IN THE MICHIGAN SUPREME COURT
Appeal from the Michigan Court of Appeals
(Talbot, C.J., O'Brien and Murray, JJ.)

In re MGR, Minor.

Supreme Court No. 857821-2
Court of Appeals Nos. 338286; 340203
Oakland Circuit Court
Case No. 2016-842995-AD
Hon. Victoria Valentine

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BRIEF OF AMICUS

ACADEMY OF ADOPTION AND ASSISTED REPRODUCTION ATTORNEYS

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DATE AND NATURE OF ORDER ON APPEAL AND RELIEF SOUGHT

In this consolidated appeal, on February 27, 2018, the Michigan Court of Appeals in *In re MGR*, 323 Mich App 279; 916 NW2d 662 (2018) affirmed the Trial Court's opinion that the Appellee properly appeared by telephone at the March 24, 2017 Section 39 hearing and dismissed as moot the Appellant's argument that the Trial Court erred when, on April 17, 2017, it *sua sponte* adjourned the Section 39 hearing pending resolution of the related paternity case.

In *MGR* the Michigan Court of Appeals dismissed as moot the appeal from the Trial Court's September 14, 2017 final Opinion and Order refusing to terminate Appellee's parental rights holding that putative father had provided substantial and regular support to mother and thus his rights could not be terminated under MCL 710.39(2). In its *published* decision also dated February 27, 2018, the Court of Appeals held that the Trial Court's October 4, 2017 order of filiation, by virtue of which the minor child's putative father attained legal parentage, rendered appellate review of the Trial Court's September 14, 2017 decision moot, since the Michigan Adoption Code does not authorize termination of a legal father's parental rights. Therefore, the Court of Appeals reasoned, even if Appellants prevailed on the merits and reversed the Trial Court, it would be without authority, on remand, to correct the error and terminate the father's parental rights.

Appellants are now asking the Michigan Supreme Court to reverse these decisions and remand to the Michigan Court of Appeals for consideration of the cited Trial Court's orders on their merits.

STATEMENT OF JURISDICTIONAL BASIS

The jurisdictional summary set forth in Appellants' Application for Leave to Appeal is complete and correct. MCR 7.212(D)(2).

STATEMENT OF GROUNDS FOR APPEAL AND WHY THIS COURT SHOULD REVERSE THE COURT OF APPEALS

Amicus Curiae, the Academy of Adoption & Assisted Reproduction Attorneys, promotes and supports Appellants' position and urges the Michigan Supreme Court to reverse the Michigan Court of Appeals and remand the consolidated appeals for consideration on the merits.

Amicus Curiae has had an opportunity to review the record. Amicus Curiae notes that the extraordinary time lapse between the adoption petition and the Trial Court's final opinion and order, i.e. more than 15 months. Delays were attributable to various factors but, other than a single three week delay, Amicus Curiae found no evidence that Appellants, the child's birth mother or lawyer guardian ad litem, at any time, caused, requested or concurred with a continuance of the adoption case.

STATEMENT OF INTEREST OF AMICUS CURIAE ACADEMY OF ADOPTION & ASSISTED REPRODUCTION ATTORNEYS

The Academy of Adoption & Assisted Reproduction Attorneys is an association of attorneys, judges and law professors in the United States and Canada who are dedicated to the highest standards of practice in the field of adoption law. Membership in the Academy is by invitation based on criteria demonstrating excellence in the practice of adoption. The Academy's mission is to support the rights of children to live in safe, permanent homes with loving families, to ensure appropriate consideration of the interests of all parties to adoptions, and to facilitate the orderly and legal process of adoption.

As an organization, and through its members and committees, the Academy has lent Amicus Curiae assistance in worthy cases, assisted and advised the United States Department of State on the implementation of the 1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption and the federal Intercountry Adoption Act of 2000, participated in the President's Adoption 2002 Initiative, provided input into the drafting

and passage of state and federal adoption legislation, and proved advice related to language to be employed in the drafting of the Uniform Adoption Act.

The Academy, because of its active involvement in the field of adoption law and practice, has an interest in the development of sound legal principles in this area of the law.

There are approximately 470 Fellows throughout the United States and the world and the number continues to grow. The mission of AAAA is to advocate for laws and policies designed to protect the best interests of children, the legal status of families formed through adoption and assisted reproduction and the rights of all interested parties.

Amicus Curiae files this brief in furtherance of the following principles:

1. In all adoptions involving minor children, the best interest of the child must be the trial court's primary objective and adoptions must be given the highest priority on the court's docket; even in cases where a putative father is found to be fit and able to raise a child, the best interests of the child must be viewed as paramount and the decisive factor related to the termination of his parental rights.

2. The Adoption Code must be strictly construed since it was enacted in derogation of common law. This includes the trial court's rigorous adherence to the sections requiring that:

   A. Putative father *must* personally appear and request custody of the child at the hearing scheduled under MCL 710.39(1) and his failure to do so should be viewed as an expression of disinterest in the child and subject him to the immediate termination of his parental rights; and,

   B. Adjournments *must* be granted only for good cause shown (MCL 710.25(2));

   C. To be categorized as a "Do Something Father," entitled to the heightened protections of MCL 710.39(2), a putative father *mus*t have either established a custodial relationship with the child or provided regular and substantial support for mother during pregnancy or for the mother or child after birth, as fully described in Section 39(2).

3. Amicus Curiae notes that cases decided by the Michigan Court of Appeals involving the same critical issue – the interplay between the Adoption Code and the Paternity Act—*must* be consistently decided and the results reconciled to ensure that trial courts treat all adoptees uniformly, fairly and in pursuance of the legislatively defined general purposes of the Adoption Code. Although the Michigan Legislature has clearly mandated that trial courts give adoption cases the highest priority on their docket (MCL 710.25), trial courts have, without good cause, delayed and repeatedly adjourned adoption proceedings in a deliberate effort to advance the putative father's interests above those of the adoptee. This allows a putative father to perfect paternity while an adoption is pending or before the trial court decision in the adoption case has been fully adjudicated. The resulting order of filiation impacts the adoption and defeats the intent of the legislature in the following ways: the inquiry into the father's fitness and ability to raise the child is defeated; the inquiry into the child's best interests is defeated; the priority granted to adoptions on the court docket by the legislature is defeated; and the statutory right to appellate review of a trial court's final order is defeated. The *MGR* Trial Court entered an order of filiation while the adoption case was pending on appeal. Approximately five months later, the Michigan Court of Appeals dismissed the appeal as moot, holding that once the putative father's status was elevated to legal father, his parental rights could no longer be terminated under the Michigan Adoption Code. Amicus Curiae argues that allowing trial courts to defeat the legislature's clear intentions, as unequivocally set forth at MCL 710.21a, cannot be permitted and thus the Court of Appeals must be reversed.

4. The results of the appeal are extremely important given that, prior to the Court of Appeals *published* opinion in *In re MGR* 323 Mich App 279; 916 NW2d 662 (2018), there was but a single published case, *In re MKK*, 286 Mich App 546, 781 NW2d 132 (2009) that considered the competition between the Adoption Code and the Paternity Act when cases involving the same child are pending under both statutes. Unfortunately, trial courts have

inconsistently applied *MKK* resulting in chaos and confusion as well as outcomes that are arguably dependent upon the trial jurist assigned to the case. In *In re MKK*, the Court of Appeals devised a three-part test[1] which some trial courts have subsequently used to avoid the legislature's intent to give priority to adoptions. Rather, courts have prioritized paternity actions over adoptions, regardless of the factors the court identified in *MKK* as having the *potential* of demonstrating good cause sufficient to allow a putative father to establish legal parentage. This cancels any inquiry into the child's best interest as well into the father's fitness and ability to raise the child. The order of filiation thus effectively disrupts and defeats a pending adoption. The published decision in *MGR* erodes the Adoption Code even further by permitting the establishment of paternity, even while the case is pending on appeal, to not only disrupt an adoption but vitiate appellant's statutory right to appellate review, regardless of the Trial Court's departures from the statutory mandates.

If the Michigan Supreme Court does not reverse the appellate court and provide trial courts with the guidance and direction necessary to assure that adoptions are consistently given the priority mandated by the legislature, adoptions will be relegated to subordinate status and the best interest of children will take second place to the whims of biological fathers without any inquiry into their fitness and ability. Putative fathers have, in fact, appealed from decisions terminating their parental rights notwithstanding their admitted inability to provide care for their children due to long term incarceration, lack of housing, employment and other indicators of financial instability; other appellate decisions have rejected putative fathers' plans to place their

[1] The court in *In Re MKK* defined a 3-prong test to stay adoption proceedings in favor of paternity actions: (1) where there is no doubt that putative father is the biological father, (2) putative father has filed a paternity action without unreasonable delay, (3) and there is no direct evidence that putative father filed the paternity action simply to thwart the adoption proceedings.

children with relatives, rather than provide first hand parental care by taking children into their custody.

5. Amicus Curiae notes that while an adoption cannot be finalized until a putative father has exhausted his appellate rights (including the denial of an application for leave to appeal to the Michigan Supreme Court or the Michigan Supreme Court's order affirming the trial court's termination of his parental rights), the published opinion in the case at bar does not afford parity to the prospective adoptive parents. See MCL 710.56(2)(3). Instead, the published decision effectively treats an order of filiation as a judicial act incapable of reversal and which moots all inquiry into the merits of the Trial Court's decision. Amicus Curiae disputes the Court of Appeals' view that the order of filiation is incapable of being challenged where the Paternity Act, itself, describes a process to be followed if either an order of filiation or acknowledgment of parentage is abrogated by a later judgment or order of a court. MCL 722.717(5). Moreover, PA 2012, No. 159, §3, effective June 12, 2012, known as the "revocation of paternity act," at MCL 722.1433 provides various grounds upon which the establishment of paternity may be judicially reversed. There is simply no legal basis upon which to sustain the Court of Appeal's conclusion that an order of filiation cannot be abrogated when it is attained in disregard of MCL 710.21a(b)'s requirement that the adoptee's rights are paramount to those of all other parties.

6. In the experience of Amicus Curiae, it is not unusual for an unwed father to contest an adoption for reasons other than his intention to parent the child. Included among those reasons is the desire to defeat an adoption plan initiated by the child's mother, force her to remain in a relationship with him or satisfy the yearnings of another family member, often an elderly grandparent who believes that, regardless of the family's lack of resources, a child is always best raised by *someone* with a biological tie to the child. These types of motives, in fact, are consistent with the putative father's testimony throughout the adoption proceedings below.

For instance, putative father freely admitted that he had not financially supported his older daughter, born to another mother out of wedlock, nor provided direct care for her (other than for a few hours each week) and that he intended to support the adoptee, as well as another child due to be born shortly after the conclusion of the Section 39(1) hearing, with resources secured from the public sector, i.e. welfare. Unfortunately, also within the experiences of Amicus Curiae, children of failed adoptions are frequently the object of contentious litigation between birth parents (many of whom barely know each other) creating uncertainty and chaos as the children are shuffled between homes of multiple relatives without stability and security. Although these circumstances are not unusual in "broken homes" or relationships such that a Birth Mother has decided on an adoption plan, they stand in stark contrast to those of prospective adoptive parents, whom the Adoption Code requires be subjected to the rigorous scrutiny of a licensed child placing agency, have a proven track record of financial responsibility and also be preapproved to adopt and raise children in their homes.

Amicus Curiae finds the partial dissenting opinion of Michigan Court of Appeals jurist, O'Brien, J., particularly illuminating since she was the only jurist on the three judge panel who appears to have reviewed the Trial Court's record. Judge O'Brien's dissenting opinion very clearly states that, from her perspective, putative father had *chosen* to not support the child's mother although he was capable of doing so, failed to provide even the basic necessities for the infant after birth and, according to his own attorney, did not show much interest in pursuing the case or, apparently, a relationship with the child as evidenced by his repeated refusal of all invitations to even meet his child. Nevertheless, the Trial Court erroneously sided with putative father's position that his potential biological link to the adoptee provided him with a fundamental right to parent. (*In re MGR*, 323 Mich App 279; 916 NW2d 662 (2018), O'Brien, J., concurring in part and dissenting in part, pp. 5-7 and p. 2 n. 2). As will be demonstrated herein, putative

fathers *do not* have the same rights as legal fathers and clearly, they do not have the fundamental constitutional right to parent their children born out of wedlock.[2]

6. Amicus Curiae cannot overemphasize the potential devastating consequences to Michigan adoptees and the future of direct placement adoptions that will result if *MGR* is not reversed. Adoptive parents will no longer have assurance that the statutory protections afforded adoptees, i.e. that the trial court will inquire not only into putative father's fitness and ability to the parent but also the child's best interests have any meaning whatsoever. Unless *MGR* is reversed, the viability of direct placement adoptions will be solely determined by whether putative father desires to establish paternity, an opportunity he will have at any time throughout the adoption proceedings and all appeals thereof. *Thus, the issue before the court is critical to the state's jurisprudence related to adoptions and the safety of children, making it one of the most critical questions to have come before this court.*

STATEMENT OF QUESTIONS INVOLVED

1. Should the Adoption Code be strictly construed so that (A) a putative father's rights must be completely adjudicated during the adoption proceedings and that all potential appeals of adoption proceedings must be concluded before paternity or custody proceedings are litigated since the Legislature specifically provided that adoptions have highest priority on the court's docket and cannot be adjourned except upon a showing of good cause; and (B) that the

[2]O'Brien, J., in her partially dissenting opinion, explained: "Notably, the trial court's belief that putative father had constitutional rights regarding the hearing was erroneous. Putative father was not the minor child's legal parent because he had not perfected paternity, and "'the mere existence of a biological link does not necessarily merit constitutional protection.'" *In re MKK*, 286 Mich App 546, 561; 781 NW2d 132 (2009), quoting *Bay Co Prosecutor v Nugent*, 276 Mich App 183, 193; 740 NW2d 678 (2007). "Further, there has yet to be any determination in this state that a putative father of a child born out of wedlock, without a court determination of paternity, has a protected liberty interest with respect to the child he claims as his own." *In re MKK*, 286 Mich App at 561. An exception exists where a putative father has established a "custodial or supportive relationship" under MCL 710.39(2), which putative father had not done here. *Id.* Accordingly, putative father had no constitutional rights for the trial court to protect. See 2/27/2018, partially dissenting opinion, O'Brien, J., P. 2, fn 2, (Emphasis added).

good cause sufficient to stay an adoption proceeding must meet an extremely high bar consistent with the statutory mandate that trial courts give adoptions precedence over all other cases on the court's docket?

Amicus Curiae answers yes.
Trial Court answers no.
Court of Appeals answers no.

2. Should *In re MKK*, 286 Mich App 546, 781 NW2d 132 (2009), establishing a three-part test to determine whether good cause exists to stay an adoption proceeding in favor of a competing paternity action, be overruled where the test has (A) been largely ignored by trial courts; (B) created inconsistent results at the trial level; and (C) defeated the plain language of the Adoption Code – a statutory scheme in derogation of the common law which, accordingly, must be strictly construed –where the statute's express purposes include the provision of prompt legal proceedings to assure that adoptees are free for placement at the earliest possible time and that the achievement of permanency and stability for adoptees must be accomplished as quickly as possible; and, (D) where the Adoption Code itself provides a complete mechanism by which to promptly consider and determine a putative father's rights?

Amicus Curiae answers yes.

The Trial Court did not analyze the facts of the instant case under *MKK* to determine whether there was good cause to continue the adoption proceedings, nor did any interested party assert that good cause existed to support the Trial Court's April 17, 2017 stay of the adoption case pending conclusion of the paternity case nor to support any of the court's multiple *sua sponte* continuances and delays that caused the adoption proceedings, commenced in June 2016 to not be decided, by the Trial Court level, until September 2017, 15 months later.

Court of Appeals answers did not address the effect of *MKK* related to the issue of good cause to continue the adoption case nor consider whether, under the circumstances presented, it should be overruled.

STATEMENT OF FACTS

Amicus Curiae Academy of Adoption & Assisted Reproduction Attorneys concurs with the Statement of Facts set forth in Appellants' Application for Leave to Appeal as augmented by Guardian Ad Litem's Answer to Appellants' Application and incorporates these factual statements by reference in this brief.

HISTORICAL REVIEW OF MICHIGAN'S ADOPTION STATUTE

The right of adoption was not recognized under the English common law. See *In re Smith's Estate,* 343 Mich 291, 296, 72 NW2d 287 (1955). Rather, adoption is purely statutory in nature, the Michigan Adoption Code having been enacted in 1861 shortly after Massachusetts passed the first adoption law in the United States. *Id.* Statutes in derogation of the common law must be strictly construed. *In re RFF*, 242 Mich App 188, 199, 617 NW2d 745 (2000). "The starting point for determining the Legislature's intent is the specific language of the statute…. When construing a statute, the court must use common sense and should construe the statute to avoid unreasonable consequences." *Id.* at 198.

The Michigan Adoption Code very clearly provides that adoptions are to be given the highest priority on the court's docket. MCL 710.25(1); *MKK*, 286 Mich App at 558-59. This priority was intended to promote and achieve the clearly stated purposes of the Michigan Adoption Code, *inter alia*: (1) To provide *prompt* legal proceedings to assure that the adoptee is free for adoptive placement at the *earliest* possible time; and (2) To achieve permanency and stability for adoptees as *quickly* as possible. See MCL 710.21a(c) and (d); *Id.* at 558. An adjournment or continuance of an adoption proceeding shall only be granted upon a showing of good cause.[3] MCL 710.25(2); *Id.* at 559.

[3] Amicus Curiae suggests that for a trial court to determine whether good cause sufficient to continue an adoption has been shown, there must first be a continuance request accompanied by a statement of good cause, followed by at least some form of an analysis into its sufficiency. This notion is, in fact, supported by the Court of Appeals'

The Adoption Code further provides a complete mechanism for identifying the adoptee's father and determining or terminating his parental rights as described in MCL 710.36, 37, and 39. First, the court must determine whether the child was born out of wedlock. The process is set forth in MCL 710.36:

> *(1) If a child is claimed to be born out of wedlock and the mother executes or proposes to execute a release or consent relinquishing her rights to the child or joins in a petition for adoption filed by her spouse, and the release or consent of the natural father cannot be obtained, the judge shall hold a hearing as soon as practical to determine whether the child was born out of wedlock, to determine the identity of the father, and to determine or terminate the rights of the father as provided in this section and sections 37 and 39 of this chapter.*
>
> * * * *
>
> *(6) The court shall receive evidence as to the identity of the father of the child. In lieu of the mother's live testimony, the court shall receive an affidavit or a verified written declaration from the mother as evidence of the identity and whereabouts of the child's father. . Based upon the evidence received, the court shall enter a finding identifying the father or declaring that the identity of the father cannot be determined.*

MCL 710.36(1), (6). (Emphasis supplied).[4]

Second, MCL 710.37 provides various criteria and evidence that a trial court may rely upon to terminate a putative father's rights, regardless of whether his identity is known, unknown, or if his identify is known but he is unable to be located. Finally, if the putative father's parental rights are not terminated by consent or release, nor pursuant to Section 37, then the trial court must determine or terminate putative father's rights under MCL 710.39.

MCL 710.39, in relevant part, provides as follows:

> *(1) If the putative father does not come within the provisions of subsection (2), and if the putative father appears at the hearing and requests custody of the child, the court shall inquire into his fitness and his ability to properly care*

extensive review of putative father's actions in *MKK*—an inquiry never made or even mentioned by the Trial Court in the case at bar.

[4] The significance of the statutory bases upon which the court may identify a child's father, is important in this case for reasons that will be explained, *infra*.

> *for the child and shall determine whether the best interests of the child will be served by granting custody to him. If the court finds that it would not be in the best interests of the child to grant custody to the putative father, the court shall terminate his rights to the child.*
>
> *(2) If the putative father has established a custodial relationship with the child or has provided substantial and regular support or care in accordance with the putative father's ability to provide support or care for the mother during pregnancy or for either mother or child after the child's birth during the 90 days before notice of the hearing was served upon him, the rights of the putative father shall not be terminated except by proceedings in accordance with section 51(6) of this chapter or section 2 of chapter XIIA.*

As a first step, the trial court must decide whether the putative father comes within the provisions of subsection (1) or (2). To do so, the court must determine whether the putative father has established a custodial relationship with the child *or* has provided regular and substantial support or care for the mother during the pregnancy – within his ability – or, after the child's birth, has provided regular and substantial support or care for the mother or the child during the 90 days before he was served with notice of the hearing. If the court determines that the putative father has a custodial relationship with the child or has provided such regular and substantial support or care for the mother or child, then the putative father's rights can only be terminated under Section 51[5] of the Adoption Code or under Section 2 of the Juvenile Code (Chapter XIIA).[6] In other words, if a putative father is found to have the requisite custodial relationship with the child or has met the support requirements, then his rights can be involuntarily terminated only in the same manner as those of a man who was married to the mother or otherwise adjudicated to be the child's father. These fathers, although technically putative, are considered to be "Do-Something Fathers" and are treated as if they were the child's

[5] Section 51(6) pertains to the involuntary termination of parental rights of a noncustodial legal parent to facilitate a stepparent's adoption of the child.

[6] The Juvenile Code has jurisdiction over children who are abused or neglected and authority to terminate parental rights on multiple grounds.

legal father, whose rights are considered fundamental and constitutionally protected. (See fn. 1, *supra*).

If the putative father does not meet the requirements to be afforded the protections of subsection (2), i.e. if he is not a "Do-Something Father," then he is deemed a "Do-Nothing Father," entitled to a lesser degree of constitutional protections than the "Do-Something Father" described in subsection (2).

Subsection 39(1), provides that when a "Do-Nothing Father" *requests* custody of the adoptee, the court must inquire into his fitness and ability to properly care for the child and, if he is found fit and able, to then determine whether the adoptee's best interests would be served by granting putative father custody.[7] If the court determines that it would not be in the best interests of the adoptee to grant the putative father custody (regardless of his fitness and ability), then his parental rights *must* be terminated.

If the court does not terminate putative father's parental rights, then the trial court must terminate the child's temporary placement with the adoptive parents, return custody of the child to mother, and dismiss the adoption petition. MCL 710.39(3).

Under circumstances when the mother's rights are terminated and not restored, Subsection (5) provides the only instance within the Adoption Code, where the trial court may grant custody of the adoptee to the putative father and thus formally transform his status from putative father to a legal father by "legitimizing the child for all purposes." MCL 710.39(5).

Particularly noteworthy is that DNA testing plays absolutely no role in determining the status of the father, but rather, in the case of a Do-Something Father, it is the nature of his relationship with the adoptee or the support he has provided to the mother or adoptee that is

[7] Amicus Curiae points out that *requesting* custody of a child is not the functional equivalent of *contesting* custody, although "request" and "contest" appear, at least occasionally, to be treated as synonymous terms. (See O'Brien, J., dissenting in part, In Re MGR, 323 Mich App 279; 916 NW2d 662 (2018).

determinative. In the case of a Do-Nothing Father, his fitness and ability to parent and the best interests of the adoptee are determinative. Thus, MCL 710.39 provides the trial court with a constitutional and procedurally sound pathway to determine or terminate the putative father's parental rights and ultimately establish the viability of the prospective adoption.

The mechanism provided by the Michigan Adoption Code to determine a putative father's legal status fully protects his constitutional rights as they are described by the United States Supreme Court in *Lehr v. Robertson*, 463 US 248 (1983). The *Lehr* court held that where an unwed father demonstrates a full commitment to the responsibilities of parenthood by "com[ing] forward to participate in the rearing of his child," *Caban v. Mohammed*, 441 U. S. 380, 392 (1979), "his interest in personal contact with his child acquires substantial protection under the Due Process Clause. However, the mere existence of a biological link does not merit equivalent protection. If the natural father fails to grasp the opportunity to develop a relationship with his child, the Constitution will not automatically compel a State to listen to his opinion of where the child's best interests lie."

Clearly, MCL 710.39 fully complies with the principles established by the United States Supreme Court in *Lehr* and thus completely protects putative father's constitutional rights.

ARGUMENT I

A. The Michigan Adoption Code should be strictly construed so that a putative father's rights will be completely adjudicated during the adoption proceedings and that all appeals of adoption proceedings must be concluded before paternity or custody proceedings are

litigated since the Legislature specifically provided that adoptions have highest priority on the court's docket.

The case at bar presents several questions pertaining to the adjudication of a putative father's parental rights under Michigan's adoption statute. In the event the Supreme Court declines to reverse the appellate court, adoptions involving minor children within the State of Michigan will be at high risk of disruption throughout a legal temporary placement under MCL 710.23a. MGR was born on June 5, 2016 and is now in his third year of life. Like most children adopted through direct placement, the child has been in his pre-adoptive home since birth. Unfortunately, it appears that the trajectory of this adoption is not unique in situations where a putative father, for whatever reason, decides to explore the issue of paternity if only to determine whether he has, in fact, fathered a child. While Michigan's adoption statute does not provide a putative father with a *right* to scientifically ascertain whether he is the child's biological father before requesting custody, trial courts appear to have largely ignored the statutory scheme and, instead, employed methods to afford putative fathers' rights that were clearly unintended by the legislature.[8] Also noteworthy is that, notwithstanding the Trial Court's extraordinary accommodations, it took putative father 14 months—from July 2016 through September 2017—to present the court with test results reliable enough to establish parentage. The delay was largely due to father's inability to fund the test. The Trial Court's findings to the contrary are erroneous.

Amicus Curiae urges the Michigan Supreme Court to reverse and remand to the Court of Appeals its decisions affirming the Trial Court's orders of March 24, 2017 and April 17, 2017:

[8] Amicus Curiae is aware of a similarly situated case, *In re LMB*, No. Case Number 156674, also pending before this Court. In *LMB*, as in the case at bar, the Michigan Court of Appeals, in an unpublished opinion preceding the published opinion in this case, held that potential errors in the trial court were moot where putative father achieved legal parentage prior to oral argument in appellant prospective adoptive parents' appeal of right.

March 24, 2017 was the fifth time the Trial Court convened a hearing on Birth Mother's Petition to Identify Father and Determine or Terminate his Rights under MCL 710.36. Previous hearings were convened and adjourned on August 9, 2016, August 30, 2016, October 17, 2016 and January 19, 2017. MCL 710.39(1) states that, "If the father appears at the hearing and requests custody of the child… the court shall inquire into his fitness and ability…"

Amicus Curiae suggests that, where putative father neither appeared nor requested custody at the Section 39(1) hearing scheduled for March 24, 2017, the statute required that his parental rights be immediately terminated. The trial court not only disregarded the statute but took extraordinary measures to provide putative father with far more rights than either the United States Constitution or Michigan Legislature intended him to enjoy.

On March 24, 2017, when putative father did not show up for the Section 39 hearing, his attorney admitted that his client had not responded to at least *seven* recent notifications and, "had not shown much interest …" in the proceedings. (TR, 3/24/2017, p. 3). By March 24, 2017, the adoptee was nine months old and the first hearing on Birth Mother's petition had taken place more than seven months earlier. Nevertheless, and notwithstanding putative father's attorney's admission that he would understand the court's refusal to grant a continuance— and over birth mother's strenuous objection— the Trial Court phoned putative father and permitted him to speak, unsworn and unimpeded, for as long as he wished. Remarkably, during this "testimony" putative father falsely reported that the Trial Court's predecessor jurist had promised him a DNA test six months prior when, in fact, the transcripts clearly demonstrate this was untrue. Yet, after allowing putative father to ramble on with grievances against everyone from Birth Mother to the former judge and his "ride" for not picking him up for the hearing, the Trial Court *ordered* DNA testing be completed within ten days. (TR, 3/24/2017, p. 22). Putative father, however, was unable to provide even unofficial results (confirming his parentage) until July 2017, followed by official results in late September, 2017—a full six months later—and 14 months after putative father filed his paternity suit. Nor did putative father, on March 24, 2017, comply with MCL 710.39(1) requirement that he

"request custody," as evidenced by the Trial Court's admonishment, towards the end of the March 24, 2017 phone call that, "…if you fail to appear at the next hearing and request custody…I will proceed as if you are not going to request custody." (TR, 3/24/2017, p.22).

Amicus Curiae contends the Michigan Supreme Court should reverse the Court of Appeals' February 27, 2018 opinion holding that putative father had properly appeared, through counsel, at the March 24, 2017 Section 39 hearing. Strict construction of the statute does not contemplate putative father "appearing" via unsworn phone testimony or through counsel when, in fact, the plain language of Section 39 requires that the court ~~to~~ inquire into putative father's fitness and ability to care for the child and whether the child's best interests will be served by awarding custody to him.

Amicus Curiae suggests that for the Trial Court to conduct a meaningful hearing to understand whether putative father actually desired *custody* and, if so, to determine or terminate his rights—he was required to be *personally* present.[9] Putative Father, on the telephone, first blamed his "ride" for his absence, then went on to make demands and comments reflecting his anger at Birth Mother, her attorneys, the child's GAL and the Trial Court— as well as its predecessor jurist.

[9] Amicus Curiae suggests that this is particularly true when the scheduled hearing was not a pretrial but, in fact, the fifth time the Section 39 hearing was convened—and was attended by petitioning Birth Mother, her attorneys, the child's guardian ad litem and prospective adoptive parents. Thus, all interested parties and their attorneys were present and ready to proceed. Only putative father was not in court—not because he had not been notified—but because his "ride" thought the hearing was the following week. See TR, 3/24/2017, pp. 9, 10 and 21; contrast 2/27/2018, Trial Court, Opinion and Order, "THE MARCH 24, 2017 HEARING" p. 10, ¶2, and Trial Court's statement that it contacted putative father by phone, "Because there was no proof of service of the Notice of Hearing in the Court file…," although the call was initiated after putative father's attorney informed the Trial Court that he had sent, "between letters and phone calls seven different contacts and [putative father] has not responded to one of them." (TR, 3/24/2018, p.3). Moreover, the Court's explanation of the impetus for its decision to make the call appears contrived to support its Opinion and Order, particularly when putative father never, during the call or at any time whatsoever, denied knowing about the March 24, 2017 Section 39 hearing.

Amicus Curiae suggests that Court of Appeals' holding that putative father had complied with the statute when he appeared at the hearing, through counsel, was erroneous where the statute must be strictly construed.

MCL 710.39(1) also requires that—during putative father's appearance at the hearing—he *request custody* of the child. Amicus Curiae suggests that strict construction of this portion of the statute cannot be met by putative father's focused demand for a DNA test to determine whether he will, "appear at the next hearing and request custody," as the Trial Court permitted. (TR, 3/24/2017, p. 22). Indeed, putative father must not only request custody but also intend to parent the child himself, not have someone else in his family do so. *In Re Baby Boy Barlow,* 78 Mich App 707; 260 NW2d 896 and *In Re RFF,* 242 Mich App 188; 617 NW2d 745.

The requirements that putative father appear at the Section 39 hearing and request custody are legislative mandates, *must* be strictly construed and, given the record before the Court, demand that the Michigan Supreme Court reverse the Court of Appeals as its February 27, 2018 Opinion and Order relates to the March 24, 2017 hearing, held almost one year prior.

B. *The legislature intended that the good cause sufficient to stay an adoption proceeding must meet an extremely high bar consistent with the statutory mandate that the trial court must give adoptions precedence on the court's docket.*

On April 17, 2017, the Trial Court *sua sponte* stayed the adoption proceedings pending its resolution of the paternity case without the showing of good cause required by MCL 710.25.

Amicus Curiae is equally troubled that the Trial Court, on April 17, 2017, issued a *sua sponte* order, (only three weeks following the March 24, 2017 hearing) that delayed the adoption proceedings, indefinitely, until the related paternity case had been concluded. The Trial Court's unexpected order was not only inconsistent with its March 24, 2017 order but was also issued in direct contravention of MCL 710.25 which requires that: "(1) All proceedings under this chapter

shall be considered to have the highest priority and shall be advanced on the court docket so as to provide for their earliest practicable disposition"; and, (2) An adjournment or continuance of a proceeding under this chapter shall not be granted without a showing of good cause."

Clearly, the Michigan legislature intended that the good cause required to stay an adoption be extremely significant and that adoptions must be advanced to facilitate their earliest possible resolution.

Further, an adoption hearing cannot be adjourned unless good cause is shown.[10] MCL 710.25.

Although the concept of good cause is not defined by Michigan statute nor court rule, appellate courts have considered and interpreted its meaning.

In *In re Utrera*, 281 Mich App 1, 11-12; 761 NW2d 253 (2008), the Michigan Court of Appeals explained:

> "Good cause" is not defined by court rule. Therefore, we consult a dictionary and case law to assist us in ascertaining its meaning. *In re FG*, 264 Mich App 413, 416; 691 NW2d 465 (2004) *supra* at 418; *Richards v McNamee*, 240 Mich App 444, 451; 613 NW2d 366 (2000). Black's Law Dictionary (8th Ed) defines good cause as "[a] legally sufficient reason." See *Richards*, *supra* at 451-453 (discussing the dictionary definition of "good cause" in applying MCR 2.102[0]). in the context of MCR 3.615(8)(3), this Court has defined good cause as "[a] legally sufficient reason" and "a substantial reason amounting in law to a legal excuse for failing to perform an act required by law." *In re FG*, *supra* at 419 (internal quotation marks and citation omitted). We adopt the same definition here, and hold that in order for a trial court to find good cause for an adjournment, "a legally sufficient or substantial reason" must first be shown.

Although MCL 710.33 provides a putative father with an opportunity to express his interest in custody of a child by filing a Notice of Intent to Claim Paternity, such filing entitles him, only,

[10] The "highest priority" provisions of MCL 710.25, as will be demonstrated herein, were not only ignored by the Trial Court but essentially turned on their head. Adjournments of weeks or even months were routinely granted without explanation. Perhaps the most prominent example is the Trial Court's decision to set the first day of the Section 39 hearing six weeks after being ordered by the Court of Appeals to schedule the Section 39 hearing forthwith. See MCOA orders dated 5/31/2017 and following, all of which Appellants sought to keep the case moving—and nearly all of which were largely ineffective if the goal of Michigan's statutory adoption scheme is, in fact, consistent with its general Code's purposes. The fact that the minor child in this case is now 26 months old and appellants have still not been able to achieve permanency is illustrative that the statute, although clearly written, is not persuading trial courts that the legislature's mandates are serious.

to receive notification of the proceedings scheduled thereafter and nothing more. Putative father may file the Section 33 notice at any time during mother's pregnancy although Amicus Curiae is aware that, in practice, putative fathers generally file notice after the child is born. Regardless of when putative father files his notice, however, it cannot and does not constitute good cause to adjourn the adoption proceedings. The Michigan Court of Appeals, in *In Re BDK*, 246 Mich App 212; 631 NW2d 353 (2001) held that such notice does not constitute support or care for purposes of MCL 710.39(2). Therefore, it reasonably follows that a putative father, simply by filing a Section 33 notice, does not create "good cause" sufficient to adjourn an adoption proceeding.

Since Michigan's Adoption Code does not provide putative father with a right to a DNA test, it reasonably follows that the Trial Court's *sua sponte* continuance of the adoption case, coupled with an order for DNA testing, cannot be good cause to adjourn, *much less stay*, the adoption proceedings, as the Trial Court did in this case. Putative father never requested the Trial Court to stay the adoption case. In contrast, birth mother repeatedly requested stays of the paternity case—all of which were unequivocally denied, even when not opposed.

After adjourning the Section 39 "putative father hearing" for nearly one year, the Trial Court commenced the hearing on July 14, 2017, but did so only after the Michigan Court of Appeals' May 31, 2017 order requiring the Trial Court to commence the Section 39(1) hearing "forthwith." At the end of the half-day court session on July 14, 2017, the court continued the hearing until September 29, 2017. The Court of Appeals, however, on Appellant's motion ordered that the Trial Court advance the hearing from September 29, 2017 so that it would be concluded within two weeks or no later than August 8, 2017. Thus, the Trial Court had no choice but to recommence the hearing on August 7, 2017 and finish it the following day. When the Trial Court had not issued its Opinion and Order after nearly three weeks, the Appellant filed yet another motion in the Court of Appeals. The appellate court again intervened and on August 29,

2017 ordered the Trial Court to issue its opinion within 21 days. It seems clear, however, that before September 14, 2017, when the Opinion and Order was issued, that the Trial Court had decided on a course of action that would not require the best interests of the child to be considered nor the factors delineated at MCL 710.21(g) to be addressed.

For all of these reasons, Amicus Curiae contends that the Michigan Supreme Court should reverse the Court of Appeals decisions affirming both its March 24, 2017 order continuing the Section 39(1) hearing and its April 17, 2017 order staying the adoption proceedings pending the resolution of the related paternity case—neither of which were authorized by statute, court rule or case law and, instead, violated the strict statutory requirements of MCL 710.21a, 710.25, 710.33, 710.36 and 710.39.

ARGUMENT II

The ruling in In re MKK, 286 Mich App 546, 781 NW2d 132 (2009), providing a three-part test by which to determine good cause to stay an adoption proceeding in favor of a competing paternity action, should be overruled. That test defeats the plain language of the Adoption Code, a statutory scheme in derogation of the common law which must be strictly construed. The Code expressly states its purposes are to provide prompt legal proceedings to assure that adoptees are free for placement at the earliest possible time and to achieve permanency and stability for adoptees as quickly as possible. It further provides a complete mechanism by which to determine the rights of a putative father.

It is imperative that this Court determine that the clear language of the Adoption Code gives adoptions the highest priority over all other cases on the docket, including, most significantly, a paternity case filed by a putative father that is pending and therefore competing in terms of time with the pending adoption. The lack of guidance from the Supreme Court has led

to immense confusion in the trial courts ultimately leading to the published case which is the subject of this appeal.

The only case that addresses the conflict between adoption cases and paternity cases, *In re MKK*, 286 Mich App 546, 781 NW2d 132 (2009), has not resolved the problem, but has only added to the confusion by providing a mechanism that permits a court to circumvent the Adoption Code's legislatively designed procedure that protects the putative father's rights while not overriding those of the adoptee. Unfortunately, however, some trial courts have used *MKK* to support the notion that a trial court should never stay a paternity case in favor of an adoption case. As a result, a putative father can disrupt a temporary placement, avoid any best interests inquiry and terminate an adoption, by merely filing a paternity action prior to the complete adjudication of an adoption case, including appeals.

Similarly, Amicus Curiae is aware that other trial courts have found that neither case should be given priority but, rather, they should simply be allowed to play out simultaneously with the results largely dependent on how quickly putative father can secure the results of genetic testing. While trial courts may believe this approach to be fair (notwithstanding the adoption code's mandate), it clearly is not when pending adoptions are subject to months of court supervision prior to finalization. In the case of MGR, the supervising agency, Morning Star Adoption Center, has recently filed 26 supervision reports with the adoption department Since MDHHS require the supervising agency to visit once per month (R400.12712) and most families have 2 or 3 visits prior to finalization, 26 visits (all with related costs) are extraordinary.

While Amicus Curiae is aware of the *MKK* decision and its potential application to favor a putative father under certain circumstances, it is impossible to describe the case at bar as other than the "race to the court house," that *MKK* described with disapproval:

The MKK court explained that:

> Upon a motion to stay adoption proceedings, the trial court must make a good cause determination based on the particular circumstances of the case.
>
> In so holding, we do not intend to create a "race to the courthouse," where a paternity action takes precedence over an adoption proceeding merely because the paternity action was filed first; rather, the timing of a paternity claim is but one factor to be considered in determining whether there is good cause under MCL 710.25(2) to stay adoption proceedings. 286 Mich App at 562. (Emphasis supplied).

Noteworthy, is that MGR's father never filed a motion to stay the adoption proceedings but, rather, the Trial Court took this action *sua sponte* less than three weeks after acknowledging on March 24, 2017, after the adoption had been pending for *nine months*, that putative father had not yet requested custody of the child as required by MCL 710.39(1). Also, by the time of the April 11, 2017 stay, the hearing on birth mother's petition to identify father and determine or terminate his rights had been convened a total of five times, and continued a total of five times, although the Trial Court never provided any rationale or justification for the delay given the requirements of MCL 710.25(2); nor did the Trial Court ever analyze whether good cause existed under *MKK* although birth mother repeatedly moved to stay the paternity proceedings and father never answered these motions as required by MCR 2.119(C)(2). Thus the "race to the courthouse" was not necessary for this putative father who did not file legally competent DNA test results until MGR was 15 months old. Amicus Curiae thus views *MKK* as a case that has caused more confusion than clarity and, therefore, to return the trial courts' focus to the statutory priority afforded adoptions in the state of Michigan, it *must* be overruled.

The *MKK* court clearly opined that there are situations where a putative father's actions in contemplation of parentage are so *extraordinary* that he should be permitted to perfect paternity and parent his child. Although it appears clear to Amicus Curiae that the *MKK* court never meant to pave the way for any putative father—and certainly not one who has done absolutely nothing but impregnate a woman out of wedlock—to terminate an adoption by filing a Complaint, that is exactly what occurred in this case.

And, since Michigan courts permit a person claiming indigence to secure a fee waiver, paternity suits, *which are almost always filed by the state in pursuance of child support,* can be filed at no cost to putative father.[11] Thus, trial courts have used the premise of *MKK* to stand for a much broader proposition than for which it was intended, i.e. that a father who files a paternity suit is entitled to establish parentage and it does not matter at which stage in the adoption proceedings this occurs.

The October 4, 2017 order of filiation resulted in the Court of Appeals' February 27, 2018 published opinion wherein two judges of the panel of three held that appellate review of the adoption proceedings was moot. The single jurist who actually addressed the facts elicited during the Section 39 hearing and the merits of the case dissented:

> In this case, the paternity action was before the same trial court, and, based on the public record of the paternity action, it appears that appellants repeatedly attempted to stay those proceedings until this appeal was resolved. However, for whatever reason the trial court denied appellants' motions [footnote 4]. In so doing, it appears that the trial court entered an order that it knew would effectively prevent appellate review of its decision rather than grant the stay and allow review. Under these circumstances, I would not hold this issue moot. And for the reasons stated herein, I would remand to the trial court to conduct a § 39 hearing under the proper standard of review.
>
> *Footnote 4 reads*:
> The trial court's decision to deny appellant's motion to stay [the paternity case] is now pending in a separate appeal before this Court. As in *LMB*, this Court's decision in that appeal could result in the Supreme Court vacating the majority's decision in this case. This is the second time this Court has been confronted with this situation in the past six months. Guidance from the Supreme Court could greatly benefit the trial courts in presiding over these scenarios in the future.
>
> Opinion and Order, published 2/27/2018, O'BRIEN, J (*concurring in part and dissenting in part*).

[11] Amicus Curiae notes that the Paternity Act, enacted in 1956, clearly states its intention to compel fathers of children born out of wedlock to pay child support, determine their liability, authorize support agreements and provide for enforcement as well as penalties on violation of support orders. Notably, it is the does not speak to "legitimizing the child for all purposes," (MCL 710.39(5); or that, afterwards, "the child shall bear the same relationship to the man …as a child born or conceived during a marriage and shall have the identical status, rights and duties of a child born in lawful wedlock effective from birth." MCL 722.1004; 722.1471.

The holding in *MKK* flies in the face of the stated purposes of the Adoption Code and the United States Supreme Court's holding in *Lehr* and, furthermore, it was completely unnecessary.[12] It is indeed a fair observation that, although the Court of Appeals did not see fit to classify MKK's putative father as a "Do Something Father," the majority of the same appellate court, nine years later, refused to consider the merits of this Trial Court's decision that putative father met the Section 39(2) requirements and was, therefore, entitled to the heightened protection it provides.

The Trial Court, in fact, failed to heed the Adoption Code's mandate that adoption proceedings be advanced, "to provide for their earliest practicable disposition," yet another example of the need for statutory clarification. On, May 31, 2017, the Court of Appeals ordered that the Section 39 hearing be scheduled "forthwith," which the Trial Court interpreted, literally, to mean the court should quickly find a date to start the hearing and chose a date ten weeks later—July 14, 2017—explaining the Court of Appeal's order required nothing more than that. After a two hour hearing on July 14, 2017, the Trial Court continued the proceedings for another ten weeks to September 29, 2017. Thus, notwithstanding the May 31, 2017 order to start the hearing "forthwith," the Trial Court thereafter would have sanctioned a 20-week delay had the Court of Appeals not been called on, once again, to intervene. On July 25, 2017, the Court of Appeals very explicitly ordered the Trial Court to complete the hearing within two weeks which occurred and closing arguments were presented on the 14th day— August 8, 2017. Almost unbelievably, however, yet another, third, Court of Appeals order was required to compel the Trial Court to issue its Opinion and Order which was finally released on September 14, 2017.

[12] In *MKK*, despite adjudication under the Adoption Code and the fact that an Order of Filiation in the paternity case was not entered, the putative father's rights were not terminated. The Court of Appeals also recognized putative father's efforts to provide support, attend parenting classes, and work with social services in preparation for fatherhood. The Court of Appeals could have just as easily reversed the lower court by finding the respondent to be a "Do-Something Father" without creating an inappropriate test to circumvent the Adoption Code.

The Trial Court's September 14, 2017 Opinion and Order retroactively addressed its repeated adjournments by asserting, for the first time, that it had no choice but to adjourn the Section 39 hearing to conduct a Section 36 hearing for another possible putative father—a man birth mother had never identified as the child's father— although birth mother is, by statute, the only party authorized to provide evidence of the father's identity. MCL 710.36(6).

Amicus Curiae notes that the time between the Trial Court's March 24, 2017 order authorizing putative father's DNA test and his filing of the certified results was six months. In fact, the certified DNA results were ultimately funded by the child's birth mother, upon order of the Trial Court, after she objected to the first results as being inadmissible to establish parentage under the Paternity Act. Based on the certified results, on October 4, 2017, the Trial Court, over the strenuous objection of birth mother, issued its handwritten order: "Brown is legal father." The Trial Court then stayed the paternity case which prevented child support from being ordered—a requirement of a final order under MCR 7.202(6). Birth mother's application for leave to appeal in the paternity case was denied May 11, 2018, the Court of Appeals not being persuaded of the need for immediate appellate review. This order is the subject of an independent appeal pending in this Court.

Notably, the Trial Court did not rely on the authority of *In re MKK* to support its *sua sponte* stay of the adoption proceedings in favor of the paternity case. Nevertheless, trial courts have the ability to do so and this authority is inconsistent and at odds with the statutory mandates of the Adoption Code. Accordingly, *MKK must* be overruled to prevent this situation from recurring.

FINAL ANALYSIS OF THE ORIGINS AND CONSEQUENCES OF THE TRIAL COURT'S SEPTEMBER 14, 2017 OPINION AND ORDER

The trial court's September 14, 2017 Opinion and Order appeared to have been a shock to petitioning birth mother, prospective adoptive parents and the child's guardian ad litem, all of whom have joined in the application pending before the Michigan Supreme Court. After citing its need to hold another hearing to rule out what appears to be best described as a phantom second putative father, the Trial Court classified this putative father as falling under Section 39(2)—elevating him to the category of fathers who have established a relationship with the child or provided regular and substantial support. Although Judge O'Brien lists many reasons for her dissent and decision that the Trial Court's record should be subject to appellate review, the Michigan Court of Appeals majority has found the issues moot and therefore unreviewable.

Amicus Curiae finds it noteworthy that the Trial Court appears, in retrospect, to have significantly grappled to justify repeatedly delaying the adoption while attempting to expedite the paternity case. Clearly, the Trial Court's initial goal was to conclude the paternity case before starting the Section 39 hearing although, by the time of the April 11, 2017 order staying the adoption, it had been pending nine months. Had the appellate court not intervened and issued the May 31, 2017 order, this would have almost certainly been the likely result of the "race to the courthouse," described in *MKK*.

In the opinion of Amicus Curiae, the Trial Court's April 11, 2017 order is inexplicable, and, in fact, the Trial Court made no effort to explain its actions until it released the September 14, 2017 Opinion and Order which, similarly, is irrational and unsupported by the record. Yet, if the Court of Appeals is not reversed, the September 14, 2017 final order in the adoption case, and the order of filiation entered two weeks later, will never be reviewed. Should this occur, the minor child, now age 27 months, will be removed from Appellants' home and become the object of yet another contentious custody case between his birth parents or his birth parents and prospective adoptive parents. Notwithstanding the evidence reviewed by the dissenting jurist in

the February 27, 2018 split opinion, i.e. that Father has no home, job or assets and intends to raise this child as he does his other children born out of wedlock, by using the public welfare system, the same Trial Court will almost certainly favor Father, after finding blame for all aspects of the adoption case—including the fact that it took 15 months to resolve, squarely at the feet of Birth Mother and her attorneys. This fact is abundantly clear from the Trial Court's September 14, 2017 Opinion and Order wherein it criticizes, either directly or by inference, nearly every step taken by both birth mother and her attorneys.

Amicus Curiae also finds the Trial Court's accusation that adoptee's Birth Mother and her attorneys concealed from the court the existence and identity of other potential fathers, is disingenuous where Section 36 hearings, by statute, are based upon the child's mother's identification of the putative father and the associated Michigan court form, PCA 310, is clearly to be filed by the child's mother. (See, also MCL 710.36(6)). It follows, then, that the Trial Court's September 14, 2017 conclusion that it was required to hold a Section 36 hearing based upon Mr. Brown's unsworn March 24, 2017 phone "testimony," during which he demanded a DNA test to potentially exclude him as the child's father (by inference alleging that other men may have impregnated Birth Mother) appears constructed to support a predestined result, i.e. that the Section 39 hearing was improperly convened because Birth Mother had deceived the court.

The Trial Court's conclusion, that Birth Mother deceived the Court is unsustainable. During the first week of July 2017, *at least a week before the July 14, 2017 Section 39 hearing started,* the Trial Court had in hand uncertified, but nevertheless conclusive, results confirming, by a factor of 99.9%, that the only putative father ever named by Birth Mother, the subject of the Section 39 hearing and the man who, on October 4, 2017, was named the child's legal father was, in fact, the child's biological father.

Accordingly, from the perspective of Amicus Curiae, the Trial Court's September 14, 2017 final Opinion and Order in the adoption case includes incredible conclusions, none of which can be explained, except by the fact that Michigan trial courts do not feel constrained by either the plain and mandatory language of the Adoption Code at MCL 710.25, nor the narrow circumstances under which the statutory priority given adoptions can be overcome by a putative father's extraordinary efforts to claim custody and parent his child as described in *In re MKK*.

The Trial Court's conclusions, in its September 14, 2017 order, that Amicus Curiae finds most troublesome are:

At Page 10: The Trial Court wrote:

> [Putative father] did not appear in person. But, because there was no proof of service of the Notice of Hearing in the Court file, the Court contacted [putative father] via phone during the hearing.

This explanation is at complete odds with putative father's own attorney's March 24, 2017 assurances to the court:

> THE COURT Sir, where is your client?
>
> MR. SEXTON: I do not know, Your Honor. I -- I can tell you that I've tried to contact my -- over the past month, he's gotten between letters and phone calls seven different contacts, and he's not responded to one of them. He was sent a reminder just the other day, did not respond to it, so he hasn't shown a lot of interest in progressing with his case recently, Your Honor.

At Page 10-11: The Trial Court wrote:

> At the March 24, 2017 hearing, the Court was made aware [by means of the putative father's unsworn "testimony"], for the first time, that there was more than one possible father… While the original petition did not include other potential fathers, this turn of events obliged the Court to hold a MCL 710.36 hearing prior to the Section 39 hearing…

This explanation is inconsistent with MCL 710.36(6) which provides that the court shall receive evidence by the mother's "live testimony" or "verified written declaration" as to the identity and whereabouts of the child's father. There is NO circumstance where a putative

father's testimony related to "other potential fathers"…obliges the Court to do anything. In other words, birth father's allegations are completely irrelevant to the Court's inquiry and obligation and this is certainly true where birth father was on the telephone, not sworn, nor being questioned by any interested party.

At Page 22: *Most curiously, the Trial Court wrote:*

> … as a result of information and evidence revealing the identity of "Buck," as another potential putative father, "who the court has reason to believe may be the child's father," [footnote omitted], Ms. Ross shall file a petition to identify "Buck" as a potential putative father within seven (7) days of entry of this order and shall serve notice of hearing, to take place, forthwith, pursuant to MCL 710.36(3)(c).
>
> IT IS SO ORDERED.
>
> /S/ Hon. Victoria A. Valentine (P58546)

Amicus Curiae cannot conceive of any justification for the Trial Court, having knowledge since the first week of July 2017, that the child could not have been fathered by "Buck" or anyone other than the putative father birth mother had consistently named, to order birth mother to, "file a petition to identify 'Buck' as a potential putative father within seven (7) days…and serve notice of hearing, to take place, forthwith…"

Finally, at Page 18: The Trial Court conceded that, although the Michigan legislature's amendment of MCL 710.39(2) requires that a putative father provide, "substantial and regular support and care," to meet the subsection (2) requirements thus, "making discussion of 'reasonable care under the circumstances,' (the pre-amendment standard), irrelevant," the court then went on to acknowledge that it found the pre-amendment factors "instructive," thereby completely usurping the legislature's exclusive prerogative to amend a statute it determines to no longer reflect the interests of the People of the State of Michigan.

Amicus Curiae is thus deeply troubled that a Michigan Trial Court, with no explanation whatsoever, ignored legislatively enacted standards to achieve a goal that neither the legislature nor the Michigan Court of Appeals ever contemplated given MCL 710.25's strict requirement that trial courts must prioritize adoptions and grant continuances only on a showing of good cause which *In re MKK* predicates on the filing of a motion by an interested party. 256 Mich App at 562.

In any event, only two weeks later, on October 4, 2017, *without ever holding the hearing to identify or determine whether "Buck," a person "who the court has reason to believe may be the child's father,"* the Trial Court again refused to stay the paternity case and, instead—while the adoption case was on appeal of right to the Michigan Court of Appeals—entered an Order of Filiation and afforded now legal father an extraordinary amount parenting time.

Amicus Curiae observes, upon review of the October 4, 2017 paternity hearing, the level of the Trial Court's obvious distain for Birth Mother, whose attorneys efforts to advocate for a gradual introduction of father to child were outright rejected:

> MOTHER'S COUNSEL: If we did a parenting coordinator, but a supervised place where this child could be, because these two people are -- are absolute strangers to each other, and this -- this -- you cannot just take this child and just grant him custody and visits for days or weeks at a time.
>
> THE COURT: He is a biological father.
> MOTHER'S COUNSEL: He is a stranger to this child, Your Honor.
>
> THE COURT: He's a stranger because of the delays in this case that were caused by the mother.
>
> MOTHER'S COUNSEL: No, which have been -- I beg to differ with you, Your Honor, we had many delays that have been caused by this father. I don't want to sit and argue with this -- with you now, but I'm asking for a supervised gradual introduction of parenting time.
>
> THE COURT: Okay. So you'll get four hours a week, sir… And then we'll step it up two hours per week after that.

Amicus Curiae finally observes that the Trial Court's response on October 4, 2017 was consistent with its disregard of the LGAL's argument six months earlier:

> LGAL MONEKA SANFORD: …what I'm indicating is, is the longer the child has bonded in one place, to try to uproot that child is negative to the child. You can't say that if a child has been with someone for nine months and that's all they know, it's just -- at ten, twelve months that they're just fine being moved to a complete stranger?
>
> THE COURT: Well, he still has his constitutional right; don't you agree? And that's my job here; don't you agree? (TR, 3/24/2017, p. 19).

Amicus Curiae urges the Michigan Supreme Court to reverse the Court of Appeals and provide Michigan trial judges with clear guidance where there is now confusion and inconsistency. Perhaps this is due, at least in part to *In re MKK*, or for unrelated reasons including at least this Trial Court's misunderstanding of the respective roles of the legislature and judiciary and what due process requires.

Amicus Curiae also requests the Michigan Supreme Court provide guidance related to the child's best interests and require that each factor in MCL 710.22g be fully addressed and a finding made on all relevant components, by reference to the record, followed by a clear explanation of specific facts supporting each conclusion.

The Supreme Court should seriously consider the implications of both the majority and dissenting opinions issued by the Court of Appeals on February 27, 2018. Only Judge O'Brien reviewed the record the majority considered moot and, after doing so, cited many instances of clear error in both the Trial Court's findings of fact and conclusions of law. The dissenting jurist clearly found that the evidence did not support the Trial Court's conclusion that, as a "do something father," under Section 39(2), appellate review and remand of this case to the trial court was impossible and thus moot. Reviewing the dissenting opinion, alone, should provide the Supreme Court with extreme caution given that, without appellate review of the majority

opinion, the life of this adoptee and future similarly situated children could be forever changed as late as their third year of life with no best interest analysis.

Amicus Curiae strongly supports Appellant's request that the Court of Appeals be reversed and the case remanded for appellate review on the merits. The profound injustice to the minor child who, without reversal of the Court of Appeals decision, will be denied his statutory right to appellate review, is unconscionable given the Trial Court's repeated deviation from the mandates of the Michigan Adoption Code.

CONCLUSION

For the foregoing reasons, Amicus Curiae, the Academy of Adoption and Assisted Reproduction Attorneys, unequivocally supports the position of the Appellants and respectfully requests that this Honorable Court grant substantive relief favoring Appellants.
Specifically, Amicus Curiae requests this Court to:

A. Require strict interpretation of the clear language of the Adoption Code such that, at the hearing scheduled under MCL 710.39, the putative father, himself, must physically appear and request custody of the child to comply with the statutory prerequisite for entitlement to a hearing. Further, interpret the putative father's failure to appear and request custody as a denial of interest in the child requiring the immediate termination of his parental rights.

B. Reverse and remand this case to the Michigan Court of Appeals for review on its merits.

C. Require that any remand by the Court of Appeals to the Trial Court be assigned to another family division jurist.

D. Reverse the Michigan Court of Appeals decision in *In re MKK* and utilize the instant case to establish that an adoption case's statutory priority over all other cases requires that related actions involving the adoptee be stayed pending resolution of the adoption case *and all appeals thereof*, whether by right or leave.

Respectfully submitted,

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