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**IN THE SUPREME COURT
STATE OF ARIZONA**

IN RE TERMINATION OF
PARENTAL RIGHTS AS TO M.N.

Supreme Court No. CR-24-0114-PR

Court of Appeals, Division One
No. 1 CA-JV 22-0227

Coconino County Superior Court
No. S0300SV202100003

**APPELLEES' PETITION
FOR REVIEW**

THROUGH COUNSEL and pursuant to Rule 609, Arizona Rule of Procedure for the Juvenile Court, the Appellees, Adoption Choices of Arizona and counsel for child, petition this Court to review the Opinion of the Court of Appeals in this matter.

A copy of the Court of Appeals decision is attached to this Petition for Review as Appendix A.

ISSUES PRESENTED FOR REVIEW

1. In this termination of parental rights action, the Court of Appeals' Opinion improperly ignored the holding in *Frank R. v. Mother Goose Adoptions*, 243 Ariz. 111, 402 P.3d 966 (2016), and mistakenly applied *David C. v. Alexis S.*, 240 Ariz. 53, 375 P.3d 945 (2016). This resulted in the Court of Appeals holding as D.I. completed genetic testing, he was no longer a "putative father" under the law and thus was not subject to the statutory requirement that a putative father is required to file a notice of claim of paternity within thirty (30) days of the birth of the child, as required by A.R.S. §8-106.01.

2. The Court of Appeals erred in its opinion when it stated D.I. had "timely served" his petition to establish paternity." (*See* Appendix A on p. 3, ¶7). D.I.'s petition was served thirty-one (31) days after D.I. was served the Arizona notice to potential father and not within the thirty (30) days, as mandated by A.R.S. §8-106, *Cox v. Ponce*, 251 Ariz. 302 (2021). This issue was not litigated by the trial court and this issue was preserved by the Appellee, Adoption Choices of Arizona, see March 25, 2022, Adoption Choices of Arizona's Third Amended Petition. (Index 52, pgs. 4-7, ¶15-26). This ground for termination, A.R.S. §8-533(B)(5), was voluntarily dismissed without prejudice. (Index 56). The Court of Appeals decision

should not have stated D.I. timely served his petition, as that could be found as the law of the case.

ADDITIONAL ISSUES ON APPEAL NOT DECIDED BY THE COURT OF APPEALS

1. The statutes requiring D.I. to both initiate paternity proceedings and register with the putative father's registry violate his procedural and substantive due process rights;
2. D.I.'s counsel was ineffective by failing to obtain a paternity judgment in juvenile court;
3. The Court applied the wrong legal standard in analyzing the child's best interests and failed to weigh all the evidence;
4. The Court failed to make sufficient findings of fact or conclusions of law; and
5. The findings it made contained critical factual errors. (Appendix A, ¶11).

MATERIAL FACTS

M.N. was born on March 23, 2021. At birth the child was drug exposed and tested positive for methamphetamine and fentanyl. (Tr. 6/1/2022, p. 48, lns 5-17); (Exhibit 2, report of Tracy Anderson, p. 8; Exhibit 9, report of Diane Baird, LCSW, p. 1).

Before and at the time of the child's birth, the mother had identified her live-in boyfriend, as the child's father. He also advised the agency that he was the child's father. (Appendix A, ¶3; Tr. 6/1/2022, p. 48, lns. 18-25, p. 49, lns. 1-25). On April 6, 2021, both mother and boyfriend signed Arizona irrevocable consents. (Appendix

A, ¶5; Tr. 6/1/2022, p. 49, lns. 3-7). On April 8, 2021, Adoption Choices filed a Petition for Termination of Parental Rights, (TPR), pursuant to A.R.S. §8-533(B)(7), in the Coconino County Superior Court (Court) based upon the child's mother and the purported father's consents. (Appendix A, ¶6; Index 1); (Transcript (Tr.) 6/1/2022, p. 54, lns 19-25, p. 55, lns. 1-25, p. 56, lns. 1-20).

When signing their consents, the mother and boyfriend advised their counsel and the agency that mother's boyfriend was the child's father. (Tr. 6/1/2022, p. 50, lns 4-25; p. 51, lns. 2-11). At that point in time, no one had identified D.I. as an individual who could be the biological father of the child.

After mother and M.N. had signed consents, the agency was advised by the hospital that an unknown person had told staff he was the child's father. Upon questioning, the mother indicated she had a one-time sexual encounter with this person. The mother advised that she only knew this individual by the name of "Blakk Jesus." (Appendix A, ¶5; Tr. 6/1/2022, p. 54, lns. 1-25, p. 55, lns. 1-25).

Later it was determined that "Blakk Jesus" was the individual identified as D.I. (Tr. 6/1/2022, p. 55, lns. 1-15).

Eventually, D.I. was located and on April 23, 2021, he was served the Arizona notice pursuant to A.R.S. §8-106(G). (Appendix A, ¶6; Tr. 6/1/2022, p. 56, ln. 5-11). Adoption Choices then filed an Amended TPR Petition on May 24, 2021,

identifying D.I., and requesting that his parental rights be terminated, pursuant to A.R.S. §8-533(B)(5) and A.R.S. §8-106(J). (Index 9).

On May 21, 2021, D.I. filed a petition to establish paternity, (hereinafter Petition), (which did not request custody nor, visitation) in the Maricopa County Superior Court (Maricopa Court). (Appendix A, ¶7; Exhibit 18, Tr. 6/1/2022, p. 56, lns. 12-16). Adoption Choices was not named as a party to said paternity action. (Exhibit 18).

Pursuant to A.R.S. §8-106(J), D.I. was required to file and serve his petition within thirty (30) days of having been served the Arizona notice on April 23, 2021. Pursuant to A.R.S. §8-106(H), D.I.'s petition was served upon counsel for Adoption Choices on May 24, 2021, which is the 31st day after he was served the Notice on April 23, 2021. (Tr. 6/1/2022, p. 56, lns. 17-25, p. 57, lns. 14-17). This issue was one of the grounds plead by the Appellee in its second and third amended petitions for termination of parental rights that was not litigated, as it was dismissed without prejudice. (Index 14, 52 and 56).

Mother's attorneys moved the Maricopa Court to dismiss the paternity case because D.I. failed to serve Mother within 30 days, as required by A.R.S. §8-106(J). (Tr. 6/1/2022, p. 58, lns. 3-25). The Maricopa Court denied this motion. (Tr. 6/1/22). The Appellees herein were not parties to that litigation at the time of that

ruling. The paternity case was subsequently dismissed without prejudice given the termination of D.I.'s parental rights. (Appendix B).

On September 15, 2021, the Maricopa Court ordered DNA paternity testing. (Appendix A, ¶8.) Once the paternity test determined D.I. was the biological father of M.N., the Maricopa Court stayed the paternity proceeding to allow the TPR case to be concluded. (Exhibit 20). On August 24, 2022, the paternity case was dismissed. (Appendix B).

The Maricopa Superior Court never entered a finding of paternity or an order of paternity.

On December 2, 2021, Adoption Choices filed a Second Amended TPR Petition adding a ground for termination of parental rights, based upon D.I.'s failure to register with the putative father registry pursuant to A.R.S. §8-533(B)(6), and pursuant to A.R.S. §8-533(B)(5) for failing to file and serve his petition to establish paternity within the mandatory thirty (30) days of his having been served the Arizona notice to potential father, §A.R.S. 8-106. (Appendix A, ¶9; Index 14).

On February 4, 2022, Adoption Choices filed a Motion for Partial Summary Judgment requesting in part, that D.I. had failed to file with the Arizona Putative Father Registry, A.R.S. §8-533(B)(6). (Index 30).

On March 25, 2022, Adoption Choices filed a Third Amended TPR Petition, which set forth additional grounds for termination of D.I.'s parental rights, pursuant to A.R.S. §8-533(B)(3) and A.R.S. §8-533(B)(4). (Index 52).

On March 28, 2022, the Court determined that clear and convincing evidence had established that D.I. had failed to comply with the putative father registry requirements, A.R.S. §8-533(B)(6) and §8-106.01.

Given this ruling, on April 7, 2022, based upon Adoption Choice's motion, the Court dismissed the remaining statutory grounds for TPR without prejudice including, but not limited to, A.R.S. §8-533(B)(5). (Index 56). The best interest aspect of the trial occurred on May 31, 2022, June 1, 2022, and June 20, 2022. (Index 94, 96, 102).

On May 31, 2022, the first day of the trial, D.I.'s counsel filed a Motion for Summary Judgment requesting the Court find D.I. to be the biological father of the child based on the result of the paternity test. (Index 90). The Court denied Adoption Choices' Motion to Dismiss D.I.'s motion. (Index 121), which had argued D.I.'s Adoption Choices had argued D.I.'s Motion for Summary Judgment should be dismissed based upon: the Doctrine of Abatement, lack of jurisdiction, and the motion being untimely, pursuant to former RPJC Rule 46(D). (Index 97). The Court granted D.I.'s motion, finding that D.I. was the biological father of the child. (Index 122).

On August 9, 2022, the Court issued its under advisement ruling terminating D.I.'s parental rights. (Index 127). Thereafter, on August 24, 2022, the trial court issued a final order terminating parental rights of D.I., as well as those of the mother and any putative father. This appeal followed. (Appendix A, ¶10.)

REASONS FOR GRANTING THE PETITION FOR REVIEW

1. The Court of Appeals Ignored The Holding in *Frank R. v. Mother Goose Adoptions*

Without recognizing or even citing *Frank R. v. Mother Goose Adoptions*, 243 Ariz. 111, 402 P.3d 966 (2016), the Court of Appeals' Opinion mistakenly applied *David C. v. Alexis S.*, 240 Ariz. 53, 375 P.3d 945 (2016) holding that, because D.I. completed genetic testing, D.I. was presumed legal father at the time of the termination hearing, and not a "putative father" under the law and thus was not subject to the statutory requirement that a putative father file a notice of claim of paternity within 30 days of the birth of the child as required by A.R.S. § 8-106.01. *Frank R.* distinguished *David C.* from a severance case such as this case. The Court of Appeals' Opinion thus conflicts with this Court's precedent in *Frank R.* and should be vacated.

It is undisputed that D.I. failed to register with the Arizona Putative Father Registry. (Index 16, 54, p. 3, 127, p. 2, 153, p. 4, ¶15). The trial court thus properly determined, as a matter of law, that there was clear and convincing evidence to

support termination of D.I.'s parental rights, pursuant to A.R.S. §8-533(B)(6). That statute provides:

B. Evidence sufficient to justify the termination of the parent-child relationship shall include any one of the following, and in considering any of the following grounds, the court shall also consider the best interests of the child: * * *

6. That the putative father failed to file a notice of claim of paternity as prescribed in § 8-106.01. (Emphasis added.)

United States Supreme Court precedent upholds state putative father registries. *Lehr v. Robertson*, 463 U.S. 248, 103 S.Ct. 2985, 77 L.Ed.2d 614 (1983). To this end, the Arizona Supreme Court held in *Frank R. v. Mother Goose Adoptions*, 243 Ariz. 111, 402 P.3d 996 (2016), that a man's failure to register with the Arizona Putative Father Registry is a statutory ground for termination of parental rights. The Court held:

¶ 24 Arizona's registry reflects our legislature's attempt to appropriately balance the interests of the child and the constitutional rights of parents. Ariz. State Sen. Fact Sheet for S.B. 1287, 45th Leg., 2d Reg. Sess. (May 15, 2002). Section 8-106.01 provides a bright-line deadline for registration and establishes a clear date after which an adoption is final and the child's placement with his or her new family is permanent. The statute recognizes the putative father's interest in establishing paternity and having a role in his child's life and weighs it against the child's interest in having a stable and permanent home and not being removed from adoptive parents with whom the child has bonded. Section 8-106.01 also protects the interest of adoptive parents in the finality of the adoption and assures prospective adoptive parents that a final order of adoption is likely to remain final. Similarly, to ensure compliance with its strict timeline for asserting paternity, the legislature made failure to comply with §8-106.01 a ground for severance in § 8-533(B)(6). 243 Ariz. at 116, 402 P.3d at 1001.

In *Frank R.* the Court explained that Arizona’s Putative Father Registry was created “to avoid protracted legal disputes between unwed father and potential adoptive parents” and that the legislative purpose of H.B. 2462 was to “clarify the responsibilities of the birth mother of the child being placed for adoption and the rights and obligations of a putative father in the adoption context in the State of Arizona.” 243 Ariz. at 115, ¶20 quoting Ariz. State Sen. Fact Sheet for H.B. 2462, 41st Legis., 2nd Reg Sess. (April 6, 1994). Quoting *Lehr*, the *Frank R.* Court determined compliance with the Putative Father Registry promoted the state’s legitimate interest in expeditious permanence by “justify[ing] a trial judge’s determination to require all interested parties to adhere precisely to the procedural requirements of the statute.” *Id.* quoting 463 U.S. at 265. “Although requiring compliance with the statute may sometimes result in harsh outcomes, requiring courts to make an individualized, post-adoption determination of whether the father’s conduct reasonably complied with the statute’s purpose would undermine legislative intent and the finality of adoptions.” 243 Ariz. at 116, ¶25. The Court concluded:

¶ 26 In *Lehr*, the United States Supreme Court noted that the state’s legitimate interests in expeditious permanency “justify a trial judge’s determination to require all interested parties to adhere precisely to the procedural requirements of the statute.” 463 U.S. at 265, 103 S.Ct. 2985. As the court of appeals here reasoned, “[N]othing in § 8-533(B)(6) states or even suggests that filing a paternity action, whether in Arizona or another state, takes the place of the putative father’s obligation to file a notice under the putative fathers registry.” *Frank R.*, 239 Ariz. at 201, ¶54, 367 P.3d 105. The statute must be applied as

written; to hold otherwise would directly contradict the plain language of § 8-533(B)(6). Because Frank did not timely register as a putative father after he had the opportunity to do so, he did not comply with the statute. Neither filing notice of a claim of paternity nor contesting the severance action excuses a putative father's failure to register for purposes of § 8-533(B)(6). 243 Ariz. at 116.

Adoption Choices proved by clear and convincing evidence, the ground for terminating D.I.'s parental rights pursuant to A.R.S. §8-533(B)(6). It is undisputed that D.I. failed to file with Arizona's Putative Fathers Registry as required by A.R.S. §8-101.01. (Index 16). *Frank R.* squarely holds that A.R.S. §8-533(B)(6) is an independent and stand-alone ground for terminating a parent's parental rights. *Id.*, 243 Ariz. at 115, ¶21. The Court concluded:

¶ 30 Here, on the other hand, § 8-106.01 specifically requires the father to file a notice of claim of paternity, which Frank failed to do, despite appearing in the Arizona severance case and having counsel appointed. Frank's rights were not terminated for failure to timely file a paternity action under §8-106(J); rather, as noted above, they were terminated on the independent ground that he failed to register with the putative fathers registry under §8-106.01, and § 8-533(B)(6) identifies such a failure as a ground for severance. Even if we assume Frank's California paternity action satisfies the § 8-106(J) requirement, he was still required to register with the putative fathers registry and failed to do so. Had Frank timely and properly registered with the putative fathers registry, this case would have a different outcome. 243 Ariz. at 117.

The similarities between the facts of this case, involving D.I., and the facts in *Frank R.* are worth noting.

In *Frank R.*, the father filed a petition to establish paternity. *Id.* 243 Ariz. at 113, ¶8. Likewise, in this case, D.I. filed a Petition to Establish Paternity on May 21, 2021. (Exhibit 18).

In *Frank R.*, the father submitted to a DNA test which established he was the child's biological father. *Id.* 243 Ariz. at 114, ¶11. In this case, D.I. submitted to DNA testing which established that he was the child's biological father. (Exhibit 21).

In *Frank R.*, the father did not file a claim of paternity with the Arizona Putative Father Registry. *Id.* 243 Ariz. at 114, ¶14. Here, D.I. failed to file a timely notice of claim of paternity with the Arizona Putative Father Registry. (Index 16, 54, and 127).

The two important differences between *Frank R.* and this case only strengthen the application of A.R.S. §8-533(B)(6) to this case. First, in *Frank R.*, the father was a resident of California and did not live in Arizona, *Id.*, 243 Ariz. at 113, ¶2. In this case, D.I. has been, at all relevant times to this matter, a resident of Arizona. (Exhibit 18, p. 2). In *Frank R.*, the father had been in a relationship with the mother. She went to Arizona during her pregnancy to conceal her whereabouts and placed their child for adoption. In this case, D.I. had a one-time sexual encounter with the mother, C.C., and had no relationship with the mother. (Tr. 6/1/2022, p. 179, lns. 7-25, p. 180, lns. 1-25, p. 181, lns. 24-25, p. 182, ln. 1). D.I. was aware of the mother's

pregnancy and the child's birth. (Tr. 6/1/2022, p. 182, lns 7-13). Nevertheless, D.I. did not file a claim of paternity with the Arizona Putative Father's Registry within thirty days after the child's birth on March 23, 2021. (Index 16).

The *Frank R.* decision states, "We "agree with the court of appeals here that 'creating a fact -based excuse for [non] compliance with the [registry] statute' is not consistent with the legislature's intent in enacting A.R.S. §8-533(B)(6)." *Id.*, 243 Ariz. at 116, ¶25. Refuting arguments like those advanced by D.I., the Court in *Frank R.* further stated, "As the court of appeals here reasoned, '[N]othing in §8-533(B)(6) states or even suggests that filing a paternity action, whether in Arizona or another state, takes the place of the putative father's obligation to file a notice under the putative fathers registry.'" *Id.* 243 Ariz. at 116, ¶26. Thus, the trial court was correct when it determined, as a matter of law, based on clear, convincing, and indisputable evidence, that D.I.'s failure to comply with the mandatory filing requirements of the Arizona Putative Father's Registry in the manner set forth in A.R.S. §8-106.01 established a ground for terminating his parental rights under A.R.S. §8-533(B)(6).

Ignoring *Frank R.*, the Court of Appeals here utilized the analysis in *David C. v. Alexis S.*, 240 Ariz. 53, 375 P.3d 945 (2016), to hold that "termination of Father's rights under A.R.S. §8-533(B)(6) was improper because it conflicted with his rights as a potential father under A.R.S. §8-106." (Appendix A, ¶16.) This ignores Frank

R. where the Supreme Court addressed and rejected this very argument. In *Frank R.* the Supreme Court held:

“Unlike *David C.*, this is a severance action, not an adoption action, and Frank’s rights were not terminated for failing to timely file a paternity action. Rather Frank’s rights were terminated under A.R.S. §8-533(B)(6) on the independent ground that he failed to register with the putative fathers registry as A.R.S. §8-106.01 requires.” *Frank R., Id.*, at 117, ¶28, (2017).

In *Frank R.*, the Court found *David C.* to be “distinguishable because they concern different statutes,” found that “Section 8-106 does not require compliance with §8-106.01 to maintain a paternity action,” and concluded that “the fact that the father in *David C.* never filed a claim of paternity with the putative fathers registry had no bearing on his compliance with §8-106.” 243 Ariz. at 117, ¶29. The Court of Appeals’ Opinion ignores this distinction and failed to apply the holding in *Frank R.*, which controls this case. Contrary to the Court of Appeals’ Opinion, *Frank R.* specially rejected the contention that A.R.S. §8-106.01 does not apply when an action is filed “to establish paternity and contesting the severance,” and the father’s “actions made the other parties aware of his intent to assert his parental rights,” because “the purpose of the putative fathers registry is to provide the father with an opportunity to claim his parental rights, to give potential adoptive parents notice of the putative father’s paternity claim early in the proceedings, and to preclude claims of paternity made more than thirty days after the child’s birth.” 243 Ariz. at 116,

¶23. The Court of Appeals' contrary ruling wrongly employs *David C.* to displace *Frank R.* in severance cases like this one.

2. The Court of Appeals Erred By Stating D.I. Timely Served His Paternity Petition, Pursuant to A.R.S. §8-106

The Court of Appeals erred in its opinion, when stated D.I. had “timely served” his petition to establish paternity.” (See Appendix A on p. 3, ¶7). D.I.’s petition was served thirty-one (31) days after D.I. was served the Arizona notice to potential father and not within the thirty (30) days, as mandated by A.R.S. §8-106, *Cox v. Ponce*, 251 Ariz. 302 (2021). This issue was not litigated by the trial court and this issue was preserved by Adoption Choices. This ground for termination, A.R.S. §8-533(B)(5), was dismissed without prejudice. (Index 56). See March 25, 2022, Adoption Choices of Arizona’s Third Amended Petition. (Index 52, pgs. 4-7, ¶15-26). (Index 56).

Therefore, this statement/finding should not be made by the Court of Appeals as it will possibly become the law of the case if the case is remanded.

CONCLUSION

The Court of Appeals’ failed to recognize or cite *Frank R. v. Mother Goose Adoptions*, 243 Ariz. 111, 402 P.3d 966 (2016), to be controlling herein, and mistakenly applied *David C. v. Alexis S.*, 240 Ariz. 53, 375 P.3d 945 (2016). The Petition for Review should be granted to correct this error and apply the holding in *Frank R.* to this case.

Furthermore, the Court of Appeals decision should not have found that D.I. had timely complied with A.R.S. §8-106(J) when he served his petition to establish paternity on the 31st day. This issue was not litigated and a separate ruling in the paternity case did not involve Adoption Choices nor counsel for the child. The Appellees preserved this issue to be litigated if the case is remanded to the trial court. (Index 56).

Dated this 30th day of May, 2024

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