262.

⁶¹ Dapolito, *supra* note 40, at 994.

⁶² *Id.* at 994–95.

⁶³ *See id.* at 990.

untapped “opportunity interest.”⁶⁴ Something more is required, as “[t]he unwed father’s interest receives the benefits of constitutional protection only when he displays an awareness of his obligation to his child and makes an effort to build a relationship.”⁶⁵ States have differed in their approach toward measuring relationship-building efforts for sufficiency.⁶⁶

B. Fathers in Ohio

Ohio, like the states presented in the landmark cases above, has a statutory scheme which governs parental rights in adoptions.⁶⁷ This scheme seeks to balance mothers’ rights, fathers’ rights, and the states’ interests in protecting the child in the process.⁶⁸ Also like the states mentioned in the cases above, Ohio’s statutory scheme has a tendency to favor mothers over fathers when dealing with unmarried parents.⁶⁹ This is evidenced by the many statutes which explicitly grant preference to mothers, as well as the many statutes which seek to define what a father is, his rights in an adoption, and what he must do to enact those rights so that they are protected under the law.⁷⁰ Ohio has also begun to protect the rights of fathers when the fathers are unmarried, but only to a certain extent, and only when compared to the state’s interests.⁷¹

1. Adoption Statutes in Ohio

Under this amended framework in Ohio, adoption is a “two-step process, involving first a determination whether parental consent is required and, second, whether the adoption is in the best interest of the child.”⁷² Because an adoption in Ohio results in the final termination of the parental rights of the biological parents,⁷³ adoption is viewed by courts, both in Ohio as well as the Supreme Court of the United States, as

⁶⁴ *Id.* at 995.

⁶⁵ *Id.*

⁶⁶ See Strasser, *supra* note 30, at 78.

⁶⁷ See OHIO REV. CODE ANN. §§ 3107–3109 (West 2010).

⁶⁸ See generally *id.* § 3107; *In re Adoption of Zschach*, 665 N.E.2d 1070, 1073 (Ohio 1996).

⁶⁹ See OHIO REV. CODE ANN. § 3109.042 (West 2010).

⁷⁰ *E.g., id.*; OHIO REV. CODE ANN. §§ 3107.01(3)–3107.06(B)–(C), 3107.07(A)–(B) (West 2010); OHIO ADMIN. CODE § 5101:2-1-01 (West 1999–2000 & Supp. 2002–2003).

⁷¹ See *In re Adoption of Greer*, 638 N.E.2d 999, 1003 (Ohio 1994).

⁷² *In re Adoption of Baby Boy Brooks*, 737 N.E.2d 1062, 1067–68 (Ohio Ct. App. 2000). See also OHIO REV. CODE ANN. § 3107.14(C) (West 2010).

⁷³ OHIO REV. CODE ANN. § 3107.15(A)(1) (West 2010).

deserving of all possible care and consideration, requiring strict construction of all laws involved.⁷⁴ Termination of parental rights has been called the “death penalty” of family law.⁷⁵ Therefore, courts are justifiably cautious and careful in their approach toward adoptions.⁷⁶

The initial and crucial determination of whether parental consent is necessary depends on an individual’s legal status at the time the adoption petition was filed.⁷⁷ This requirement bears repeating, as it was the crux of the dissent’s main argument in these note cases.⁷⁸ The level of protection and hurdles Ohio’s adoption statutes have erected depend on a father’s status. His status is established at the point in time when the adoption petition is filed.⁷⁹

Within the initial parental consent step, if the person’s legal status requires his consent, the court must then determine whether consent is “excused.”⁸⁰ This will depend on what actions the person has taken to demonstrate commitment to the child.⁸¹ Finally, in the second step, if consent is not required, or if consent is required but is excused, the court must then make a best interests determination⁸²

The penultimate consent is that of the mother, because her consent is required for all adoptions, without regard to any qualifiers or pre-existing conditions.⁸³ Predictably, the father’s consent receives different treatment under the law.

Under current Ohio statutes, a biological father can be classified either as a “legal father” or a “putative father,” thereby determining his right to consent in an adoption.⁸⁴ A father will be considered a “legal father,” thereby granting him consent rights when any of the following conditions are met:

⁷⁴ See *M.L.B. v. S.L.J.*, 519 U.S. 102, 116–17 (1996); *In re Adoption of Zschach*, 665 N.E.2d 1070, 1074 (Ohio 1996).

⁷⁵ *In re Smith*, 601 N.E.2d 45, 55 (Ohio Ct. App 1991).

⁷⁶ See OHIO REV. CODE ANN. § 3107.06 (West 2010).

⁷⁷ *Id.* §§ 3107.01(3)–3107.06(B)(3) (West 2010). See also *In re Brooks*, 737 N.E.2d at 1066.

⁷⁸ See discussion *infra* Part III.A.4.c.

⁷⁹ See discussion *infra* Part III.A.4.c.

⁸⁰ *In re Brooks*, 737 N.E.2d at 1066.

⁸¹ *Id.*

⁸² *Id.* at 1067–68.

⁸³ OHIO REV. CODE ANN. § 3107.06(A) (West 2010)

⁸⁴ *Id.* §§ 3107.06(B)–(C), 3107.07(A)–(B).

(1) The minor was conceived or born while the father was married to the mother; (2) The minor is his child by [prior] adoption; (3) Prior to the date the petition was filed, it was determined by a court [or administrative proceeding] . . . that he has a parent and child relationship with the minor; [or] (4) He acknowledged paternity of the child⁸⁵

A legal father's consent would be excused or, rather, he would lose his right to withhold his consent and prevent an adoption, if he has either "failed without justifiable cause to provide more than de minimis contact with the minor or to provide for the maintenance and support of the minor . . . for a period of at least one year"⁸⁶ Therefore, a legal father must take certain action to be considered a legal father. Once deemed a legal father, he has the right to consent unless he has failed to provide for the child, in which case this right is lost.

A putative father's consent may or may not be required depending on if he has satisfied the requirements to render him a "putative father."⁸⁷ Under Ohio law, "putative father" is defined as a man who may be the child's father and who could potentially be a legal father but who must take further action first.⁸⁸ If that action does not occur, he remains a putative father.

A putative father's consent, like that of a legal father, is also required for the adoption to proceed, provided that he does not fall into an exception.⁸⁹ Under the exceptions, if a putative father fails to register with the Putative Father Registry within thirty days of the child's birth, he will lose his right to both notice and consent of the adoption of his child.⁹⁰ If, however, a putative father registers within thirty days of the child's birth, he is entitled to notice of the adoption.⁹¹ His consent is then required if he is actually proven to be the father.⁹² By filing with the registry, he gives himself notice rights, and the opportunity to obtain a later determination of

⁸⁵ *Id.* § 3107.06(B).

⁸⁶ *Id.* § 3107.07(A).

⁸⁷ *Id.* § 3107.06(C).

⁸⁸ OHIO ADMIN. CODE § 5101:2-1-01 (West 1999–2000 & Supp. 2002–2003).

⁸⁹ OHIO REV. CODE ANN. §§ 3107.06(C), 3107.07(B) (West 2010).

⁹⁰ See *infra* Part II.B.2 for a more detailed analysis of Ohio's putative father registry.

⁹¹ See *infra* Part II.B.2; OHIO REV. CODE ANN. § 3107.06(C) (West 2010).

⁹² OHIO REV. CODE ANN. § 3107.07(B)(2)(a) (West 2010).

parentage (through genetic testing or a judicial hearing).⁹³ This secures his right to withhold consent and prevent an adoption, provided that a court does not find abandonment.⁹⁴

2. *Ohio's Putative Father Registry*

Like many other states, the Ohio General Assembly created a Putative Father Registry in an effort “to limit a putative father’s ability to interfere with an adoption if the putative father has failed to comply with clearly enunciated procedural requirements.”⁹⁵ Men who believe themselves to be the father of a child could fulfill certain requirements under the law (by filing with the registry) to preserve their rights.⁹⁶ A father wishing to file with the Putative Father Registry must complete and submit a registration form to the Ohio Department of Job and Family Services.⁹⁷ To make the Putative Father Registry an integral part of the adoption process, the legislature mandated a search of the registry prior to an adoption proceeding to ascertain whose consent is required.⁹⁸ This requirement emphasized the legislature’s objective of establishing clear-cut obligations for the fathers and ensuring swift adoptions where the obligations are not met.⁹⁹

Filing with the Putative Father Registry does not, however, guarantee consent rights to pending adoptions.¹⁰⁰ Indeed, even if a father does timely register, his consent is not required if he is later determined to not be the biological father.¹⁰¹ Thus, registering alone does not establish a father’s right to withhold consent.¹⁰²

⁹³ See *Id.* §§ 3107.06–3107.07.

⁹⁴ See *id.*

⁹⁵ *In re Adoption of P.A.C.*, 919 N.E.2d 791, 793–94 (Ohio Ct. App. 2009), *rev'd* 933 N.E.2d 236 (Ohio 2010).

⁹⁶ OHIO REV. CODE ANN. § 3107.062 (West 2010).

⁹⁷ *The Putative Father Registry*, OHIO DEP’T JOB AND FAM. SERVICES, <http://jfs.ohio.gov/pfr/> (last visited Mar. 12, 2012).

⁹⁸ OHIO REV. CODE ANN. §§ 3107.063, 3107.064 (West 2010).

⁹⁹ See *In re Adoption of G.V.*, 933 N.E.2d 245, 253 (Ohio 2010) (Cupp, J., dissenting); *In re Adoption of P.A.C.*, 933 N.E.2d 236, 244 (Ohio 2010) (Cupp, J., dissenting).

¹⁰⁰ OHIO REV. CODE ANN. §§ 3107.06(C), 3107.07(B) (West 2010).

¹⁰¹ See *Id.* §§ 3107.062, 3107.07(B); *In re Adoption of P.A.C.*, 919 N.E.2d 791, 793 n.9 (Ohio Ct. App. 2009), *rev'd* 933 N.E.2d 236 (Ohio 2010) (“Consent is not required from a timely registered putative father who is not the biological father.”).

¹⁰² See OHIO REV. CODE ANN. §§ 3107.062, 3107.07(B) (West 2010).

Furthermore, the thirty day deadline set by the statute is “absolute: [n]either deceit, misrepresentation nor ignorance of the pregnancy will likely excuse failure to register.”¹⁰³ Therefore, a court could choose to enforce this deadline regardless of any deceitful actions on the part of the mother. Ohio law makes clear that all men are put “on notice” upon having sexual intercourse with a woman that if a child is born as a result of the relationship, the child can be adopted without the father’s consent.¹⁰⁴ Accordingly, armed with the knowledge that he has had sex with a woman, a man must take proactive steps to preserve his rights.¹⁰⁵ Failure to take these steps will result in a loss of parental rights.¹⁰⁶ To reap the benefits of the registry, fathers must take these proactive steps almost immediately.¹⁰⁷

3. *Public Policy Considerations Behind Ohio’s Statutory Scheme*

This firm approach is in line with the stated policy interests behind the registry, and the adoption statutes as a whole: to promote and allow for the successful and prompt adoption of children, and to “avoid court battles.”¹⁰⁸ A major concern the legislature had in enacting the statute was to avoid “the delays inherent in allowing ancillary litigation regarding status to complete before considering the adoption petition.”¹⁰⁹ As a result of this concern, the General Assembly attempted to draw a line to better define the point at which a putative fathers’ fundamental right to father would vest and gain protection.¹¹⁰ If a father’s actions do not reach a point of acceptable commitment, he will fall on the other side of the line and will be denied all protection and rights.¹¹¹ This seems on the surface to be a strict cut-off, especially in light of the Court’s pronounced emphasis on parental rights and overall hesitation to regulate and terminate them.¹¹² The Ohio General Assembly nevertheless sought out this bright-line test in its 1996 amendments to the statutes, demonstrating its desire to promote

¹⁰³ Erik L. Smith, *Basics of the Ohio Putative Father Registry*, OHIO LAW., Mar./Apr. 2005, at 6.

¹⁰⁴ OHIO REV. CODE ANN. § 3107.061 (West 2010).

¹⁰⁵ *See generally id.* §§ 3107.06(C), 3107.07(B).

¹⁰⁶ *See id.*

¹⁰⁷ *See id.*

¹⁰⁸ *See Price, supra* note 10.

¹⁰⁹ *In re Adoption of P.A.C.*, 933 N.E.2d 236, 242 (2010) (Brown, J., dissenting).

¹¹⁰ *See id.*

¹¹¹ *See id.* at 240.

¹¹² *See id.* at 237.

and facilitate uncontested adoptions.¹¹³ While some view this approach as efficient and effective in meeting these policy goals,¹¹⁴ others have greatly criticized the current statutory structure in Ohio.¹¹⁵ Those opposed to the scheme argue that Ohio has failed to publicize and make known to male citizens the existence of the registry, as well as the steps required to preserve their potential rights.¹¹⁶

4. *Adoption Case Law in Ohio*

Ohio case law further elaborates on these statutory requirements. The Supreme Court of Ohio was forced to examine the intricacies of the consent statutes in *In re Adoption of Pushcar*.¹¹⁷ There, a step-father attempted to adopt his wife's child from a previous relationship with a man to whom she was never married.¹¹⁸ The biological father of the child had already been determined to be the legal father, as he had signed the birth certificate and was registered as the child's father in the Centralized Paternity Registry.¹¹⁹ Although the man was considered to be the legal father, court rules required him to submit to genetic testing to establish paternity for purposes of visitation.¹²⁰ He did just that.¹²¹

The prospective adoptive father, however, argued that because the biological father had failed to care for the child for more than one year, his consent was not required.¹²² The court was faced with several issues, including "whether a probate court must refrain from proceeding with the adoption of a child when an issue concerning the parenting of that child is

¹¹³ See *id.* at 242.

¹¹⁴ See *id.*

¹¹⁵ For additional information on criticism of the registry see Erik L. Smith, *The Ohio Putative Father Registry—The What?*, ADOPTING.ORG, <http://www.adopting.org/adoptions/the-ohio-putative-father-registry-the-what.html> (last visited Nov. 1, 2011) (demonstrating that the actual numbers of usage of the putative father registry are extremely low, suggesting a lack of knowledge on behalf of the general public).

¹¹⁶ *Id.*

¹¹⁷ 853 N.E.2d 647 (Ohio 2006).

¹¹⁸ *Id.* at 648–49.

¹¹⁹ *Id.* at 648.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.* at 650. As it is with any parent, a father's abandonment of his child is also a basis to lose the right to withhold consent. OHIO REV. CODE ANN. § 3107.07 (West 2010). Abandonment may be willful or through a failure to care for and support the minor. *Id.*

pending in the juvenile court.”¹²³ The court focused on the fact that it could not make an abandonment determination yet, as the legal father had not submitted to genetic testing.¹²⁴ The court, citing *In re Adoption of Sunderhaus*,¹²⁵ noted that the year period relevant to an abandonment determination, and thus, whether consent is required, does not begin to run until after the trial court determines paternity.¹²⁶ The court also described the “bedrock proposition that once a court of competent jurisdiction has begun the task of deciding the long-term fate of a child, all other courts are to refrain from exercising jurisdiction over that matter.”¹²⁷ Because of this principle, the court in *Pushcar* found that the year period to determine if the biological father had failed to communicate with the child had not yet begun to run, as paternity had not yet been established by genetic testing.¹²⁸ It ultimately held that in situations where a parentage action is pending in juvenile court, as it was here, the probate court “must defer to the juvenile court and refrain from addressing the matter until adjudication in the juvenile court.”¹²⁹ In reaching this conclusion, the court stressed the gravity of the situation in that permitting the adoption of a child by one person in effect terminates the fundamental rights of another (the parent).¹³⁰ As a result, the court gave great deference to the determination made by the juvenile court, and required it to reach a decision on paternity before allowing the probate court to proceed on the adoption petition.¹³¹

In ruling this way, the court provided protection (in the form of time) for a father trying to establish a relationship with his child. The court opened up an additional window of time in which the father could evidence visible efforts at establishing a relationship. The court’s ruling, while appearing equitable in the sense that it allowed father’s more time to establish a relationship, was inequitable as to all other parties, because this extension of time, which does not appear in the statute, allowed fathers to make little or no effort at establishing a relationship prior to the adoption petition, but gave them an opportunity to do so later.

¹²³ *In re Pushcar*, 853 N.E.2d at 649.

¹²⁴ *Id.* at 650.

¹²⁵ 585 N.E.2d 418 (Ohio 1991).

¹²⁶ *In re Pushcar*, 853 N.E.2d at 650.

¹²⁷ *Id.* at 649 (quoting *In re Adoption of Asente*, 734 N.E.2d 1224, 1225 (Ohio 2000)).

¹²⁸ *Id.* at 650.

¹²⁹ *Id.* at 649.

¹³⁰ *Id.* at 650. See also *In re Adoption of Masa*, 492 N.E.2d 140 (Ohio 1986).

¹³¹ *In re Pushcar*, 853 N.E.2d at 650.

5. *Confusion in Ohio's Courts as to the Correct Approach*

As the previous discussion indicates, the statutes and case law in this area are in conflict. What a father has done up until the point in time of the filing of the adoption petition determines his role from that point forward. This includes not only efforts at paternity determinations but also successful, completed paternity determinations, as evidenced by a judicial ruling. It appears that the Ohio General Assembly would see *Lehr* as holding that more than a mere good faith attempt at establishing a relationship is required. Instead, from the plain language of the statutes, it seems the Ohio General Assembly requires that the father must be successful in his effort to establish the relationship with his child. *Pushcar*, however, contradicts this, by allowing for separate proceedings to later determine the legal status and consent requirements.

The timing and statuses involved have caused much confusion in the Ohio courts today. Both legislative history and case law evidence the courts' inability and unwillingness to honor the line drawn between adoptive parents' ability to pursue and obtain a final adoption and biological parents' rights to parent.¹³²

III. DISCUSSION AND ANALYSIS

A. *Discussion of the Cases*

The confusion in this area of the law came to light in two recent and highly publicized cases.¹³³ In these cases, the Supreme Court of Ohio examined the consent requirements of unwed biological fathers under two different fact patterns, attempting to create a more universal and clear-cut rule to approach these issues in the future.

1. *In re Adoption of G.V.*

The court in *In re Adoption of G.V.*¹³⁴ (*In re G.V.*) addressed an adoption made through a private placement agency, between Ohio and Indiana.¹³⁵ The child, Grayson Vaughn,¹³⁶ was born in Ohio in October of

¹³² *Supra* Part II.B.

¹³³ See, e.g., *The Early Show: Parents Plead to Keep Adopted Son*, (CBS News television broadcast Sept. 28, 2010), available at <http://www.cbsnews.com/stories/2010/09/28/earlyshow/living/parenting/main6907366.shtml>. See also Price, *supra* note 10; *Indiana Couple, Birth Father Fight Over 3-Year Old*, FT. WAYNE J. GAZETTE, Sept. 26, 2010, available at 2010 WLNR 19297917.

¹³⁴ 933 N.E.2d 245 (Ohio 2010).

¹³⁵ *Id.*

2007 and was almost immediately placed with the Vaughn family for the purposes of adoption.¹³⁷ Both the biological mother and her husband, the legal father under Ohio's presumption through marriage, "executed a permanent-surrender agreement pursuant to R.C. 5103.15 in early November 2007."¹³⁸ Soon after, Benjamin Wyrembek came forward claiming to be Grayson's biological father from an extramarital affair with the mother.¹³⁹ Mr. Wyrembek registered with Ohio's Putative Father Registry within the time-frame required by Ohio law.¹⁴⁰ Furthermore, on December 28, 2007, he filed an action in juvenile court to establish paternity and parental rights.¹⁴¹ On January 16, 2008, however, Jason and Christy Vaughn, then custodians of Grayson, filed a petition in probate court to effectuate an adoption.¹⁴² Here, as in *Pushcar*, the adoption petition was filed after the paternity action.¹⁴³ According to facts outside of the record, however, the Vaughns were delayed in their filing for reasons outside of their control.¹⁴⁴

Initially, the probate court stayed its proceedings pending results from the juvenile action.¹⁴⁵ Nearly fifteen months later, after performing genetic testing to confirm Mr. Wyrembek's paternity, the juvenile court determined that Mr. Wyrembek was the biological father of Grayson.¹⁴⁶ As Mr. Wyrembek was the biological father and had followed the law until that point in an effort to preserve his rights as such, he was deemed by this

¹³⁶ *The Early Show*, *supra* note 133 (noting that the child referred to as "G.V." in the case is Grayson Vaughn).

¹³⁷ *Id.* The Vaughn family was present at the hospital for Grayson's birth and took him home from the hospital soon after. *Id.* See also *In re G.V.*, 933 N.E.2d at 246.

¹³⁸ *In re G.V.*, 933 N.E.2d at 246.

¹³⁹ Robin Sax, *Baby Vaughn Court Battle*, HUFFINGTON POST, Oct. 6, 2010, http://www.huffingtonpost.com/robin-sax/baby-vaughn-court-battle_b_752793.html.

¹⁴⁰ *Id.* (thirty days).

¹⁴¹ *In re G.V.*, 933 N.E.2d at 246.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ Jason Vaughn, *A Letter to Grayson—Your First 30 Days*, JASON'S BLOG (Dec. 25, 2010), <http://keepinggraysonhome.com/?p=608> (explaining that the Vaughns maintained custody of Grayson both before Mr. Wyrembek filed with the registry, as well as before the juvenile action was instituted, but were held up in filing their adoption petition until after Mr. Wyrembek's filing in juvenile court because they were waiting for Grayson's birth certificate, a requirement for filing an adoption petition under Ohio law).

¹⁴⁵ *In re G.V.*, 933 N.E.2d at 246.

¹⁴⁶ *Id.*

lower court to be the legal father.¹⁴⁷ He was therefore granted the one-year period by which he had to demonstrate communication with or support for Grayson to preserve his right to consent.¹⁴⁸ Because Mr. Wyrembek's paternity had just been established, the probate court found that the one-year period had not yet begun, and therefore the Vaughns' adoption petition was filed prematurely.¹⁴⁹ Mr. Wyrembek did not consent and the adoption petition was dismissed.¹⁵⁰

The Sixth District Court of Appeals affirmed the dismissal of the adoption petition, and the Vaughns appealed to the Supreme Court of Ohio.¹⁵¹ Throughout the nearly two-and-a-half years of litigation, Grayson remained in the care and custody of the Vaughn family.¹⁵²

2. *In re Adoption of P.A.C.*

A companion case to *In re G.V.*, *In re Adoption of P.A.C.*¹⁵³ (*In re P.A.C.*), presented a somewhat similar situation, this time in the context of a step-parent adoption.¹⁵⁴ The child in this case, "P.A.C.,"¹⁵⁵ was born in July of 2005 to Susan Tuttle.¹⁵⁶ Susan's husband at the time, Jeremy, was listed on the child's birth certificate as the father.¹⁵⁷ Shortly after the child's birth, however, genetic testing demonstrated that Gary Otten was the biological father of P.A.C.¹⁵⁸ Unlike Mr. Wyrembek, Mr. Otten did not register with the Putative Father Registry,¹⁵⁹ nor did Mr. Otten acknowledge his paternity under Ohio statutes, or obtain a judicial

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 247.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 248.

¹⁵¹ *Id.* at 247.

¹⁵² See Jason Vaughn, *Unanswered Questions*, JASON'S BLOG (Dec. 3, 2010), <http://keepinggraysonhome.com/?cat=3&paged=2> (explaining that Grayson had only lived in Indiana with the Vaughn family); Jason Vaughn, *A Simple Question*, JASON'S BLOG (Nov. 30, 2010), <http://keepinggraysonhome.com/?cat=3&paged=2> (opining that for the first time in three years, someone other than the Vaughns had to support Grayson).

¹⁵³ 933 N.E.2d 236 (Ohio 2010).

¹⁵⁴ *Id.* at 237.

¹⁵⁵ The child's name in this case is unknown to the author, as there was far less publicity surrounding *In re P.A.C.* than *In re G.V.*

¹⁵⁶ *In re P.A.C.*, 933 N.E.2d at 236.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 237.

determination of paternity.¹⁶⁰ Instead, Mr. Otten waited until nearly eighteen months later to file a parentage action in juvenile court.¹⁶¹ During that time, the mother, Susan Tuttle, divorced her husband Jeremy.¹⁶² Susan also filed her own complaint for parentage against Mr. Otten shortly thereafter.¹⁶³ Between the time when the hearing was originally set and the date when it was continued to, Susan Tuttle married Kevin Michael Crooks, who then proceed to file a petition in probate court to adopt P.A.C.¹⁶⁴

As in *G.V.*, “the probate court stayed the adoption proceedings not just for the resolution of parentage as it might be relevant to a best-interest determination, but to determine Otten’s procedural and substantive rights under the adoption statutes.”¹⁶⁵ After determining that Mr. Otten was indeed the biological father, the probate court lifted the stay and granted him parenting time.¹⁶⁶ The probate court gave full weight to the juvenile court’s determination and ruled that Mr. Otten’s consent was required for the adoption to continue.¹⁶⁷ Because he did not consent, the adoption petition was dismissed.¹⁶⁸

On appeal, the First District Court of Appeals in Hamilton County notably reversed the dismissal, citing a strong legislative intent to strictly enforce Putative Father Registry requirements.¹⁶⁹ The appellate court held that because Mr. Otten did not file with the Putative Father Registry or otherwise acknowledge paternity before filing his adoption petition, he did not take the necessary steps to protect his procedural and substantive rights.¹⁷⁰ The statutes therefore required the court to rule in favor of Mr. Crooks.¹⁷¹ The appellate court placed an emphasis on the timing and sequence of events, noting that “[i]f you fail to timely register on the Putative Father Registry, or if you fail to take other enumerated action

¹⁶⁰ *In re Adoption of P.A.C.*, 919 N.E.2d 791 (Ohio Ct. App. 2009), *rev’d* 933 N.E.2d 236 (Ohio 2010).

¹⁶¹ *Id.* at 791–92.

¹⁶² *Id.* at 791.

¹⁶³ *Id.* at 792.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 793.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 796.

¹⁷⁰ *Id.* at 797.

¹⁷¹ *Id.*

before the petition is filed, then, as here, your child can be adopted without notice and your consent.”¹⁷²

Both *In re P.A.C.* and *In re G.V.* were appealed to the Supreme Court of Ohio around the same time in 2009.¹⁷³ Although the Supreme Court of Ohio declined to certify a conflict between the First and Sixth Appellate districts, the apparent conflict between the districts, as well as the great media attention, likely motivated the Supreme Court of Ohio to hear oral arguments in these cases on the same day.¹⁷⁴

3. *The Issue*

The factual similarities between both *In re G.V.* and *In re P.A.C.* are limited, if not minimal. In both cases, actions in juvenile court were pending when an adoption petition was filed in the probate court.¹⁷⁵ Also in both cases, the father seeking to stop the adoption through consent requirements was proven to be the biological father through genetic testing.¹⁷⁶ The similarities, however, end there. The court nevertheless decided to frame the issues in these two cases as one single issue,¹⁷⁷ resolving both matters in an arguably oversimplified manner. The court equated the issues in both cases to the issue in *Pushcar*,¹⁷⁸ thereby ignoring the potentially determinative differences between the three separate fact patterns. According to the Supreme Court of Ohio, the issue was whether a probate court was required to stay an adoption proceeding when an issue concerning parenting of the minor was pending in the juvenile court.¹⁷⁹

4. *Holding and Rationale*

a. *Majority*

The three-justice majority concluded that its holding in *Pushcar* was dispositive of the issues presented in these two cases.¹⁸⁰ More specifically, it maintained that “[w]hen an issue concerning parenting of a minor is

¹⁷² *Id.* at 796.

¹⁷³ *In re P.A.C.*, 933 N.E.2d 236; *In re Adoption of G.V.*, 933 N.E.2d 245.

¹⁷⁴ *In re G.V.*, 923 N.E.2d 620 (Ohio 2009) (Table).

¹⁷⁵ *In re P.A.C.*, 933 N.E.2d at 236–37; *In re G.V.*, 933 N.E.2d at 246.

¹⁷⁶ *In re P.A.C.*, 933 N.E.2d at 236; *In re G.V.*, 933 N.E.2d at 246.

¹⁷⁷ *In re P.A.C.*, 933 N.E.2d at 236; *In re G.V.*, 933 N.E.2d at 246.

¹⁷⁸ See *In re P.A.C.*, 933 N.E.2d at 238; *In re G.V.*, 933 N.E.2d at 248.

¹⁷⁹ *In re P.A.C.*, 933 N.E.2d at 237 (quoting *In re Adoption of Pushcar*, 853 N.E.2d 647, 649 (Ohio 2006)); *In re G.V.*, 933 N.E.2d at 249 (quoting *In re Pushcar*, 853 N.E.2d at 649).

¹⁸⁰ *In re P.A.C.*, 933 N.E.2d at 236; *In re G.V.*, 933 N.E.2d at 246.

pending in the juvenile court, a probate court must refrain from proceeding with the adoption” until adjudication in the juvenile court is complete.¹⁸¹ The opinions in the two cases are nearly identical and are therefore discussed simultaneously.

The court led its opinion on both matters with an emphasis on the gravity of the situation, placing extreme weight on the fact that terminating parental rights should be a last resort.¹⁸² In reaching its holding, the court shied away from the established statutory framework and instead focused on a general and definitive parental right, one which was “one of the most precious and fundamental in law.”¹⁸³ Downplaying the state’s interest regarding a potential parent’s interest, the court pointed to precedent to prove that only when a parent is found to be unfit is the State’s interest in finding a home for the child given consideration.¹⁸⁴ The court did not discuss the precedent relating to the point at which a parent’s rights become fully-protected, but rather assumed (for the purposes of its analysis) rights that may not yet have been triggered in these two cases. The court ignored the difference between fully-vested parental rights and those which had the potential to vest and garnish protection after being established. Instead, the court merely referred back to an earlier case where it held that “[a]ny exception to the requirement of parental consent [to adoption] must be strictly construed so as to protect the right of natural parents to raise and nurture their children.”¹⁸⁵

After an introduction rife with references to the severity of the cases, the court came to its holding by applying the holding from *Pushcar*.¹⁸⁶ Despite noting that the issue involved in *Pushcar* was “relatively narrow,”¹⁸⁷ the court applied the same holding, stating that its previous ruling “was more general,”¹⁸⁸ as evidenced by its use of “general language.”¹⁸⁹ The court found that *Pushcar* was not limited to cases

¹⁸¹ *In re G.V.*, 933 N.E.2d at 247 (quoting *In re Pushcar*, 853 N.E.2d at 649).

¹⁸² *In re P.A.C.*, 933 N.E.2d at 237; *In re G.V.*, 933 N.E.2d at 247.

¹⁸³ *In re P.A.C.*, 933 N.E.2d at 237 (quoting *In re Adoption of Masa*, 492 N.E.2d 140, 141 (Ohio 1986)); *In re G.V.*, 933 N.E.2d at 247 (quoting *In re Masa*, 492 N.E.2d at 141).

¹⁸⁴ *In re P.A.C.*, 933 N.E.2d at 237; *In re G.V.*, 933 N.E.2d at 247.

¹⁸⁵ *In re P.A.C.*, 933 N.E.2d at 237 (quoting *In re Masa*, 492 N.E.2d at 142) (alteration in original); *In re G.V.*, 933 N.E.2d at 247 (quoting *In re Masa*, 492 N.E.2d at 142) (alteration in original).

¹⁸⁶ *In re P.A.C.*, 933 N.E.2d at 237; *In re G.V.*, 933 N.E.2d at 247.

¹⁸⁷ *In re P.A.C.*, 933 N.E.2d at 237; *In re G.V.*, 933 N.E.2d at 247.

¹⁸⁸ *In re P.A.C.*, 933 N.E.2d at 237; *In re G.V.*, 933 N.E.2d at 247.

¹⁸⁹ *In re P.A.C.*, 933 N.E.2d at 238; *In re G.V.*, 933 N.E.2d at 247.

involving a determination of when an established parent of a minor has failed to support the minor for at least one year.¹⁹⁰ Instead, the court held it should be applied to all adoption cases where there is a parenting action pending simultaneously in juvenile court.¹⁹¹

In its opinion in *In re G.V.*, the court found that Mr. Wyrembek attempted to establish paternity prior to the filing of an adoption petition, and made special mention of the fact that Mr. Wyrembek did file with the Putative Father Registry, whereas the father in *In re P.A.C.* did not.¹⁹² In its opinion for *In re P.A.C.*, however, the court pointed to the fact that instead of filing for putative father status with the registry, Mr. Otten had instead arranged to have his DNA tested.¹⁹³ The court used different factual reasons to support its claim that the fathers in both cases had made sufficient efforts.¹⁹⁴

The court's use of language referencing attempts to establish paternity and the gravity of severing parental rights indicates that its rationale is one concerned primarily with preserving a biological father's opportunity interest whenever remotely possible. By repeatedly stressing the gravity and magnitude of the situation, and by offering different support in favor of the fathers to help them make their claims, the court demonstrated its reluctance to rule in favor of the prospective adoptive parents. This paved the way for a holding which will no doubt preserve the fathers' rights, despite clear and unambiguous statutory language which would lead to a different conclusion.¹⁹⁵

The Supreme Court of Ohio, in its opinion denying reconsideration of the issue, noted that the ultimate issue dividing the court in these two cases was whether the statutory scheme and precedent allowed for a man to change his legal status from "putative father" to "father" after the adoption petition had been filed.¹⁹⁶ The majority believed that a man should be afforded the extra time to have his paternity definitively determined in juvenile court, after the adoption petition has been filed, but before a ruling in the adoption action.¹⁹⁷ The majority's approach to this question would

¹⁹⁰ *In re P.A.C.*, 933 N.E.2d at 238; *In re G.V.*, 933 N.E.2d at 247.

¹⁹¹ *In re P.A.C.*, 933 N.E.2d at 238; *In re G.V.*, 933 N.E.2d at 247-48.

¹⁹² *In re G.V.*, 933 N.E.2d at 248.

¹⁹³ *In re P.A.C.*, 933 N.E.2d at 238.

¹⁹⁴ *In re P.A.C.*, 933 N.E.2d at 238; *In re G.V.*, 933 N.E.2d at 248.

¹⁹⁵ *In re P.A.C.*, 933 N.E.2d at 238; *In re G.V.*, 933 N.E.2d at 248.

¹⁹⁶ *In re Adoption of G.V.*, 937 N.E.2d 1285, 1285 (Ohio 2010) (O'Donnell, J., concurring).

¹⁹⁷ *In re P.A.C.*, 933 N.E.2d at 238; *In re G.V.*, 933 N.E.2d at 248.

be to give effect to a paternity determination in a subsequent adoption proceeding, even if the paternity determination came after the adoption petition was filed.

b. Concurrence

Justice Evelyn Lundberg Stratton wrote a concurring opinion for *In re P.A.C.* only, shedding further light on the policy implications and overall practicality concerns behind this area of the law.¹⁹⁸ Justice Stratton began her concurrence by referencing a procedural rule which requires expedited appeals in issues dealing with adoptions and termination of parental rights.¹⁹⁹ She chastised the Ohio Court of Appeals for exceeding the rule's time limitation when it took nearly ten months to hear the case, and four months after that to journalize its opinion.²⁰⁰ Justice Stratton noted that "[w]hile these cases are pending, the children whose lives are at issue lack a sense of permanency,"²⁰¹ and that this delay in a court's docket could result in damage to the child should a change in placement occur after the appeal is finally heard.²⁰² Justice Stratton's concern in her concurrence focused solely on the best interests of the child.²⁰³

c. Dissenting Opinions

Justices Brown, Cupp, and Lanzinger all dissented,²⁰⁴ agreeing on certain issues, and disagreeing on others. The dissenting opinions addressed such issues as statutory language, the application of *Pushcar*, and public policy concerns.²⁰⁵

All the dissenting justices agreed that the majority failed to apply the unambiguous language of the relevant adoption statutes.²⁰⁶ They all agreed that this language provides that a father's status should be determined at the point in time that the adoption petition is filed.²⁰⁷ If, at that point, a

¹⁹⁸ *In re P.A.C.*, 933 N.E.2d 238 (Stratton, J., concurring).

¹⁹⁹ *Id.* (referencing OHIO R. APP. P. 11.2(C)(1)).

²⁰⁰ *Id.* at 238–39.

²⁰¹ *Id.* at 239.

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.* at 239–43.

²⁰⁵ *In re P.A.C.*, 933 N.E.2d at 239–45; *In re G.V.*, 933 N.E.2d at 248–54.

²⁰⁶ *In re P.A.C.*, 933 N.E.2d at 240, 243–44; *In re G.V.*, 933 N.E.2d at 249, 252.

²⁰⁷ *In re P.A.C.*, 933 N.E.2d at 240–44; *In re G.V.*, 933 N.E.2d at 249–52 (referencing OHIO REV. CODE ANN. §§ 3107.01(H), 3107.06(B), 3107.07(A), 3107.07(B) (West 2005 & Supp. 2010)).

man is a “legal father,” the clearer and stricter exceptions to consent apply.²⁰⁸ If however, a father is a “putative father” at that point, the more malleable exception applies, and it is less likely that his consent will be required.²⁰⁹ Biological fathers should not be afforded extra time beyond the established cut-off.²¹⁰ This extra time translates to extra rights that were not intended or granted by the statutes.²¹¹

Justices Brown and Cupp relied on the legislative intent behind the statutes to argue against the fathers in these cases.²¹² Where the justices differed, however, was on the issue of whether *Pushcar* was dispositive of the issues presented in both *In re P.A.C* and *In re G.V.*²¹³ Both came to a different conclusion than the majority, but for different reasons and based upon different rationales.

Justice Brown’s dissent is the most thorough, perhaps because of his prior experience as a probate court judge.²¹⁴ He explained the different statutes in detail, including the legislative intent behind them.²¹⁵ He also compared the facts in both cases to those in *Pushcar*.²¹⁶ Justice Brown first discussed the timing involved in the statutory language, stressing that the status of the father is determined at the time the adoption petition is filed.²¹⁷ He noted that the statutes “are absolutely clear” that a putative father’s consent is not required “when he fails to register with the . . . [r]egistry or to establish a parent-child relationship through one of the judicial or administrative means set forth in R.C. 3107.06(B) before the

²⁰⁸ *In re P.A.C.*, 933 N.E.2d at 239–40; *In re G.V.*, 933 N.E.2d at 249, 252 (referencing OHIO REV. CODE ANN. § 3107.07(A) (West 2005 & Supp. 2010)).

²⁰⁹ *In re P.A.C.*, 933 N.E.2d at 239–44; *In re G.V.*, 933 N.E.2d at 249–55. (referencing OHIO REV. CODE ANN. § 3107.07(B) (West 2005 & Supp. 2010)).

²¹⁰ *In re P.A.C.*, 933 N.E.2d at 241–44; *In re G.V.*, 933 N.E.2d at 250–52.

²¹¹ *In re P.A.C.*, 933 N.E.2d at 242, 244; *In re G.V.*, 933 N.E.2d at 251, 253.

²¹² *In re P.A.C.*, 933 N.E.2d at 241–45; *In re G.V.*, 933 N.E.2d at 249–53.

²¹³ *In re P.A.C.*, 933 N.E.2d at 241–45; *In re G.V.*, 933 N.E.2d at 249–52.

²¹⁴ *Eric Brown*, JUDGEPEdia.ORG, http://judgepedia.org/index.php/Eric_Brown (last visited Mar. 12, 2012).

²¹⁵ *In re P.A.C.*, 933 N.E.2d at 239–40 (Brown, J., dissenting); *In re G.V.*, 933 N.E.2d at 248–50 (Brown, J., dissenting).

²¹⁶ *In re P.A.C.*, 933 N.E.2d at 241 (Brown, J., dissenting); *In re G.V.*, 933 N.E.2d at 250–51 (Brown, J., dissenting).

²¹⁷ *In re P.A.C.*, 933 N.E.2d at 240 (Brown, J., dissenting); *In re G.V.*, 933 N.E.2d at 250 (Brown, J., dissenting).

adoption petition is filed.”²¹⁸ According to Brown, the statutes simply do not allow a stay in an adoption proceeding in probate court for the “filing of or completion of pending actions to establish paternity.”²¹⁹

Brown also wrote that the majority erroneously relied on *Pushcar*, ignoring the important differences between the two cases.²²⁰ *Pushcar*, according to Brown, was a case which sought to divest a legally established father of his rights, whereas the cases involved here sought to find a putative father’s consent unnecessary.²²¹ Brown believed that the timing of events in these cases was dispositive of the issue, not the fact that all three cases involve simultaneous actions in both the probate and juvenile courts as the majority believed.²²²

Brown also pointed to the fact that *Pushcar* relies on *Sunderhaus*, a case which was decided before the Ohio General Assembly enacted the current statutory scheme (including the Putative Father Registry).²²³ He found faults in the *Pushcar* holding and analysis, especially as applied to the facts in both *In re P.A.C.* and *In re G.V.*, and therefore, he found its value limited and outside of the scope of these cases.²²⁴ Further, Justice Brown acknowledged Justice Cupp’s dissent, which he noted “correctly set[] forth the legislative history and [policy] objectives” supporting the statutory scheme as it is today.²²⁵

After initially addressing the statutes in play, Brown turned his focus to the facts in these cases; specifically, the father’s registration (or lack

²¹⁸ *In re P.A.C.*, 933 N.E.2d at 240 (Brown, J., dissenting); *In re G.V.*, 933 N.E.2d at 250 (Brown, J., dissenting).

²¹⁹ *In re P.A.C.*, 933 N.E.2d at 240 (Brown, J., dissenting); *In re G.V.*, 933 N.E.2d at 250 (Brown, J., dissenting).

²²⁰ *In re P.A.C.*, 933 N.E.2d at 241 (Brown, J., dissenting); *In re G.V.*, 933 N.E.2d at 251 (Brown, J., dissenting).

²²¹ *In re P.A.C.*, 933 N.E.2d at 241 (Brown, J., dissenting); *In re G.V.*, 933 N.E.2d at 250 (Brown, J., dissenting).

²²² *In re P.A.C.*, 933 N.E.2d at 241 (Brown, J., dissenting); *In re G.V.*, 933 N.E.2d at 250–51 (Brown, J., dissenting).

²²³ *In re P.A.C.*, 933 N.E.2d at 241 (Brown, J., dissenting); *In re G.V.*, 933 N.E.2d at 250–51 (Brown, J., dissenting).

²²⁴ *In re P.A.C.*, 933 N.E.2d at 241 (Brown, J., dissenting); *In re G.V.*, 933 N.E.2d at 251 (Brown, J., dissenting).

²²⁵ *In re P.A.C.*, 933 N.E.2d at 242 (Brown, J., dissenting); *In re G.V.*, 933 N.E.2d at 251 (Brown, J., dissenting).

thereof) with the Putative Father Registry.²²⁶ In *In re P.A.C.*, Brown noted that Mr. Otten failed to register with the Putative Father Registry, and therefore, the statute referring specifically to putative fathers who fail to register rendered his consent unnecessary.²²⁷ He claimed that Mr. Otten was attempting to “change his status in the adoption proceeding from putative father to father after the adoption petition has been filed.”²²⁸ Justice Brown argued that, because of the timing elements previously described, Mr. Otten’s status was determined based on his actions prior to the time of the petition, and therefore the putative father statute applied and consent was not required.²²⁹ To allow the juvenile court proceeding to stay the adoption petition would be “inappropriate in light of the clear directive of the adoption statutes as it unnecessarily delays adoption proceedings contrary to the intent of the General Assembly.”²³⁰ Because of this, Brown would have ruled in favor of the adoption petition being heard, rather than being stayed during the pendency of Mr. Otten’s juvenile court determination.²³¹

Brown’s position in *In re G.V.* was slightly different, because in that case, the father did register with the registry.²³² Brown noted that Mr. “Wyrembek timely registered . . . but failed to establish a parent-child relationship before the adoption petition was filed. Therefore, Mr. Wyrembek is a putative father”²³³ Brown believed that the consent requirements for a putative father should apply, rather than those intended for the legally established father.²³⁴ The probate court, according to Brown, should have held a hearing to make a determination on the necessity of his consent under this standard.²³⁵

Justice Lanzinger took the position that the holding in *Pushcar* applied, yet also believed that the status of the father at the time the adoption

²²⁶ *In re P.A.C.*, 933 N.E.2d at 240 (Brown, J., dissenting); *In re G.V.*, 933 N.E.2d at 249 (Brown, J., dissenting).

²²⁷ *In re P.A.C.*, 933 N.E.2d at 240 (Brown, J., dissenting) (referencing OHIO REV. CODE ANN. § 3107.07(B)(1) (West 2005 & Supp. 2010)).

²²⁸ *Id.* at 240.

²²⁹ *Id.* at 242.

²³⁰ *Id.*

²³¹ *Id.*

²³² *In re G.V.*, 933 N.E.2d at 249 (Brown, J., dissenting).

²³³ *Id.* at 251.

²³⁴ *Id.*

²³⁵ *Id.*

petition was filed determined the consent requirements.²³⁶ Under Lanzinger's approach, courts must strictly construe the statute requiring a father to be classified as either a putative father or a father at the time the petition is filed.²³⁷ According to her view, a father will be considered a putative father until he receives a judicial determination that he is in fact the father.²³⁸ Without this determination prior to filing of the adoption petition, the man is a putative father for the remainder of the proceedings.²³⁹ Lanzinger believed that *Pushcar's* application comes into play only when determining what is in the best interests of the child in an adoption petition, as "[k]nowing who the biological father is may affect this decision."²⁴⁰

In *In re G.V.*, Lanzinger's approach did not afford Mr. Wyrembek consent rights because "[a]lthough Wyrembek filed a parentage action . . . that action had not concluded when the adoption petition was filed."²⁴¹ Therefore, he was a putative father, and again a hearing under the less favorable statutory exceptions would be required before determining if his consent was necessary.²⁴²

In *In re P.A.C.* as well, Lanzinger pointed to the fact that while Mr. Otten had filed an action, he had not yet received a conclusion to the action, and therefore under the statute as it is written he should have been considered only a putative father.²⁴³ Because he did not register with the registry as a putative father, his consent should not have been required, and Lanzinger would have instead affirmed the appellate court's decision to allow the adoption to proceed.²⁴⁴

Finally, Justice Cupp's dissent also evaluated the statutes in play, and delved into further detail on the General Assembly's policy goals behind the statutes and the injustice the majority's decision did to the policy

²³⁶ *In re P.A.C.*, 933 N.E.2d at 242–43 (Lanzinger, J., dissenting); *In re G.V.*, 933 N.E.2d at 252 (Lanzinger, J., dissenting).

²³⁷ *In re P.A.C.*, 933 N.E.2d at 242–43 (Lanzinger, J., dissenting); *In re G.V.*, 933 N.E.2d at 252 (Lanzinger, J., dissenting).

²³⁸ *In re P.A.C.*, 933 N.E.2d at 242–43 (Lanzinger, J., dissenting); *In re G.V.*, 933 N.E.2d at 252 (Lanzinger, J., dissenting).

²³⁹ *In re P.A.C.*, 933 N.E.2d at 242–43 (Lanzinger, J., dissenting); *In re G.V.*, 933 N.E.2d at 252 (Lanzinger, J., dissenting).

²⁴⁰ *In re P.A.C.*, 933 N.E.2d at 243 (Lanzinger, J., dissenting).

²⁴¹ *In re G.V.*, 933 N.E.2d at 252 (Lanzinger, J., dissenting).

²⁴² *Id.*

²⁴³ *In re P.A.C.*, 933 N.E.2d at 243 (Lanzinger, J., dissenting).

²⁴⁴ *Id.*

goals.²⁴⁵ Cupp agreed with Lanzinger that *Pushcar* did apply but that the status at time of filing determined the father's consent status.²⁴⁶ Cupp wrote that the majority takes the *Pushcar* holding "too far by permitting a party's consent-to-adoption status to change even *after the adoption petition has been filed, in clear contradiction of the language of the statute.*"²⁴⁷ In doing so, the majority elevated *Pushcar* to a level that was "contrary to both the General Assembly's clear statutory directives and to the public policy clearly expressed in the adoption statutes."²⁴⁸

Justice Cupp elaborated on the public policy issues in play when he noted that the General Assembly amended the adoption laws to reduce the time necessary to finalize adoptions and to prevent children "from being forcibly removed from their adoptive families after a biological father belatedly exercised parental rights."²⁴⁹ According to Cupp, the legislature created the putative father registry, among other resources, in an effort to allow putative fathers a chance to establish a parent-child relationship, while also providing a means to establish a failure on the part of a putative father to do just that.²⁵⁰ The overall objective behind the current statutory framework, according to Cupp, was to facilitate the adoption process in a manner which preserved the rights of the natural parents when they demonstrated commitment to the parent-child relationship, and to preserve the rights of the state, the child, and the adoptive parents when they did not.²⁵¹ Cupp emphasized that great thought and effort was placed into these adoption amendments.²⁵² These amendments were seeking to create a more definite line by which to evaluate if the commitment a father

²⁴⁵ *In re P.A.C.*, 933 N.E.2d at 243–45 (Cupp, J., dissenting); *In re G.V.*, 933 N.E.2d at 252–54 (Cupp, J., dissenting).

²⁴⁶ *In re P.A.C.*, 933 N.E.2d at 244 (Cupp, J., dissenting); *In re G.V.*, 933 N.E.2d at 252 (Cupp, J., dissenting).

²⁴⁷ *In re P.A.C.*, 933 N.E.2d at 244 (Cupp, J., dissenting); *In re G.V.*, 933 N.E.2d at 252 (Cupp, J., dissenting) (emphasis in original).

²⁴⁸ *In re P.A.C.*, 933 N.E.2d at 244 (Cupp, J., dissenting); *In re G.V.*, 933 N.E.2d at 252 (Cupp, J., dissenting).

²⁴⁹ *In re P.A.C.*, 933 N.E.2d at 244 (Cupp, J., dissenting); *In re G.V.*, 933 N.E.2d at 253 (Cupp, J., dissenting).

²⁵⁰ *In re P.A.C.*, 933 N.E.2d at 244–45 (Cupp, J., dissenting); *In re G.V.*, 933 N.E.2d at 253 (Cupp, J., dissenting).

²⁵¹ *In re P.A.C.*, 933 N.E.2d at 244–45 (Cupp, J., dissenting); *In re G.V.*, 933 N.E.2d at 253 (Cupp, J., dissenting).

²⁵² *In re P.A.C.*, 933 N.E.2d at 244–45 (Cupp, J., dissenting); *In re G.V.*, 933 N.E.2d at 253 (Cupp, J., dissenting).

demonstrated was sufficient, thereby determining his rights through a predictable and certain standard.²⁵³ Cupp argued that “the result of the majority opinion [was] to excuse appellant’s failure to . . . demonstrat[e] his commitment to meeting the responsibilities of parenthood in the manner provided by the applicable statutes, and [left] the child in legal limbo,”²⁵⁴ going against the ultimate goal of protecting the child’s best interests.²⁵⁵

Under the facts in *In re G.V.*, Cupp found that despite having registered with the registry, Mr. Wyrembek’s failure to establish a relationship with his child prior to the filing of the adoption petition rendered him a putative father, and the probate court should have applied the consent requirements under the putative father framework.²⁵⁶ According to Cupp, Mr. Wyrembek should not have been permitted to change his legal status after the adoption petition had been filed, as to do so is “not authorized by the adoption statutes.”²⁵⁷

Likewise, Cupp noted that the father’s failure to file with the registry in *In re P.A.C.* was a clear failure to establish a parent-child relationship.²⁵⁸ In allowing Mr. Otten to change his status, the majority’s opinion “serve[d] only to undermine the effectiveness of the Putative Father Registry and to upend Ohio’s orderly adoption process.”²⁵⁹ The father here also went against the plain meaning of the statute by attempting to change his status after the deadline.²⁶⁰ According to Cupp, his consent should not have been required.²⁶¹

Ultimately, the dissenters, especially Cupp and Brown, believed that both decisions were inconsistent with the goals of the legislature as enunciated through the statutes. The dissent argued that the majority, in ruling the way it did, substituted its own policy goals for those of the

²⁵³ *In re P.A.C.*, 933 N.E.2d at 244–45 (Cupp, J., dissenting); *In re G.V.*, 933 N.E.2d at 253–54 (Cupp, J., dissenting).

²⁵⁴ *In re P.A.C.*, 933 N.E.2d at 245 (Cupp, J., dissenting); *In re G.V.*, 933 N.E.2d at 253–54 (Cupp, J., dissenting).

²⁵⁵ *In re P.A.C.*, 933 N.E.2d at 245 (Cupp, J., dissenting); *In re G.V.*, 933 N.E.2d at 253 (Cupp, J., dissenting).

²⁵⁶ *In re G.V.*, 933 N.E.2d at 254 (Cupp, J., dissenting) (citing OHIO REV. CODE ANN. § 3107.07(B)(2)(West 2005)).

²⁵⁷ *Id.*

²⁵⁸ *In re P.A.C.*, 933 N.E.2d at 245 (Cupp, J., dissenting).

²⁵⁹ *Id.* at 244.

²⁶⁰ *Id.* at 243–44.

²⁶¹ *Id.* at 244.

legislature, thus inviting uncertainty and unpredictability back into the world of adoption law.²⁶²

Both the majority and the dissenting opinions in these cases placed emphasis on the actions and level of commitment demonstrated by the fathers, attempting to follow the current doctrine as established by the Supreme Court of the United States. The fact that the justices came to different conclusions based on the same facts evidences a lack of clear guidance.

B. Analysis

This lack of guidance and the conflict of opinions that resulted must be further dissected to determine whether the court was correct in its holding and to understand the implications a decision such as this will have on future adoption proceedings. Although it is tempting to sympathize with the fathers in these cases, and therefore to initially agree with the majority's holding, further scrutiny reveals that the majority's holding was nevertheless the improper approach. The Ohio Supreme Court's disregard for the plain statutory language afforded biological fathers a right greater than what was intended during the drafting of the statutes and essentially undid the work of the legislature.

1. Strengths of the Majority Opinion

There are both strengths and weaknesses in the majority's opinion. Public outcry in the media following these two cases highlighted these strengths and weaknesses, drawing attention to the underlying issues at play under the framework as it currently exists, and as some argue, how it should be.²⁶³ The media both criticized and praised the majority for its approach.²⁶⁴

Among the strengths was the majority's reliance on some of the oldest liberty interests recognized and protected by the Constitution.²⁶⁵ Setting the tone from the beginning of its opinion, the majority cited to the oldest and most supported case law in an effort to further its position of a strongly recognized and protected parental interest.²⁶⁶ In doing so, the court

²⁶² *In re P.A.C.*, 933 N.E.2d at 245 (Cupp, J., dissenting); *In re G.V.*, 933 N.E.2d at 253–54 (Cupp, J., dissenting).

²⁶³ *Indiana Couple, Birth Father Fight Over 3-Year Old*, *supra* note 133.

²⁶⁴ *Id.*

²⁶⁵ *In re P.A.C.*, 933 N.E.2d at 237; *In re G.V.*, 933 N.E.2d at 247.

²⁶⁶ *In re P.A.C.*, 933 N.E.2d at 237; *In re G.V.*, 933 N.E.2d at 247.

remains loyal to that certain portion of the nation's jurisprudence valuing family and parental rights.

In light of the history and purported goal of supporting strong parental rights, the majority's opinion succeeds in protecting these rights by providing a result favoring biological fathers. While the fathers in these cases may not have completed their paternity actions in juvenile court before the adoption petitions were filed, the court nevertheless protected these rights, because "us[ing] a technicality to say that a parent-child relationship is going to be terminated doesn't sit well."²⁶⁷ The media even characterized the ruling as a "boost" to birth father's rights.²⁶⁸ While debate ensued as to whether that was what the statute called for, the majority's ruling for the fathers made clear which side of the balance between biological rights and state's interest the court itself favored.

This result appears most justified in light of the facts in *In re G.V.* The father involved there had filed with the Putative Father Registry, had instituted a paternity action in juvenile court, and had ensued in a lengthy battle which spanned over two years to protect his rights.²⁶⁹ In the eyes of some, he did everything he could to preserve his liberty interest in his child, and therefore the majority felt he should be afforded the extra time to establish and protect his rights.²⁷⁰

Further, it is important to note that the majority's holding in *In re G.V.* is consistent with its earlier ruling in *Pushcar*, despite the cases' factual differences.²⁷¹ The court acknowledged these factual differences, and by doing so again advanced its position on the issue by attempting to simplify the overall message. The majority appeared to not be concerned with technicalities, but instead reduced the issue to one involving two pending judicial actions, one a paternity action in juvenile court, and the other an adoption petition in probate court.²⁷² The majority opinion made it clear that whenever this is the case, regardless of the intricacies and timelines involved in the individual cases, the probate court is to exercise restraint and preserve the father's opportunity to establish his parental rights,

²⁶⁷ Price, *supra* note 10, at B2 (interviewing Kenneth Cahill, the attorney for the biological father in *In re P.A.C.*).

²⁶⁸ See, e.g., *id.*

²⁶⁹ *In re G.V.*, 933 N.E.2d at 246-47.

²⁷⁰ Respondent's Brief in Opposition, *In re Adoption of G.V.*, 933 N.E.2d 245 (Ohio 2010) (No. 10-882), 2011 WL 440443 at *17.

²⁷¹ See *In re P.A.C.*, 933 N.E.2d at 237-38; *In re G.V.*, 933 N.E.2d at 247-48.

²⁷² See *In re G.V.*, 933 N.E.2d at 248.

allowing those rights to come into full existence whenever possible.²⁷³ This view is superficially clear and should be afforded some merit in its attempt to provide precise direction for future courts.

Finally the fact that some of the justices who sat on the bench in *Pushcar* also sat on the bench in these two cases further gives credence to the majority's stated intent and meaning behind the *Pushcar* language and the goal that was to be served by the *Pushcar* ruling.²⁷⁴

2. Weaknesses of the Majority Opinion

Arguably one of the greatest weaknesses in the majority opinion, which is identified and memorialized in the dissenting opinions, is its overreliance on the *Pushcar* case and its under-reliance on the actual language involved in the statutes. The statutes make no allowance for a father's status to change from putative to legal after the adoption petition has been filed. The majority opinion attempted to explain away this requirement by noting that the paternity action was permitted to proceed in *Pushcar*, despite not having been completed prior to the adoption petition.²⁷⁵ This proposition is flawed, as it implies that the *Pushcar* court also ignored the statutory language.

In its holding, by ignoring the plain language and timing element of the statutes, the majority seemed to not place much weight on the chain of events, indicating that it holds substance to be more important than procedure in these types of cases. Although that may appear to be the equitable approach when something like parental rights are at issue, this implication is instead at odds with the majority's detailed timeline of events in its recitation of facts. This demonstrates confusion among the majority as to the importance of timing, and a rationalization by which to circumvent the statutory language and counter the dissent's strong arguments.

While the court's attempt at simplicity can be commended, it should not proceed along that path if simplicity requires the court to ignore statutory language. Furthermore, even though the court mentioned the factual differences between *In re P.A.C.*, *In re G.V.*, and *Pushcar*, the court did not sufficiently explain why those differences are not relevant. The opinion ignored the fact that *Pushcar* expressly mentions established legal

²⁷³ See *id.* at 247–48.

²⁷⁴ See *In re G.V.*, 933 N.E.2d 245; *In re P.A.C.*, 933 N.E.2d 236; *In re Adoption of Pushcar*, 853 N.E.2d 647 (Ohio 2006) (Justices Pfiefer, Stratton, O'Connor, O'Donnell, and Lanzinger were on the bench in all three cases).

²⁷⁵ *In re P.A.C.*, 933 N.E.2d at 238.

fathers. The court ignored the fact that the fathers here were considered putative at the time of the petition, thereby placing them under different requirements based on that difference alone. The court also ignored *Pushcar's* focus on the one-year requirement involved. It is unclear whether the court in *Pushcar* believed that its holding would be limited to that particular status; nevertheless, the court in these note cases failed to acknowledge the differences and explain why the earlier ruling was not meant to be limited.

The majority also placed great weight on the fact that the father in *In re G.V.* did in fact register with the Putative Father Registry and appeared to rule in his favor in large part because he did everything he could to attempt “to establish paternity prior to the filing of an adoption petition.”²⁷⁶ The majority then failed to explain why this significant factor was not determinative when ruling for a father who failed to register in *In re P.A.C.*²⁷⁷ The father in *In re P.A.C.* did not do everything he could, yet he was provided the same protection as someone who did.

The majority also based its holding on the nation’s history of strong parental rights.²⁷⁸ What it failed to mention in relying on *Santosky v. Kramer*²⁷⁹ is that the facts there included parental rights between a married couples.²⁸⁰ The United States Supreme Court’s famous line of cases established that the fundamental rights of parents are not absolute, especially when considering the gender and marital status of the parents.²⁸¹ Furthermore, while the majority in both of the note cases relied on past precedent to make its point, it took a significant amount of its support from the dissenting opinions in United States Supreme Court’s opinions evaluating the fundamental rights of parents.²⁸²

Finally, perhaps the greatest weakness in the majority’s opinion is its failure to discuss the interplay between the determination of the fundamental rights of parents and the best interests of the child. Under Ohio’s statutory scheme, a best interest determination is not made until after the determination and termination of parental rights.²⁸³ Yet it is hard to ignore the consequences of this type of an initial determination, as they

²⁷⁶ *In re G.V.*, 933 N.E.2d at 248.

²⁷⁷ See *In re P.A.C.*, 933 N.E.2d at 238.

²⁷⁸ See *In re P.A.C.*, 933 N.E.2d at 237; *In re G.V.*, 933 N.E.2d at 247.

²⁷⁹ 455 U.S. 745 (1982).

²⁸⁰ See *id.* at 751–52.

²⁸¹ See discussion *supra* Part II.A.

²⁸² See *In re P.A.C.*, 933 N.E.2d at 237; *In re G.V.*, 933 N.E.2d at 247.

²⁸³ See OHIO REV. CODE ANN. § 3107.14(C) (West 2005 & Supp. 2011).

ultimately relate to what is best for the child. The court failed to address and justify its decision to recognize a biological parent's rights which are gained at the expense of removing a child from the only home he has known in his two years of life.²⁸⁴ Although its point on the importance of parental rights is well-established and well-taken, the majority nevertheless fails to offer an explanation for its blatant disregard for the children involved in these cases.

3. *Why the Court Ruled the Way It Did*

Outside of the plain language of the majority opinion and dissents, it is difficult to specifically ascertain the court's reasoning or motivation behind ruling the way it did, absent speculation and conjecture. Two possible explanations exist though, supported by both the court's implicit and explicit language. As evidenced by its continued and abundant references to prior precedent on the robust nature of general, parental rights, the court could have been hesitant to directly address and challenge a constitutional issue it feels the Supreme Court of the United States has already addressed. The court appeared to be comfortable relying on this general jurisprudence, without delving deeper into the underlying constitutional issues. It may have been afraid to incorrectly apply this past precedent or it may have been afraid to tinker with this "death penalty." Or perhaps it felt that the past precedent already spoke to the issue. Regardless of the rationale, the court gave great deference to the United States Supreme Court's line of cases on parental law, relied on their vagueness, and opted to construe the statutes in a way to avoid addressing these issues in this context.

Another possibility, also evidenced in the majority's focus on the equity of the scenario, is that of a difference in opinion on policy objectives. The court, possibly without even realizing it, gave greater weight to the fairness of the factual scenarios, possibly implying that it felt the legislature was incorrect in its approach. It may have felt that an individual could have established the requisite level of interest in any number of ways, including the ways presented in these facts. Furthermore, the court may have felt that had its understanding of the current framework been improper until now, the legislature would have sought to clarify its intentions in the wake of *Pushcar*. As the legislature let the statutes stand

²⁸⁴ See Barbara Pinto & Sarah Netter, *Fighting for Grayson: Indiana Couple Fights Court Ruling to Give Son to Biological Father*, ABCNEWS.COM (Sept. 23, 2010) <http://abcnews.go.com/GMA/fighting-grayson-indiana-couple-refuses-give-adopted-son/story?id=11704478&page=1>.

in light of this decision, the court may have felt that it correctly understood the boundaries and leeway it was afforded regarding the statutes.

While one is left guessing as to the exact motivations behind the decision, it is not without value to dissect the questions presented from the bench during oral arguments in these cases in an attempt to gather further insight as to why the court ruled the way it did. For example, in the arguments for *In re G.V.*, Justice Pfeifer, the author of the majority opinion, asked questions relating to facts not in the record which demonstrated the father's abandonment of the mother during her pregnancy.²⁸⁵ He was careful to note that these are not in the record and asked what the court could do to prevent tragedies like this in the future.²⁸⁶ His questions in the argument in *In re P.A.C.* also indicated sensitivity to the severity of the issue when he asked if there should be a case-by-case or fact-driven analysis in these types of situations in the future.²⁸⁷

Furthermore, Justice Stratton appeared to be more concerned with the equity argument—that if this issue were to be determined by a technical timing requirement it could create a “race to the court house”²⁸⁸ and result in the tragic termination of parental rights for the father.²⁸⁹ She asked whose rights would be violated if the juvenile court were to be allowed to proceed first.²⁹⁰ She made note that she was on the court when *Pushcar* was decided, and that when she signed it, she understood it to mean that when one court had jurisdiction, they must be afforded time to finish before the next court can rule on the same situation.²⁹¹ Justice Stratton solicited from arguing counsel a counter argument as to why a juvenile court should not trump an adoption proceeding.²⁹²

Justice O'Donnell, who also joined in the majority, was very vocal during the oral arguments, and asked questions relating to a father's demonstration of commitment through the signing of the Putative Father

²⁸⁵ Oral Argument at 11:40, *In re Adoption of G.V.*, 933 N.E.2d 245 (Ohio 2010) (No. 2009-2355), available at <http://supremecourtofohiomedialibrary.org/Media.aspx?fileId=125712> [hereinafter Oral Argument, *In re G.V.*].

²⁸⁶ *Id.* at 11:04, 28:00

²⁸⁷ Oral Argument at 3:12, *In re Adoption of P.A.C.*, 933 N.E.2d 236 (Ohio 2010) (No. 2009-1757), available at <http://supremecourtofohiomedialibrary.org/Media.aspx?fileID=125711> [hereinafter Oral Argument, *In re P.A.C.*].

²⁸⁸ *Id.* at 35:36.

²⁸⁹ Oral Argument, *In re G.V.*, *supra* note 285, at 9:13.

²⁹⁰ *Id.* at 7:57.

²⁹¹ Oral Argument, *In re P.A.C.*, *supra* note 287, at 34:01.

²⁹² *Id.* at 23:02.

Registry and the filing of a paternity action in juvenile court.²⁹³ In both arguments, he mentioned a potential “race to the court” and noted that if a father has a right to file in juvenile court, he should have a right to get an answer that is afforded weight.²⁹⁴ He also asked about the result that would ensue if the juvenile court’s docket was backed up and the adoption petition was allowed to proceed by no fault of the father, who had made efforts to obtain a judicial determination of paternity.²⁹⁵

These arguments together support the majority’s ultimate opinion, demonstrating its concern for making this a technical issue and giving further weight to the argument of a difference in opinions on policy. The court was obviously concerned, and rightly so, that an individual who had made initial efforts to demonstrate an interest would be penalized by a system wrought with delay and inefficiency. The majority appeared to want to get to the substantive merits of the case and make a ruling based on its feelings of fairness rather than a ruling under the confinement of the limiting intricacies of the statutory language.

Likewise, the dissenting justices’ questions supported their written concerns. Justice Brown, in the arguments for *In re G.V.*, asked if the *Pushcar* and *Sunderhaus* precedent should have been overruled.²⁹⁶ Further, he inquired as to whether and to what extent the current framework was insufficient.²⁹⁷ He also demonstrated that he was not completely against the fathers in these cases when he asked if a father who would not have consent and notice rights would later be afforded an opportunity to present his relationship with the child during the best interest determination.²⁹⁸ He noted that the language in the statutes is unambiguous, and requested from counsel reasons why the court should adopt a bright line test.²⁹⁹

Justice Cupp also demonstrated his legislative intent and public policy arguments through his line of questioning in these cases. Justice Cupp asked if the policy argument involved should be one for the legislature to decide, rather than one for the court to try to read into a statute.³⁰⁰ He

²⁹³ *Id.* at 14:13.

²⁹⁴ *Id.* at 27:57, 28:28; Oral Argument, *In re G.V.*, *supra* note 285, at 10:23.

²⁹⁵ Oral Argument, *In re P.A.C.*, *supra* note 287, at 30:35; Oral Argument, *In re G.V.*, *supra* note 285, at 12:22.

²⁹⁶ Oral Argument, *In re G.V.*, *supra* note 285, at 5:50, 6:48.

²⁹⁷ *Id.* at 21:39.

²⁹⁸ *Id.* at 18:36.

²⁹⁹ Oral Argument, *In re P.A.C.*, *supra* note 287, at 7:08.

³⁰⁰ *Id.* at 9:14.

noted the father's failure to evidence commitment in the *In re P.A.C.* argument and made mention of the fact that under the current framework, such evidence of commitment (or lack thereof) and participation in the proceedings would be allowed regardless of the judicial "status" given to these fathers.³⁰¹ He inquired about the opportunity a father has under the law to defend against either a willful abandonment or a one-year failure to support determination.³⁰² Even if found to be putative, he mentioned, further judicial determinations would be required concerning the father's commitment to the child.³⁰³

These questions also support the dissenting justices' written attacks on the majority's reliance on *Pushcar*, its failure to follow the statutory language, and the policy implications involved in the majority's ruling. Most importantly though, these questions show that the dissenting justices are not oblivious to the weight the majority's equity argument carries, and demonstrate that they would prefer to follow the statute, as written, and allow the fathers' involvement where the statute permits.

While the inquiry into the justices' questions does not indicate or offer an absolute rationale, they shed light on the weaknesses in both the majority and the dissenting opinions, and the reasons behind why each justice may have ruled the way they did despite these weaknesses. It also demonstrates that these cases are very factually driven, that several justices are concerned with legislative intent behind the statutes, and that legislative reform in this area is likely.

4. *Why the Court Got It Wrong*

Under the Ohio statutes, as written, these cases were decided incorrectly. Although the majority may argue that the cases were nevertheless correct from a constitutional standpoint, as explained through the United States Supreme Court's jurisprudence in this area, that presumption too is incorrect. This jurisprudence has revealed a need for a "substantial relationship" to have been established for a father's biological rights to be given the full effect,³⁰⁴ yet has failed to define what is sufficient to establish this kind of a relationship. The Court has left open to the states how to measure a father's commitment,³⁰⁵ and it is with this leeway that the Ohio General Assembly came up with a framework it

³⁰¹ *Id.* at 15:01; Oral Argument, *In re G.V.*, *supra* note 285, at 14:36.

³⁰² Oral Argument, *In re G.V.*, *supra* note 285, at 14:47.

³⁰³ *Id.* at 15:55.

³⁰⁴ See *Caban v. Mohammed*, 441 U.S. 380, 393 (1979).

³⁰⁵ See generally *Dapolito*, *supra* note 40, at 990.

found fitting to advance its policy objectives. The Ohio General Assembly chose to advance the need for swift and definitive adoptions through the use of strict deadlines.

While this may seem a harsh conclusion, especially in *In re G.V.* where the father did take certain efforts initially to establish his rights, it is important to remember that the father there, despite filing with the registry, did nothing else.³⁰⁶ He did not support the child throughout the entire ordeal, financially or otherwise.³⁰⁷ He also did not attempt to contact the child and the Vaughn family,³⁰⁸ nor did he attempt to visit the child or otherwise establish a bond with the child over the course of over two years.³⁰⁹ Furthermore, as argued by the adoptive parents in *In re G.V.*, litigation does not equate to support.³¹⁰ Despite initiating actions and filing motions, the biological father failed to offer support and contact, and failed to demonstrate any commitment to the child over the course of the child's entire life up until that point.³¹¹

As contemplated by the statutes, his filing with the Putative Father Registry increased, yet did not secure, his chances at establishing his parental rights. The father in *In re P.A.C.* did even less. His actions, in addition to being minimal, were delayed and arguably made under an improper motivation.

This may seem highly formalistic and technical, yet it is a technicality the legislature envisioned in its efforts at forwarding its policy goals.³¹² The legislature felt the need to re-evaluate its focus so as to better consider what would ultimately be in the best interests of the child.³¹³ Surely even *Lehr's* focus on a familial bond,³¹⁴ along with *Quillon's* emphasis on the family unit³¹⁵ and *Caban's* supported state interest in promoting

³⁰⁶ *In re Adoption of G.V.*, 933 N.E.2d 245, 256 (Ohio 2010) (Brown, J., dissenting). See also Jason Vaughn, *Unanswered Questions*, JASON'S BLOG (Dec. 3, 2010), <http://keepinggraysonhome.com/?p=547>.

³⁰⁷ Vaughn, *supra* note 306.

³⁰⁸ *Id.*

³⁰⁹ Pinto & Netter, *supra* note 284.

³¹⁰ Jennifer Feechan, *Fate of Adopted Child Is in Question*, TOLEDO BLADE, Sept. 24, 2010, <http://www.toledoblade.com/local/2010/09/24/Fate-of-adopted-child-is-in-question.html>.

³¹¹ *Id.*

³¹² *In re Adoption of P.A.C.*, 933 N.E.2d 236, 244 (Ohio 2010)

³¹³ *Id.* at 245 (quoting *In re Adoption of Zschach*, 665 N.E.2d 1070, 1073 (Ohio 1996)).

³¹⁴ *Lehr v. Robertson*, 463 U.S. 248, 262–63 (1983).

³¹⁵ *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978).

adoptions³¹⁶ can all be said to reinforce the Ohio General Assembly's intended result. Furthermore, it cannot be argued that the technical lines drawn by the legislature are unconstitutional in light of *Lehr*, as the frameworks in both cases are remarkably similar, and survived earlier scrutiny by the Supreme Court of the United States.³¹⁷ Nevertheless, should the legislature be uncomfortable with this technicality in light of these recent cases, it is in its hands to move Ohio's framework back toward a more flexible and biological father-friendly system. As it stands now, absent a ruling of unconstitutionality (a route the court did not take), the majority overstepped its boundaries.

5. *The Foreseeable Consequences of the Decision*

The resulting implications of the court's holding are numerous and significant. Specifically, and most importantly, the ruling excuses a father's failure to demonstrate commitment and creates the possibility of severe litigation strategies which can be used improperly.

The majority's opinion sends the message that the courts will essentially excuse a father's failure to demonstrate commitment. In both cases discussed in this note, the fathers failed to do something which the law required of them. As a result, "the majority's decision serves only to undermine the effectiveness of the provisions pertaining to putative fathers and to upend Ohio's orderly adoption process,"³¹⁸ thereby rendering the Putative Father Registry in Ohio moot.³¹⁹ By allowing the fathers' rights to be preserved in these cases, despite certain failures on their part (and especially in *In re P.A.C.*), the majority promoted its own agenda over that of the legislature's.³²⁰ A great deal of time, effort, and consideration went into the creation and enactment of this statutory framework, which the majority undermined here in one fell swoop.

³¹⁶ *Caban v. Mohammed*, 441 U.S. 380, 392 (1979).

³¹⁷ In *Lehr*, the Court held that only when the father had shown a commitment to the child and "accepts some measure of responsibility in the child's future," will his father-child relationship be protected. *Lehr*, 463 U.S. at 261–62, 267. Similarly, both *In re G.V.* and *In re P.A.C.* involve fathers who have asserted their rights in juvenile court, but failed to do something the law required of them. *In re Adoption of G.V.*, 933 N.E.2d 245, 246 (Ohio 2010); *In re P.A.C.*, 933 N.E.2d at 236.

³¹⁸ *In re G.V.*, 933 N.E.2d at 253 (Cupp, J., dissenting).

³¹⁹ *See id.* at 252–53 (Cupp, J., dissenting); *In re P.A.C.*, 933 N.E.2d at 244–45 (Cupp, J., Dissenting).

³²⁰ *In re P.A.C.*, 933 N.E.2d at 245 (Cupp, J., dissenting); *In re G.V.*, 933 N.E.2d at 253 (Cupp, J., dissenting).

Furthermore, while the court here has closed one “loophole” or anomaly, it created another in its place. Instead of permitting a situation whereby prospective adoptive parents could render a pending paternity determination irrelevant before its conclusion, the court instead allowed one in which adoptive parents can seek to limit a biological father’s interference with an adoption by attempting to file an adoption petition in the probate court before the father files his action in the juvenile court.³²¹ Similarly, “[i]f the [father] doesn’t want the adoption to go forward, all he has to do is file a paternity suit.”³²² Under the court’s ruling, the parties are very much in control and are permitted to engage in abusive litigation tactics to increase the weight of their rights.³²³ This hardly seems consistent with the constitutional backdrop provided by the Supreme Court of the United States, and will no doubt result in an influx of improper litigation in the future.

6. Guidelines Provided by the Court

Because the facts in *In re Pushcar*, *In re P.A.C.*, and *In re G.V.* were different, yet resulted in the same conclusion, the court added confusion and inscrutability to whatever guidelines came out of these cases, rendering the lower courts effectively without guidance on how to proceed in future cases with similar issues. The court’s holding is not clear in how this new “test” will apply to future cases where a father has done nothing other than file a paternity action before an adoption petition is filed. It is unclear where the line will be drawn in future cases as to when, if ever, it is in the best interests of the child to allow an adoption to proceed despite a parentage action.

7. Call for Legislative Review

It appears that by creating the Putative Father Registry, the Ohio General Assembly intended to draw a clearer line between the rights of biological parents and the state’s interest in adoption, in an effort to prevent situations where children are forcibly removed from their adoptive placement “after a biological father belatedly exercise[s] his] parental

³²¹ *In re G.V.*, 933 N.E.2d at 247–48 (inferring litigation tactics could result from these rulings).

³²² Price, *supra* note 10 (quoting Susan Eisenman, an Ohio adoption attorney).

³²³ *Id.* (“[T]he rulings could create ‘a race to the courthouse’ to see which is filed first – the adoption petition or the paternity suit.”).

rights.”³²⁴ Here, the majority’s holding seems to go against that interest by preserving a biological father’s interest at whatever cost, rather than respecting the line drawn by the legislature. As a result of this departure, the legislature will likely be forced to revisit the issue, either to clarify and reiterate its initial goals, or to re-evaluate them in light of the current realities presented in these cases. If it is the latter, it will be necessary for the legislature to reconsider and reconstruct the Putative Father Registry so that it carries definitive weight.

If, however, the best interests of the child is a major goal, as the dissenting opinions suggest, the legislature should instead rework the statutes to better balance the competing interests in an effort to reach this goal. This would likely require less of a strict, bright-line rule and more of a balancing test. To ultimately obtain a situation which is in the best interests of the child, the legislature could draft the statute to allow consideration of indicia of best interests, including registration with the Putative Father Registry, support offered by all parties involved, established relationships between both biological and adoptive parents (including whether either have a strong emotional connection and bond with the child), legal proceedings initiated (when, by whom, and with what information), and contact with the child, among others. These factors could be viewed in light of the established weight and preference given to biological parents. A balancing approach such as this would lend itself more to the original United States Supreme Court’s reasoning when it began determining the trigger for unwed father’s rights, by looking not at the biological status alone, but rather at the relationship, and history and fairness involved between all parties. Conceding to the fact that such an approach creates less certainty, it is surely a small price to pay for what would no doubt reach the more equitable result among a broader range of different factual scenarios.

IV. SIGNIFICANCE

Aside from calling into question the entire adoption scheme in Ohio, these cases also present serious policy and constitutional implications under both the current framework, and the one suggested by this court. Chief among the concerns is that the court, in stretching the statute outside the scope that was initially intended by the legislature, may be overstepping its boundaries and usurping the legislature’s authority. These

³²⁴ *In re P.A.C.*, 933 N.E.2d at 244 (Cupp, J., dissenting); *In re G.V.*, 933 N.E.2d at 253 (Cupp, J., dissenting).

cases bring to the forefront the recurring question of whether courts or the legislature should be responsible for making and implementing public policy.

Furthermore, assuming equal protection and due process concerns were in play when the legislature created the initial statutory scheme, any forward movement to reconcile these two frameworks must continue to be sensitive to those constitutional concerns. Moving in a different direction to better protect the best interests of the child by favoring either biological parents or adoptions could deprive individuals of their due process rights, as well create issues involving disparate protection under the law on the basis of gender. Despite policy goals favoring either biological parents' rights or speedy adoptions, the legislature and courts must tread lightly under these precedents to maintain these constitutional protections while also achieving a desirable result for the child.

V. CONCLUSION

In situations like the ones presented in these cases, there are no winners. The court's ruling in favor of the fathers in *In re P.A.C.* and *In re G.V.* resulted in at least one child being torn from the only home he had ever known, leaving a family devastated. The child was forced to leave the life he knew, and move in with a man he had barely met. Honoring a father's parental rights resulting only from his biological tie is no longer in the best interests of the child under these circumstances. Yet had the court made its ruling under the motivation of the child's welfare alone, the fathers would have lost out in both cases, and assuming they had genuine interests, they too would have been left devastated.

There are no clear, fair answers in such difficult cases, yet there were guidelines to help the court choose. The legislature enacted clear statutes that, while technical in nature, provided guidance under which the court could have analyzed these cases. The court was afraid to fully address the constitutional issues here, and instead ignored the enacted law and guidance it provided, finding the statutes an insufficient route by which to obtain its desired conclusion. The legislature drew a line and chose a side, and the court chose the other. Chaos resulted.

Any time a clear, definitive line is drawn in the law to make a determination, criticism ensues, and it will be argued that the line is

particularly arbitrary or unfair.³²⁵ Unfortunately, the occasional harsh outcome will result.³²⁶ This is especially true when dealing with a line drawn in an area as sensitive and personal as that of the family unit and parental rights.³²⁷ The line the Ohio General Assembly drew to clearly mark and divide the point where father's rights end and the state's interests begin becomes increasingly apparent and arguably arbitrary when it creates a situation where the court is forced to rule between two sympathetic parties. Yet it is a line which was contemplated, studied, critiqued, revised, and thoroughly analyzed by many of Ohio's elected lawmakers before being enacted by the General Assembly and signed into law by the Governor. This line has goals it seeks to accomplish by way of promoting adoptions. It has the potential to create good results, even if it is a strict cut-off. It will, however, have no effect whatsoever if the Ohio courts continue to disobey it. By giving the fathers here another chance at what they failed to do initially, the court perpetuated the chaos in Ohio's adoption law.

³²⁵ See, e.g., Price, *supra* note 10 (noting that there are supporters of the Ohio law containing the bright-line test and critics of the Ohio Supreme Court's decisions to overlook the test).

³²⁶ See, e.g., J.N.R. v. O'Reilly, 264 S.W.3d 587 (Ky. 2008) (holding that the biological father lacked subject matter standing to press his parental rights because of a Kentucky statute that denied adjudicating paternity merely because the child was not born out of wedlock as the mother was married to another man at the time of the child's birth).

³²⁷ See, e.g., *id.*