No. _____

In the
Supreme Court of the United States

IN RE BABY BOY DOE, MINOR

PETER KRUITHOFF

Petitioner,

v.

CATHOLIC CHARITIES WEST MICHIGAN,
and
ADOPTIVE PARENTS 1 & 2,

Respondents.

On Petition for a Writ of Certiorari
to the Michigan Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Under Michigan's Safe Delivery of Newborns Law ("SDNL"), a parent-child relationship can be permanently severed (1) with less notice than is required in a child abuse case, (2) without any system in place for courts to determine if another court already has jurisdiction over the child, (3) without an adjudication of parental fitness, and (4) with only a preponderance of the evidence that termination is in the best interests of the child. **Does the SDNL comply with Due Process requirements and, if not, does Michigan have a sufficient State interest to justify same?**

2. Legal parents are entitled to an individualized fitness determination before the State destroys their family life. The SDNL permits the permanent severing of a parent's relationship with their child based not on their actions, but on the other parent's decision to surrender the child pursuant to Michigan's SDNL rather than to surrender the child pursuant to Michigan's Adoption Code. **Does the SDNL violate the one-parent doctrine articulated by this Court in *Stanley v Illinois*?**

3. The Equal Protection Clause prohibits the disparate treatment of individuals based upon marital status absent the classification furthering an important government interest by means that are substantially related to that interest. In Michigan, unwed fathers have a greater ability to secure their rights to a surrendered newborn than a married father. **Does Michigan have a sufficient State interest to justify legislation that provides lesser procedural protections to married parents than those who are unwed?**

PARTIES TO THE PROCEEDINGS

Petitioner Peter Kruithoff is the original legal father of Baby Boy Doe, whose parental rights were terminated after his wife surrendered Baby Boy Doe for adoption. He was the plaintiff in the associated finalized divorce action against his (now former) wife in Ottawa County, Michigan.

Respondent Catholic Charities West Michigan (referred to herein as "CCWM") was the initiating party for the Kalamazoo County Safe Delivery of Newborns action that resulted in the termination of Petitioner's parental rights to Baby Boy Doe. They were a subpoenaed non-party in the Ottawa County, Michigan, divorce action.

Respondents Adoptive Parent 1 and Adoptive Parent 2 are the anonymous adoptive parents with whom Catholic Charities West Michigan placed Baby Boy Doe, and to whom the Kalamazoo Court awarded the baby. These respondents did not appear in the proceedings until after the Michigan Court of Appeals issued an opinion. They were cross-appellants when this matter was before the Michigan Supreme Court.

LIST OF PROCEEDINGS

- *In re Baby Boy Doe,* No. 2018-6540-NB, Probate Court for Kalamazoo County, Michigan. Orders:
  - Order after hearing on petition to accept release and terminate rights to surrendered newborn child, September 28, 2018 (App.A, 1a).
  - Order of Adoption, February 12, 2019 (App.B, 3a).
  - Order denying motion to unseal adoption file, January 2, 2020 (App.C, 4a).
  - Order denying motion for reconsideration, February 19, 2020 (App.D, 6a).
- *Peter Kruithoff v KGK*, No. 2018-088972-DM, 20th Circuit Court of the State of Michigan, Ottawa County. Judgment of Divorce entered July 30, 2019 (App.G, 74a).
- *In re Baby Boy Doe (Peter Kruithoff v Catholic Charities of West Michigan),* Docket No. 353796, Michigan Court of Appeals. Opinion issued August 26, 2021 (App.E, 8a).
- *In re Baby Boy Doe, Minor (Peter Kruithoff v Catholic Charities of West Michigan and Adoptive Parent 1 and Adoptive Parent 2),* Docket No. 163807. Decision issued June 29, 2022. (App.F, 43a). Order Denying Motion for Rehearing issued Sept. 21, 2022. (App.G, 73a)
- *Peter Kruithoff v Catholic Charities West Michigan, et al.*, No. 31-6576-CZ, 20th Circuit Court of the State of Michigan, Ottawa County. Said collateral matter is noted herein per this Court's Rule 14.1(b)(iiii).

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The August 26, 2021, opinion of the Michigan Court of Appeals, is reported at __ N.W.2d. __ (2022), and is reproduced at App.E, 8a, but is otherwise available at 2021 WL 3818056.

The June 29, 2022, decision of the Supreme Court of the State of Michigan is reported at 975 N.W.2d. 486 (2022), and is reproduced at App.F, 43a.

The September 21, 2022, order of the Michigan Supreme Court, is reproduced at App.G, 73a.

JURISDICTION

On June 29, 2022, the Michigan Supreme Court entered an order and decision which upheld the termination of Petitioner's parental rights pursuant to the SDNL while remanding a secondary issue to the Michigan Court of Appeals.

On July 15, 2022, Petitioner filed a Motion for Rehearing and Clarification with the Michigan Supreme Court. Said motion sought correction and clarification of statements within the June 29, 2022, Order. An Order was issued on September 21, 2022, denying said motion.

Petitioner argues herein that the procedures within Michigan's Safe Delivery of Newborns law are repugnant to the Constitution of the United States. Jurisdiction of this Court is appropriate per 28 U.S.C. §1257(a).

STATUTORY PROVISIONS INVOLVED

Michigan's Safe Delivery of Newborns law, found at §712.1 to §712.20 of Michigan's Compiled Laws, [1] is within Michigan's Probate Code, Public Act 288 of 1939. (App.I, 84a).

Review of the Constitutionality of Michigan's SDNL requires consideration of related Michigan statutes in the appendices, and noted throughout this petition.

CONSTITUTIONAL PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment to the U.S. Constitution provides that no person shall "be deprived of life, liberty, or property, without due process of law". Section 1 of the Fourteenth Amendment provides:

> …No state shall … deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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[1] Throughout the body of this petition, all statutory references that begin with "§" refer to Michigan's Compiled Laws.

INTRODUCTION

Since the 1800s, Michigan has provided for the safety and welfare of abandoned children. Since the early 1900s, Michigan's adoption, child protection, and health codes have provided procedures for the confidential and immediate surrender of infants by parents. The safe and anonymous abandonment of infants has never been a crime in Michigan.

For over 150 years, Michigan's adoption and child protection laws have been refined and strengthened through the process of judicial review. Safeguards have been put in place to minimize the risk of erroneous deprivation of what this Court has deemed essential human rights: that of fit parents to raise their children, and of children to only be taken from parents in the most extreme of circumstances.

Enter the Safe Delivery of Newborns Law. Enacted in 2000, the SDNL seeks to prevent the unsafe abandonment of newborns by incentivizing women to surrender them at safe locations. The incentive was complete anonymity and secrecy, achieved by the elimination of time-tested protocols meant to provide constitutionally-sound notice and an opportunity for the other parent to be heard.

The process of terminating their rights under "safe haven" laws is so thorough that these laws have escaped review by any high court in any State for two decades. This case is the first in the nation to address whether the core feature of "safe haven" laws—the empowerment of one parent to choose whether to deprive the other parent of their rights—is Constitutionally sound.

STATEMENT OF THE CASE

I. Factual & Procedural Background

A. Pre-termination acts and proceedings

A few weeks before her due date, Petitioner's pregnant wife expressed that she intended to release their unborn child for adoption. She indicated that she had contacted Bethany Christian Services to pursue an adoption, but that due to her marital status they required spousal consent. In requesting Petitioner's consent, his wife noted having "another option" where she could give up the child anonymously "and everything is done" without him.

Eight days later, on August 8, 2018, Petitioner filed a Divorce Complaint in his county of residence, that being Ottawa County, Michigan. In the Complaint, he gave notice to the court that his pregnant wife had expressed an intent to release their child for adoption at birth—possibly under the SDNL. He requested custody of the child contingent upon genetic testing—consistent with the SDNL's provisions and the State's sample form.

Less than 24 hours after the Complaint's filing, two events transpired: first, Baby Boy Doe was born with a drug addiction in an out-of-county hospital; second, the Ottawa court granted Petitioner's request for an ex parte order prohibiting the child from being surrendered for adoption.

Three days later, on August 12, 2018, Petitioner's wife—who had not yet been found by the private investigator to be served with the Complaint and order—released the child to Catholic Charities West Michigan ("CCWM"), who accepted the newborn

despite being aware that she was married. Within days, CCWM placed the child with their clients (Adoptive Parents) and then initiated a surrendered-newborn action in Kalamazoo County—where their clients reside.

On August 16, 2018, a notice of the child's surrender was published—next to an advertisement for Pomeranian puppies—on page 23 of the Grand Rapids Press, a local newspaper in the county where the child was born [where neither parent resided]. The notice reads:

> Publication of Notice
> Safe Delivery of Newborns
> (M.C.L. 712.1)
>
> TO: Birth Father and Birth Mother, of minor child.
>
> IN THE MATTER OF: newborn baby, born on August 9, 2018 at 11:08 am and surrendered on August 12, 2018 at Spectrum Health Grand Rapids, MI.
>
> TAKE NOTICE: By surrendering your newborn, you are releasing your newborn to a child placing agency to be placed for adoption. You have until September 9, 2018 (28 days from surrender of the child) to petition the court to regain custody of your child. After 28 days there will be a hearing to terminate your parental rights. You as the parents can call Catholic Charities West MI, adoption unit at (877) 673-6338 for further information.

Unaware of the published notice, Petitioner actively pursued information about—and custody of—his child in the Ottawa court system. Meanwhile, CCWM actively pursued termination proceedings in Kalamazoo.

- **09/11/2018 (Ottawa)** Petitioner signs a contempt motion against his wife for her refusal to divulge information about the surrender.
- **09/14/2018 (Kalamazoo)** CCWM petitions to terminate rights of Baby Boy Doe's parents.
- **09/21/2018 (Ottawa)** Petitioner obtained an interim order awarding him custody of the child.
- **09/28/2018 (Kalamazoo)** Order entered, terminating the rights of Baby Boy Doe's parents.

There was no notice—by publication or otherwise—of a termination hearing having been scheduled, or of the termination order having been entered. Beside from a single checked-box on the Order form (App.A, 1a), there is no transcript or other record of the hearing having been held. If a hearing was held, there is nothing in the record showing whether (or what) evidence was presented.

Petitioner's parental rights were permanently severed in just six weeks.

The Six-Week Surrender-to-Termination Timeline

August 2018

Sun	Mon	Tue	Wed	Thu	Fri	Sat
			1	2	3	4
5	6	7	8 ❶	9 ❷	10	11
12 ❸	13	14	15	16 ❹	17	18
19	20	21	22	23	24	25
26	27	28	29	30	31	

September 2018

Sun	Mon	Tue	Wed	Thu	Fri	Sat
						1
2	3	4	5	6	7	8
9 ❺	10	11 ❻	12	13	14 ❼	15
16	17	18	19	20	21 ❽	22
23	24	25	26	27	28 ❾	29
30						

1. Aug. 8th: Divorce Complaint filed (Ottawa)
2. Aug. 9th: Birth & Entry of Ex Parte Order (Ottawa)
3. Aug. 12th: Surrender (Kent)
4. Aug. 16th: Notice in Paper (Kent)
5. Sept. 9th: Expiration of 28-day deadline
6. Sept. 11th: Contempt motion signed, re: wife's nondisclosure of surrender (Ottawa)
7. Sept 14th: CCWM petitions to terminate (Kalamazoo)
8. Sept. 21st: Petitioner awarded interim custody (Ottawa)
9. Sept 28th: Termination order entered (Kalamazoo)

B. Post-termination acts and proceedings

Through a series of events not in the record due to the lack of any evidentiary hearings in either county, Petitioner eventually became aware that CCWM was involved with the surrender of his child. Subsequently, on January 16, 2019, his counsel issued a subpoena to CCWM—in the Ottawa divorce action—requesting "any and all records regarding Baby Boy Doe, date of birth August 9, 2018, at Spectrum Health in Grand Rapids, Michigan, to mother [KGK]."

CCWM moved to quash the subpoena, claiming that the SDNL prohibited them from providing any information about the child or the surrendered-newborn proceedings.

CCWM's opposition to discovery coincided with three things: (1) the continued refusal of Petitioner's wife to disclose information, (2) CCWM's finalization of the adoption proceedings in Kalamazoo, and (3) the finalization of the divorce action.

- **02/01/2019 (Ottawa)** CCWM filed a motion to quash the subpoena, citing the confidentiality requirements of the SDNL.
- **02/12/2019 (Kalamazoo)** On CCWM's motion, a final Order of Adoption entered.
- **02/25/2019 (Ottawa)** At a hearing held not even two weeks after CCWM secured an Order of Adoption in Kalamazoo, its counsel specifically states that the surrendered-newborn case is in Kent County. The propriety of the procedure by which Petitioner's parental

rights were terminated was discussed at this hearing.

- **04/22/2019 (Ottawa)** After delays due to disputes about minimum disclosure requirements, CCWM stated at a second discovery hearing that the termination case was in Kent County. Petitioner's right to parent was again discussed.
- **06/10/2019 (Ottawa)** At a hearing on continued disputes over what must be produced, CCWM's counsel revealed that, at some point since the first hearing in February 2019, he "learned that it was actually Kalamazoo County."
- **07/12/2019** CCWM discloses identifying case information.
- **07/30/2019 (Ottawa)** Petitioner is awarded sole custody of the child in a final divorce Judgment.[2]

By the time CCWM released the identifying case information, nine months had passed since Petitioner's rights had been terminated; the maximum period for filing a delayed application for leave to appeal with the Michigan Court of Appeals had passed three months prior.[3]

The information provided by CCWM was minimal. Yet, Petitioner persisted. After months of

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[2] Petitioner's former wife did not appeal or otherwise contest the Ottawa County divorce action.

[3] See Michigan Court Rules 7.204 and 7.205.

difficulty getting the Kalamazoo court to accept a filing in the adoption matter from a person not listed as a party, Petitioner was finally able to file a Motion to Unseal Adoption File to obtain more specific information so as to advance his claims regarding the child.

A hearing was held in Kalamazoo on December 10, 2019, where Petitioner's counsel stated that the statute was unconstitutional. The probate judge refused to consider any constitutional argument, stating "[w]ell, you – you are barking up the wrong tree for an unconstitutional statute."

An Order denying Petitioner's request to unseal the adoption file was entered on January 2, 2020. Shortly thereafter, Petitioner filed an unsuccessful motion for reconsideration.

C. Appellate Proceedings

On review, the Michigan Court of Appeals reviewed the procedural process that led to what it deemed a "plain error affecting substantial rights." (App.E, 27a). The majority opinion concluded that Petitioner's divorce Complaint constituted a timely filed petition for custody of Baby Boy Doe and, as such, it was improper for the Kalamazoo court to terminate his parental rights. It further held that CCWM's efforts to locate and provide notice to Petitioner were "woefully short of what is 'reasonable'." (App.E, 35a).

After issuance of the published Court of Appeals decision, Adoptive Parents appeared and filed a Motion for Reconsideration in that court. CCWM did so as well. After those motions, and motions filed by

Petitioner in opposition, were denied, CCWM and Adoptive Parents filed applications to be heard by the Michigan Supreme Court.

On March 17, 2022, the Michigan Supreme Court ordered supplemental briefing as to:

> (1) Whether a complaint for divorce that seeks custody of an unborn child qualifies as a petition to gain custody of a newborn under the Safe Delivery of Newborns Law . . . and
>
> (2) Whether the application of the SDNL violates the due process rights of an undisclosed father.

Oral argument was on May 4, 2022, and a decision was issued on June 29, 2022. The Michigan Supreme Court concluded that Petitioner's request for custody in his divorce Complaint did not constitute a timely petition for custody under the SDNL because it was filed pre-birth. (App.F, 47a-50a). The majority declined to reach the constitutional questions. (App.F, 51a).

However, Michigan Supreme Court Chief Justice McCormack wrote a partial concurrence and partial dissent, expressing concern as to whether the notice provisions in the SDNL satisfy Due Process. (App.F, 52a). Justice Zahra also wrote a partial concurrence, and partial dissent. (App.F, 58a).

In Justice Zahra's dissent, in which Chief Justice McCormack joined, he stated the SDNL is a "highly flawed law because of significant constitutional concerns that this Court should not sweep under the rug" and that "[b]ecause the SDNL does not

distinguish between the greater rights possessed by a legal parent from the lesser rights afforded a mere putative parent, I conclude the SDNL is unconstitutional as applied to legal parents." (App.F, 60a).

On July 15, 2022, Petitioner filed a Motion for Rehearing and Clarification, requesting clarification of reasoning collateral to the central finding that his request for custody was untimely and the termination of his rights was proper. An Order denying said motion was summarily issued on September 21, 2022. (App.G, 73a).

REASONS FOR GRANTING THIS PETITION

I. This Case Presents an Important Issue of First Impression

Per a publication of the United States Department of Health and Human Services, "all 50 States, the District of Columbia, Guam, and Puerto Rico have engaged safe haven legislation"[4] that permits a person to anonymously abandon a child. A common feature of these laws is the dilution of the due process procedures that otherwise exist in the realm of adoption and child protection cases, procedures meant to safeguard the rights of all parents and prevent the erroneous deprivation of fundamental rights. As such, the likelihood of a nonsurrendering parent receiving an opportunity to contest (or appeal) the termination of their rights is low. It is thus no surprise that these laws have escaped constitutional review throughout the nation for over two decades. Until now.

This is the first surrendered-newborn case in the nation to reach a State's highest court. Though the underlying principles of Due Process and Equal Protection in the realm of legal parentage is not a new concept, the application of these principles to a safe haven law such as Michigan's SDNL is truly a case of first impression worthy of consideration.

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[4] Child Welfare Information Gateway. (2022). Infant Safe Haven laws. U.S. Department of Health and Human Services, Administration for Families, Children's Bureau. https://www.childwelfare.gov/topics/systemwide/lawspolicies/statutes/safehaven/

II. Due Process and the High Risk of Erroneous Deprivation of Intrinsic Rights

Standard: As articulated by this Court in *Mathews v Eldridge*, 424 U.S. 319, 334-335 (1976):

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: **First**, the private interest that will be affected by the official action; **second**, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and **finally**, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

A. The private interest at stake

In *Dobbs v Jackson Women's Health Org,* this Court explained that Due Process protects certain categories of rights, and in "deciding whether a right falls into either of these categories, the question is whether the right is deeply rooted in our history and tradition and whether it is essential to this Nation's scheme of ordered liberty." [5]

Though the Constitution does not specifically mention parental rights, our nation's history and

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[5] *Dobbs v Jackson Women's Health Org*, 142 S.Ct. 2228, 2235 (2022) [internal quotations and citations omitted].

tradition has always recognized their fundamental nature. In 1942, this Court stated, in *Skinner v State of Oklahoma ex rel Williamson*, that "[m]arriage and procreation are fundamental to the very existence and survival of the race."[6] This Court, in the 1982 decision of *Santosky v Kramer*—a case concerning parental neglect—described a person's interest in the custody of their children as a "fundamental liberty interest" that is "far more precious than any property right."[7]

The protection of a "natural" parent's right to their child has consistently been interpreted to recognize legal parentage derived from marriage. As this Court explained in the 1989 case of *Michael H v Gerald D*—where legal parentage prevailed over biology—the presumption of legitimacy of children born or conceived during a marriage "was a fundamental principle of the common law" dating back to the 1500s.[8]

This was echoed in the 1983 case *Lehr v Robertson*, where this Court reasoned that "[t]he most effective protection of the putative father's opportunity to develop a relationship with his child is provided by the laws that authorize formal

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[6] *Skinner v State of Okl ex rel Williamson*, 316 U.S. 535, 541; (1942).

[7] *Santosky v Kramer,* 455 U.S. 745, 758–59 (1982) [internal quotations and citations omitted]; *see also, Lassiter v Dep't of Social Services of Durham, North Carolina*, 452 U.S. 18, 27 (1981).

[8] *Michael H v Gerald D,* 491 U.S. 110, 111 (1989).

marriage and govern its consequences."[9] The importance of these rights is so high that, in the interest of ordered liberty, this Court further held, in *Santosky* that a parent's fundamental right to their child "does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State." Similarly, marital discord does not justify the stripping of legal parentage – as evident in *Michael H. v. Gerald D.*

Here, Petitioner was married to Baby Boy Doe's mother at the time of his conception and birth. Per Michigan's legitimacy statutes, in effect since 1846,[10] Petitioner is Baby Boy Doe's legal parent—as recognized by the Ottawa divorce court that awarded him sole custody of the child in a Judgment that has never been vacated.

Per this Court, due to the mutual nature of this liberty interest, at the moment of birth Baby Boy Doe and Petitioner "share[d] a vital interest in preventing erroneous termination of their natural relationship,"[11] an interest worthy of the protection afforded to other fundamental liberty interests by the Due Process clauses of the Constitution.

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[9] *Lehr v Robertson*, 463 U.S. 248, 263 (1983).
[10] M.C.L. 552.1 (App.J, 1a(II), M.C.L. 552.29)(App.J, 11a(II)).
[11] *Santosky, supra,* 455 U.S. at 760–61 (1982).

B. The Risk of Erroneous Deprivation

The provisions below review eleven aspects of Michigan's SDNL that highlight the high risks that its procedures will result in the erroneous termination of parental rights.

1. *The non-specific "notice of surrender"*

This Court explained, in the 1950 case of *Mullane v Century Hanover Bank & Trust Company*, that:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

Per *Mullane*, a "process which is a mere gesture is not due process."[12] While this Court has approved notice by publication in certain "class[es] of cases where it is not reasonably possible or practicable to give more adequate warning[,]" notice by publication for unknown interested parties are nonetheless disfavored. "Exceptions in the name of necessity do not sweep away the rule that within the limits of practicability notice must be such as is reasonably calculated to reach interested parties."[13]

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[12] *Mullane v Cent Hanover Bank & Tr. Co,* 339 U.S. 306, 314-315 (1950).
[13] *Mullane*, *supra* at 318 (1950).

Though the SDNL requires notice by publication if a nonsurrendering parent is unknown, the contents of the notice are not specified anywhere in the SDNL. The notice is not required to specify the race, gender, or any other description of the newborn. It's not required to state if the baby was born early, late, or on time. There is no requirement to describe the surrendering parent. The notice is not required to specify the county where the newborn is located. The notice is not required to specify the location of the emergency service provider. The notice is not required to state the county in which the SDNL action is pending. The notice is not required to state the date, time, or location of any hearing regarding the newborn.

Even if a nonsurrendering parent were aware that their child would be surrendered, and even if s/he monitored every newspaper in every county in Michigan for weeks before and weeks after the anticipated due date (presuming they know the due date), the lack of specificity of the notice eliminates any realistic likelihood that they would become aware of proceedings meant to sever their parental rights.

2. *The criminalization of sharing information*

Not only does the notice not have to contain any helpful information, but the release of identifying information by the agency is criminalized. Section 712.2a renders "all child placing agency records" confidential and strictly prohibits the release of information about the proceedings to anyone who is not a party, with the threat of a misdemeanor, potential imprisonment, and civil liability if information is released.[14]

SDNL supporters argue that the agency is permitted to release information about the proceedings to a party. But the SDNL does not specify a procedure for becoming a party. Contacting an adoption agency does not automatically confer party status to the caller. If that were the case, a parent following up on every notice of surrender that they see in any paper would become a party to every case, which is clearly an absurd result.

The conflict between the confidentiality requirements in §712.2a and the §712.7's placement of the agency to be wholly in charge of providing notice (i.e. information about the proceeding) is not just an ambiguity. It is a barrier that gives an agency absolute control over whether a parent will have enough information to timely contest the litigation, or whether their client (the adoptive parents) will be granted an unreviewable adoption.

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[14] App.I, 86a.

3. *The timing conundrum*

As said by this Court in *Greene v Lindsey*, the sufficiency of notice "must be tested with reference to its ability to inform people of the pendency of proceedings that affect their interests" by looking to "the realities of the case" and considering practical applications.[15] Though micromanaging legislative time parameters is loathsome, sometimes the "time allowed is manifestly so insufficient that the statute becomes a denial of justice."[16]

The SDNL, at §712.7(f), states "within 28 days, [an agency shall] make reasonable efforts to identify, locate, and provide notice of the surrender of the newborn to the nonsurrendering parent." It further states that if nonsurrendering parent is unknown, an agency must "provide notice of the surrender of the newborn by publication of general circulation in the county where the newborn was surrendered." The nonsurrendering parent's deadline to file a petition for custody is, per §712.10, "[n]ot later than 28 days after notice of surrender of a newborn has been published[.]"

The Michigan Court of Appeals interpreted the "not later than 28 days" to mean that "a petition may not be filed *more than* 28 days after the publication of the notice of surrender" and that nothing in the statute precludes an advance filing. (App.E, 25a-26a). In contrast, the Michigan Supreme Court held

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[15] *Greene v Lindsey,* 456 U.S. 444, 451 (1982).

[16] *Texaco, Inc. v Short*, 454 U.S. 516, fn 21 (1982); *Hodel v Irving*, 481 U.S. 704, 732-734 (1987).

that advance pre-birth filings are not timely, focusing on timed procedures within the SDNL that detail post-petition tasks (such as genetic testing) that cannot occur while the child is still *in utero*.

As explained *infra*, this is not such a concern for unwed fathers who can actively secure their rights by initiating paternity actions during pregnancy and participating in Michigan's Putative Father Registry. This interpretation is disastrous for married fathers, especially for those who cannot predict the exact date of their child's birth.

The SDNL's procedures do not change for infants born prematurely or born late. If married expectant father files a Divorce Complaint on the expected due date, but the pregnancy becomes overdue, the request is premature. If the father waits to file his Complaint until after the expected due date, the request could be overdue if the child was premature.

Here, the child was born the morning after Petitioner filed the Complaint, rendering his request for custody-upon-birth moot. Had his wife delivered very early, his Complaint could have been too late. As interpreted by the Michigan Supreme Court, the deadline is fixed, and a court lacks the ability to deny an agency's request for termination if the narrow twenty-eight day window is missed. It is inherently unjust for legislation to not only permit, but require, a parent to be stripped of the ability to ever have a relationship with their child based on such unpredictable circumstances.

4. *"Reasonable efforts"*

As noted above, §712.7(f) requires the agency to "make reasonable efforts to identify, locate, and provide notice of the surrender of the newborn to the nonsurrendering parent."[17] The SDNL does not specify what "reasonable efforts" entail.

One cannot turn to other Acts for guidance as to what constitutes "reasonable efforts" because—in addition to not specifying what "reasonable efforts" means— the SDNL specifically provides, at 712.2(3) that provisions of other chapters within "this act" and the Child Custody Act do not apply to SDNL actions.[18]

While there is no definition or guidance in the SDNL as to what specifically constitutes "reasonable efforts", that phrase clearly indicates a lesser search than would be required when a statute requires a "diligent search," a "reasonably diligent search," or a "diligent inquiry"—terms used in other Michigan legislation and caselaw regarding the search for unidentified parents whose rights are at risk of being terminated.

The inadequacy of the SDNL's "reasonable efforts" requirement in anonymous surrender cases is most apparent when compared with the Absent

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[17] App.I, 93a.

[18] App.I, 86a. The SDNL is Chapter XII of the Probate Code, Act 288 of 1939. The Adoption Code, inclusive of the Michigan Indian Family Preservation Act, is found in Chapter X. Chapter XIIA consists of the child protection and juvenile codes, MCL 712A.1 through 712A.32.

Parent Protocol developed by Michigan's State Court Administrative Office in 2018,[19] which must be used in all termination cases involving an absent parent. As detailed in the protocol and in the Michigan Supreme Court's 2009 opinion in *In re Rood*, when a child's parent is absent in child protective proceedings, the search for the absent parent begins as early as possible and continues "throughout the course of the case until the parent is located or all efforts have been exhausted."[20]

The continuous-search requirement in child protective proceedings stems from the Michigan Supreme Court's acknowledgment that "the adequacy of the government's efforts will be evaluated in light of the actions it takes after it learns that its attempt at notice has failed."[21]

In child abuse and neglect cases, the evaluation of an agency's efforts is governed by court rules that specify (1) alternate service is only permitted after "testimony or a motion and affidavit" show that personal service cannot be achieved, (2) the alternative method of alternate service is "reasonably calculated to give notice of the proceedings and an opportunity to be heard," and (3) publication is permitted only if it is first established not just that the parent's "whereabouts remain unknown," but that there was a "diligent inquiry" to

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[19] *Absent Parent Protocol,* at 7. App.O, 130a(II).
[20] App.O, 139a(II).
[21] *In re Rood,* 763 N.W.2d 587, 608 (2009), quoting *Sidun v Wayne Co. Treasurer,* 751 N.W.2d 453, 458-9 (2008).

find them.[22] Then, if a putative father comes forward, judges have discretion to find that "justice requires that he be allowed 14 days to establish his relationship" or more time "for good cause shown." [23]

The Absent Parent Protocol provides additional guidance for determining whether the location efforts in a given case were sufficiently diligent. The Protocol's non-exhaustive list of types of location efforts was the result of a concerted effort of a variety of agencies, an effort that benefited from decades of real-life cases on appeal.

The SDNL's constitutional inadequacies can be measured by the lack of oversight and protocol for identifying, locating, and providing notice to absent or unknown parents whose rights are at risk of being severed. It can also be measured by another key difference between the SDNL and abuse cases: voidability if the lack of notice or participation is caused by the agency or the court. In child abuse cases, court or agency errors that restrict a legal parent's participation at every stage of the proceeding can constitute a jurisdictional defect warranting reversal. [24] As shown in this case, there is no look-back in the SDNL, not even if the missed-step that could have changed everything was in the hands of court clerks.

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[22] Michigan Court Rules 3.920(4)(b) and 3.921(D).
[23] Michigan Court Rule 3.921(D)(2)(b).
[24] *Matter of Adair*, 478 N.W.2d 667, 668 (1991).

5. *Communications between county courts*

If a parent seeks custody of their surrendered child, they can, per §712.10(1)(a), file a petition in the county "where the newborn is located." Per §712.7(f), the agency is required to initiate the SDNL action "in the county in which the prospective adoptive parents resides[.]" (App.I,94a).

It does not take a great stretch of the imagination to conclude that a majority of surrendering and nonsurrendering parents would not know the address of the prospective adoptive parents. As the newborn would presumptively be residing with the prospective adoptive parents in the county where the SDNL action is pending, and as there is no requirement for the agency to notify the nonsurrendering parent as to which county the SDNL action is pending in, it is unlikely that a nonsurrendering parent would be able to file a petition for custody "in the county where the newborn is located" as prescribed in §712.10(1)(a).

In which case, the two alternative counties where a nonsurrendering parent can file a petition for custody are—per §712.10(1)(b)-(c)—the county where the emergency service provider is located or the county where the parent is located. The SDNL provides, at §712.10(1)(2):

> If the court in which the petition for custody is filed did not issue the order placing the newborn, the court in which the petition for custody is filed shall locate and contact the court that issued the order and shall transfer the proceedings to that court.

Practical realities beg the question of how the court in the county where the petition for custody is filed will locate the court where the SDNL action is pending because of the following:

1. There is no requirement for a pregnant woman to give birth within any certain radius of their residence. There is no requirement that a pregnant woman live near the other expectant parent. There is no prohibition against travel during pregnancy. There is no guarantee that the child will be born on its due date. The baby could be born and surrendered virtually anywhere, at any time.

2. There are fifty-seven circuit courts in Michigan's eighty-three counties. There is no statewide case management system. Even if there were, the court clerk in the county where the petition for custody is filed may only know the names of the parents and the tentative due date of the child. Given the ability, under the SDNL, for a surrendering parent to withhold their identity and the identity of the nonsurrendering parent, knowing the names of the parents would not provide any nexus between the cases.

3. The court in which the SDNL action is pending might have identifying information about the child that might be helpful in matching cases. But the SDNL provides no authority for a court clerk where the SDNL action is pending to divulge sealed-file information about an SDNL case in the county to any out-of-county clerk.

Even if a court clerk in the parent's county sent a notice to all the other counties in Michigan, what would the recipient courts do with such information? Certainly, all SDNL actions within Michigan—for children born at times proximate to the petitioning parent's child—would not be held in abeyance pending genetic tests to see which child matches the claimed parent.

It is abjectly futile to require a clerk in the county where the custody petition is filed to find the other court. In addition to considering the futility of the SDNL's procedures—and in addition to considering the burden that such a requirement places upon court staff and resources—it cannot be ignored that if the court staff fails to timely locate the court where the SDNL action is pending, then the SDNL court will have no awareness of whether the nonsurrendering parent has filed a petition or not.

If the SDNL court is not aware of the petition for custody properly filed in the nonsurrendering parent's county of residence, then it appears to the SDNL court as though no petition has been filed. In which case, the nonsurrendering parent's rights could be terminated without further notice as detailed in §712.17(5) due to the actions—or inactions—of court staff rather than their own.

6. *The petition*

Per this Court's decision in the 1971 case of *Boddie v Connecticut,*[25] absent sufficient countervailing justifications by the State, impediments to a fair opportunity to be heard can run afoul of the Due Process Clause. Under the SDNL, either parent can file a custody petition and theoretically halt the court from granting an agency's petition to terminate their rights.

But—in sharp contrast to other more-developed areas of Michigan law—the necessary components of a petition are not delineated in the SDNL nor in any corresponding court rule. Though Michigan's Supreme Court Administrative Office has created a petition form, there is no requirement to use it. There is also no guidance as to whether this form is to be filed into an existing case, or whether it is a case-initiating document.

It has been argued that using the optional state-form would have given Petitioner the opportunity to participate in the surrendered-newborn action. A quick review of the form[26] shows that this is purely legal fiction. The only information that a nonsurrendering parent would be able to fill in would be their spouse and their own identifying information—the two things that would be the least helpful to a court clerk tasked with tracking down an anonymously-surrendered-newborn action in another county.

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[25] *Boddie v Connecticut,* 401 U.S. 371, 381 (1971).
[26] Form CCFD 03, Version 01/2001 (App.P, 152a(II)).

The lack of case-linking information on the State's form highlights how unlikely it is that a parent's use of the form will facilitate their county clerk finding the court where the SDNL action is pending. It is no wonder why Petitioner included his request for custody in a divorce Complaint, where he could provide additional information, rather than file a relatively blank form.

The ineffectiveness of the form underscored by the difficulty CCWM had in keeping track of Petitioner's baby, evidenced by their repeated statements in two Ottawa court hearings that the SDNL action was pending in Kent County only for them to reveal at a third hearing that they "learned that it was actually Kalamazoo County." [27]

In a surrendered-newborn action, the agency is the litigant with the most information. It alone knows where and when the baby was surrendered, where the baby was placed, and where the action is pending. If CCWM's privately retained counsel was unable to keep track of Baby Boy Doe in this case, then court staff in a parent's county of residence—staff who lack any useful information about the child—will have no chance at success.

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[27] Transcript 02/25/2019, at 7; Transcript 04/22/2019, at 5; and Transcript 06/10/2019, at 3.

7. *The requirement to terminate*

Per §712.17(5), "the court **shall** enter an order terminating parental rights" if (1) the court finds by a preponderance that the surrendering parent knowingly released their rights, (2) that reasonable efforts were made to locate the nonsurrendering parent, and (3) that a custody action has not been filed.[28] Nothing in §712.17 requires the court to consider the adequacy of the clerk's efforts to determine whether a custody petition had been timely filed in another county.

There is no ability for the court to exercise discretion if it later discovers that the nonsurrendering parent had timely filed a petition for custody but the court staff in the county of filing had simply been unable to notify the SDNL court in time. There is no ability to exercise discretion if a parent appears at the hearing with good cause for their failure to file a petition in that narrow twenty-eight day window.

The SDNL's clear departure from the precedent in *Stanley v. Illinois*, below, is unconstitutional, and must not stand.

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[28] App.I, 99a.

8. *The lack of a fitness hearing*

In the 1972 case of *Stanley v Illinois*, this Court held that all parents, whether male, female, married, unmarried, or divorced, "are constitutionally entitled to a hearing on their fitness before their children are [permanently] removed from their custody."[29] Procedures based upon presumptions of unfitness that were "cheaper and easier" for the State were deemed insufficient "when the issue at stake is the dismemberment of [the father's] family."[30]

In this case, there is no transcript or other record of *any* hearing having been held before Petitioner's rights were terminated, let alone a fitness hearing. If a hearing was held, there is nothing in the record showing whether evidence (if any) was presented at that hearing. The lack of a hearing in this case should have been a fundamental error sufficient to void the termination proceedings *ab initio* and restore Petitioner's parental rights.

Per the Michigan Supreme Court, the blame for Petitioner's inability to be heard in the Kalamazoo case rested on the form and timing of his custody request. Aside from the unconstitutionality of placing the burden of proof on the parent at all, even if he had been granted a hearing, the standard by which his rights could nonetheless be terminated is still violative of Due Process.

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[29] *Stanley v Illinois*, 405 U.S. 645, 658-659 (1972).
[30] *Id.* at 657.

In cases where the court is aware of a custody petition having been filed, then there should be an additional hearing.[31] Said hearing does not concern parental fitness. Rather, it pertains only to the child's best interests. A best-interests test is directly in conflict with this Court's decision in *Troxel v Granville*, recognizing "the Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a "better" decision could be made."[32]

In *Troxel*, this Court further held that legislation that fails to "accord at least some special weight to the parent's own determination"[33] is unconstitutional, stressing that in disputes between parents and third parties, or parents and the State, the burden of proof must not be placed on the parent.

The SDNL adheres to neither of these holdings. There is no mention of a parental presumption in the section regarding a best-interests hearing. There is no language which mandates the family court's placement of the burden of proof on the agency.

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[31] *See* §712.14 (App.I, 96a).
[32] *Troxel v Granville*, 530 U.S. 57, 73 (2000).
[33] *Id.* at 70.

9. *The prohibited use of a "preponderance" standard of proof*

In the *Santosky v Kramer, supra,* this Court reviewed New York legislation that permitted the termination of parental rights upon a finding that the parent had "permanently neglected" the child, requiring only a "fair preponderance of the evidence" to support the finding of neglect.

Holding that "the Due Process Clause of the Fourteenth Amendment demands more", this Court explained that "[b]efore a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegations by at least clear and convincing evidence."[34] The heightened standard is necessary, per this Court, because "persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family matters."[35]

The use of a "preponderance" evidentiary standard in SDNL cases is a clear departure from the standard used in Michigan child protective proceedings,[36] and is directly in conflict with this Court's precedent.

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[34] *Santosky, supra,* 455 U.S. at 747–48 (1982).
[35] *Id.*
[36] See Michigan Court Rule 3.977; M.C.L. 712A.19(b)

10.*Anonymity, and the callousness of it all*

The SDNL permits the anonymous surrender of a newborn. As the SDNL is premised on the idea that it is helping women in crisis, a provider must accept a surrendered child no matter what the circumstances. The appearance that a surrendering parent is in distress or abused is inconsequential.

The SDNL is further premised on the assumption that the person surrendering the child is a parent. But what if it is not? The SDNL does not require the birth to be witnessed by the emergency service provider. There is no test to determine if a person dropping off a newborn is a parent. Nothing in the process lends itself to such verification.

SDNL supporters claim it is a lifeline for women in crisis, but what about women who are forced into surrender out of necessity, poverty, or fear? Per the language of the SDNL, a parent who surrenders a child under duress has a shorter period in which to seek custody than a nonsurrendering parent. Surrendering parents who desire custody of their child must, per §712.10(1), file their petition "within 28 days after the newborn was surrendered." (App.I, 94a). This is even less time than the twenty-eight day period for nonsurrendering parents, which runs from the time of notice rather than the time of surrender.[37]

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[37] The Michigan Supreme Court disagreed with the Court of Appeals' interpretation of the "not later than 28 days" language in §712.10(1). The conflict between their interpretations of this core filing requirement demonstrates its ambiguity.

Even if it is later discovered that the surrender was caused by fraud, duress, or a criminal act, there is no provision within the SDNL that would permit the restoration of a parent's rights to their child. As is evident by the Michigan Supreme Court's decision that the termination of Petitioner's rights was appropriate because he filed too early, parental rights can be permanently severed if the court in which the action is pending does not receive notice of a parental request for custody within twenty-eight days of surrender.

The victim of domestic violence (whose partner might have preferred to force her into an abortion but instead settles for taking the baby away) has just twenty-eight days to escape her abuser and file a petition. If the agency chooses to not disclose where the action is pending, and if she files in her own county, then everything comes down to whether her county's clerk is able to find the other court in time. She will be held to the same standard as a legal, married father whose drug-addicted wife decides to leave and give away his child in another county.

No State interest can support such callousness.

III. Equal Protection and the Disparate Treatment of Classes of Fathers

Standard: As articulated by this Court:

- Legislative "classifications which might invade or restrain [fundamental rights] must be closely scrutinized and carefully confined." *Harper v Virginia State Bd. Of Elections*, 383 U.S. 663, 670 (1966).
- Classifications based on marital status and legitimacy must be substantially related to an important governmental objective. *Sessions v Morales-Santana*, 137 S.Ct 1678 (2017).

In Michigan, a divorce court has jurisdiction, per §552.15, over all minor children of the parties during the pendency of the divorce action, regardless of whether they were born prior to or following the Complaint. However, the Michigan Supreme Court held that because Petitioner's Complaint was filed pre-birth, it did not strictly comply with the SDNL and was thus insufficient to prevent the termination of his rights. The lower court's reasoning is problematic for three reasons.

First, it nullifies all child-related provisions in the divorce Judgment without any procedure having been applied. While the SDNL, at §712.2(3) specifically suspends other laws, nothing in the SDNL indicates that it trumps the Divorce Code. There is no statutory authority that empowers an SDNL court to strip a circuit court of its jurisdiction to resolve all matters involving minor children of the parties. Due Process does not permit such an unpredictable result.

Second, the idea that a father should delay taking action to prevent the termination of his rights, is contrary to this Court's precedent. In *Lehr*, *supra*, this Court reviewed and upheld a New York statute that permitted adoption proceedings to move forward despite a putative father's lack of participation. The father's due process claim failed because "the right to receive notice was completely within [his] control"[38] due to New York's Putative Father Registry. As this Court explained, the Registry was for those who sought to secure their rights but chose not to take advantage of the "most effective protection" of the "opportunity to develop a relationship with his child" which, per this Court, is to marry the mother and receive the benefit of "the laws that authorize formal marriage and govern its consequences."[39]

Which brings us to the third reason why the Michigan Supreme Court's holding is problematic: it violates Equal Protection. Like New York, Michigan also has a putative father registry. The governing statute, §710.33 of the Adoption Code, states: "before the birth of a child born out of wedlock, a person claiming under oath to be the father of the child may file a verified notice of intent to claim paternity[.]"[40] A putative father can thus submit a form pre-birth and his name will be put on the Putative Father

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[38] *Lehr, supra* at 264 (1983).
[39] *Lehr*, *supra* at 263.
[40] See App.K, 64a(II).

Registry, which would hopefully be checked by an agency per §712.7(d).[41]

In addition to securing their rights via the Registry, an unwed expectant father also has the opportunity to initiate a paternity action "during the pregnancy of the child's mother", as detailed in §722.714 of Michigan's Paternity Act.[42] These opportunities are consistent with precedent supporting the protection of the parent-child relationship from collateral attack by the State or third parties so long as a father "admits paternity and comes forward to participate in the rearing of the child."[43]

As the Putative Father Registry is only for "out of wedlock" expected children, and the Paternity Act is likewise reserved for the unmarried, the only pre-birth court action that a married expectant father can take to proactively secure his rights to a child conceived during a marriage is to initiate a divorce.

As this Court explained in *Eisenstadt v Baird*, the Equal Protection Clause prevents legislation from treating people differently as a result of classifications unrelated to the statute's objective. [44] Per said Opinion, if there is a statutory classification, it must be "reasonable, not arbitrary, and must rest on some ground of difference having a

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[41] See App.I, 92a.
[42] The Paternity Act, Public Act 205 of 1956, as amended. (App.K, 14a(II)).
[43] See *Caban v Mohammed*, 441 U.S. 380, 99 (1979).
[44] *Eisenstadt v Baird*, 405 U.S. 438, 447 (1972).

fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."[45]

Under the Michigan Supreme Court's interpretation of the SDNL, unwed fathers have a greater ability to preserve their rights than married fathers. Legal fathers whose spouses choose the SDNL have less procedural protections than those whose spouses use the Adoption Code's procedures. Such distinctions (which also strip a divorce court of its jurisdiction) are not just arbitrary: they are offensive.

IV. The State's Interests Do Not Justify the SDNL's Constitutional Deficiencies

A. There was not an unmet need for the SDNL, re: existing adoption procedures

Since 1939, the Adoption Code has facilitated the voluntary surrender of children. Arrangements for the release of a child—either directly or through an agency—can begin during pregnancy.[46] At birth, the child can be immediately placed with prospective adoptive parents.[47] The formal release can be signed as soon as seventy-two hours after birth,[48] giving time for the birth parent to regain stability from the immediate emotional and physical effects of childbirth. Identifying information about the

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[45] *Id.*.
[46] M.C.L. 710.34(1) (App.L, 65a(II)).
[47] M.C.L. 710.23d (App.L, 28a(II)).
[48] M.C.L. 710.29(5)(a) (App.L, 54a); §710.44(8)(a) (App.L, 77a).

releasing parent is kept in a confidential, sealed file.[49] There are even procedures for handling fathers who vindictively withhold consent.[50]

If a parent is in distress or otherwise unwilling to participate in the paperwork aspect of the Adoption Code, and if they abandon the child, then Michigan's child protection laws are triggered.[51] The procedures provide immediate protection to the child, as well as services to parents to promote reunification if so desired.

B. The concern about criminal consequences

It is said that without the SDNL, parents in crisis would unsafely abandon their children for fear of criminal consequences that could stem from dropping the newborn off at an emergency service provider. But that is not true. As explained by the Michigan Supreme Court in 1858, a parent would not be violative of Michigan's "exposure with intent to abandon" criminal statute if the parent "remain[s] within view, or within the hearing of its cries, until he sees that it has found the protection of another[.]"[52]

As noted by the Michigan Court of Appeals in a published 2002 decision,[53] exposure+abandonment

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[49] M.C.L. 710.27a; M.C.L. 710.68 (procedure for release of information); (App.L, 48a(II)).

[50] M.C.L. 710.45 (App.L, 86a(II)); M.C.L. 710.62 (App.L, 100a(II)).

[51] Also known as the "Juvenile Code," M.C.L. 712A.2(a)(1); M.C.L. 712A.2(b)(1). (App.M, 120a(II)).

[52] *Shannon v People*, 5 Mich 71, 96–97 (1858).

[53] *People v Schaub*, 656 N.W.2d 824, 826-827 (2002).

statute,[54] "has remained basically unchanged since it was first interpreted" by the Michigan Supreme Court in *Shannon*. As such, any pre-SDNL worry of criminal consequences stemming from a safe surrender of a newborn was based in a lack of awareness of the law, not a legitimate state interest justifying new legislation.

C. Preventing "dumpster babies"

The sensationalist reasoning for the SDNL is that it will prevent "newborn babies being found in dumpsters and bathrooms."[55] Clearly everyone can agree that is a laudable goal. Certainly there is value to the provisions within the SDNL that specify how an emergency service provider should conduct themselves, facilitate medical and other care to surrendered newborn, and establish a specific safe-delivery program within the department of community health.

But the SDNL does not stop there. It suspends due process protections that would otherwise result in the father—putative or legal—receiving notice. It creates an entirely new system by which parental rights can be terminated. An entirely new system for a fast-track adoption.

What interest could Michigan possibly have in the SDNL's peculiar—yet critical—post-surrender

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[54] MCL 750.153 (App.N, 128a(II).

[55] See House Legislative Analysis Section, "Safe Infant Abandonment", Second Analysis (7-12-00), available at: <http://www.legislature.mi.gov/documents/1999-2000/billanalysis/House/pdf/1999-HLA-5543-B.pdf>.

timeframes and procedures? Why relieve agencies from having to check the missing-child list in some circumstances? Why permit notice-by-publication without requiring the use of the Absent Parent Protocol? Why restrict the time frame by which an interested parent can preserve their right to participate, etc.? It is not as though such things are new, unfamiliar, or costly tasks that the State cannot bear. They are already featured in existing adoption and child protection laws in Michigan.

Nor is it a matter of domestic violence victims having no other option. In Michigan, pregnant spouses can seek court protection by initiating a divorce. Personal protection proceedings provide ready protection, in addition to laws criminalizing stalking and violence. If the concern is that the child will be abused by the other parent, then child protective services are available.

Everything comes down to the odious belief that women would rather murder their children than participate in an adoption process where the father might end up with the child. In the 1979 case of *Caban v Mohammed*, this Court rejected the "harshness" of a law that permitted unmarried mothers to release their children for adoption over the objection of the father. The State's interest in "promoting the adoption of illegitimate children" was insufficient to justify the "enabl[ing] of some alienated mothers arbitrarily to cut off the paternal rights of fathers."[56]

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[56] *Caban*, 441 U.S. at 394 (1979).

CONCLUSION

The Michigan House of Representatives' final analysis of the SDNL—issued just two months before it was passed—contains arguments for and against the proposed bill, and (literally) ends with the following passage: [57]

> The proposal is worth a try. The worse that can happen is that it doesn't work and that newborns are not surrendered in the manner anticipated. If only one infant is protected in this way, however, that would make the law a success in many minds.

Because of this legislative experiment, countless fathers are unable to contest the severing of their rights in the secret proceedings. Fundamental rights are severed with the barest minimum of efforts being made by agencies imbued as arms of the State.

Given the important interests at stake, this Court must grant certiorari to review and reverse the opinion of the Michigan Supreme Court and, in doing so, deem Michigan's Safe Delivery of Newborns Law unconstitutional and restore Petitioner's parental rights.

Respectfully submitted,
Saraphoena B. Koffron
Petitioner's Counsel of Record

---

[57] House Legislative Analysis (7-12-00), *supra.*

Appendix A

State of Michigan 9th Judicial Circuit-Family Division Kalamazoo County	**Order after hearing on petition to accept release and terminate rights to surrendered newborn child**	Case No. 2018-6540-NB

In the matter of Baby Boy Doe, a surrendered newborn child.

1. Date of Hearing: September 28, 2018
   Judge: Julie K. Phillips P46459

2. A petition requesting an order to accept the release of the surrendering parent and terminating the parental rights of both the surrendering and nonsurrendering parents has been filed by Catholic Charities West Michigan, a child-placing agency.

3. The surrendering parent, Unknown, ☒ has ☐ has not knowingly released the newborn.

4. ☐ a. The nonsurrendering parent, _____, has been identified and located and provided with notice of the surrender of the newborn.
   ☒ b. The nonsurrendering parent has not been identified or located, and the child-placing agency has made reasonable efforts to provide notice of the surrender of the newborn.

5. The ☒ surrendering parent ☐ nonsurrendering parent has not filed a petition for custody of the newborn within the required 28 days following notice of the surrender of the newborn.

IT IS ORDERED:

6. The release of the surrendering parent
☒ is ☐ is not accepted

7. The parental rights of the ☐ surrendering parent ☒ nonsurrendering parent are terminated. Custody and care of the surrendered newborn child is granted to Catholic Charities West Michigan, a child placing agency. The prior order dated August 16, 2018 that authorizes placement of the surrendered newborn child with the prospective adoptive parent(s) is continued.

8. ☐ The petition is denied.

9. Other:

Date: 9-28-2018 s/_____
Judge Julie K. Phillips

[Original version of Order is on Michigan Supreme Court Administrative Office form CCFD 08 (9/07)]

Appendix B

State of Michigan 9th Judicial Circuit-Family Division Kalamazoo County	**ORDER OF ADOPTION**	Case No. 2018-6540-NB

In the matter of Baby Boy Doe, [date of birth] 08/09/2018, adoptee

THE COURT FINDS:

1. A petition for an order of adoption has been filed.
2. All necessary orders terminating parental rights have been entered.
3. The adoptee □ was □ was not made a ward of this court.
4. That any appeal of the decision to terminate parental rights has reached disposition; that no appeal, application for leave to appeal, or motion for rehearing or reconsideration is pending; and that the time for all appellate proceedings in this matter has expired.
5. The adoption of the adoptee [by] the petitioner(s) is desirable and in the best interests of the adoptee.

IT IS ORDERED:

6. From and after this date the parent(s) of the adoptee is/are _____ and _____.
7. The name of the adoptee is _____.
8. The adoptee, if a ward of this court, is discharged.

Date: 02-12-2019 s/_____
Judge Julie K. Phillips

Appendix C

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF OTTAWA
414 Washington Grand Haven Michigan 49417
(616) 846-8315

In Re: Baby Boy Doe Case # 2018-6540-NB

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ORDER DENYING MOTION TO UNSEAL ADOPTION FILE

At a session of said Court held in the County of Kalamazoo, City of Kalamazoo, State of Michigan on this 2 day of Jan 2020
Present: Honorable Julie K. Phillips
Circuit Court Judge

This matter having come before the Court on Petitioner's Motion to Unseal Adoption Records; the Court having read the parties' submissions and having heard oral argument on December 9, 2019,

NOW THEREFORE, for the reasons stated on the record, Petitioner's motion is denied. The adoption records at issue shall remain sealed.

This is a final order and closes this case.

s/_____
Hon. Julie K. Phillips
Circuit Court Judge

Appendix D

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF OTTAWA
414 Washington Grand Haven Michigan 49417
(616) 846-8315

In Re: Baby Boy Doe (8/9/2018) Case # 2018-6540-NB

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ORDER DENYING PETITIONER'S MOTION FOR RECONSIDERATION

At a session of said Court held in the City of Kalamazoo, County of Kalamazoo, State of Michigan on the 19 day of February 2020

Present: Honorable Julie K. Phillips

This matter having come before the Court on Petitioner's Motion for Reconsideration; the Court having read the parties' submissions and review of the testimony provided on the record on December 10, 2019, Petitioner's Motion for reconsideration is

denied. The adoption records at issue shall remain sealed.

Date: 2-19-2020 s/_____
Julie K. Phillips (P46459)

Appendix E

STATE OF MICHIGAN

COURT OF APPEALS

In re BABY BOY DOE, Minor.

PETER KRUITHOFF, Petitioner-Appellant,
v.
CATHOLIC CHARITIES OF WEST MICHIGAN,
Respondent-Appellee.

No. 353796

August 26, 2021

Kalamazoo Circuit Court Family Division LC No. 2018-006540-NB

Before: Ronayne Krause, P.J., and Beckering and Boonstra, JJ.

BOONSTRA, J.

Petitioner appeals by delayed leave granted the trial court's order denying his motion to unseal a sealed adoption file. Following the entry of that order, the trial court denied petitioner's motion for reconsideration, in which he additionally requested that the trial court reinstate his parental rights to Baby Boy Doe (Doe). Petitioner raised both issues in his delayed application for leave to appeal, and this Court granted the application "limited to the issues raised in the application and supporting

brief."[1] Underlying this matter is a series of conflicting orders independently entered by two circuit courts, each apparently acting largely without knowledge of the actions of (or the proceedings pending before) the other. We vacate in part, reverse in part, and remand for further proceedings.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

On August 8, 2018, petitioner initiated a divorce proceeding against his then-pregnant wife, KGK, in the family division of the Ottawa Circuit Court (the Ottawa court); petitioner additionally sought custody of his then-unborn child. Petitioner resided in Ottawa County at the time he filed for divorce, while KGK resided in Muskegon County.

The following day, August 9, 2018, unbeknownst to petitioner or the Ottawa court, KGK gave birth to a male child (Doe) at the Butterworth Campus of Spectrum Health Hospitals in Grand Rapids. On August 10, 2018, the Ottawa court entered an ex parte order for DNA testing of the child that was carried by KGK and an ex parte restraining order prohibiting either petitioner or KGK from taking "any action pertaining to the permanent placement or adoption of the defendant's unborn child pending further order of the court." The record before us[2] does not contain a

[1] In re Doe, unpublished order of the Court of Appeals, entered August 31, 2020 (Docket No. 353796).

[2] The Ottawa court file is not part of the record on appeal, inasmuch as this appeal arises out of Kalamazoo County.

proof of service or other indication that this order was served on KGK; petitioner's counsel later represented at a motion hearing that she was served with a copy of the complaint for divorce and the ex parte order sometime in September 2018.

KGK surrendered Doe at the hospital on August 12, 2018, under Michigan's Safe Delivery of Newborns Law (SDNL), MCL 712.1 *et seq*. KGK declined to provide any information regarding the birth father's identity, but did indicate that she was married.[3] She also refused to sign a "Voluntary Release For Adoption Of A Surrendered Newborn by Parent" form because she did not want her name appearing on any legal documents. The hospital placed Doe with respondent, a nonprofit agency that provides, among other services, child placement and adoption services.

On August 15, 2018, again unbeknownst to petitioner or the Ottawa court, respondent petitioned the family division of the Kalamazoo County Circuit Court (the Kalamazoo court) for permission to place Doe with prospective adoptive parents. The Kalamazoo court entered an order authorizing placement on August 16, 2018. However, Doe was not placed with the prospective adoptive parents until August 25, 2018, because he

[3] Petitioner asserts that KGK gave hospital staff her maiden name. At the motion hearing on petitioner's motion to unseal the adoption records, counsel for petitioner stated that KGK's maiden name was "in the hospital records" transferred from the hospital to respondent. Those records are not a part of the record provided to this Court. However, respondent has not challenged this assertion by petitioner.

was born with a methadone addiction and required additional medical care. Also on August 16, 2018, a "Publication of Notice, Safe Delivery of Newborns" was published in the Grand Rapids Press. This notice contained no names, but was merely addressed, generically, to the birth mother and father of "a newborn baby, born on August 9, 2018 at Spectrum Health Grand Rapids, MI." Twenty-eight days passed without a response to the publication being received by the Kalamazoo court.

On September 14, 2018, respondent petitioned the Kalamazoo court to accept the release of the surrendering parent and terminate the parental rights of both the surrendering and nonsurrendering parents. Meanwhile, on September 21, 2018, the Ottawa court entered an order awarding petitioner temporary physical and legal custody of Doe. On September 28, 2018, the Kalamazoo court held a hearing on respondent's termination petition. The court found that the surrendering parent (KGK) had knowingly released her rights to Doe, and that "[t]he nonsurrendering parent has not been identified or located, and the child-placing agency has made reasonable efforts to provide notice of the surrender of the newborn." The Kalamazoo court then terminated the parental rights of both of Doe's parents (i.e., both petitioner and KGK) and granted custody of Doe to respondent.

On January 16, 2019, petitioner issued a third-party subpoena to respondent as part of the ongoing Ottawa court proceeding, requesting that respondent produce "any and all records regarding

Baby Boy Doe, date of birth August 9, 2018 at Spectrum Health in Grand Rapids, Michigan to mother [KGK]." Petitioner issued the subpoena after taking the deposition of KGK, during which she revealed that she had surrendered Doe and that the child had been placed with respondent to facilitate his adoption. On February 1, 2019, respondent filed a motion to quash the subpoena on the ground that respondent's placement records were confidential and that disclosure of a placement agency's records without a court order constituted a criminal offense under MCL 712.2a(2), (3).

On February 12, 2019, the Kalamazoo court granted the prospective adoptive parents' petition to adopt Doe.

On February 25, 2019, the Ottawa court heard arguments on respondent's motion to quash. The court held that petitioner was entitled to be informed of where the "Safe Delivery action" was proceeding, "so [petitioner] can pursue custody there." The court directed respondent to provide petitioner with a copy of the pleadings filed in the "Safe Delivery action," with the names and identifying information of the adoptive parents redacted from the pleadings. The parties disputed the language of the proposed order for several months; on June 10, 2019, an order was finally entered reflecting the Ottawa court's ruling.[4]

[4] Respondent's counsel apparently mistakenly represented to the Ottawa court that the Safe Delivery action was pending in

On July 30, 2019, the Ottawa court entered a judgment of divorce, which granted petitioner full physical and legal custody of Doe.

On October 16, 2019, petitioner moved the Kalamazoo court to unseal the adoption file of Doe and provide petitioner with access to all of the information contained in that file. His motion stated in relevant part:

> 52. The Michigan Safe Delivery Act provides that the emergency service provider to whom the newborn was surrendered has to provide the adoption agency "any information, either written or verbal, that was provided by and to the parent who surrendered the newborn."
>
> 53. The Michigan Safe Delivery Act provides that the adoption agency shall, "within 28 days, make reasonable efforts to identify, locate, and provide notice of the surrender of the newborn to the nonsurrendering parent. The child placing agency shall file a written report with the court that issued the order placing the child. The report shall state the efforts the child placing agency made in attempting to identify and locate the

Kent County, not Kalamazoo County. Petitioner represents that he was not aware of the correct venue for the action until July 12, 2019, when he received from respondent the information that the Ottawa court ordered respondent to produce.

> nonsurrendering parent and the results of those efforts. If the identity and address of the nonsurrendering parent are unknown, the child placing agency shall provide notice of the surrender of the newborn by publication in a newspaper of general circulation in the county where the newborn was surrendered."
>
> 54. Petitioner is in need of access to the entire adoption file, as he is the legal father of Baby Boy Doe.
>
> 55. Petitioner does not believe that Catholic Charities of West Michigan made reasonable efforts to identify and locate him.
>
> 56. Petitioner has no reason to rely on the accuracy of the disclosures of Catholic Charities West Michigan as they hid the location of the probate case from him and did not inform him of the impending final order of adoption once Catholic Charities knew he was seeking information on the adoption.
>
> 57. Furthermore, Catholic Charities of West Michigan sent Petitioner documents indicating that the Court knew of [sic, or?] should have known that the surrendering mother was married at the time of birth.

Respondent responded, arguing that MCL 712.2(a)(1) provides that the adoption records are

subject to strict confidentiality and only the parties to the adoption proceeding are entitled to those records. According to respondent, petitioner was not a party to the Doe adoption proceedings, and thus was not entitled to disclosure of the records. Respondent also argued that petitioner's claim that it had failed to use reasonable efforts to identify the nonsurrendering parent was both "legally irrelevant" and factually inaccurate. Respondent asserted that petitioner had failed to identify any legal basis that would allow the Kalamazoo court to grant the requested relief.

The Kalamazoo court held a hearing on petitioner's motion on December 10, 2019. After hearing the parties' arguments, the court ruled from the bench:

> They have got the legislature, the Court of Appeals, everybody has said this is secure haven. I understand you are arguing that mom went rouge [sic] and she had a duty - or somebody had a duty to let dad know what's going on, I mean that is really the heat [sic] of your argument, I get it. It is unfortunate for him.
>
> She is going to the hospital, telling the hospital there - there has been - what did she say - there has been abuse - domestic violence - I don't remember her exact terms and that the best interest [f]or my baby is for me to give my baby up. The hospital can't ask any questions,

takes the baby, contacts the people on the list. Catholic Charities gets the baby placed. No questions by law can be asked.

I don't have any clear and convincing evidence of any legal argument from you why the confidential records for an adoption should be opened up in this case. There is nothing unique.

Other than the statute never addresses what happens if there is really no actual notice. There is legal notice. How many times - I don't know what kind of law you guys do, but I don't know how many times this Court has had published notice in the Climax Crescent, some tiny little newspaper within the county, but it is general circulation, meets the criteria of the statute. Do we think dad had actual notice? Probably not, but did he get legal notice? Absolutely.

I find that dad got legal notice. Did mom bamboozle everybody? Maybe. But that in and of itself is not a reason to change the confidential records and open up Pandora's Box and let we just assure you everything that Catholic Charities gave to this Court Ottawa County has already given you, just redacted with the third - innocent third parties names on it and the information about them.

So I really don't think our files would have anymore to give you. You got the orders, you have submitted them to us and we've got the information that Catholic Charities already gave you. That's all that there is.

Sure, but I really don" [sic] want to unseal our adoptive records. I don't think you've shown anything that shows that anything was violated, that there is any good cause.

I find this very interesting. The only concern that I have is I really think the legislature needs to tweak the law about notice. It is unfortunate that, you know, there is no requirement that the publication shall be where the mother resides or where the father resides or that shall be some notice a legal father [sic], but again the domestic violence people would be all up in arms to have that for this very reason. Mom is saying there is domestic violence. She is protecting herself allegedly and her baby. She doesn't want that baby to go to dad. I don't know. I don't know what the facts are, but we certainly have lots of cases like that.

So I have to follow the law until the legislature changes it. In fact, *In re Miller* confirms the legislature's intent.

The Kalamazoo court entered an order consistent with its ruling on January 2, 2020. Petitioner subsequently moved for reconsideration, arguing that the trial court had erred by not unsealing the adoption records so that he could determine whether respondent had made reasonable efforts to provide him with notice under the SDNL. In addition, petitioner advanced a new argument-that he had timely filed a petition for custody "within 28 days after the newborn is surrendered" as required by MCL 712.10(1) by filing for his divorce/custody action in the Ottawa court shortly before Doe's birth. Therefore, petitioner argued, the Kalamazoo court had erred by terminating his parental rights to Doe, and those rights should be reinstated. Without addressing the termination issue, the trial court entered an order denying petitioner's motion for reconsideration, stating:

This matter having come before the Court on Petitioner's Motion for Reconsideration; the Court having read the parties' submissions and review of the testimony provided on the record on December 10, 2019, Petitioner's Motion for reconsideration is denied. The adoption records at issue shall remain sealed.

This appeal followed, by delayed leave granted. Petitioner's application for appeal raised two issues: (1) whether petitioner was entitled to have his parental rights reinstated and (2) whether the Kalamazoo court erred by not unsealing the adoption file.

II. TERMINATION OF PARENTAL RIGHTS

Petitioner argues that the Kalamazoo court erred by terminating his parental rights as a nonsurrendering parent under the SDNL. We agree. As discussed, it was in his motion for reconsideration that petitioner first raised the argument that his divorce action in Ottawa County was a "petition for child custody" under the SDNL, and the trial court did not specifically address that argument in its denial. This argument is therefore unpreserved. See *Vushaj v Farm Bureau Gen Ins Co of Mich*, 284 Mich.App. 513, 519; 773 N.W.2d 758 (2009). However, this Court "may overlook preservation requirements if the failure to consider the issue would result in manifest injustice, if consideration is necessary for a proper determination of the case, or if the issue involves a question of law and the facts necessary for its resolution have been presented." *Smith v Foerster-Bolser Constr, Inc*, 269 Mich.App. 424, 427; 711 N.W.2d 421 (2006).

We review for plain error unpreserved issues regarding the termination of parental rights. See *In re Utrera*, 281 Mich.App. 1, 8-9; 761 N.W.2d 253 (2008). We review issues of statutory interpretation de novo. *Eggleston v Bio-Med Applications of*

Detroit, Inc, 468 Mich. 29, 32; 658 N.W.2d 139 (2003).

This Court recently summarized the operation of the SDNL in *In re Miller*, 322 Mich.App. 497, 502-503; 912 N.W.2d 872 (2018):

> The Safe Delivery of Newborns Law "encourage[s] parents of unwanted newborns to deliver them to emergency service providers instead of abandoning them[.]" *People v Schaub*, 254 Mich.App. 110, 115 n 1; 656 N.W.2d 824 (2002). The statute permits a parent to surrender a child to an emergency service provider within 72 hours of the child's birth. MCL 712.1(2)(k); MCL 712.3(1). When the emergency service provider takes temporary custody of the child, the emergency service provider must reasonably try to inform the parent that surrendering the child begins the adoption process and that the parent has 28 days to petition for custody of the child. MCL 712.3(1)(b) and (c). The emergency service provider must furnish the parent with written notice about the process of surrender and the termination of parental rights. MCL 712.3(1)(d). The emergency service provider should also try to inform the parent that, before the child can be adopted, "the state is required to make a reasonable attempt to identify the other parent, and then ask the parent to identify the other

parent." MCL 712.3(2)(e). Finally, the emergency service provider must take the newborn to a hospital, if the emergency service provider is not a hospital, and the hospital must take temporary protective custody of the child. MCL 712.5(1). The hospital must notify a child-placing agency about the surrender, and the child-placing agency has various obligations, including making "reasonable efforts to identify, locate, and provide notice of the surrender of the newborn to the nonsurrendering parent" within 28 days, which may require "publication in a newspaper of general circulation in the county where the newborn was surrendered." MCL 712.7(f).

Either the surrendering parent, within 28 days of surrender, or the nonsurrendering parent, within 28 days of published notice of surrender, may file a petition to gain custody of the child. MCL 712.10(1). If neither the surrendering parent nor the nonsurrendering parent files a petition for custody within 28 days of surrender or notice of surrender, the child-placing agency must immediately file a petition with the court to terminate the rights of the surrendering parent and the nonsurrendering parent. MCL 712.17(2) and (3). The agency "shall present evidence that demonstrates that the

> surrendering parent released the newborn and that demonstrates the efforts made by the child placing agency to identify, locate, and provide notice to the nonsurrendering parent." MCL 712.17(4). If the agency meets its burden of proof by a preponderance of the evidence and a custody action has not been filed by the nonsurrendering parent, the trial "court shall enter an order terminating parental rights of the surrendering parent and the nonsurrendering parent under this chapter." MCL 712.17(5). The Safe Delivery of Newborns Law does not define "parent," "surrendering parent," or "nonsurrendering parent." See MCL 712.1(2) (definitions). [*Id.*]

Petitioner argues that the complaint in the Ottawa court constituted a petition for custody of Doe that was timely filed under MCL 712.10(1). We agree. MCL 712.10(1) provides:

> If a surrendering parent wants custody of a newborn who was surrendered under section 31 of this chapter, the parent shall, within 28 days after the newborn was surrendered, file a petition with the court for custody. *Not later than 28 days* after notice of surrender of a newborn has been published, an individual claiming to be the nonsurrendering parent of that newborn may *file a petition with the court for*

> *custody*. The surrendering parent or nonsurrendering parent shall file the petition for custody in 1 of the following counties:
>
> (a) If the parent has located the newborn, the county where the newborn is located.
>
> (b) If subdivision (a) does not apply and the parent knows the location of the emergency service provider to whom the newborn was surrendered, the county where the emergency service provider is located.
>
> (c) If neither subdivision (a) nor (b) applies, the county where the parent is located. [Emphasis added.]

The Legislature is presumed to have intended the meaning it has plainly expressed in statutory language. *Joseph v Auto Club Ins Ass'n*, 491 Mich. 200, 206; 815 N.W.2d 412 (2012). Therefore, nothing will be read into a clear statute that is not within the manifest intention of the Legislature as derived from the language of the statute itself. *Mich Ed Ass'n v Secretary of State* (*On Rehearing*), 489 Mich. 194, 218; 801 N.W.2d 35 (2011). The provisions of a statute should be construed reasonably and in context, and terms given their plain and ordinary meaning unless otherwise defined in the statute. *Pace v Edel-Harrelson*, 499 Mich. 1, 7; 878 N.W.2d 784 (2016); *In re Wirsing*, 456 Mich. 467, 474; 573 N.W.2d 51 (1998). If the

plain and ordinary meaning of statutory language is clear, no judicial construction is permitted. *Pace*, 499 Mich. at 7.

In this case, it is undisputed that (1) petitioner was not aware of the county where Doe was located or the county where Doe was surrendered until after petitioner's parental rights were terminated; (2) Ottawa County was where petitioner was located; and (3) petitioner filed his complaint for divorce/custody in Ottawa County. Therefore, if his complaint constituted a "petition for custody" of Doe, then it was filed in the correct county.[5]

We conclude that petitioner's complaint in the Ottawa court was a petition for custody of Doe. When terms are not defined in a statute, a court may consult a dictionary to ascertain their common meaning. See *Epps v 4 Quarters Restoration LLC*, 498 Mich. 518, 529; 872 N.W.2d 412 (2015). A petition is "[a] formal written request presented to a court or other body." Black's Law Dictionary (11th ed). This Court has referred to a marital partner's "right to petition for divorce." *Skaates v*

[5] MCL 712.10(2) states that "[i]f the court in which the petition for custody is filed did not issue the order placing the newborn, the court in which the petition for custody is filed shall locate and contact the court that issued the order and shall transfer the proceedings to that court." We note that this subsection imposes no further duties on a petitioning parent regarding such a transfer. MCL 712.14 provides the procedure for holding a hearing on a petition for custody, and requires the court to "determine custody of the newborn based on the newborn's best interest." MCL 712.14(1).

Kayser, 333 Mich.App. 61, 83; 959 N.W.2dd 33 (2020). And although the record of the proceedings in the Ottawa court was not provided to this Court, it is undisputed that the complaint for divorce sought a legal resolution to the issue of the custody of (the then-as-yet-unborn) Doe, and that petitioner requested that the court award him custody of Doe. In fact, the next action taken by petitioner after filing the complaint was to secure an *ex parte* order preventing *either* parent from taking "any action pertaining to the permanent placement or adoption of the defendant's unborn child pending further order of the court." Clearly, petitioner sought to have the Ottawa court determine the issue of custody, and in fact took steps to prevent either parent from doing anything that affected custody without permission of the court.

Further, the complaint was filed "not later than 28 days after notice of surrender of a newborn has been published." The complaint for divorce was filed on August 8, 2018, and the first order regarding custody in the case was entered on August 10. The notice of surrender was published on August 16, 2018. Nothing in the plain language of MCL 712.10(1) precludes the filing of a petition for custody by a nonsurrendering parent *before* a notice of surrender is published, or sets any time limit on such an advance filing. *Pace*, 499 Mich. at 7. The word "not" is a function word that serves to "make negative of group of words or a word"-in this case, the words "later than 28 days after" notice of surrender has been published. *Merriam-Webster's Collegiate Dictionary* (11th ed), p 848. The word "later" means "at some time subsequent to a given

time; [s]ubsequently, afterward." *Id.* at 703. The plain and ordinary meaning of the phrase "not later than 28 days after" in MCL 712.10(1) therefore simply means a petition may not be filed more than 28 days after the publication of the notice of surrender.[6] Consequently, the Ottawa County complaint was not only a petition for custody of Doe that was filed in the correct location, but it was also timely filed.

MCL 712.17(3) provides that "*[i]f the nonsurrendering parent has not filed a petition for custody of the newborn within 28 days of notice of surrender of a newborn*," then "the child placing agency with authority to place the newborn shall immediately file a petition with the court to determine whether the court shall enter an order terminating the rights of the nonsurrendering parent." (Emphasis added). MCL 712.17(4) further

[6] We note also that the Legislature chose to require the surrendering parent to file a petition "within" 28 days after surrender, but to require the nonsurrendering parent to file a petition "not later than" 28 days after the notice was filed. The use of different terms suggests different meanings. United States Fidelity Ins & Guaranty Co v Mich. Catastrophic Claims Ass'n (On Rehearing), 484 Mich. 1, 14; 795 N.W.2d 101 (2009). While it would be illogical to give effect to a petition for custody filed by the surrendering parent that was filed before the surrender, because the act of surrender itself necessarily indicates a present desire to give up custody of the child, the same is not true of a nonsurrendering parent, who may be attempting, as seems to be the case here, to secure his or her parental rights against the possibility of a future surrender of a child by the other parent.

requires the court to have a hearing on any such petition, at which child placing agency "shall present evidence that demonstrates that the surrendering parent released the newborn and that demonstrates the efforts made by the child placing agency to identify, locate, and provide notice to the nonsurrendering parent." MCL 712.17(5) states that "[i]f the court finds by a preponderance of the evidence that the surrendering parent has knowingly released his or her rights to the child and that reasonable efforts were made to locate the nonsurrendering parent *and a custody action has not been filed*, the court shall enter an order terminating parental rights of the surrendering parent and the nonsurrendering parent under this chapter." (Emphasis added).

Because petitioner had properly and timely filed a petition for custody of Doe, the petition to terminate petitioner's parental rights filed by respondent in this case was filed in violation of MCL 712.17(3), and the Kalamazoo court's subsequent entry of a termination order was in violation of MCL 712.17(5). This was plain error affecting substantial rights. *Utrera*, 281 Mich.App. at 8-9. While respondent and the Kalamazoo court may not have been aware, at the time of the termination order, that petitioner had filed a petition for custody, the fact remains that he had, and the actions of respondent and the Kalamazoo court were therefore in error.[7] *Id.* In any event, the

[7] We note that MCL 712.17(4) requires a child placing agency to present evidence at the termination hearing concerning its efforts to identify, locate, and provide notice to the

Kalamazoo court had been made aware of the divorce/custody action well before it decided petitioner's motion for reconsideration, and therefore plainly erred by denying it. *Id.*[8]

Miller does not compel a different result. In a subsequent hearing on petitioner's motion to unseal the adoption file, the Kalamazoo court stated that *Miller* prevented a non-surrendering husband from asserting parental rights once they had been terminated in a proceeding under the SNDL and that a husband in that situation "would be without parental rights to assert-to disrupt an adoption." This analysis neglects a critical portion of our holding in *Miller*. In *Miller*, this Court indeed concluded that "the Safe Delivery of Newborns Law applies to the husband of a surrendering mother in that the husband may not later assert parental rights." *Miller*, 322 Mich.App. at 500. But it did so in the context of *no petition for custody having been filed*. *Id*. at 506. This Court described the procedure

nonsurrendering parent; it does not require a child placing agency to present evidence regarding whether a petition for custody has been filed. This suggests to us that the requirement of MCL 712.17(5) that the trial court make certain findings "by a preponderance of the evidence" was not intended to require the trial court to make a finding about whether a custody action had been filed; rather, the phrase in MCL 712.17(5) that "a custody action has not been filed" sets forth a prerequisite that must be fulfilled before the court is authorized to terminate parental rights.

[8] We also note that respondent appears to have been aware (by virtue of petitioner's January 16, 2019 subpoena) of petitioner's custody interest before the Kalamazoo court entered its February 12, 2019 adoption order.

that should be followed when the husband of a surrendering mother does file such a petition, and contrasted that with what happened in the case before it:

> If the husband had filed a petition for custody of the children within 28 days of published notice of the surrender, see MCL 712.10(1), he would have been required to submit to a DNA test to determine paternity, see MCL 712.11(1). If the testing established that he was not the children's biological father, the trial court would have dismissed his petition for custody. See MCL 712.11(5). This dismissal would be consistent with the rules governing the presumption of legitimacy. The DNA test would have demonstrated that the children were not the issue of the marriage, thereby defeating the presumption of legitimacy. See 722.711(a); *Barnes*, 475 Mich. at 703, 718 N.W.2d 311. On the other hand, if the husband of the surrendering mother was the biological father, the trial court would have held a best-interest hearing to determine the children's custody. See MCL 712.14. *If the children's biological father never claimed paternity or petitioned for custody*, the child placing agency would have had to "immediately file a petition with the court to determine whether the court shall enter an order terminating

> the rights of the nonsurrendering parent." MCL 712.17(3).
>
> *In this case, no one claimed paternity*. If the trial court terminates the parental rights of the nonsurrendering parent and the husband of the surrendering mother later seeks to assert his parental rights, he would have to demonstrate that he was not the biological father to show that the order terminating parental rights did not apply to him. However, in doing so, he would be defeating the presumption of paternity, and he would be without parental rights to assert to disrupt an adoption. Accordingly, the termination proceedings under the Safe Delivery of Newborns Law apply to the legal father of the children. [*Id*. (emphasis added).]

In other words, *Miller* held generally that the termination of the parental rights of a nonsurrendering husband under the SDNL is valid; it did not hold that nonsurrendering parents were prohibited from challenging whether those procedures were in fact followed correctly. As we have discussed, in this case they were not. *Miller* does not prevent us from granting relief to petitioner.

III. MOTION TO UNSEAL ADOPTION FILE

Petitioner also argues that the Kalamazoo court erred by denying his motion to unseal the

adoption file. We conclude that further proceedings are warranted in light of our determination that petitioner's parental rights were terminated erroneously. We review issues of statutory interpretation de novo. *Eggleston v Bio-Med Applications of Detroit, Inc*, 468 Mich. at 32. We review a trial court's findings of fact for clear error. MCR 2.613(C).

MCL 712.2a(1) provides that "[a] hearing under this chapter is closed to the public. A record of a proceeding under this chapter is confidential, except that the record is available to any individual who is a party to that proceeding." MCL 712.2a(2) further states that "[a]ll child placing agency records created under this chapter are confidential except as otherwise provided in the provisions of this chapter."

In this case, the Kalamazoo court held that petitioner could not challenge the termination of his parental rights under *Miller*. As discussed, this holding was erroneous (although, in fairness to the court, it was only in his motion for reconsideration that petitioner specifically raised the issue of whether the Ottawa court complaint constituted a petition for custody under the SDNL). The court also stated that it had reviewed the sealed file and found that "everything [respondent] gave to this Court[,] Ottawa County has already given to you, just redacted with the third - innocent third parties names on it and the information about them." The court added: "So I really don't think our files would have anymore to give you. You've got the orders, you have submitted them to us and we've got the

information that Catholic Charities already gave you. That's all that is there."

Petitioner's stated purpose in seeking to have the adoption records unsealed was to permit him to challenge the efforts made by respondent to identify and locate him, in order to provide him with notice of Doe's surrender. The court found that petitioner had been given all of the evidence it had relied upon in making its determination that petitioner had been given adequate notice of Doe's surrender. It is unclear to us whether the court's statements were a specific factual finding, or more in the nature of reassurance to petitioner. And it is possible that its failure to grant petitioner's motion is harmless error. MCR 2.613(A). However, as we have discussed, there was a legal error concerning the termination of petitioner's parental rights. That being the case, we conclude that the Kalamazoo court's orders denying petitioner's motion and denying reconsideration should be vacated. On remand, the Kalamazoo court should consider petitioner's request (if petitioner renews it) in the context of our holding regarding the termination of petitioner's parental rights.

Relatedly, we note that petitioner has argued at various points in the proceedings that the efforts undertaken by respondent to identify and locate him, in order to provide him with notice of Doe's surrender, were not reasonable, and that his motion to unseal the records in this case was part of his effort to challenge the reasonableness of those efforts. In light of our holding in Section II of this opinion, we could opt not to address the

reasonableness of respondent's efforts. However, we believe it important to note our disagreement with the Kalamazoo court's apparent interpretation of MCL 712.7 as providing that publication of a notice, for one day, which merely generically states the newborn's date of delivery and hospital location, in a newspaper published in a county in which neither parent resides, constitutes "reasonable efforts to identify, locate, and provide notice of the surrender of the newborn to the nonsurrendering parent." MCL 712.7(f). We interpret the provision differently. MCL 712.7(f) provides that the child placing agency shall:

> Within 28 days, make reasonable efforts to identify, locate, and provide notice of the surrender of the newborn to the nonsurrendering parent. The child placing agency shall file a written report with the court that issued the order placing the child. The report shall state the efforts the child placing agency made in attempting to identify and locate the nonsurrendering parent and the results of those efforts. If the identity and address of the nonsurrendering parent are unknown, the child placing agency shall provide notice of the surrender of the newborn by publication in a newspaper of general circulation in the county where the newborn was surrendered.

This provision, by its plain language, see *Pace*, 499 Mich. at 7, does not indicate that

publication of notice of surrender satisfies an agency's duty to make reasonable efforts to identify, locate, and provide notice to a nonsurrendering parent. To the contrary, the plain language of the statute requires the agency to make reasonable efforts to identify, locate, and provide notice of surrender to the nonsurrendering parent, and to file a written report identifying those efforts. Only then, if, despite those efforts, the identity of the non-surrendering parent remains unknown, does the statute provide for publication in a newspaper of general circulation.[9] Yet, respondent's report to the Kalamazoo court was devoid of any mention of any efforts taken to identify and locate petitioner, other than the publication itself. Despite being told that KGK was married, there is no evidence that respondent attempted to locate, for example, marriage records, or inquire any further into her husband's identity. Respondent filed an essentially blank, unsigned Voluntary Release For Adoption of Surrendered Newborn by Parent form with the court. Although respondent's petition to terminate petitioner's parental rights claimed that "reasonable efforts were made to identify and locate the father *and* publication was made in a newspaper of general circulation in the county where the newborn was surrendered and no one responded" (emphasis added), it appears that respondent undertook no efforts apart from the publication itself. Simply put, nothing in the language of MCL 712.7(f) can be read as providing that publication alone constitutes

[9] The statute does not specify the contents of the notice of publication, or the duration of publication.

reasonable efforts, or that such a nondescript and *de minimis* notice as the one in this case, or one that was published for such a brief time, should be accepted by a trial court as adequately evidencing reasonable efforts.

In the context of termination of parental rights proceedings under the Juvenile Code, exactly how thorough and extensive efforts must be in order to be considered "reasonable" has not been defined; rather, reasonable efforts must be tailored to the particular facts of the case, and are to be evaluated on a case-by-case basis. See, e.g., *In re Hicks/Brown*, 500 Mich. 79, 89-90; 893 N.W.2d 637 (2017). In this case, additional efforts on the part of respondent might have discovered the divorce/custody proceedings in the Ottawa court, and the existence of a restraining order prohibiting KGK from doing exactly what she did in surrendering Doe. Based on the record before us, respondent's efforts in this case appear to us to have fallen woefully short of what is "reasonable."

We vacate the Kalamazoo court's denial of petitioner's motion to unseal the adoption records. We reverse the court's determination that petitioner's parental rights as a nonsurrendering parent should be terminated, and vacate the order terminating those rights. We remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

Amy Ronayne Krause, P.J. (dissenting)

I respectfully dissent. The majority thoroughly recites the relevant facts and applicable law. Petitioner has indeed suffered a grievous loss. However, I conclude that the Safe Delivery of Newborns Law (SDNL), MCL 712.1 *et seq*, simply does not permit the remedy crafted by the majority on these facts. The Legislature made a policy choice under which other considerations take precedence over petitioner's rights. Therefore, any remedy must come from the Legislature, not from this Court. I believe the majority, although understandably frustrated, deviates from what is permitted by law.

As the majority recites, MCL 712.10(1) provides, in relevant part, that "[n]ot later than 28 days after notice of surrender of a newborn has been published, an individual claiming to be the nonsurrendering parent of that newborn may file a petition with the court for custody." I agree with the majority that the above sentence imposes a deadline: in this case, the notice of surrender was published on August 16, 2018, so an appropriate petition must have been filed by September 13, 2018. I also agree with the majority's determination that *if* petitioner's Ottawa County complaint for divorce and custody constituted a "petition for custody" within the meaning of MCL 712.10(1), then it was properly filed in Ottawa County, notwithstanding the fact that the termination proceeding was held in Kalamazoo County. I respectfully disagree with the majority's conclusion that the Ottawa County complaint for

divorce and custody may, at least on these facts, be considered a "petition for custody" within the meaning of MCL 712.10(1).

The most obvious reason why the Ottawa County petition for divorce and custody was, pursuant to the plain language of the statute, not a proper petition under the SDNL is simply that the child had not yet even been born, let alone surrendered. Therefore, it was literally impossible for petitioner to have "claim[ed] to be the nonsurrendering parent of [a] newborn." Indeed, MCL 712.10(2) provides,

> If the court in which the petition for custody is filed did not issue the order placing the newborn, the court in which the petition for custody is filed shall locate and contact the court that issued the order and shall transfer the proceedings to that court.

In other words, the statute is, by its plain language, premised upon the newborn having already been placed,[10] and therefore necessarily already born and surrendered. In addition, elsewhere in the SDNL are references to custody petitions or proceedings being filed specifically under MCL 712.10. See MCL 712.7(c), MCL 712.10(3), MCL 712.11(1), MCL 712.11(2), MCL 712.17(3). Although not expressly stated in so many words, it is readily apparent that the Legislature intended that a custody petition under the SDNL

[10] Presumably pursuant to MCL 712.7(e).

must be *specifically* brought *under the SDNL*. The Ottawa County petition was therefore not the proper kind of petition to invoke any procedures under the SDNL.

I do not disagree with the majority that, in principle, if a statute sets a deadline after some triggering event, but the statute does not expressly require the filing to occur after any particular time, a filing could potentially be timely even if filed before that triggering event. See *Fischer-Flack, Inc v Churchfield*, 180 Mich.App. 606, 609-613; 447 N.W.2d 813 (1989) (notice held timely where it was provided before furnishing materials, notwithstanding statute requiring notice to be provided "within 20 days after" furnishing materials); *People v Marshall*, 298 Mich.App. 607, 625-627; 830 N.W.2d 414 (2012), vacated in part on other grounds 493 Mich. 1020 (2013) (habitual-offender notice held timely because defendant was not arraigned, so deadline of "within 21 days after the defendant's arraignment" was never triggered). However, all things are not equal here. As discussed, the SDNL requires the "petition for custody" under MCL 712.10 to be founded upon a surrender of a newborn having already occurred. Although the statute does not explicitly forbid, in so many words, a pre-surrender petition, the statute also does not explicitly permit a pre-surrender petition. Given the clear intent of the Legislature, I conclude that it would require impermissibly reading language into the SDNL to permit a pre-surrender petition to be considered timely under that statute.

The majority also takes issue with the reasonableness of respondent's efforts to provide notice to petitioner under MCL 712.7(f). The majority implicitly also analogizes to general principles of due process, which does not require notice to be successful, but does require a good-faith effort under the circumstances to try to achieve actual notice. *Sidun v Wayne Co Treasurer*, 481 Mich. 503, 509-510; 751 N.W.2d 453 (2008). Once again, I do not disagree in principle that MCL 712.7(f) requires the agency to provide notice by publication if the nonsurrendering parent is unknown, and it also imposes an independent requirement of making "reasonable efforts" to communicate notice to the nonsurrendering parent. However, it does not follow that, under these circumstances, it was necessarily unreasonable to do nothing more than post notice by publication. In fact, the majority outlines precisely why there was effectively nothing more that respondent *could* do: the only thing it knew was that KGK was married. I do not know offhand how many married people there are in Michigan, but even if respondent had scoured every single marriage record in the state, I am unable to imagine how respondent could have deduced that petitioner was Doe's father.[11] As the majority states, reasonableness depends on the

[11] Indeed, even if respondent had also known that divorce proceedings had been initiated against KGK, and respondent had requested a copy of all records of all pending divorce proceedings in Kalamazoo County, and respondent had some way to divine a connection between an unidentified baby and any particular husband, respondent still would not have discovered petitioner, because the divorce proceeding was pending in Ottawa County.

circumstances. The law generally does not obligate anyone to expend resources making clearly futile gestures. See *Cichecki v City of Hamtramck, Police Dep't*, 382 Mich. 428, 437; 170 N.W.2d 58 (1969).

Even if the Ottawa County petition could be considered a properly filed petition for custody under MCL 712.10, the remedy crafted by the majority would still be improper. First, even if there was any legal or rational basis for challenging the reasonableness of respondent's efforts to locate petitioner, it should not be necessary to unseal the entire adoption record to make that inquiry. A more appropriate remedy would be for the trial court to conduct an *in camera* review of the records to determine whether there is any evidence that respondent knew more about Doe and KGK than just the fact that KGK was married. The trial court could then, as appropriate, and if any such evidence was actually present, order release of properly redacted documentation or pass on the relevant information. Such a limited remedy would, at least, be consistent with the purposes of the statutory confidentiality provisions, and would still permit respondent to make a meaningful argument regarding the reasonableness of respondent's efforts with the benefit of that knowledge-if any.

Furthermore, as this Court has explained, and as expressly set forth by statute, the proper procedure would have been to hold a hearing to "determine custody of the newborn based on the newborn's best interest." MCL 712.14; *In re Miller*, 322 Mich.App. 497, 506; 912 N.W.2d 872 (2018). As

a general matter, custody best-interests analyses require consideration of the facts and circumstances as they exist at the time of that hearing, even if that hearing is held after remand due to an error in earlier proceedings. See *Fletcher v Fletcher*, 447 Mich. 871, 889; 526 N.W.2d 889 (1994). It has now been more than two years since the Kalamazoo circuit court granted Doe's prospective adoptive parents' petition to adopt Doe, and Doe is almost three years old. Even if that adoption had been legally erroneous, which I do not accept, the majority's resolution of this appeal is contrary to the plain language of the statute. The majority's resolution also appears to presume that it would somehow be in Doe's best interest-the standard under the SDNL-to rip him from the arms of the only family he has known and place him with a stranger, as if Doe was somehow a mere piece of property instead of a living person. Again, I agree that petitioner has suffered a grievous loss, but the overarching goal of the SDNL is the protection of children.

It is certainly within the purview of the courts to point out that the Legislature has chosen a policy with consequences it may not have anticipated, but ultimately, the wisdom or propriety of legislative policy is the sole province of the Legislature. The Legislature enacted a statutory scheme to "encourag[e] parents of unwanted newborns to deliver them to emergency service providers instead of abandoning them." See *People v Schaub*, 254 Mich.App. 110, 115 n 1; 656 N.W.2d 824 (2002). That scheme includes provisions to address situations in which the

newborn is only unwanted by one of the parents. That scheme requires emergency service providers to ask surrendering parents for identifying information, but it expressly does not require the surrendering parent to disclose any such information. MCL 712.3(2). The Legislature presumably understood the implications: that it was possible a nonsurrendering parent would therefore be unknowable and unfindable. The Legislature therefore enacted a policy that prefers to err on the side of protecting the safety of the child and of the surrendering parent, even at the possible detriment to the nonsurrendering parent. I appreciate the majority's frustration with such a scheme, but it is not for us to decide that it is wrong and therefore bypass the plain language of the statute.

I would affirm.

Appendix F

IN THE SUPREME COURT
for the
STATE OF MICHIGAN

975 N.W.2d 486 (Mem)
Supreme Court of Michigan.

IN RE BABY BOY DOE, Minor.
Peter Kruithoff,
Petitioner-Appellee/Cross-Appellee,
v.
Catholic Charities of West Michigan,
Respondent-Appellant,
and
Adoptive Parent Number 1 and Adoptive Parent Number 2, Appellees/Cross-Appellants.

SC: 163807
|
COA: 353796
|
June 29, 2022

Kalamazoo CC Family Division: 2018-006540-NB

Order

On May 4, 2022, the Court heard oral argument on the application for leave to appeal the August 26, 2021 judgment of the Court of Appeals and the application for leave to appeal as cross-appellants.

On order of the Court, the applications are again considered. MCR 7.305(H)(1). In lieu of granting leave to appeal, *we hold that petitioner's complaint for divorce did not satisfy MCL 712.10(1)* despite containing a demand for custody because it was filed before the child was born. Accordingly, we REVERSE in part and VACATE in part the judgment of the Court of Appeals and REMAND this case to the Court of Appeals for reconsideration of petitioner's arguments regarding the denial of his motion to unseal the adoption file and for further proceedings not inconsistent with this order.

On August 8, 2018, petitioner filed a complaint for divorce against his then pregnant wife in the Ottawa Circuit Court, Family Division. In the copy of the complaint filed with this Court, petitioner admitted his lack of certainty about his paternity,[1] alleged that his then wife intended to give the child up for adoption or to surrender the child pursuant to the Safe Delivery of Newborns Law (SDNL), MCL 712.1 *et seq.*, and requested that the child be placed with petitioner's parents in Nevada if his paternity was established. On August 9, 2018, Baby Boy Doe was born at a hospital in Kent County. On August 10, 2018, the Ottawa Circuit Court, without knowledge of Doe's birth, entered an ex parte order that ordered "DNA testing [of the child] upon birth to establish paternity" and enjoined either party from taking "any action

[1] Whether petitioner is the biological father of Baby Boy Doe is still undetermined.

pertaining to the permanent placement or adoption ***487** of the" unborn child until further ordered by the court. *The August 10 order was not served on the birth mother until at least August 30.*

In the meantime, on August 12, 2018, Doe was surrendered under the SDNL at the hospital, and the child was placed with respondent adoption agency, which assumed responsibility for the child. Respondent petitioned the Kalamazoo Circuit Court, Family Division, for an order authorizing placement of Doe with a prospective family, which perfected jurisdiction in that court. The SDNL placement order was granted on August 16, 2018. A "Publication of Notice, Safe Delivery of Newborns" was published in the Grand Rapids Press the same day, but Doe was not placed with the prospective adoptive parents until August 25 because he required additional medical treatment. On September 14, 2018, after receiving no response during the 28-day waiting period, MCL 712.7(f), respondent petitioned the Kalamazoo Circuit Court to accept the release of the surrendering parent and terminate the parental rights of both the surrendering and nonsurrendering parents. The Kalamazoo Circuit Court held a hearing on September 28, 2018, after which it terminated the parental rights of Doe's surrendering and nonsurrendering parents and granted custody and care of Doe to respondent. Doe's adoption by the placement family in Kalamazoo County was finalized on February 12, 2019.

Without knowledge of the proceedings in

Kalamazoo County, the Ottawa Circuit Court entered an order in the divorce case awarding temporary custody to petitioner on September 21, 2018. Petitioner never filed a separate petition for custody under the SDNL, nor did he file a motion requesting that the Ottawa Circuit Court locate the court presiding over the SDNL action or that the custody portion of the divorce action be transferred. However, on January 16, 2019, after having located the Safe Delivery of Newborns Publication Notice, petitioner sent a subpoena to respondent in the Ottawa County action, apparently requesting copies of Doe's adoption file and related information. Respondent declined to provide the information and filed a motion to quash the subpoena in the Ottawa Circuit Court on February 1, 2019. After several hearings, some of the subpoenaed information was provided to petitioner's counsel on July 12, 2019, which, at a minimum, provided petitioner with enough information to determine the docket number for the SDNL action in the Kalamazoo Circuit Court. The Ottawa Circuit Court entered a default divorce judgment in petitioner's favor on July 30, 2019.

Even though petitioner had known since at least mid-July 2019 that the SDNL proceedings had been commenced in the Kalamazoo Circuit Court, he neither attempted to move for untimely reconsideration of the earlier termination decision under MCR 2.119(F) nor did he attempt to appeal the earlier termination decision under MCR 7.204 or MCR 7.205. Instead, petitioner moved the Kalamazoo Circuit Court to unseal the adoption file

on October 7, 2019. That motion was denied on January 2, 2020. Petitioner then argued for the *first time* that his parental rights were improperly terminated in his motion for reconsideration of that decision, which the Kalamazoo Circuit Court denied.[2]

On this record, we hold that regardless of whether the Court of Appeals erred by sua sponte addressing an issue that was ***488** unpreserved and beyond the scope of the judgment from which petitioner appealed, it committed reversible error in its interpretation of the SDNL. The statutory issue before this Court is whether a husband's complaint for divorce filed before a child is born that seeks custody of the unborn child, contingent upon the results of DNA testing, can constitute a timely "petition" for custody filed by a "nonsurrendering parent" under MCL 712.10(1). The SDNL "encourages parents of unwanted newborns to deliver them to emergency service providers instead of abandoning them." *In re Miller*, 322 Mich.App. 497, 502, 912 N.W.2d 872 (2018) (quotation marks, citation, and brackets omitted). The SDNL allows a parent to "surrender" [3] a "newborn" [4] within 72 hours of

[2] "Where an issue is first presented in a motion for reconsideration, it is not properly preserved." *Vushaj v. Farm Bureau Gen. Ins. Co. of Mich.*, 284 Mich.App. 513, 519, 773 N.W.2d 758 (2009).

[3] " 'Surrender' means to leave a newborn with an emergency service provider without expressing an intent to return for the newborn." MCL 712.1(2)(n).

[4] " 'Newborn' means a child who a physician reasonably

birth. Under MCL 712.10(1), "[n]ot later than 28 days after *notice of surrender of a newborn* has been published, an *individual claiming to be the nonsurrendering parent of that newborn* may file a petition with the court for custody." (Emphasis added.) This is a filing deadline that is premised on the existence of a "newborn" who has been "surrendered" and the petitioner's status as the nonsurrendering parent. When considered along with the statutory definitions, the statute sets forth the Legislature's intent for a child to be born before a petition for custody can be filed under the SDNL. After birth, and depending on the information available, a petition for custody may be filed in the county where the newborn is located, in the county where the emergency service provider to whom the child was surrendered is located, or in the county where the parent is located. MCL 712.10(1)(a) to (c). The statutory language outlining where the petition for custody can be filed presupposes that the child has already been born.

Upon the filing of the petition, the statute establishes several time-sensitive obligations for the courts involved that will slow and potentially cancel the process of terminating parental rights and finalizing adoption. First, if the court in which the petition for custody was filed is not the court that issued "the order placing the newborn," then it "shall locate and contact the court that issued the order and shall transfer the proceedings to that court." MCL 712.10(2). Second, "[*b*]*efore holding a*

believes to be not more than 72 hours old." MCL 712.1(2)(k).

custody hearing on a petition filed under this section and not later than 7 days after a petition for custody under this section has been filed," the placing court "shall conduct a hearing" to determine paternity or maternity. MCL 712.10(3) (emphasis added). Third, as to the issue of paternity, "[i]n a petition for custody filed under [the SDNL], the court *shall order* the child and each party claiming paternity to submit to blood or tissue typing determinations or DNA identification profiling ...." MCL 712.11(1) (emphasis added). Testing will also be required for individuals claiming maternity "[u]nless the birth was witnessed by the emergency service provider" and sufficient documentation exists. MCL 712.11(2). *Only if* the "probability of paternity or maternity" as determined by the testing is "99% or higher and the DNA identification profile and summary report are admissible, paternity or maternity is presumed ...." MCL 712.11(3). If the testing "establishes that the petitioner could not be the parent of the newborn, the court shall dismiss the petition for custody." MCL 712.11(5). Fourth, if paternity or maternity is established, then the ***489** court must still make a determination of "custody of the newborn based on the newborn's best interest ... with the goal of achieving permanence for the newborn at the earliest possible date." MCL 712.14(1). Section 14(2) of the SDNL lays out the best-interest factors that the court must consider. Based on the court's findings under MCL 712.14, the court may then (a) grant "legal or physical custody, or both, of the newborn to the [petitioner] parent and either retain[ ] or relinquish[ ]

jurisdiction," (b) determine "that the best interests of the newborn are not served by granting custody to the petitioner parent and order[ ] the child placing agency to petition the court for jurisdiction under section 2(b) of chapter XIIA" of the probate code, or (c) dismiss the petition. MCL 712.15. None of the time-sensitive procedures and determinations that a properly filed petition for custody triggers can feasibly be accomplished before a child is born. These procedures demonstrate that the Legislature did not intend a prebirth complaint for divorce to serve as a petition for custody under the SDNL.

Petitioner's complaint for divorce filed in the Ottawa Circuit Court was filed before Doe was born and was not served on Doe's mother until after Doe had been surrendered. The complaint was untimely and did not satisfy the requirements of MCL 712.10(1) because it was filed before Doe's birth. Assuming petitioner could have taken some postbirth action to satisfy the statutory requirements or invoke the SDNL's protections for alleged nonsurrendering parents in the Ottawa Circuit Court, he did not do so. Petitioner also did not file a separate petition for custody under the SDNL.[5] Accordingly, we REVERSE Part II of the

[5] Counsel for the adoptive parents, who are cross-appellants here, conceded at oral argument that a timely filed divorce complaint coupled with additional postfiling actions could, in certain circumstances, serve as a petition for custody under MCL 712.10(1). However, because the divorce complaint here was untimely under MCL 712.10(1), we need not address this hypothetical circumstance.

Court of Appeals opinion addressing the termination of any parental rights petitioner might have had. The Court of Appeals' analysis of the Kalamazoo Circuit Court's judgment denying the motion to unseal the adoption records in Part III was intertwined with its holding under Part II; therefore, we VACATE Part III of the Court of Appeals opinion and REMAND this case to the Court of Appeals for reconsideration of that issue and further proceedings not inconsistent with this order.[6]

[6] On our own initiative, we directed the parties to brief "whether the application of the SDNL violates the due process rights of an undisclosed father." *In re Baby Boy Doe*, 509 Mich. ——, ——, 970 N.W.2d 668, 669 (2022). Upon review of the issue, we decline to reach it. We generally do not reach issues that were not raised and briefed in the lower courts. See *Walters v. Nadell*, 481 Mich. 377, 387, 751 N.W.2d 431 (2008) ("Although this Court has inherent power to review an issue not raised in the trial court to prevent a miscarriage of justice, generally a 'failure to timely raise an issue waives review of that issue on appeal.' ") (citations omitted); *Booth Newspapers, Inc. v. Univ. of Mich. Bd. of Regents*, 444 Mich. 211, 234 n. 23, 507 N.W.2d 422 (1993) ("This Court has repeatedly declined to consider arguments not presented at a lower level, including those relating to constitutional claims. We have only deviated from that rule in the face of exceptional circumstances.") (citations omitted). This course of action is particularly suited to this issue because it raises a constitutional question of first impression not only for this state, but also for other states across the country. Justice Zahra considers it "debatable" whether this issue was preserved in the trial court. But aside from a single line by petitioner's counsel at a hearing, petitioner never raised or addressed the constitutionality of the statute throughout this litigation, at least not until prompted by this Court. The constitutional issue, therefore, has not been properly preserved or even presented to the Court.

***490** As to petitioner's "Motion to Strike Non-Conforming Briefs," we GRANT the motion as to the pictures described in ¶ 1, the unverified statistics described in ¶ 4, and any allegations of domestic violence that were not substantiated by official court records, MCR 7.310(A); the balance of the motion is DENIED. As to petitioner's "Motion to Strike Portions of Appendices," we GRANT the motion as to the unverified statistics described in ¶ 9 and the spreadsheet and associated author credentials described in ¶¶ 10 to 12, MCR 7.310(A); the balance of the motion is DENIED, as the remaining allegations refer to copies of court records and transcripts from official court proceedings. See MRE 201; MRE 902; MRE 1005. We direct the Clerk of the Court to redact the stricken materials from the filed briefs and appendices before making them publicly available.

McCormack, C.J. (concurring in part and dissenting in part).

I concur with the majority's statutory analysis, concluding that the Court of Appeals erred by holding that the petitioner's complaint for divorce and custody request for the as-yet-unborn child constituted a petition for custody under the Safe Delivery of Newborns Law (SDNL). I also join Justice Zahra's partial dissent, as I share his concerns about the SDNL's "dubious method of providing notice before terminating" the parental rights of a nonsurrendering parent. I write

separately to express my deep reservations about whether the statute's notice-by-publication provision sufficiently protects the due-process rights of nonsurrendering parents.

The SDNL requires a child-placing agency to "make reasonable efforts to identify, locate, and provide notice of the surrender of the newborn to the nonsurrendering parent." MCL 712.7(f). When the identity and address of that parent are unknown, "the child placing agency shall provide notice of the surrender of the newborn by publication in a newspaper of general circulation in the county where the newborn was surrendered." *Id.* That's what happened in this case, where Catholic Charities of West Michigan published the following notice in the Grand Rapids Press on August 16, 2018:

> Publication of Notice
> Safe Delivery of Newborns
> (MCL 712.1)
>
> TO: Birth Father and Birth Mother, of minor child.
>
> IN THE MATTER OF: newborn baby, born August 9, 2018 at 11:08 am, and surrendered on August 12, 2018 at Spectrum Health Grand Rapids, MI.
>
> TAKE NOTICE: By surrendering your newborn, you are releasing your newborn to a child placing agency to be placed for adoption. You have until September 9, 2018 (28 days from surrender of the child) to petition the court to regain custody of

> your child. After 28 days there will be a hearing to terminate your parental rights. You as the parents can call Catholic Charities West MI, adoption unit at (877) 673-6338 for further information.

The SDNL does not require more. And this notice by publication is likely permissible under current procedural-due-process precedent. See *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 317, 70 S.Ct. 652, 94 L.Ed. 865 (1950) ("[I]n the case of persons missing or unknown, employment of an indirect and even a probably futile means of notification is all that the situation permits and creates no constitutional bar to a final decree foreclosing their rights."); *Krueger v. Williams*, 410 Mich. 144, 166, 300 N.W.2d 910 (1981) (noting that in circumstances where "the specific whereabouts of a person is unknown, service of process by publication ***491** may be the most practicable and adequate method of service available"). But I am not convinced that such a notice, published on a single day in a local print newspaper, should satisfy the due-process guarantees of our state and federal constitutions. At the very least, in an era of rapidly declining print newspaper circulation, I am skeptical that such notice continues to make sense as the standard method of providing constructive notice.

To be sure, the challenge of providing notice to an unknown party is a problem without an easy solution. Nor is it a new problem: As far back as 1950, long before the decline of print newspapers,

the Supreme Court was under no illusion about the efficacy of notice by publication: "Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation the odds that the information will never reach him are large indeed." *Mullane*, 339 U.S. at 315, 70 S.Ct. 652; see also *Walker v. City of Hutchinson*, 352 U.S. 112, 116, 77 S.Ct. 200, 1 L.Ed.2d 178 (1956) ("It is common knowledge that mere newspaper publication rarely informs a landowner of proceedings against his property"); *City of New York v. New York, N.H. & H. R. Co.*, 344 U.S. 293, 296, 73 S.Ct. 299, 97 L.Ed. 333 (1953) ("Notice by publication is a poor and sometimes a hopeless substitute for actual service of notice. Its justification is difficult at best.").

But the due-process deficiencies inherent in notice by publication are magnified in cases like this one, where a profound, fundamental liberty interest is at stake. The petitioner's parental rights were terminated because he failed to pick up a copy of the August 9, 2018 edition of the Grand Rapids Press and read all the way through the classified ads. And because he did not respond within 28 days to an SDNL notice he did not see, published once, in a print newspaper from a county in which he did not reside, describing a birth "on August 9, 2018 at 11:08 am, and surrendered on August 12, 2018 at Spectrum Health Grand Rapids," he has forfeited his parental rights. I think due process demands more.

The legal rule acknowledges that notice by publication may functionally amount to a legal fiction, "[b]ut when the names, interests and addresses of persons are unknown, plain necessity may" leave no other choice. *City of New York*, 344 U.S. at 296, 73 S.Ct. 299. In other words: What other option do we have? It seems to me government can answer that question today better than in 1953 when *City of New York* was decided.

One partial solution may be found in supplementing traditional notice by publication in print newspapers with simultaneous online postings. See Rieders, Note, *Old Principles, New Technology, and the Future of Notice in Newspapers*, 38 Hofstra L Rev 1009 (Spring 2010); Klonoff, Herrmann, & Harrison, *Making Class Actions Work: The Untapped Potential of the Internet*, 69 U Pitt L Rev 727 (Summer 2008). This solution is imperfect, but given the far broader reach of the Internet and its relative ease of access, it represents a marked improvement over the status quo.

Fortunately, the Michigan Legislature appears to agree. In May 2022, the Revised Judicature Act, MCL 600.101 *et seq.*, was amended to require Michigan newspapers to provide free access to public notices on their websites. See 2022 PA 74, amending MCL 600.1461 and MCL 691.1051(2)(a)(*i*). Notices must "remain on the website during the full required publication period"

and must "remain searchable on the website as a permanent record ***492** of the publication." MCL 691.1051(2)(a)(*ii*) and (*iii*). The statute also requires newspaper publishers to ensure that notices are added to a central online repository to consolidate legal notices from across the state. MCL 691.1051(2)(b).

Courts can contribute to a solution too. The petitioner was proceeding in Ottawa Circuit Court to assert his parental rights while his wife's child's adoption was proceeding in Kalamazoo County. Neither court was remotely aware of what the other was doing—through no fault of their own, as Michigan courts do not have a statewide case-management system. On September 28, for instance, the Kalamazoo Circuit Court terminated the parental rights of the petitioner, who had—just one week prior—received an order from the Ottawa Circuit Court purporting to award him physical and legal custody of the very same newborn. Building a statewide case-management system takes resources, but among many other benefits it would provide the public and lawmakers, the enhanced transparency could contribute to solving notice problems.

I suspect, though, that this recent statutory tweak and the hope of a future statewide case-management system are cold comfort to the petitioner, who will never have the opportunity to argue for the right to parent the child he believes is his own.

Zahra, J. (concurring in part and dissenting in part).

This is a case of first impression for this Court addressing the Safe Delivery of Newborns Law (SDNL), MCL 712.1 *et seq.* I agree with the dissenting Court of Appeals judge's opinion highlighting that the SDNL contains "references to custody petitions or proceedings being filed specifically under MCL 712.10. See MCL 712.7(c), MCL 712.10(3), MCL 712.11(1), MCL 712.11(2), MCL 712.17(3)."[7] I also agree with the dissenting judge that "[a]lthough not expressly stated in so many words, it is readily apparent that the Legislature intended that a custody petition under the SDNL must be specifically brought under the SDNL."[8] Along these lines, I am persuaded, as a matter of statutory interpretation, that petitioner's complaint for divorce requesting custody cannot be relied upon to collaterally attack proceedings of a case brought under the SDNL.[9]

Still, I believe that the SDNL is a highly flawed law because of significant constitutional concerns that this Court should not sweep under the rug.[10] The

[7] *In re Baby Boy Doe*, —— Mich.App. ——, ——, —— N.W.2d ——, 2021 WL 3818056 (2021) (Docket No. 353796) (Ronayne Krause, P.J., dissenting); slip op. at 2.

[8] *Id.* at ——, —— N.W.2d —— slip op. at 11.

[9] I agree with the majority that a complaint for divorce does not qualify as a petition to gain custody of a newborn under the SDNL. Still, I am not convinced the majority should definitively "hold that petitioner's complaint for divorce did not satisfy MCL 712.10(1) despite containing a demand for custody because it was filed before the child was born." (Emphasis omitted.)

[10] The Kalamazoo court acknowledged that the SDNL is flawed and ruled from the bench:

They have got the legislature, the Court of Appeals, everybody has said this is secure haven. I understand you are arguing that mom went rouge [sic] and she had a duty—or somebody had a duty to let dad know what's going on, I mean that is really the heat [sic] of your argument, I get it. It is unfortunate for him.

She is going to the hospital, telling the hospital there—there has been—what did she say—there has been abuse—domestic violence—I don't remember her exact terms and that the best interest [f]or my baby is for me to give my baby up. The hospital can't ask any questions, takes the baby, contacts the people on the list. Catholic Charities gets the baby placed. No questions by law can be asked.

I don't have any clear and convincing evidence of any legal argument from you why the confidential records for an adoption should be opened up in this case. There is nothing unique.

Other than the statute never addresses what happens if there is really no actual notice. There is legal notice. How many times—I don't know what kind of law you guys do, but I don't know how many times this Court has had published notice in the Climax Crescent, some tiny little newspaper within the county, but it is general circulation, meets the criteria of the statute. Do we think dad had actual notice? Probably not, but did he get legal notice? Absolutely.

I find that dad got legal notice. Did mom bamboozle everybody? Maybe. But that in and of itself is not a reason to change the confidential records and open up Pandora's Box and let we [sic] just assure you everything that Catholic Charities gave to this Court Ottawa County has already given to you, just redacted with the third—innocent third parties names on it and the information about them.

So I really don't think our files would have anymore [sic] to give you. You've got the orders, you have submitted them to us and we've got the information that Catholic Charities already gave you. That's all that is there.

* * *

... I really don" [sic] want to unseal our adoptive records. I

fundamental problem with the SDNL is that the termination ***493** of a nonsurrendering parent's rights is presumed without any showing of parental unfitness, regardless whether the nonsurrendering parent is a legal parent[11] or a putative parent. Because the SDNL does not distinguish between the greater rights possessed by a legal parent from the lesser rights afforded a mere putative parent, I conclude the SDNL is unconstitutional as applied to legal parents. This conclusion is consistent with this Court's precedent as well as that of the Supreme Court of the United States.

In *In re Clausen*,[12] this Court acknowledged the

> don't think you've shown anything that shows that anything was violated, that there is any good cause.
>
> * * *
>
> I find this very interesting. The only concern that I have is I really think the legislature needs to tweak the law about notice. It is unfortunate that, you know, there is no requirement that the publication shall be where the mother resides or where the father resides or that shall be some notice a legal father [sic], but again the domestic violence people would be all up in arms to have that for this very reason. Mom is saying there is domestic violence. She is protecting herself allegedly and her baby. She doesn't want that baby to go to dad. I don't know. I don't know what the facts are, but we certainly have lots of cases like that.
>
> So I have to follow the law until the legislature changes it. In fact, *In re Miller* [322 Mich.App. 497, 912 N.W.2d 872 (2018)] confirms the legislature's intent.

[11] A "parent," also termed "legal parent," is "[t]he lawful father or mother of someone." *Black's Law Dictionary* (11th ed.). "In ordinary usage, the term denotes more than responsibility for conception and birth." *Id.*

[12] *In re Clausen*, 442 Mich. 648, 502 N.W.2d 649 (1993).

constitutional distinction between legal parents and a mere putative parent. In *Clausen*, an Iowa woman gave up her daughter for adoption but later decided she wanted her back. Before the natural mother had a change of heart, the child was adopted by a Michigan couple. The adoptive parents refused the natural mother's request to set aside the adoption. Litigation dragged on for years, which ended when this Court ordered the child returned to her natural parents.

The Court first acknowledged that " '[n]o one would seriously dispute that a deeply loving and interdependent relationship with an adult and a child in his or her care may exist even in the absence of blood relationship.' "[13] Yet, quoting at ***494** length an opinion from the Supreme Court of the United States in the context of foster care, we recognized that there "are limits to such claims":[14]

> "[T]here are also important distinctions between the foster family and the natural family. First, unlike the earlier cases recognizing a right to family privacy, the State here seeks to interfere, not with a relationship having its origins entirely apart from the power of the State, but rather with a foster family which has its source in state law and contractual arrangements.... [T]he liberty interest in family privacy has its source, and its contours are ordinarily to be sought, not in state

[13] *Id.* at 654, 502 N.W.2d 649, quoting *Smith v. Org. of Foster Families*, 431 U.S. 816, 843-844, 97 S.Ct. 2094, 53 L.Ed.2d 14 (1977).

[14] *In re Clausen*, 442 Mich. at 654, 502 N.W.2d 649.

> law, but in intrinsic human rights, as they have been understood in 'this Nation's history and tradition.' Here, however, whatever emotional ties may develop between foster parent and foster child have their origins in an arrangement in which the State has been a partner from the outset.
>
> * * *
>
> "A second consideration related to this is that ordinarily procedural protection may be afforded to a liberty interest of one person without derogating from the substantive liberty of another.... It is one thing to say that individuals may acquire a liberty interest against arbitrary governmental interference in the family-like associations into which they have freely entered, even in the absence of biological connection or state-law recognition of the relationship. It is quite another to say that one may acquire such an interest in the face of another's constitutionally recognized liberty interest that derives from blood relationship, state-law sanction, and basic human right—an interest the foster parent has recognized by contract from the outset."[15]

While the aims of the SDNL are laudable, the law fails to adequately secure a legal parent's liberty interest in family, an intrinsic human right understood in accord with "this Nation's history

[15] *In re Clausen*, 442 Mich. at 664-665, 502 N.W.2d 649, quoting *Smith*, 431 U.S. at 845-846, 97 S.Ct. 2094 (alterations in original).

and tradition."[16]

Admittedly, whether this constitutional issue was properly preserved is debatable. At a hearing before the Kalamazoo circuit court, petitioner's counsel attempted to raise the constitutional claim, stating: "I think it is [an] unconstitutional statute because here my guy ...." But the trial court put an end to the argument, interjecting, "[w]ell, ... you are barking up the wrong tree for an unconstitutional statute." There was no further discussion of the SDNL's constitutionality. Ordinarily the constitutionality of a statute will not be first considered on appeal,[17] though there may be compelling reasons to consider the issue on the Court's own initiative.[18] In this case, we asked the parties to ***495** brief the constitutional question because there are compelling reasons to question

[16] *In re Clausen*, 442 Mich. at 664, 502 N.W.2d 649, quoting *Smith*, 431 U.S. at 845, 97 S.Ct. 2094.

[17] See 7A Michigan Pleading & Practice (2d ed.), § 57:48, pp. 551-552 and multiple cases cited therein.

[18] *Id.* at 551, citing *Ridenour v. Bay Co.*, 366 Mich. 225, 114 N.W.2d 172 (1962), for the proposition that even if the question whether a statute is constitutional is not raised in the trial court, it will be considered on appeal "where public rights and the financing of public improvements are involved and an emergency exists with respect to getting proper statutes enacted"; see also *id.* at 551 n 2, citing *Kunde v. Teesdale Lumber Co.*, 52 Mich.App. 360, 217 N.W.2d 429 (1974), for the proposition that an appellate court "may exercise its discretion to consider a constitutional question of first impression in Michigan raised by the appellant on appeal of worker's compensation proceedings, even though the appellant did not raise the issue on application for leave to appeal."

whether the SDNL provides for an adequate process of law before terminating a legal parent rights[19] without any finding of parental unfitness. We highlighted a more recent case decided by this Court, *In re Sanders*,[20] which underscored that "due process requires that every parent receive an adjudication hearing before the state can interfere with his or her parental rights."[21] The *Sanders* Court also made clear that "[t]he Constitution does not permit the state to presume rather than prove a parent's unfitness 'solely because it is more convenient to presume than to prove.' "[22]

Under the SDNL, the adoption process begins when a newborn is surrendered. The emergency service provider that takes temporary custody of the child owes several duties to the surrendering parent under the SDNL:

> When the emergency service provider takes temporary custody of the child, the emergency service provider must reasonably try to inform the parent that surrendering the child begins the adoption process and that the parent has 28 days to petition for custody of the child. MCL 712.3(1)(b) and (c). The emergency service provider must furnish the parent with written

[19] Presumably the mother's parental rights could be terminated as well if a newborn is surrendered by someone other than the mother.

[20] *In re Sanders*, 495 Mich. 394, 852 N.W.2d 524 (2014).

[21] *Id.* at 415, 852 N.W.2d 524.

[22] *Id.*, quoting *Stanley v. Illinois*, 405 U.S. 645, 658, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972).

> notice about the process of surrender and the termination of parental rights. MCL 712.3(1)(d). The emergency service provider should also try to inform the parent that, before the child can be adopted, "the state is required to make a reasonable attempt to identify the other parent, and then ask the parent to identify the other parent." MCL 712.3(2)(e). Finally, the emergency service provider must take the newborn to a hospital, if the emergency service provider is not a hospital, and the hospital must take temporary protective custody of the child. MCL 712.5(1).[23]

The hospital then must notify a child-placing agency about the surrender. The child-placing agency has various obligations under the SDNL. These include making "reasonable efforts to identify, locate, and provide notice of the surrender of the newborn to the nonsurrendering parent," which may require "publication in a newspaper of general circulation in the county where the newborn was surrendered."[24]

The SDNL provides a procedure for either parent to contest the termination of parental rights: "[T]he surrendering parent, within 28 days of surrender, or the nonsurrendering parent, within 28 days of published notice of surrender, may file a petition to gain custody of the child. MCL 712.10(1)."[25] The

[23] *In re Miller*, 322 Mich.App. 497, 502, 912 N.W.2d 872 (2018).
[24] MCL 712.7(f); see also *In re Miller*, 322 Mich.App. at 502, 912 N.W.2d 872.
[25] *In re Miller*, 322 Mich.App. at 503, 912 N.W.2d 872.

procedure for filing a petition for custody is set forth in MCL 712.10(1), which provides in pertinent part:

> ***496** Not later than 28 days after notice of surrender of a newborn has been published, an individual claiming to be the nonsurrendering parent of that newborn may file a petition with the court for custody. The surrendering parent or nonsurrendering parent shall file the petition for custody in 1 of the following counties:
>
> (a) If the parent has located the newborn, the county where the newborn is located.
>
> (b) If subdivision (a) does not apply and the parent knows the location of the emergency service provider to whom the newborn was surrendered, the county where the emergency service provider is located.
>
> (c) If neither subdivision (a) nor (b) applies, the county where the parent is located.

If neither parent files a petition for custody, "the child-placing agency must immediately file a petition with the court to terminate the rights of the surrendering parent and the nonsurrendering parent."[26] The agency must offer evidence to show that the surrendering parent released the baby and demonstrate the agency's efforts "to identify, locate, and provide notice to the nonsurrendering

[26] *In re Miller*, 322 Mich.App. at 503, 912 N.W.2d 872, citing MCL 712.17(2) and (3).

parent."[27] If the agency meets its burden of proof by a preponderance of the evidence and a custody action has not been filed by the nonsurrendering parent, the trial court "shall enter an order terminating parental rights of the surrendering parent and the nonsurrendering parent under this chapter."[28]

The SDNL presumes that an unknown parent is presumptively unfit on the basis of a failure to respond within 28 days of a cryptic public notice. In *Mathews v. Eldridge*, [29] the Supreme Court articulated a three-part balancing test to determine "what process is due" when the state seeks to curtail or infringe an individual right:

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

The process entailed in the SDNL falls woefully

[27] MCL 712.17(4).
[28] MCL 712.17(5).
[29] *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

short of the process required under *Mathews*. First, as fully explained in *In re Sanders*, the private interest of a legal parent is "significant."[30] Second, there is clearly a " 'risk of an erroneous deprivation of such interest through the procedures used ....' "[31] The SDNL merely requires publication in a newspaper of general circulation in the county in which the child was surrendered. As the trial court noted, such notice by publication probably did not give the legal parent actual notice. In short, this is a dubious method of providing notice before terminating a legal parent's parental rights. Finally, ***497** the last aspect of *Mathews* must be understood in terms of the adoption aspect permeating the SDNL. Surely, the state has a legitimate and important interest in protecting the health and safety of minors and, in some circumstances, that interest will require temporarily placing a child with a nonparent. But that state interest is largely satisfied simply by the placement of the child with a nonparent. And the SDNL's ancillary goal of expediting adoption requires the termination of parental rights. If the child was simply placed in foster care instead of being rapidly ushered into adoption, the constitutional concerns would dissipate. In other words, foster care provides an adequate substitute procedural safeguard that does not impose a significant burden on the state's interest in

[30] *In re Sanders*, 495 Mich. at 409-410, 852 N.W.2d 524.
[31] *Id.* at 410, 852 N.W.2d 524, quoting *Mathews*, 424 U.S. at 335, 96 S.Ct. 893.

protecting the health and safety of minors.[32]

McCormack, C.J., joins the statement of Zahra, J.

Welch, J. (concurring).

I concur in full with the Court's disposition of this case. I write separately because we directed the parties to brief the unraised and unpreserved issue of "whether application of the [Safe Delivery of Newborns Law (SDNL), MCL 712.1 *et seq.*,] violates the due process rights of an undisclosed father," *In re Baby Boy Doe*, —— Mich. ——, ——, 970 N.W.2d 668, 669 (2022), and I believe petitioner is deserving of some explanation in this regard. Under the unique facts of this case, petitioner's due process rights were not violated by application of the SDNL. MCL 712.7(f).

In *Lehr v. Robertson*, 463 U.S. 248, 103 S.Ct. 2985, 77 L.Ed.2d 614 (1983), the United States Supreme Court considered whether the failure to provide notice of the pending adoption of a two-year-old child to the putative father violated his due process or equal protection rights. Not only did the putative

[32] I am not alone in holding this view. Indeed, the Family Law Section of the State Bar of Michigan submitted an amicus brief in this Court concluding that "[t]he application of the SDNL violates the due process rights of an undisclosed [parent]."

father in *Lehr* not receive actual notice prior to the adoption, but the Court's decision suggests that notice by publication was not provided either. The Court held that where a putative father had not established a substantial relationship with the child, the failure to give the putative father notice of pending adoption proceedings, despite the state's actual knowledge of his existence and whereabouts, did not deny the putative father due process or equal protection because he could have guaranteed that he would receive notice of any adoption proceedings by mailing a postcard to the putative-father registry. *Id.* at 261-268, 103 S.Ct. 2985. Stated differently, the putative father in *Lehr* had the opportunity and legal right to protect any constitutional rights he may have held in connection with the child and failed to do so, and his failure foreclosed his ability to collaterally attack a finalized adoption.

While Baby Boy Doe was not a child born out of wedlock, there are many similarities between this case and the facts of *Lehr*. It appears that petitioner and his wife were separated from around the time of conception through birth. Whether petitioner is the biological father of Doe is unknown. Petitioner's attack on the finalized adoption of Doe is collateral and was raised for the first time in a motion for reconsideration of an order denying a previous motion to unseal the adoption file. The respondent adoption agency and the Kalamazoo Circuit Court both complied with the procedural, notice, and hearing requirements of the SDNL. The record ***498** shows that petitioner

knew of his wife's plan to surrender Doe prior to filing his complaint for divorce in the Ottawa Circuit Court; thus, petitioner had presurrender and prebirth knowledge that his wife planned to invoke the SDNL. Petitioner did not file a petition for custody under the SDNL or otherwise move the Ottawa Circuit Court to locate the court where the SDNL action was pending, and he failed to seek reconsideration of or appeal the Kalamazoo Circuit Court's order terminating parental rights after obtaining actual knowledge of the SDNL case information in July 2019 (at the latest). Additionally, had petitioner filed a notice of intent to claim paternity before Doe's birth, respondent would have located him because it checked Michigan's putative-father registry as part of its "reasonable efforts to identify, locate, and provide notice of the surrender of the newborn to the nonsurrendering parent." MCL 712.7(f). Under these unique facts and in light of *Lehr*, I would hold that *application* of the SDNL's notice-by-publication provision and the subsequent termination of any parental rights that petitioner might have held did not violate petitioner's right to due process of law.[33]

Despite my conclusion that petitioner's due process

[33] I acknowledge that there could be circumstances under which application of the SDNL to terminate the parental rights of a biological parent who has taken the necessary steps to assert and preserve those rights, such as by filing a petition for custody under MCL 712.10 and establishing paternity or maternity under MCL 712.11, might be unconstitutional.

rights were not violated in this case, I believe that Chief Justice McCormack and Justice Zahra raise valid concerns about the SDNL and the future of notice by publication in printed newspapers. The recent amendments that 2022 PA 76 made to the Revised Judicature Act's newspaper notice-by-publication requirements are an improvement that will make such notices more accessible in real time. I also agree with the Chief Justice that the creation of a statewide case-management system would facilitate better communication between trial courts in situations where time is of the essence. While the SDNL is invoked with relative rarity in Michigan, I would encourage the Legislature to consider amending the SDNL to better ensure that the competing rights of all parties involved are safeguarded to the highest degree possible.

Appendix G

IN THE SUPREME COURT
for the
STATE OF MICHIGAN
IN RE BABY BOY DOE, Minor.
Peter Kruithoff,
Petitioner-Appellee/Cross-Appellee,
v.
Catholic Charities of West Michigan,
Respondent-Appellant,
and
Adoptive Parent Number 1 and Adoptive Parent Number 2, Appellees/Cross-Appellants.
SC: 163807
|
COA: 353796
|
September 21, 2022
Kalamazoo CC Family Division: 2018-006540-NB

Order

On order of the Court, the motion for reconsideration of this Court's June 29, 2022 order is considered, and it is DENIED, because we are not persuaded that reconsideration of our previous order is warranted. MCR 7.311(G).

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

September 21, 2022 s/_____
Clerk

Appendix H

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF OTTAWA
414 Washington Grand Haven Michigan 49417
(616) 846-8315

PETER KRUITHOFF,
Plaintiff,

File No. 2018- 88972-DM

v

Hon. Kent Engle

K[redacted] K[redacted],
Defendant.

John R. Moritz (P34859)
Law Office of John R. Moritz, P.C.
Attorneys for Plaintiff Husband
217 East 24th Street Loft 107
Holland, Michigan 49423
(616) 399-8830

DEFAULT JUDGMENT OF DIVORCE

At a session of said Court held in the City of Grand Haven,
County of Ottawa and State of Michigan
on this 30th day of July 2019
Present: Honorable Kent Engle,
Circuit Court Judge,

This cause having been brought on to be heard on the Complaint for Divorce filed herein by Plaintiff Husband, taken as confessed by Plaintiff Husband, from which it satisfactorily appears to this Court that the material facts alleged in the Complaint for Divorce are true and that there has

been a breakdown in the marriage relationship to the extent that the objects of matrimony have been destroyed and there remains no reasonable likelihood that the marriage relationship can be preserved. The Parties have one (1) minor child, a baby boy born on August 9, 2018.

On motion of the Law Office of John R. Moritz, attorneys for Plaintiff Husband,

IT IS HEREBY ORDERED AND ADJUDGED that the marriage between said Plaintiff Husband and Defendant Wife be, and the same hereby is, dissolved, and a divorce from the bonds of matrimony between said Parties is also adjudged.

CUSTODY

IT IS FURTHER ORDERED AND ADJUDGED that Plaintiff Father shall have sole legal custody of the minor child.

IT IS FURTHER ORDERED AND ADJUDGED that Plaintiff Father shall have sole physical custody of the minor child.

HOME INVESTIGATION

IT IS FURTHER ORDERED AND ADJUDGED that any home investigation prepared by the Ottawa County Friend of the Court is hereby waived by the Parties.

PARENTING TIME

IT IS FURTHER ORDERED AND ADJUDGED that Defendant Mother shall have parenting time as the Parties agree.

HAUGE CONVENTION

Except based on a written agreement of the parties, neither parent shall exercise parenting time in a foreign country/nation that is not a party to the Hague Convention on the Civil Aspects of International Child Abduction.

CHILD SUPPORT

IT IS FURTHER ORDERED AND ADJUDGED that issue of child support is reserved.

INHERENT RIGHTS OF CHILD

IT IS FURTHER ORDERED AND ADJUDGED that the child shall have the inherent rights to the natural affections and love of both parents and neither party shall do anything to estrange, discredit, diminish or cause disrespect for the natural affections of the child for the other party.

CHANGE OF LEGAL RESIDENCE

IT IS FURTHER ORDERED AND ADJUDGED that except as otherwise provided in this Order, the domicile or residence of said minor child shall not be removed from the State of Michigan without the written consent of this Court, and that the Parties shall promptly notify the Ottawa County Friend of the Court whenever the child are moved to an address other than the address as set forth in this Judgment of Divorce.

IT IS FURTHER ORDERED AND ADJUDGED that a parent whose custody or parenting time of a child is governed by this Judgment of Divorce shall not change the legal residence of the child except in compliance with Section 11 of the Child Custody Act of 1970, 1970 PA 91, MCL 722.31, which provides that after a court

order is issued concerning custody, a parent of a child shall not change a legal residence of the child to a location that is more than 100 miles from the child's legal residence (at the time of the commencement of the divorce) unless the other parent consents or the court permits the residence change. This provision does not apply if the legal residence changes results in the child's two legal residences being closer to each other than they were before the change. This provision does not apply if one of the parents has sole legal custody.

REAL PROPERTY

IT IS FURTHER ORDERED AND ADJUDGED that neither Plaintiff Husband or Defendant Wife own any real property to be divided.

PERSONAL PROPERTY

IT IS FURTHER ORDERED AND ADJUDGED that the Parties will keep all the property currently in their possession.

MOTOR VEHICLES

IT IS FURTHER ORDERED AND ADJUDGED that Plaintiff Husband shall receive as his sole and separate property the 2002 Toyota 4-Runner currently in his possession with Plaintiff Husband being responsible for any and all obligation thereon holding Defendant Wife harmless therefrom. Further, the vehicle was Plaintiff Husband's prior to the marriage.

MARITAL DEBT

IT IS FURTHER ORDERED AND ADJUDGED that each party will be responsible for any and all debt incurred in their name.

SPOUSAL SUPPORT

IT IS FURTHER ORDERED AND ADJUDGED that neither party shall be entitled to spousal support.

ASSUMPTION OF DEBTS, OBLIGATIONS, ETC.

The assumption of joint debt by Plaintiff Husband and Defendant Wife is a function of family support, and they intended to create a non-dischargeable obligation under 11 USC Section 523. If any of these obligations are discharged in bankruptcy, this Court retains jurisdiction to modify this Judgment to effectuate the intent of the parties and this Court at the time of the Judgment. Any costs of collection efforts resulting from Plaintiff Husband's failure to comply with this Judgment shall be borne by Plaintiff Husband, including reasonable attorney fees. Any costs of collection efforts resulting from Defendant Wife's failure to comply with this Judgment shall be borne by Defendant Wife, including reasonable attorney fees. The parties duly understand and agree that this Judgment, and specifically this paragraph can defend any claim of discharge ability in any bankruptcy proceeding and that this provision shall control in any action filed by either party for non-discharge ability under 11 USC Section 523 and/or 1328.

COBRA

IT IS FURTHER ORDERED AND ADJUDGED that each Party shall inform their employer, pursuant to consolidated Omnibus Reconciliation Act (C.O.B.R.A.) Of 1985, the other is entitled at that person's election to a continuation of

health insurance under said insurance plan. Should either party elect to use the coverage of the other's health insurance plan, or take benefits pursuant to C.O.B.R.A., the person making such an election shall be solely responsible for the cost of any future coverage provided under said plan.

DOWER RELEASE

IT IS FURTHER ORDERED AND ADJUDGED that the property settlement provisions contained herein are made for Plaintiff Husband and Defendant Wife herein in lieu of their dower in the lands of their spouse, and that the Parties shall hereafter hold their respective lands free, clear and discharged from any such dower, right or claim that their former spouse may have in any property which they own or may hereafter own or which they have or may hereafter have any interest.

STATUTORY PENSION PROVISION

IT IS FURTHER ORDERED AND ADJUDGED that in accordance with the provisions of MCLA 552.101, being Act 40 of the Public Acts of 1985, each of the Parties hereto is awarded as his or her sole and separate property, free and clear of any and all claims of the other Party whatsoever, all pension, annuity or retirement benefits; all accumulated contributions in any pension, annuity or retirement system; and any right or contingent right in and to invested pension, annuity or retirement benefits which said Party may own in his or her own name or to which he or she may be entitled to as a result of his or her past, present or future employment unless otherwise stated below.

LIFE INSURANCE

IT IS FURTHER ORDERED AND ADJUDGED that all rights of each of the Parties hereto in and to the proceeds of any policy or contract of life insurance, endowment, or annuity upon the life of the other Party in which either became entitled by assignment or change of beneficiary during the marriage or in anticipation thereof, whether such contract or policy was heretofore or shall hereafter be written or become effective, are hereby cut off and at an end unless the insured shall reaffirm after the date of this Judgment of Divorce, that the other Party shall be a beneficiary of any policy or contract of life insurance, endowment, or annuity upon the life of the insured now in existence or the insured shall affirmatively designate the other Party as beneficiary of any new policy or contract of life insurance, endowment or annuity upon the life of the insured.

GENERAL PROVISIONS

IT IS FURTHER ORDERED AND ADJUDGED that each Party shall execute, acknowledge and deliver to the other Party, when required, any and all further instruments and assurances that the other Party may reasonably require for the purposes of giving full force and effect to the provisions of this Judgment.

IT IS FURTHER ORDERED AND ADJUDGED that in the event either party shall fail or refuse to execute, acknowledge and deliver any instrument required to implement the terms and provisions of this Judgment of Divorce, this Judgment shall be self-executing and shall stand in the place of such document and instead of any of the

instruments required. Further, a certified copy of this Judgment of Divorce may be recorded with any Register of Deeds, Secretary of State, stock transfer agent or other public office to have the same force and effect as if such instrument had, in fact, been properly executed, acknowledged, and delivered.

ATTORNEY FEES AND COURT COSTS

IT IS FURTHER ORDERED AND ADJUDGED that each Party shall be responsible to pay his or her own attorney's fees without contribution to the payment of fees to the attorney representing the other Party, unless otherwise stated herein.

DISCLOSURE

IT IS FURTHER ORDERED AND ADJUDGED that the terms and provisions contained in this Judgment of Divorce are based upon a full disclosure having been made to the other, that each party has entered into the agreement relying on the correctness of the other's disclosure of his or her earnings, and of the nature, extent and value of all of his or her property, real and personal, and of whatever kind or description and wheresoever situated, and this settlement is conditioned upon their reliance on such disclosure that the assets, liabilities and financial information furnished to date constitutes a full, true, accurate and complete statement of all assets and liabilities owned by either of the parties, jointly or individually, or in which the parties have any interest of any type or description.

RETENTION OF JURISDICTION

IT IS FURTHER ORDERED AND ADJUDGED that the Court specifically reserves and retains jurisdiction over this cause and the Parties hereto for the purpose of assuring compliance with the executory provisions of this Judgment and reserves the right to make such other and further orders as shall be necessary to implement the same.

ADVICE OF COUNSEL

IT IS FURTHER ORDERED AND ADJUDGED that each party hereto acknowledges that, while they have had access to advice of legal counsel during the course of these legal proceedings, this Judgment is entered into of his or her own volition. By virtue of the settlement reached herein, the parties have avoided further attorney fees, further legal proceedings, and ultimately a Trial which could have produced significantly different results, favorable or unfavorable, than the Agreement set forth herein. The parties likewise acknowledge, by their signature hereto, their satisfaction with this Judgment, the efforts of their attorneys in negotiating for this Judgment, and that, except for issues within the continuing jurisdiction of this Court; this is a full, final and binding judgment.

RELEASE OF COUNSEL

IT IS FURTHER ORDERED AND ADJUDGED that the attorneys for the Parties shall be and are released as attorney of record in post judgment proceedings unless specifically hereinafter retained by the Parties for such post judgment action.

RELEASE OF CLAIMS

IT IS FURTHER ORDERED AND ADJUDGED that except as otherwise expressly provided herein, the Parties shall and do mutually release and forever discharge each other from any and all known actions, suits, debts, claims, demands, and obligations whatsoever, both in law and in equity, which either of them ever had, now has, or may hereafter have against the other upon or by reason of any known matter, cause, or thing up to the date of the filing of this Judgment. This release shall not apply to assets which have been concealed or the value of which has been misrepresented.

ENFORCEMENT OF PROVISIONS OF JUDGMENT OF DIVORCE

IT IS FURTHER ORDERED AND ADJUDGED that if either Party has to file a Motion to Enforce this Judgment of Divorce and it is determined by this Court, or its successor, that either Party is in violation of this Court's Order, the Party who is in violation of this Court's Order shall be responsible for payment of the other Party's attorney fees and actual costs.

MCR 2.602(3) REQUIREMENT

IT IS FURTHER ORDERED AND ADJUDGED pursuant to MCR 2.602(3), the entry of this Order resolves the last pending claim and the file is therefore closed.

s/____
Honorable Kent Engle
Circuit Court Judge

Appendix I

PROBATE CODE OF 1939 (EXCERPT)
Act 288 of 1939
Chapter XII
SAFE DELIVERY OF NEWBORNS

712.1 Short title of chapter; definitions.
Sec. 1.

(1) This chapter shall be known and may be cited as the "safe delivery of newborns law".

(2) As used in this chapter:

(a) "Child placing agency" means that term as defined in section 1 of 1973 PA 116, MCL 722.111.

(b) "Court" means the family division of circuit court.

(c) "Department" means the department of human services.

(d) "DNA identification profile" and "DNA identification profiling" mean those terms as defined in section 1 of the paternity act, 1956 PA 205, MCL 722.711.

(e) "Domestic violence" means that term as defined in section 1 of 1978 PA 389, MCL 400.1501.

(f) "Emergency service provider" means a uniformed or otherwise identified employee or contractor of a fire department, hospital, or police station when that individual is inside the premises and on duty. Emergency service provider also includes a paramedic or an emergency medical technician when either of those individuals is responding to a 9-1-1 emergency call.

(g) "Fire department" means an organized fire department as that term is defined in section 1 of the fire prevention code, 1941 PA 207, MCL 29.1.

(h) "Gross negligence" means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.

(i) "Hospital" means a hospital that is licensed under article 17 of the public health code, 1978 PA 368, MCL 333.20101 to 333.22260.

(j) "Lawyer-guardian ad litem" means an attorney appointed under section 2 of this chapter. A lawyer-guardian ad litem represents the newborn, and has the powers and duties, as set forth in section 17d of chapter XIIA.

(k) "Newborn" means a child who a physician reasonably believes to be not more than 72 hours old.

(l) "Police station" means that term as defined in section 43 of the Michigan vehicle code, 1949 PA 300, MCL 257.43.

(m) "Preplacement assessment" means an assessment of a prospective adoptive parent as described in section 23f of chapter X.

(n) "Surrender" means to leave a newborn with an emergency service provider without expressing an intent to return for the newborn.

History: Add. 2000 Act 232, Eff. Jan. 1, 2001 ;-- Am. 2006, Act 488, Eff. Jan. 1, 2007

Compiler's Notes: Enacting section 1 of Act 232 of 2000 provides: "Enacting section 1. Section 19b of chapter XIIA of the probate code of 1939, 1939 PA 288, MCL 712A.19b, as amended by this amendatory act, and chapter XII of the probate code of 1939, 1939 PA 288, as added by this amendatory act, do not apply to a proceeding that arises before the effective date of this amendatory act." The heading to Chapter XII added by 2000 PA 232 ("SAFE DELIVERY OF NEWBORNS") was incorrectly referenced in 2000 PA 235 as "SURRENDERED NEWBORNS." The chapter heading evidently should read "SAFE DELIVERY OF NEWBORNS."

712.2 Newborn surrendered to emergency service provider; court jurisdiction; effect of other provisions of law; immunity from civil action.

Sec. 2.

(1) The court has jurisdiction over a newborn who is surrendered to an emergency service provider as provided in section 3 of this chapter. The court may appoint a lawyer-guardian ad litem to represent a newborn in proceedings under this chapter.

(2) Except as provided in section 5 of this chapter, the reporting requirement of section 3 of the child protection law, 1975 PA 238, MCL 722.623, does not apply regarding a child surrendered to an emergency service provider as provided in section 3 of this chapter.

(3) Unless this chapter specifically provides otherwise, a provision in another chapter of this act does not apply to a proceeding under this chapter. Unless this chapter specifically provides otherwise, the child custody act of 1970, 1970 PA 91, MCL 722.21 to 722.30, does not apply to a proceeding under this chapter.

(4) A hospital and a child placing agency, and their agents and employees, are immune in a civil action for damages for an act or omission in accepting or transferring a newborn under this chapter, except for an act or omission constituting gross negligence or willful or wanton misconduct. To the extent not protected by the immunity conferred by 1964 PA 170, MCL 691.1401 to 691.1415, an employee or contractor of a fire department or police station has the same immunity that this subsection provides to a hospital's or child placing agency's agent or employee.

History: Add. 2000 Act 232, Eff. Jan. 1, 2001
Compiler's Notes: Enacting section 1 of Act 232 of 2000 provides: "Enacting section 1. Section 19b of chapter XIIA of the probate code of 1939, 1939 PA 288, MCL 712A.19b, as amended by this amendatory act, and chapter XII of the probate code of 1939, 1939 PA 288, as added by this amendatory act, do not apply to a proceeding that arises before the effective date of this amendatory act."

712.2a Confidentiality.

Sec. 2a.

(1) A hearing under this chapter is closed to the public. A record of a proceeding under this chapter is confidential, except that the record is available to any individual who is a party to that proceeding.

(2) All child placing agency records created under this chapter are confidential except as otherwise provided in the provisions of this chapter.

(3) An individual who discloses information made confidential under subsection (1) or (2) without a court order or specific authorization under federal or state law is guilty of a misdemeanor punishable by imprisonment for not more than 93 days or a fine of not more than $100.00, or both. An individual who discloses information made confidential under subsection (1) or (2) without a court order or specific authorization under federal or state law is civilly liable for damages proximately caused by disclosure of that information.

History: Add. 2006, Act 488, Eff. Jan. 1, 2007

712.3 Conduct of emergency service provider.
Sec. 3.

(1) If a parent surrenders a child who may be a newborn to an emergency service provider, the emergency service provider shall comply with the requirements of this section under the assumption that the child is a newborn. The emergency service provider shall, without a court order, immediately accept the newborn, taking the newborn into temporary protective custody. The emergency service provider shall make a reasonable effort to do all of the following:

(a) Take action necessary to protect the physical health and safety of the newborn.

(b) Inform the parent that by surrendering the newborn, the parent is releasing the newborn to a child placing agency to be placed for adoption.

(c) Inform the parent that the parent has 28 days to petition the court to regain custody of the newborn.

(d) Provide the parent with written material approved by or produced by the department that includes, but is not limited to, all of the following statements:

(i) By surrendering the newborn, the parent is releasing the newborn to a child placing agency to be placed for adoption.

(ii) The parent has 28 days after surrendering the newborn to petition the court to regain custody of the newborn.

(iii) After the 28-day period to petition for custody elapses, there will be a hearing to determine and terminate parental rights.

(iv) There will be public notice of this hearing, and the notice will not contain the parent's name.

(v) The parent will not receive personal notice of this hearing.

(vi) Information the parent provides to an emergency service provider will not be made public.

(vii) A parent can contact the safe delivery line established under section 20 of this chapter for more information.

(2) After providing a parent with the information described in subsection (1), an emergency service provider shall make a reasonable attempt to do all of the following:

(a) Encourage the parent to provide any relevant family or medical information.

(b) Provide the parent with the pamphlet produced under section 20 of this chapter and inform the parent that he or she can receive counseling or medical attention.

(c) Inform the parent that information that he or she provides will not be made public.

(d) Ask the parent to identify himself or herself.

(e) Inform the parent that in order to place the newborn for adoption the state is required to make a reasonable attempt to identify the other parent, and then ask the parent to identify the other parent.

(f) Inform the parent that the child placing agency that takes temporary protective custody of the newborn can provide confidential services to the parent.

(g) Inform the parent that the parent may sign a release for the newborn that may be used at the parental rights termination hearing under this chapter.

(3) A newborn whose birth is described in the born alive infant protection act, 2002 PA 687, MCL 333.1071 to 333.1073, and who is in a hospital

setting or transferred to a hospital under section 3(1) of the born alive infant protection act, 2002 PA 687, MCL 333.1073, is a newborn surrendered as provided in this chapter. An emergency service provider who has received a newborn under the born alive infant protection act, 2002 PA 687, MCL 333.1071 to 333.1073, shall do all of the following:

(a) Comply with the requirements of subsections (1) and (2) to obtain information from or supply information to the surrendering parent by requesting the information from or supplying the information to the attending physician who delivered the newborn.

(b) Make no attempt to directly contact the parent or parents of the newborn.

(c) Provide humane comfort care if the newborn is determined to have no chance of survival due to gestational immaturity in light of available neonatal medical treatment or other condition incompatible with life.

History: Add. 2000 Act 232, Eff. Jan. 1, 2001 ;-- Am. 2002, Act 688, Eff. Mar. 31, 2003 ;-- Am. 2006, Act 488, Eff. Jan. 1, 2007

Compiler's Notes: Enacting section 1 of Act 232 of 2000 provides: "Enacting section 1. Section 19b of chapter XIIA of the probate code of 1939, 1939 PA 288, MCL 712A.19b, as amended by this amendatory act, and chapter XII of the probate code of 1939, 1939 PA 288, as added by this amendatory act, do not apply to a proceeding that arises before the effective date of this amendatory act."

712.5 Transfer of newborn to hospital; physician report of abuse, neglect, or child not a newborn; notice to child placing agency.

Sec. 5.

(1) An emergency service provider that is not a hospital and that takes a newborn into temporary

protective custody under section 3 of this chapter shall transfer the newborn to a hospital. The hospital shall accept a newborn who an emergency service provider transfers to the hospital in compliance with this chapter, taking the newborn into temporary protective custody.

(2) A hospital that takes a newborn into temporary protective custody under this chapter shall have the newborn examined by a physician. If a physician who examines the newborn either determines that there is reason to suspect the newborn has experienced child abuse or child neglect, other than being surrendered to an emergency service provider under section 3 of this chapter, or comes to a reasonable belief that the child is not a newborn, the physician shall immediately report to the department as required by section 3 of the child protection law, 1975 PA 238, MCL 722.623.

(3) If a physician is not required to report to the department as provided in subsection (2), the hospital shall notify a child placing agency that the hospital has taken a newborn into temporary protective custody under this chapter.

History: Add. 2000 Act 232, Eff. Jan. 1, 2001
Compiler's Notes: Enacting section 1 of Act 232 of 2000 provides: "Enacting section 1. Section 19b of chapter XIIA of the probate code of 1939, 1939 PA 288, MCL 712A.19b, as amended by this amendatory act, and chapter XII of the probate code of 1939, 1939 PA 288, as added by this amendatory act, do not apply to a proceeding that arises before the effective date of this amendatory act."

712.7 Duties of child placing agency.

Sec. 7.

Upon receipt of notice from a hospital under section 5 of this chapter, the child placing agency shall do all of the following:

(a) Immediately assume the care, control, and temporary protective custody of the newborn.

(b) If a parent is known and willing, immediately meet with the parent.

(c) Unless otherwise provided in this subdivision, make a temporary placement of the newborn with a prospective adoptive parent who has an approved preplacement assessment. If a petition for custody is filed under section 10 of this chapter, the child placing agency may make a temporary placement of the newborn with a licensed foster parent.

(d) Unless the birth was witnessed by the emergency service provider, immediately request assistance from law enforcement officials to investigate and determine, through the missing children information clearinghouse, the national center for missing and exploited children, and any other national and state resources, whether the newborn is a missing child.

(e) Not later than 48 hours after a transfer of physical custody to a prospective adoptive parent, petition the court in the county in which the prospective adoptive parent resides to provide authority to place the newborn and provide care for the newborn. The petition shall include all of the following:

(i) The date of the transfer of physical custody.

(ii) The name and address of the emergency service provider to whom the newborn was surrendered.

(iii) Any information, either written or verbal, that was provided by and to the parent who surrendered the newborn. The emergency service provider that originally accepted the newborn as required by section 3 of this chapter shall provide this information to the child placing agency.

(f) Within 28 days, make reasonable efforts to identify, locate, and provide notice of the surrender of the newborn to the nonsurrendering parent. The child placing agency shall file a written report with the court that issued the order placing the child. The report shall state the efforts the child placing agency made in attempting to identify and locate the nonsurrendering parent and the results of those efforts. If the identity and address of the nonsurrendering parent are unknown, the child placing agency shall provide notice of the surrender of the newborn by publication in a newspaper of general circulation in the county where the newborn was surrendered.

History: Add. 2000 Act 232, Eff. Jan. 1, 2001 ;-- Am. 2006, Act 488, Eff. Jan. 1, 2007

Compiler's Notes: Enacting section 1 of Act 232 of 2000 provides: "Enacting section 1. Section 19b of chapter XIIA of the probate code of 1939, 1939 PA 288, MCL 712A.19b, as amended by this amendatory act, and chapter XII of the probate code of 1939, 1939 PA 288, as added by this amendatory act, do not apply to a proceeding that arises before the effective date of this amendatory act."

712.10 Custody action by surrendering or nonsurrendering parent; filing; hearing; determination of paternity or maternity.

Sec. 10.

(1) If a surrendering parent wants custody of a newborn who was surrendered under section 3 of this chapter, the parent shall, within 28 days after the newborn was surrendered, file a petition with the court for custody. Not later than 28 days after notice of surrender of a newborn has been published, an individual claiming to be the nonsurrendering parent of that newborn may file a petition with the court for custody. The surrendering parent or nonsurrendering parent shall file the petition for custody in 1 of the following counties:

(a) If the parent has located the newborn, the county where the newborn is located.

(b) If subdivision (a) does not apply and the parent knows the location of the emergency service provider to whom the newborn was surrendered, the county where the emergency service provider is located.

(c) If neither subdivision (a) nor (b) applies, the county where the parent is located.

(2) If the court in which the petition for custody is filed did not issue the order placing the newborn, the court in which the petition for custody is filed shall locate and contact the court that issued the order and shall transfer the proceedings to that court.

(3) Before holding a custody hearing on a petition filed under this section and not later than 7 days after a petition for custody under this section has been filed, the court shall conduct a hearing to make the determinations of paternity or maternity as described in section 11.

History: Add. 2000 Act 232, Eff. Jan. 1, 2001 ;-- Am. 2006, Act 488, Eff. Jan. 1, 2007
Compiler's Notes: Enacting section 1 of Act 232 of 2000 provides: "Enacting section 1. Section 19b of chapter XIIA of the probate code of 1939, 1939 PA 288, MCL 712A.19b, as amended by this amendatory act, and chapter XII of the probate code of 1939, 1939 PA 288, as added by this amendatory act, do not apply to a proceeding that arises before the effective date of this amendatory act."

712.11 Blood or tissue typing or DNA identification profiling; presumption; costs; dismissal of custody petition.

Sec. 11.

(1) In a petition for custody filed under this chapter, the court shall order the child and each party claiming paternity to submit to blood or tissue typing determinations or DNA identification profiling, as described in section 16 of the paternity act, 1958 PA 205, MCL 722.716.

(2) Unless the birth was witnessed by the emergency service provider and sufficient documentation exists to support maternity, in a petition for custody filed under this chapter, the court shall order the child and each party claiming maternity to submit to blood or tissue typing determinations or DNA identification profiling, as described in section 16 of the paternity act, 1958 PA 205, MCL 722.716.

(3) If the probability of paternity or maternity determined by the blood or tissue typing or DNA identification profiling is 99% or higher and the DNA identification profile and summary report are admissible, paternity or maternity is presumed and the petitioner may move for summary disposition on the issue of paternity or maternity.

(4) The court may order the petitioner to pay all or part of the cost of the paternity or maternity testing.

(5) If the result of the paternity or maternity testing is admissible and establishes that the petitioner could not be the parent of the newborn, the court shall dismiss the petition for custody.

History: Add. 2000, Act 232, Eff. Jan. 1, 2001 ;-- Am. 2006, Act 488, Eff. Jan. 1, 2007

Compiler's Notes: Enacting section 1 of Act 232 of 2000 provides: "Enacting section 1. Section 19b of chapter XIIA of the probate code of 1939, 1939 PA 288, MCL 712A.19b, as amended by this amendatory act, and chapter XII of the probate code of 1939, 1939 PA 288, as added by this amendatory act, do not apply to a proceeding that arises before the effective date of this amendatory act."

712.12, 712.13 Repealed. 2006, Act 488, Eff. Jan. 1, 2007.

Compiler's Notes: The repealed sections pertained to blood or tissue typing or DNA identification profile and disclosure of information.

712.14 Determination of custody; basis; newborn's best interest; factors.

Sec. 14.

(1) In a custody action under this chapter, the court shall determine custody of the newborn based on the newborn's best interest. The court shall consider, evaluate, and make findings on each factor of the newborn's best interest with the goal of achieving permanence for the newborn at the earliest possible date.

(2) A newborn's best interest in a custody action under this chapter is all of the following factors regarding a parent claiming parenthood of the newborn:

(a) The love, affection, and other emotional ties existing between the newborn and the parent.

(b) The parent's capacity to give the newborn love, affection, and guidance.

(c) The parent's capacity and disposition to provide the newborn with food, clothing, medical care, or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.

(d) The permanence, as a family unit, of the existing or proposed custodial home.

(e) The parent's moral fitness.

(f) The parent's mental and physical health.

(g) Whether the parent has a history of domestic violence.

(h) If the parent is not the parent who surrendered the newborn, the opportunity the parent had to provide appropriate care and custody of the newborn before the newborn's birth or surrender.

(i) Any other factor considered by the court to be relevant to the determination of the newborn's best interest.

History: Add. 2000 Act 232, Eff. Jan. 1, 2001

Compiler's Notes: Enacting section 1 of Act 232 of 2000 provides: "Enacting section 1. Section 19b of chapter XIIA of the probate code of 1939, 1939 PA 288, MCL 712A.19b, as amended by this amendatory act, and chapter XII of the probate code of 1939, 1939 PA 288, as added by this amendatory act, do not apply to a proceeding that arises before the effective date of this amendatory act."

712.15 Court order.

Sec. 15.

Based on the court's finding under section 14 of this chapter, the court may issue an order that does 1 of the following:

(a) Grants legal or physical custody, or both, of the newborn to the parent and either retains or relinquishes jurisdiction.

(b) Determines that the best interests of the newborn are not served by granting custody to the petitioner parent and orders the child placing agency to petition the court for jurisdiction under section 2(b) of chapter XIIA.

(c) Dismisses the petition.

History: Add. 2000 Act 232, Eff. Jan. 1, 2001 ;-- Am. 2006, Act 488, Eff. Jan. 1, 2007 ;-- Am. 2010, Act 349, Imd. Eff. Dec. 22, 2010

Compiler's Notes: Enacting section 1 of Act 232 of 2000 provides: "Enacting section 1. Section 19b of chapter XIIA of the probate code of 1939, 1939 PA 288, MCL 712A.19b, as amended by this amendatory act, and chapter XII of the probate code of 1939, 1939 PA 288, as added by this amendatory act, do not apply to a proceeding that arises before the effective date of this amendatory act."

712.17 Release or termination of parental rights to newborn.

Sec. 17.

(1) A parent who surrenders a newborn under section 3 of this chapter and who does not file a custody action under section 10 of this chapter is presumed to have knowingly released his or her parental rights to the newborn.

(2) If the surrendering parent has not filed a petition for custody of the newborn within 28 days of the surrender, the child placing agency with authority to place the newborn shall immediately file a petition with the court to determine whether the release shall be accepted and whether the court

shall enter an order terminating the rights of the surrendering parent.

(3) If the nonsurrendering parent has not filed a petition for custody of the newborn within 28 days of notice of surrender of a newborn under section 10 of this chapter, the child placing agency with authority to place the newborn shall immediately file a petition with the court to determine whether the court shall enter an order terminating the rights of the nonsurrendering parent.

(4) The court shall schedule a hearing on the petition from the child placing agency within 14 days of receipt of that petition. At the hearing, the child placing agency shall present evidence that demonstrates that the surrendering parent released the newborn and that demonstrates the efforts made by the child placing agency to identify, locate, and provide notice to the nonsurrendering parent.

(5) If the court finds by a preponderance of the evidence that the surrendering parent has knowingly released his or her rights to the child and that reasonable efforts were made to locate the nonsurrendering parent and a custody action has not been filed, the court shall enter an order terminating parental rights of the surrendering parent and the nonsurrendering parent under this chapter.

History: Add. 2000 Act 232, Eff. Jan. 1, 2001 ;-- Am. 2006, Act 488, Eff. Jan. 1, 2007 ;-- Am. 2010, Act 348, Imd. Eff. Dec. 22, 2010

Compiler's Notes: Enacting section 1 of Act 232 of 2000 provides: "Enacting section 1. Section 19b of chapter XIIA of the probate code of 1939, 1939 PA 288, MCL 712A.19b, as amended by this amendatory act, and chapter XII of the probate code of 1939, 1939 PA 288, as added by this amendatory act, do not apply to a proceeding that arises

before the effective date of this amendatory act."

712.20 Safe delivery program; establishment.
Sec. 20.

The department of community health in conjunction with the department shall establish a safe delivery program. The safe delivery program shall include, but is not limited to, both of the following:

(a) A toll-free, 24-hour telephone line. The information provided with this telephone line shall include, but is not limited to, all of the following:

(i) Information on prenatal care and the delivery of a newborn.

(ii) Names of health agencies that can assist in obtaining services and supports that provide for the pregnancy-related health of the mother and the health of the baby.

(iii) Information on adoption options and the name and telephone number of a child placing agency that can assist a parent or expecting parent in obtaining adoption services.

(iv) Information that, in order to safely provide for the health of the mother and her newborn, the best place for the delivery of a child is in a hospital, hospital-based birthing center, or birthing center that is accredited by the commission for the accreditation of birth centers.

(v) An explanation that, to the extent of the law, prenatal care and delivery services are routinely confidential within the health care system, if requested by the mother.

(vi) Information that a hospital will take into protective custody a newborn that is surrendered as provided for in this chapter and, if needed, provide

emergency medical assistance to the mother, the newborn, or both.

(vii) Information regarding legal and procedural requirements related to the voluntary surrender of a child as provided for in this chapter.

(viii) Information regarding the legal consequences for endangering a child, including child protective service investigations and potential criminal penalties.

(ix) Information that surrendering a newborn for adoption as provided in this chapter is an affirmative defense to charges of abandonment as provided in section 135 of the Michigan penal code, 1931 PA 328, MCL 750.135.

(x) Information about resources for counseling and assistance with crisis management.

(b) A pamphlet that provides information to the public concerning the safe delivery program. The department of community health and the department shall jointly publish and distribute the pamphlet. The pamphlet shall prominently display the toll-free telephone number prescribed by subdivision (a).

History: Add. 2000, Act 235, Eff. Jan. 1, 2001 ;-- Am. 2003, Act 245, Imd. Eff. Dec. 29, 2003

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