**[Cite as *In re Adoption of G.V.*, 2011-Ohio-5367.]**

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

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| In the Matter of the Adoption of | : | |
| G.T.V., | : | |
| [J.V. & C.V., | : | |
| Appellants], | : | No. 11AP-617<br>(Prob. No. 543356) |
| [B.W., | : | (ACCELERATED CALENDAR) |
| Appellee]. | : | |

D E C I S I O N

Rendered on October 18, 2011

*Voorhees & Levy LLC*, and *Michael R. Voorhees*, for appellants.

*The McQuades Co., L.P.A.,* and *Alan J. Lehenbauer*, for appellee.

APPEAL from the Franklin County Court of Common Pleas, Probate Division

CONNOR, J.

**{¶1}** Petitioners-appellants, J.V. and C.V. ("appellants"), appeal from an entry of the Franklin County Court of Common Pleas, Probate Division, overruling their objections to the magistrate's decision and adopting said decision, which dismissed appellants' adoption petition due to lack of venue and lack of subject-matter jurisdiction. Because we find the probate court was without jurisdiction to decide this matter, and because the

Franklin County Court of Common Pleas, Probate Division, is not the proper venue for this action, we affirm the judgment of the trial court.

**{¶2}** G.V. was born on October 29, 2007, in Lucas County, Ohio. His birth mother executed a permanent surrender agreement pursuant to R.C. 5103.15 on November 1, 2007. The agreement was executed with Adoption By Gentle Care, a licensed private child placing agency as defined in R.C. 2151.011(A)(3), which is located in Franklin County, Columbus, Ohio. On November 4, 2007, G.V.'s legal father (the man who was married to his birth mother at the time he was conceived) executed a permanent surrender agreement. On the permanent surrender agreement, G.V.'s legal father indicated that he was not the biological father. The permanent surrender agreements were executed in order to give permanent custody of G.V. to Adoption By Gentle Care ("the agency"), for purposes of adoption. Following the execution of the permanent surrender agreements, G.V. was put into an adoptive placement with appellants, who live in the state of Indiana. On November 8, 2007, that placement was approved under the Interstate Compact on the Placement of Children.

**{¶3}** On November 15, 2007, respondent-appellee, B.W. ("appellee" or "B.W."), timely registered with the Putative Father Registry. On December 28, 2007, B.W. filed an action in Fulton County Juvenile Court to determine paternity and to establish parental rights and responsibilities. On January 16, 2008, appellants filed a petition in the Lucas County Court of Common Pleas, Probate Division, to adopt G.V. On February 21, 2008, the parentage/parental rights action was transferred to the Lucas County Court of Common Pleas, Juvenile Division. On May 19, 2008, the probate court stayed the adoption proceedings until paternity could be established pursuant to the juvenile court proceedings. Appellants eventually agreed to DNA testing, which established appellee is

the biological father of G.V. On March 17, 2009, the juvenile court in Lucas County issued an entry finding appellee to be G.V.'s biological father.

**{¶4}** On June 4, 2009, the probate court in Lucas County issued a judgment entry dismissing the petition for adoption on the grounds that the petition was prematurely filed and was not yet ripe. The probate court held that, following the determination of paternity, appellee was the biological father of G.V. As a result, appellee was found to be G.V.'s legal father, and therefore his consent was required prior to the adoption unless petitioners could demonstrate, pursuant to R.C. 3107.07(A), that appellee had failed to support and/or maintain contact with G.V. for one year or more since parentage had been judicially determined. Because B.W. did not consent to the adoption, and because less than one year had passed since parentage was judicially determined, the petition was dismissed.[1]

**{¶5}** Following the dismissal of the adoption petition, the juvenile court in Lucas County made a determination regarding appellee's parental rights and custody of the child. In an entry filed February 5, 2010, the juvenile court declared appellee to be the residential parent and legal custodian of G.V., pending a positive home study report. In July 2010, the juvenile court directed the transfer of custody of the child to appellee

[1] On November 30, 2009, the Sixth District Court of Appeals affirmed the decision of the Lucas County Probate Court. See *In re Adoption of G.V.*, 6th Dist. No. L-09-1160, 2009-Ohio-6338. On July 22, 2010, the Supreme Court of Ohio also affirmed the dismissal of the adoption petition. The Supreme Court of Ohio determined that, because B.W. attempted to establish paternity prior to the filing of the adoption petition, pursuant to *In re Adoption of Pushcar*, 110 Ohio St.3d 332, 2006-Ohio-4572, the probate court must consider the findings of the juvenile court which were made while the adoption proceeding was held in abeyance. Here, B.W. was determined to be the biological father of G.V. Because B.W. was deemed to be the child's legal father, R.C. 3107.07(A), which governs the issue of consent for legal fathers, rather than R.C. 3107.07(B), which governs consent involving putative fathers, was found to apply. See *In re Adoption of G.V.*, 126 Ohio St.3d 249, 2010-Ohio-3349. A motion for reconsideration of that decision was denied on October 7, 2010. See *In re Adoption of G.V.*, 126 Ohio St.3d 1592, 2010-Ohio-4880. A petition for writ of certiorari filed in the United States Supreme Court was denied on March 7, 2011. See *Vaughn v. Wyrembek* (2011), __ U.S. __, 131 S.Ct. 1610.

following its receipt of the favorable home study.[2] Appellants filed an appeal in the Sixth District Court of Appeals challenging the order declaring B.W. to be the residential parent and legal custodian of the child and transferring custody to B.W. The Sixth District subsequently affirmed the judgment of the juvenile court on June 10, 2011. See *B.W. v. D.B.-B.*, 6th Dist. No. L-10-1212, 2011-Ohio-2813. Appellants have appealed that decision and have filed a memorandum in support of jurisdiction, which appellee has opposed, and it is currently pending before the Supreme Court of Ohio. See *B.W. v. D.B.-B.*, S.Ct. case No. 11-1208.

**{¶6}** While the custody order was on appeal in the Sixth District, appellants also filed the instant adoption petition in the Franklin County Court of Common Pleas, Probate Division, on September 13, 2010, arguing the consent of the biological father is unnecessary because appellee had failed to communicate or support the child for at least one year since he was adjudicated to be the father. Appellants asserted that such failure means consent to the adoption is not required, based upon R.C. 3107.07(A). Appellants further argued Franklin County was the proper forum for the petition because the agency, which is located in Franklin County, has maintained custody of the child pursuant to the execution of the permanent surrender agreements.

**{¶7}** On June 21, 2011, the probate court in Franklin County dismissed the adoption petition, finding the court lacked subject-matter jurisdiction and venue was not proper in Franklin County. This appeal now follows and raises a single assignment of error for our review:

> The Probate Court erred by finding that it lacked proper venue and subject matter jurisdiction to proceed with the petition as required in R.C. 3107.04(A).

[2] On October 30, 2010, appellants transferred the child to appellee, pursuant to court order.

**{¶8}** In their sole assignment of error, appellants challenge two findings made by the probate court: (1) lack of venue, pursuant to R.C. 3107.04(A); and (2) lack of subject-matter jurisdiction. In short, appellants contend the trial court erred in finding venue was not proper in Franklin County, and in finding that it lacked subject-matter jurisdiction to address the petition due to the existence of pending matters in other courts.

**{¶9}** We shall begin by addressing the issue of venue. Appellants argue venue is proper in Franklin County because the agency, which is located in Franklin County, still had permanent custody of the child on the date on which the adoption petition was filed in the probate court in Franklin County, pursuant to the permanent surrender agreements executed for purposes of obtaining adoption of the child. Appellants further argue the adoptive placement is still in effect and has never been lawfully terminated. In addition, appellants assert the July 2010 orders from the juvenile court cannot supersede the grant of permanent custody to the agency because there is no authority for a juvenile court to invade the exclusive jurisdiction of the probate court and indirectly terminate the permanent custody held by the agency, which exists for as long as an adoption proceeding is pending. Therefore, appellants contend the child is still in the permanent custody of the agency pursuant to legal statutory process, and venue is proper in Franklin County.

**{¶10}** The relevant portion of R.C. 3107.04, which is entitled "Where petition to be filed; caption" reads, in relevant part, as follows:

> (A) A petition for adoption shall be filed in the court in the county in which the person to be adopted was born, or in which, at the time of filing the petition, the petitioner or the person to be adopted or parent of the person to be adopted resides, or in which the petitioner is stationed in military

> service, or in which the agency having the permanent custody of the person to be adopted is located.

**{¶11}** In order for venue to be proper in Franklin County, it must be established that the agency is located in Franklin County and that the agency had permanent custody of the child at the time the adoption petition was filed.[3] Because we find the agency did not have permanent custody of the child at the time the adoption petition was filed in Franklin County on September 13, 2010, venue is not proper here, and we find the probate court properly dismissed the petition.

**{¶12}** Under R.C. 5103.15(B)(2), an agency such as Adoption By Gentle Care can obtain permanent custody of a child less than six-months old by entering into an agreement with the parents of the child to surrender the child, if the agreement is executed for the sole purpose of obtaining the adoption of the child. Such an agreement does not require juvenile court approval. Here, appellants submit that the permanent surrenders executed by the birth mother and her ex-husband giving permanent custody of the child to the agency are still in effect and cannot be superseded by the Lucas County Juvenile Court orders finding appellee to be the legal father of the child, as well as the residential parent and legal custodian. However, we disagree.

**{¶13}** In a prior case involving related issues, the Lucas County Juvenile Court determined B.W. is the child's legal parent. This finding was challenged on appeal and affirmed by the Supreme Court of Ohio in *In re Adoption of G.V.*, 126 Ohio St.3d 249, 2010-Ohio-3349. The Supreme Court of Ohio further determined that as a result of this finding, B.W. is the legal father of G.V. for purposes of determining the necessity of his

[3] None of the other options for establishing venue in Franklin County are potentially available here. Neither biological mother, nor B.W., live in Franklin County, and G.V. was born in Lucas County and has never resided in Franklin County. Furthermore, during the relevant time period, appellants have resided in the state of Indiana.

consent for adoption. Id. Consequently, the Supreme Court agreed that the Lucas County Probate Court properly dismissed the adoption petition pursuant to *In re Adoption of Pushcar*, 110 Ohio St.3d 332, 2006-Ohio-4572.

**{¶14}** Nevertheless, appellants continue to challenge B.W.'s status as the child's legal father, and argue that B.W.'s consent is not required. However, because this issue has been litigated and determined, any challenges to the contrary are barred by the basic principles of res judicata. See generally *Clagg v. Clagg*, 10th Dist. No. 08AP-570, 2009-Ohio-328, ¶14 (the doctrine of res judicata includes issue preclusion, also known as collateral estoppel; collateral estoppel precludes relitigation, in a second action, of an issue that was actually and necessarily litigated and determined in a prior action that was based on a different cause of action).

**{¶15}** The Supreme Court of Ohio decided *In re Adoption of G.V.*, on July 22, 2010. This decision was released several days after the Lucas County Juvenile Court declared appellee was the legal custodian of G.V. Because appellants argue the adoption proceeding was still "pending" in the Supreme Court of Ohio when the juvenile court made its July 2010 ruling finding B.W. to be the residential parent and legal custodian, and because the adoption continued to be "pending" while appellants pursued a motion for reconsideration in the Supreme Court of Ohio, followed by a subsequent petition for a writ of certiorari to the United States Supreme Court, appellants submit an adoption proceeding has been pending continuously since January 16, 2008. As a result, appellants contend the juvenile court is without authority or jurisdiction to issue orders with respect to custody, due to the probate court's exclusive jurisdiction over adoption proceedings and due to the child remaining a ward of the probate court. However, we disagree with appellants' rationale.

**{¶16}** First, we have not been presented with any authority nor directed to any part of the record which would indicate that the child remained a ward of the probate court following the dismissal of the adoption petition in the Lucas County Probate Court but during the time period while appeals were pursued. In addition, there is no indication that appellants requested any type of stay of execution of the Lucas County Probate Court's judgment. See Civ.R. 62; Civ.R. 73; and App.R. 7(A). Moreover, the Supreme Court of Ohio has previously determined that the Lucas County Probate Court's dismissal of the adoption petition was proper because there was an issue of parenting of a minor pending in the juvenile court, which required the probate court to refrain from proceeding with the adoption. See *In re Adoption of G.V*. at ¶8 and *In re G.T.B.*, 128 Ohio St.3d 502, 2011-Ohio-1789, ¶10.

**{¶17}** Consequently, it follows that the Lucas County Juvenile Court, having found B.W. to be the child's father, had exclusive, original jurisdiction under R.C. 2151.23(A)(2) to determine the custody of any child who is not a ward of another court of this state, once the adoption petition was dismissed. Therefore, following the dismissal of the Lucas County adoption petition, the Lucas County Juvenile Court issued orders in July 2010 finding appellee to be the child's residential parent and legal custodian. Without explicitly stating so, this determination, in essence, indicates that the permanent surrenders executed by the biological mother and her ex-husband are not sufficient to award permanent custody to the agency, due to the fact that appellee's consent to the adoption is required, and such consent was not provided. Furthermore, we find the juvenile court's order designating appellee as G.V.'s residential parent and legal custodian divested the agency of permanent custody of the child. Although not directly on point, we find the case

of *Adoption Link, Inc. v. Suver*, 112 Ohio St.3d 166, 2006-Ohio-6528, supports our basic rationale on this issue.

**{¶18}** In *Adoption Link, Inc*., Robert Suver ("Suver"), the director of the Clark County Department of Job and Family Services, received temporary custody of a newborn child pursuant to a juvenile court order issued following an emergency shelter care hearing. A few months later, the parents of the newborn executed permanent surrender agreements which were filed in a different county and which purported to surrender the newborn to Adoption Link for purposes of adoption. Suver moved to have the permanent surrender order vacated. The Supreme Court of Ohio found that although juvenile court approval is not required to effect a permanent surrender of a child under six months of age pursuant to R.C. 5103.15(B)(2), any person executing a permanent surrender, with or without juvenile court approval, must have legal custody of the child. The court further determined the parents lacked authority to permanently surrender the child because at the time of the purported surrender, they did not have legal custody of the child, since Suver (and the department of job and family services) had been given legal custody of the child.

**{¶19}** In the instant case, we will assume without deciding (for purposes of this particular argument only), that the agency initially obtained validly executed permanent surrender agreements when biological mother and her ex-husband, who was presumed pursuant to statute to be the legal father, signed the surrender agreements. Nevertheless, B.W.'s registration with the Putative Father Registry and the subsequent establishment of paternity and parental rights, which resulted in an order finding B.W. to be the legal custodian and residential parent of the child, served to divest the agency of any permanent custody it may have held.

**{¶20}** Pursuant to the July 2010 juvenile court order, appellee, as the legal father, had legal custody of G.V. at the time the adoption petition was filed in the probate court in Franklin County on September 13, 2010. Because appellee was now the legal father and the legal custodian of the child, biological mother's ex-husband's right or authority to surrender the child to the agency no longer existed. Her ex-husband's surrender of permanent custody to the agency was no longer valid and was not sufficient to provide permanent custody to the agency because he lacked legal custody of the child. See also *In re Adoption of Reams* (1989), 52 Ohio App.3d 52 (biological mother and non-spousal donor who executed consent forms believed to be valid could not relinquish legal custody through the adoption process where legal custody was currently being held by the court). Therefore, because the agency did not have permanent custody of G.V. at the time of the filing of the adoption petition, Franklin County is not the proper forum for this action under the requirements set forth in R.C. 3107.04.

**{¶21}** We next address appellants' challenges to the trial court's determination that it lacked subject-matter jurisdiction[4] to decide this case. Appellants dispute this determination, arguing the probate court in Franklin County can exercise jurisdiction in this matter because the probate court has original and exclusive jurisdiction over adoption proceedings, and all other courts, including the juvenile court, have no authority or jurisdiction to act until all appellate proceedings on the adoption matter have ceased. In essence, appellants claim the juvenile court lacked subject-matter jurisdiction to consider the action for parental rights and responsibilities and/or custody because probate courts have original and exclusive jurisdiction over adoption proceedings, and the exercise of

[4] Subject-matter jurisdiction refers to the power of the court to adjudicate the merits of the case. *Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980, ¶11. If a court acts without jurisdiction, any proclamation by the court is void. Id. at ¶11.

subject-matter jurisdiction continued to lie with the probate court until all appeals were resolved. Stated another way, appellants contend the juvenile court and all other courts should have refrained from exercising jurisdiction over the custody issue until all appeals regarding the dismissal of the adoption petition had been exhausted.

**{¶22}** Here, the Lucas County Juvenile Court issued an order establishing custody prior to the exhaustion of all appeals. Appellants submit such an exercise of jurisdiction was improper and said custody order cannot supersede the permanent custody established pursuant to the statutory process set forth in R.C. 5103.15(B)(2), which does not require court approval. Because they submit the juvenile court should have refrained from exercising jurisdiction over the custody issue until the adoption appeals were exhausted, appellants argue the Lucas County Juvenile Court acted without authority in awarding legal custody to appellee. We disagree.

**{¶23}** Under *Pushcar*, it was proper for the juvenile court to decide the action involving parentage prior to proceeding on the adoption. It has long been recognized that " '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.' " *Pushcar* at ¶10, quoting *In re Adoption of Asente*, 90 Ohio St.3d 91, 92, 2000-Ohio-32. Upon determining that appellee is G.V.'s legal father, appellee's consent to the adoption was required. Appellee did not consent to the adoption; instead, he requested a determination of his parental rights and responsibilities and was subsequently awarded legal custody. We have not been directed to anything in the record which indicates that the juvenile court in Lucas County relinquished jurisdiction with respect to the issue of custody of the child, yet appellants' seek to move forward with a new adoption petition in a new probate court that was never previously involved in this

matter when the juvenile court still has jurisdiction over the custody issue. This goes against controlling authority on similar issues. See also *State ex rel. Otten v. Henderson*, 129 Ohio St.3d 453, 2011-Ohio-4082, ¶32 ("Until the first court with jurisdiction over the matter has relinquished jurisdiction, the second court lacks jurisdiction.").

**{¶24}** Additionally, even if we were to follow the logic of appellants and assume that the adoption petition from Lucas County was still "pending" during the time period when the appeal to the Supreme Court of Ohio, the subsequent motion for reconsideration, and the petition for a writ of certiorari in the United States Supreme Court were ongoing, and we further assumed that, as a consequence, all courts other than the Lucas County Probate Court were required to refrain from exercising jurisdiction over the adoption of G.V., this assertion does not support appellants' position.

**{¶25}** Instead, such logic would require the Franklin County Probate Court to refrain from exercising jurisdiction over appellants' September 13, 2010 adoption petition, because the probate court did not have the authority to exercise subject-matter jurisdiction at that time, since the motion for reconsideration was not decided until October 7, 2010 (see *In re Adoption of G.V.*, 127 Ohio St.3d 1247, 2010-Ohio-4879), and the writ of certiorari was not denied until March 7, 2011 (see *Vaughn v. Wyrembek* (2011), ___ U.S. ___, 131 S.Ct. 1610). Thus, even applying the rationale asserted by appellants, dismissal of the petition was proper.

**{¶26}** Accordingly, we overrule appellants' single assignment of error and affirm the judgment of the Franklin County Court of Common Pleas, Probate Division.

*Judgment affirmed*.

BROWN and TYACK, JJ., concur.