Order

Michigan Supreme Court
Lansing, Michigan

June 29, 2022

Bridget M. McCormack,
Chief Justice

163807 & (68)(88)(89)

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh
Elizabeth M. Welch,
Justices

In re BABY BOY DOE, Minor.

_____

PETER KRUITHOFF,
Petitioner-Appellee/Cross-Appellee,

v

SC: 163807
COA: 353796
Kalamazoo CC Family Division:
2018-006540-NB

CATHOLIC CHARITIES OF WEST MICHIGAN,
Respondent-Appellant,
and

ADOPTIVE PARENT NUMBER 1 and
ADOPTIVE PARENT NUMBER 2,
Appellees/Cross-Appellants.

_____/

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

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

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 pertaining to the permanent placement or adoption 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 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 (2018) (quotation marks, citation, and brackets omitted). The SDNL allows a parent to "surrender"[3] a "newborn"[4] within 72 hours of 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,"

---

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

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 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 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]

[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.

Accordingly, we REVERSE Part II of the 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]

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

---

[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 NW2d 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 (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 (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.

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 US 306, 317 (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 (1981) (noting that in circumstances where "the specific whereabouts of a person is unknown, service of process by publication 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*, 399 US at 315; see also *Walker v City of Hutchinson*, 352 US 112, 116 (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, NH & H R Co*, 344 US 293, 296 (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 US at 296. 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 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]

---

[7] *In re Baby Boy Doe*, ___ Mich App ___ (2021) (Docket No. 353796) (RONAYNE KRAUSE, P.J., dissenting); slip op at 2.

[8] *Id*. at ___; 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

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

---

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.

fundamental problem with the SDNL is that the termination 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 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

---

> 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 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 (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 (1993).

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 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 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]

---

[13] *Id*. at 654, quoting *Smith v Org of Foster Families*, 431 US 816, 843-844 (1977).

[14] *In re Clausen*, 442 Mich at 654.

[15] *In re Clausen*, 442 Mich at 664-665, quoting *Smith*, 431 US at 845-846 (alterations in original).

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 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 brief the constitutional question because there are compelling reasons to question 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]

---

[16] *In re Clausen*, 442 Mich at 664, quoting *Smith*, 431 US at 845.

[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 (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 (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."

[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 (2014).

[21] *Id*. at 415.

[22] *Id*., quoting *Stanley v Illinois*, 405 US 645, 658 (1972).

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

> 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.

---

[23] *In re Miller*, 322 Mich App 497, 502 (2018).

[24] MCL 712.7(f); see also *In re Miller*, 322 Mich App at 502.

[25] *In re Miller*, 322 Mich App at 503.

> (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 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 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

---

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

[27] MCL 712.17(4).

[28] MCL 712.17(5).

[29] *Mathews v Eldridge*, 424 US 319, 335 (1976).

[30] *In re Sanders*, 495 Mich at 409-410.

[31] *Id*. at 410, quoting *Mathews*, 424 US at 335.

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, 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 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 NW2d 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 US 248 (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 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. Stated differently, the putative father in *Lehr* had the

[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]."

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 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 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

[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.

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.