

**STATE OF MICHIGAN
IN THE SUPREME COURT**

IN RE: BABY BOY DOE

Supreme Court Case No.: 163807
Court of Appeals Case No. 353796

Kalamazoo County
Circuit Court Case No. 2018-6540-NB

**BRIEF OF AMICUS CURIAE
THE FAMILY LAW SECTION OF THE STATE BAR OF MICHIGAN**

Submitted by:

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Statement of Jurisdiction

This case is before this Court on the application for leave to appeal filed on December 2, 2021, by Petitioner/Appellant Catholic Charities West Michigan from the Court of Appeals' denial of Petitioner/Appellant's motion for reconsideration on November 4, 2021. The Court of Appeals' initial decision was issued on August 26, 2021. This Court has granted oral argument on application.

Statement of Questions Presented

- I. Does the application of the SDNL violate the due process rights of an undisclosed father?

Amicus Answers **Yes**

The Court of Appeals **did not answer.**

- II. Does a complaint for divorce that seeks custody of an unborn child qualify as a petition to gain custody of a newborn under the Safe Delivery of Newborns Law (SDNL), which requires the petition of a nonsurrendering parent to be filed "[n]ot later than 28 days after notice of surrender of a newborn has been published," MCL 712.10(1)?

Amicus Answers **Yes**

The Court of Appeals Answered **Yes.**

- III. Must statutes account for Constitutionally-Protected Interests?

Amicus Answers **Yes.**

Statement of Interest of Amicus Curiae

The Family Law Council (“the Council”) is the 21-member governing body of the Family Law Section (“the Section”) of the State Bar of Michigan. The Section is comprised of over 2,600 attorneys who practice family law. The Section members elect the members of the Council. Because of its members’ commitment to family law, and as part of the State Bar of Michigan, the Council has an interest in developing sound legal principles in family law.

The Council provides diverse services to its membership outside of participating in Amicus Curiae briefs. The Council provides training, publishes the Michigan Family Law Journal, multiple times annually plus special issues, and advocates and comments on proposed legislation relating to family law topics.

The instant case provides the opportunity to address where a newborn is surrendered and the impact of such a surrender on the parental rights of the nonsurrendering parent, including the right to claim custody of the newborn. For the reasons outlined in this brief, the Section supports the result of the Court of Appeals’ decision.

No counsel for any party authored this Brief, and no party or any individual or entity made a monetary contribution intended to fund the preparation or submission of this Brief.

Introduction

The Fourteenth Amendment of the United States Constitution provides that “[n]o 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.” US Const, Am XIV, § 1. Included in the Fourteenth Amendment's promise of due process is a substantive component that provides heightened protection against government interference with certain fundamental rights and liberty interests. *Washington v Glucksberg*, 521 U.S. 702, 720 (1997). Among these fundamental rights is the right of parents to make decisions concerning the care, custody, and control of their children. See *Meyer v Nebraska*, 262 U.S. 390, 399-400 (1923). Parents have “perhaps the oldest of fundamental liberty interests” (in the care, custody and control of their children) and children likewise have a constitutionally protected interest in a relationship with their fit parent. See *Troxel v Granville*, 530 US 57, 64 (2000);¹ *In re Clausen*, 442 Mich 648, 502 NW2d 649 (1993) (*mutual liberty interest* exists between parent and child).

The child at the center of this case was conceived and born during the marriage of Peter Kruithoff and his wife (the biological mother of the child). As such, he is presumed to be the natural/biological father of Baby Doe. *Barnes v Jeudevine*, 475 Mich 696, 704 (2006)(strong presumption of the legitimacy of a child born or conceived during a marriage). "The presumption that children born or conceived during a marriage are the issue of that marriage is deeply rooted in our statutes and case law." *Independence Agency v. Jefferson (In re KH)*, 469 Mich 621, 634 (2004). The

¹ "Parents have a significant interest in the companionship, care, custody, and management of their children, and the interest is an element of liberty protected by due process." *In re JK*, 468 Mich 202, 210; (2003).

presumption of legitimacy can be overcome only by a showing of clear and convincing evidence. *Id.* at 634 & n 24. Appellee Kruithoff specifically requested DNA testing in the divorce and custody action to verify he is the legal and natural/biological father of the child.²

Appellee has been deprived of the opportunity to assert the fundamental Constitutionally protected liberty interest in the care of his child.

Statement of Facts

Amicus Curie relies on the facts and procedures as set out in the Court of Appeals' Opinion.

Argument

Overview of the Law:

The Mechanics of the Safe Delivery of Newborns Law (SDNL).

The Purpose. The SDNL was enacted in 2000 (Public Act 232 of 2000) and subsequently amended. MCL 712.1, *et seq.* The Senate Fiscal Agency analysis of the enrolled bills describes the rationale for passage of the bill by focusing on stories of newborns being abandoned in unsafe conditions. "In order to protect the health and safety of unwanted infants, and to provide their mothers with a safe option for surrendering the babies, Michigan should enact a safe haven law for parents legally to give up their newborns." Even when the law was being debated in 2000, the Analysis noted opposing views, including that there is no requirement that identification of the surrendering parent be obtained, which "may make it difficult to ensure that the surrendering individual is actually a parent, secure relinquishment of parental rights,

² The SDNL has a DNA testing provision. MCL 712.11(1)

obtain needed medical history information, and facilitate the adoption process.” These issues are brought to light in this case.

Anyone may surrender a newborn anonymously and for any reason. The SDNL sets out a procedure allowing a parent (or apparently *any* individual) to anonymously surrender a newborn within 72 hours of its birth to an emergency service provider. While provisions (such as MCL 712.3 for example) refer to a parent surrendering a child, there is no procedure or oversight ensuring that children are only surrendered by parents.

The emergency service provider must make a reasonable attempt to encourage the parent to provide any relevant family or medical information. MCL 712.3(2)(a). But there is no requirement that surrendering persons identify themselves. The provider takes the child to a hospital, the child is taken into temporary protective custody and a child placing agency is notified. MCL 712.5.

Notice: The child placing agency must notify the nonsurrendering parent; publication is acceptable. The child placing agency must within 28 days make reasonable efforts to identify, locate, and provide notice of the surrender of the newborn to the nonsurrendering parent. “Reasonable efforts” are not defined. If the identity and address of the nonsurrendering parent are unknown, the agency must provide notice of the surrender by publication in a newspaper of general circulation in the county where the newborn was surrendered, MCL 712.7(f), and make unspecified efforts to locate the child’s parent – efforts that are not monitored or thoroughly reviewed by a court.

A nonsurrendering parent who learns of the surrender may claim custody. To claim custody of the newborn, the nonsurrendering parent must file a custody petition within 28 days after the date of publication, however, this section only works if the

nonsurrendering parent was aware of the notice by publication. The petition may be filed in the county where the newborn is located, the county where the emergency services provider is located, or the county where the nonsurrendering parent is located. MCL 712.10(1). Without knowledge of the identity of a nonsurrendering parent, there cannot be notice in the county where that parent is located.

If the nonsurrendering parent learns of the surrender by reading the publication notice and files a custody petition within 28 days of the publication, and the petition is filed or transferred to the court with jurisdiction under the SDNL, and the court determines paternity or maternity, then the court shall hold a custody hearing based on the newborn's best interests. (These factors include consideration of domestic abuse. MCL 712.14(1), (2)(g)). At the conclusion of the hearing, the court may grant custody to the parent, dismiss the custody petition, or order the child placing agency to petition the court to take jurisdiction over the newborn under section 2(b) of chapter XIIA. MCL 712.15.

Parental rights may be terminated, and the newborn adopted. If the nonsurrendering parent has not filed a petition for custody within 28 days of notice of surrender (which includes publication), the child placing agency must file a petition for termination of the rights of the nonsurrendering parent. MCL 712.17. At the hearing, the child placing agency must present evidence of its efforts to identify, locate, and provide notice to the nonsurrendering parent. If the court finds 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 both parents. MCL 712.17(5).

I. The Application of The SDNL Violated the Due Process Rights of an Undisclosed Father.

The Sections adopt Appellee Kruithoff's analysis that notice in this case was inadequate to protect the due process rights and fundamental liberty interests of Appellee in his child.

Except in emergency situations, the state cannot deprive a person of a protected liberty or property interest without affording the person notice and an opportunity for a hearing before the termination of the protected interest becomes effective. *Bd of Regents of State Colleges v Roth*, 408 U.S. 564, 570, n 7 (1972); *Bell v Burson*, 402 U.S. 535, 542 (1971). These procedural due process requirements apply only if there is to be a deprivation of Constitutionally protected interests. *Roth*, 408 U.S. at 569.

This case involves perhaps the most fundamental of Constitutional liberty interests. "A natural parent has a fundamental liberty interest 'in the care, custody, and management' of his child" *In re Rood*, 483 Mich 73, 91 (2009). When the state interferes with parental rights, it must provide the parent with fundamentally fair procedures. *Id.* at 91-92. "Due process in civil cases generally requires **notice of the nature of the proceedings, and an opportunity to be heard in a meaningful time and manner**, and an impartial decisionmaker." *In re Juvenile Commitment Costs*, 240 Mich App 420, 440 (2000) (emphasis added).

To determine what constitutes sufficient due process before a parent's fundamental liberty interest in the care, custody, and control of the parent's child is burdened by the state, the court apply three factors set out in *Mathews v Eldridge*, 424 U.S. 319, 335 (1976). See *In re Sanders*, 495 Mich 394, 410-411 (2014) (quoting *Mathews*, 424 U.S. at 335 (alteration in original):

[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 under the SDNL wholly fails to meet these factors, certainly as applied in this case. Unlike the parental rights termination statute, which provides a systemize approach to ensuring all efforts are made to provide notice regarding termination of parental rights proceedings, the SDNL lacks similar procedural protections. Notice is not defined generally. And when a nonsurrendering parent is “unknown,” the agency must show “reasonable efforts to locate the other parent” (efforts which again are not defined) and provide notice and opportunity to be heard through publication in the county of surrender, regardless of any evidence or chance that the nonsurrendering parent lives elsewhere. Appellee did not live in the county where there was publication.

Here, the identity of the mother was kept confidential and she did not provide information concerning her husband -- the legal/natural father -- so his identity was unknown. The SDNL provides only for publication in the county where the newborn was surrendered and in this case was not the county where the father resided. This is not necessarily county wide publication. The notice here was published in the Grand Rapids Press. Notice by publication that targets a discrete area in another county borders on a futile act. The notification requirements should be commensurate with the Constitutional right they protect. *Sanders, supra*. This case involves “perhaps the most fundamental” of liberty interests and the risk of losing any *opportunity to assert* the

right to be a parent (and hence losing that right) was almost a certainty based on the lack of statutory requirements concerning notice.

Further, what constitutes reasonable efforts to locate the nonsurrendering parent is not defined in the statute and is under the control of the child placing agency, a private entity with the purpose of placing the surrendered newborns for adoption. There is very little court oversight. Not until *after* publication, when the court is prepared to terminate parental rights to facilitate an adoption, does the court have the minimal task of finding by *preponderance of the evidence* that reasonable efforts were made to locate the nonsurrendering parent. MCL 712.17(5). Again, there is no requirement or verification that a mother releases her name and thus no ability to locate the father when, as here, the mother declines to identify herself.

Under these circumstances, there are no clear statutory parameters for reasonable efforts to provide notice sufficient to protect a fundamental liberty interest; without that this statute is vague and overbroad. There is a grant of authority to a private agency to essentially do what it determines is reasonable in terms of notice. The breath of the statute is also highlighted by the fact that it appears that anyone can surrender a newborn. The statute doesn't limit surrender to a mother or a father, although as mentioned some of the provisions refer to a parent. MCL 712.3(1) ("If a parent surrenders a child who may be a newborn to an emergency service provider..."). This language leaves open the possibility of others who may surrender a newborn and also leaves open the applicability of the statutory provision that appears limited to a parent. A relative, friend or other person can apparently surrender a newborn to an emergency service provider, or an emergency service provider contractor which may be a private entity. And there is no requirement for individuals surrendering the newborn

to identify who they are; it is wholly permissive. There is little oversight of the entire process.

Although Amicus is sympathetic to the mother's alleged reasons for surrendering the newborn – that the father was physically abusive – and concerned that both she and the child are protected from abuse, that is not sufficient to ignore a presumed father's parental rights. There was no process, certainly in this case, for rebuttal of any claims of abuse. **Further, a surrender under the SDNL can occur for any reason or no reason.** The mother's allegations of abuse would have been considered by the court in a subsequent best-interest hearing had the father received actual notice of the proceeding and had the SDNL court learned of his divorce filing. The legislature has the power to enact statutes, but statutes are subject to Constitutional constraint.

In this unique situation where there is a presumed, natural/biological father there is a necessity to insure more than a loose approach to notification, with ineffective oversight. Looking at the statute as applied in this case, the notice procedure was grossly insufficient, violating due process.³

³ According to Appellants' proposed interpretation, a parent knowing of an impending delivery of a child must scour publications in the State and wait for a generic message to appear before attempting to make a claim.

II. 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 (SDNL), Which Requires the Petition of a Nonsurrendering Parent to be Filed "[n]ot later than 28 days after notice of surrender of a newborn has been published," MCL 712.10(1).

Amicus adopts Appellee's analysis that a divorce complaint that requests custody of an unborn child is a petition for custody under the SDNL.

A parent who wants custody of a newborn surrendered under the SDNL must file a "petition with the court for custody." MCL 712.10(1). The petition must be filed no later than 28 days after the publication of the notice of surrender. Of course, if a nonsurrendering parent never learns about the surrender by reading the publication notice, as was the case here, that parent is unlikely to have the benefit of this section.

Mr. Kruithoff stated he never learned that the child born during his marriage was surrendered by his wife and he never saw the publication and the child placing agency charged with providing notice to him was only required to publish a notice in the county where the newborn was surrendered, which was not where he resided. He suspected his wife, however, was pregnant and he filed a divorce action in Ottawa county, where he resided, in which he sought custody of the unborn child and a determination of his paternity. His wife resided in Muskegon County. He was unaware that subsequently his wife gave birth in Kent County where she surrendered the newborn. The hospital in Kent County placed the newborn with the child placing agency, which in turn petitioned the court in Kalamazoo County to place the child with prospective adoptive parents. The notice was published in Kent County. Because the mother anonymously surrendered the newborn without identifying herself or the father, neither court was aware of Mr. Kruithoff or his legal case. Although the SDNL

requires communication between courts, that failed to happen through no fault of Mr. Kruithoff, none of the courts were aware of the filings in the other courts, and each court operated independently of the other. This is due in large part to deficiencies in the SDNL.

Mr. Kruithoff's divorce complaint was a "petition for custody" as contemplated by the SDNL and was the only method available to him to alert the court that he sought custody. The SDNL does not define petition for custody and the Court may turn to the dictionary for its common meaning. "A petition is a plea for relief, presented to a judge or other official with the power to grant such relief under law...". Additionally, [t]he primary difference in contemporary legal usage between a petition and a pleading, such as a complaint or a motion, is one of custom..." The Wolters Kluwer Bouvier Law Dictionary Desk Edition Copyright 2012 CCH Incorporated.

Further, his divorce complaint included a request – a plea for relief – that the court award him custody of the parties' unborn child. In fact, a party filing a complaint for divorce must disclose whether there are minor children of the parties or minor children born during the marriage and whether a party is pregnant. MCR 3.206(A)(4). And the court must determine the custody of the parties' minor children at the time it enters a judgment of divorce. MCL 552.16; MCL 722.24(1); MCR 3.210(C). Thus, Mr. Kruithoff's complaint for divorce satisfied a petition for custody under the SDNL.

Secondly, Mr. Kruithoff filed his petition for custody no later than 28 days after the publication of the notice of surrender as required by the SDNL. The notice of surrender was published on August 16, 2018 and his filing would have been untimely had he filed on or after September 13, 2018. His divorce complaint was filed on August

8, 2018 and there is nothing in the SDNL that prohibits filing a petition for custody prior to the date of the notice of publication.

Mr. Kruithoff could only file a divorce action to satisfy the SDNL procedural requirement that a parent who wants custody of a newborn must file a petition for custody. While a divorce complaint may be filed in the county where the plaintiff resides, MCL 552.9, a custody complaint must be filed in the county where the child resides or may be found. MCL 722.26(2). Mr. Kruithoff did not know where the child or his spouse resided, so he filed a divorce complaint in his county of residence.

Finally, Mr. Kruithoff was presumed to be the child's father "by virtue of his marriage to the child's mother at the time of the child's conception or birth." MCL 722.1433(3). Any other conclusion than that made in the Court of Appeals would mean that, despite a pending custody action, a parent could anonymously deliver a newborn and instantly deprive the other parent of their fundamental rights as well as the court of jurisdiction.

As noted above, the complaint disclosed that his spouse was pregnant and included his request for custody of the unborn child. Such a filing satisfies the requirements of the SDNL and the court erred by failing to consider his request for custody, or even hold a hearing to consider the best interests of the newborn. Here, Mr. Kruithoff, the non-surrendering parent, did everything he could to make known his status as a legal father entitled to request custody.

Amicus is troubled by the fact that the SDNL specifically excludes application of the Child Custody Act or the juvenile code, including child protection statutes.⁴ MCL

⁴ Assuming there had been no exclusions, statutes *in pari materia* must be interpreted in light of each other since they have a common purpose for comparable events or items.

710.2(3). The SDNL has created a unique and insulated process. These other statutes also provide a mechanism for the protection of children and for parents to establish custody of their children. See MCL 722.24. The Child Custody Act requires the court to determine custody based on child's the best interests and welfare, MCL 722.24, and to consider, evaluate, and make findings on each best interest factor, including factors that are similar under both acts. See MCL 722.23 (Child Custody Act best interest factors, including consideration of domestic violence); MCL 712.14. The child protection statutes provide for surrender or removal of a child from a parent and placement with a third party (in that way similar to the SDNL). While the SDNL and the protection statutes also provide for return of the child to the parent – a nonsurrendering parent may request under MCL 712.10 and a child removed or under court jurisdiction under the child protection statute due to abuse or neglect may be reunified with his or her parent, the protection statutes provide numerous protections of parental rights. MCL 712A.19a(2). The SDNL wholly fails to incorporate similar parental protections, although there is arguably even a greater risk of termination of the parental liberty interest under the SDNL.

“Under this doctrine, statutes that relate to the same subject or share a common purpose are in *pari materia*. Such statutes must be read together as one law, even if they contain no reference to one another and were enacted on different dates.” *People v Webb*, 458 Mich. 265 (1998). Further, the objective of the rule “is to further legislative intent by finding a harmonious construction of related statutes, so that the statutes work together compatibly to realize that legislative purpose. *Id.* Therefore, if two statutes lend themselves to a construction that avoids conflict, that construction should control. *Id.*” *People v. Stephan*, 241 Mich. App. 482, 497-98 (2000) (finding that under *pari materia*, the insanity defense and guilty but mentally ill verdict statutes consistent).

III. Statutes must account for Constitutionally-Protected Interests.

Legislative creations cannot compete against the Constitutionally protected parent-child liberty, privacy, and associational interests that "derive from blood relationship, state-law sanction, and basic human right...". *Smith v Organization of Foster Families (OFFER)*, 431 US 816, 846 (1977).

The SDNL in various ways elevates the interests of a surrendering parent or person (as well as the interests of prospective adoptive parents) above the interests of the nonsurrendering parent and does not provide sufficient oversight of the reasons for surrender (there is no guaranteed mechanism for review, let alone a determination of unfitness), or of agency discretion concerning notice and "reasonable efforts" to find the non-surrendering parent. And application of the SDNL to a married person raises its own significant issues. Child welfare and best interests are the goals of all of these statutes (the Child Custody Act, child protection statutes, and the SDNL), however, that does not exempt a statute from Constitutional scrutiny. The SDNL in its current form fails to adequately protect the fundamental Constitutional liberty interest in being a parent as well as the mutual parent-child liberty interest existing between fit parent and child. *Clausen, supra*.⁵

⁵ The rights of a natural parent and child do not diverge unless there is a finding of unfitness or unless the parent has voluntarily terminated parental rights in an appropriate proceeding with all attendant due process protections. This Court in *Clausen, supra*, stated that:

While a child has a constitutionally protected interest in family life, that interest is not independent of its parents' in the absence of a showing that the parents are unfit.

Smith v OFFER, supra, involved third-party foster parents' attempts to have input in determining the custody of children. The Court refused to acknowledge the claimed "liberty interests" of the foster parents.

It is one thing to say that individuals may acquire a liberty interest against arbitrary government interference into the family-like associations into which they have freely entered, even without 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..... *Id.* at 846.

This Court recognized that foster families develop a relationship with children, but specifically found that they have no rights as against the natural child-parent relationship and refused to permit the state-created interests of the third parties, the foster parents, to rise to the level requiring the same due process rights guaranteed to natural parents.

The SDNL fails to adequately protect the mutual parent-child relationship. It fails to protect the due process rights of parents to notice and an opportunity to be heard when it permits by publication in a newspaper where the newborn was surrendered, resulting in an improper termination of parental rights without an adequate hearing or other protections.

Relief

Amicus requests that this Court affirm the Court of Appeals.

Respectfully Submitted:

Family Law Section:

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Submitted: April 27, 2022