

**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

APPELLANT FATHER'S SUPPLEMENTAL BRIEF

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ISSUE FOR REVIEW

Pursuant to Order of the Arizona Supreme Court dated 10/21/2024, the rephrased issue in this matter is:

In a termination of parental rights action, is a party listed by the mother as a potential father under [A.R.S. § 8-106\(F\)](#) and served with notice under [A.R.S. § 8-106\(G\)](#) still required to file notice of a claim of paternity with the putative fathers registry under [A.R.S. § 8-106.01](#)?

This brief is compliant with the Arizona Supreme Court’s admonition, “This order should not be construed as an invitation to repeat the contents of the Petition for Review, the Response, or any Reply.” ASC Minute Letter, October 15, 2024 (CV-24-0114-PR). Thus, Appellant asserts that his recitation of facts and procedural history and his arguments in his Opening and Reply Briefs filed in the Arizona Court of Appeals, Division 1 and his Response to Petition for Review in the above-captioned matter address the Issue for Review. Furthermore, Appellant asserts that the Court of Appeals Opinion correctly addresses the Issue for Review. This brief sets forth arguments to address the specific Issue for Review not set forth in the Court of Appeals Briefs, Response to Petition for Review, and Opinion.

Furthermore, Regarding the issues not decided by the Court of Appeals, if the Arizona Supreme Court reverses the Arizona Court of Appeals reversal of the Superior Court's termination of Appellant Father's parental rights, he respectfully requests, pursuant to Rule 23(m)(2), Ariz. R. Civ. App. P., that the Arizona

Supreme Court, “consider and decide those issues or remand the appeal to the Court of Appeals to decide them.”

SUPPLEMENTAL ARGUMENT

“Statutes should be construed sensibly to avoid reaching an absurd conclusion.” *See generally State ex rel. Montgomery v. Harris*, 237 Ariz. 98, 101 ¶ 13, 346 P.3d 984, 987 (2014). Courts review the interpretation of a statute *de novo*. *State v. Kearney*, 206 Ariz. 547, 549, ¶ 5, 81 P.3d 338, 340 (App.2003). “If a statute’s language is clear and unambiguous, Courts apply it without resorting to other methods of statutory interpretation.” *Hayes v. Cont’l Ins. Co.*, 178 Ariz. 264, 268, 872 P.2d 668, 672 (1994). However, if more than one plausible interpretation of a statute exists, Courts typically employ tools of statutory construction. *Id.* We consider the statute’s context, its language, subject matter and historical background, its effects and consequences, and its spirit and purpose. *Id.* The definitions of “putative father” and “potential father” are susceptible to interpretations. In such a circumstance, it is appropriate “to review the statute’s legislative history to find, if possible, any shared legislative understanding of the relevant language.” *Hayes*, 178 Ariz. at 269, 872 P.2d at 673 (1994).

A. Statutory Context

A party identified as a potential father and served with A.R.S. § 8-106(G) notice is not required to file a notice of claim of paternity because he is not a

putative father per the context of the statutory framework. Simply put, to hold otherwise extinguishes the statutory framework’s distinction between a putative father and a potential father. *David C. v. Alexis S.*, 240 Ariz. 53, 57, 375 P.3d 945, 949 (2016) harmonized the statutes creating the distinct definitions of putative and potential fathers,

[T]he registry requirement in A.R.S. § 8–106.01 supplements but does not supplant the provisions of the adoption statute, A.R.S. § 8–106. The two statutes provide different ways of recognizing fathers’ parental rights Section 8–106(G) provides notice when the mother identifies potential fathers, and § 8–106.01 is intended to provide notice when the putative father identifies himself. A potential father is entitled to notice under § 8–106(G) whether or not he registers with the putative fathers registry. A putative father must timely register . . . or he waives notice In either case, a father is entitled to bring an action to establish paternity if he does so within thirty days of the A.R.S. § 8–106(G) notice. This reading harmonizes A.R.S. §§ 8–106 and 8–106.01.

Simply put, [A.R.S. § 8-106](#) imposes duties on mothers to notify a man known to her as the father or possible father. This man is defined as a potential father. By contrast, [A.R.S. § 8–106.01](#) imposes duties on putative fathers because they are by definition men unknown to mother who believe they are the father. This harmonizing of the statutes creates the distinct definitions of “putative father” and “potential father”. Appellant Father was known to Mother. Appellant Father was not unknown to Mother.

The plain language of [A.R.S. § 8–533\(B\)\(6\)](#) is clear: it is only applicable to putative fathers who are obliged to identify themselves because the Mother does not or cannot. Title 8 of the Arizona Revised Statutes does not define “putative father” nor “potential father”. Therefore, it is unclear who precisely is a “putative father” to whom [A.R.S. § 8–533\(B\)\(6\)](#) is applicable without legislative definition. A harmonious reading statutes shows that [A.R.S. § 8–533\(B\)\(6\)](#) is a ground that can sustain termination of parental rights of a person who is or claims to be the father distinguished who is unknown to Mother.

[A.R.S. § 8–533\(B\)\(6\)](#), states in relevant part:

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). By plain reading, [A.R.S. § 8–533\(B\)\(6\)](#) is applicable only to a “putative father” and not any and all fathers, especially not potential fathers, who have their own procedural ground for termination of their rights and are distinguished from putative fathers within the statutory framework. [A.R.S. § 8–533\(B\)\(5\)](#).

Harmonizing the statutory framework to define “putative father” as an unknown and unidentified father obliged to register to preserve parental rights and to define “potential father” as a father known to a mother and served with [A.R.S. §](#)

8-106(G) notice avoids absurd results and is consistent with the constitutional history of putative father’s registries and the legislative understanding that putative fathers and potential fathers are distinct.

B. Subject Matter and Historical Background

Appellant Father herein is not a “putative father”. Any other reading of the statutory framework is also contrary to the constitutional history of the narrow holdings of the U.S. Supreme Court regarding the constitutionality of putative father’s registries as set forth in Appellant’s Opening Brief in the Arizona Court of Appeals, Division 1. O.B. 13-14.

The landmark U.S. Supreme Court case *Lehr v. Robertson* opens noting that the 1983 New York putative registry statutory framework clearly distinguished putative fathers from potential fathers.

In addition to the persons whose names are listed on the putative father registry, New York law requires that notice of an adoption proceeding be given to several other classes of possible fathers of children born out of wedlock . . . who have been identified as the father by the mother . . . [Lehr] admittedly was not a member of any of those classes.

463 U.S. 248, 251–52, 103 S. Ct. 2985, 2988, 77 L. Ed. 2d 614 (1983) (Emphasis added).

“When the plain text of a statute is clear and unambiguous,” it controls unless an absurdity or constitutional violation would result. *State v. Christian*, 205 Ariz. 64, 66 ¶ 6, 66 P.3d 1241, 1243 (2003). Statutes that are *in pari materia*

should be read together and harmonized. *David C.*, 240 Ariz. at 55, 375 P.3d at 947. §8-533(B)(5) and (B)(6) can only be harmonized consistent with substantive and procedural due process thus: §8-533(B)(5) is a procedural ground for §8-106 potential fathers served §8-106(G) notice and §8-533(B)(6) is a procedural ground for putative fathers, whom Mothers cannot identify who fail to identify themselves through the putative father's registry pursuant to §8-106.01. This reading of the statutory framework is consistent with the fountainhead case regarding putative fathers, *Lehr v. Robertson*.

Courts “must strive to give [statutes and rules] meanings that avoid serious constitutional issues.” *Brenda D. v. Dep't of Child Safety*, 243 Ariz. 437, 444, 410 P.3d 419, 426 (2018) (internal quotation marks omitted). Whenever a rule or procedure deprives a person of a liberty or property interest, its constitutionality must be measured against the procedural due process factors set forth in *Mathews v. Eldridge*, 424 U.S. 319, 334, 96 S.Ct. 893, 903 (1976): (1) the importance of the private interests affected by the proceeding, (2) the risk of error created by the state's chosen procedure, and (3) the countervailing government interest supporting the challenged procedure. *See Santosky v. Kramer*, 455 U.S. 745, 754, 102 S.Ct. 1388 (1982) (applying *Mathews* factors to determine the appropriate burden of proof in child termination cases). Applying, the *Mathew's* factors, the

Juvenile Court's application to Father of §8-533(B)(6) violated his right to due process and thus incorrect statutory interpretation.

Sixty-two days after the Child's birth, the procedural safeguards in §8-106 had protected all parties' private interests from erroneous deprivation because of Father's strict compliance to the statutory dictates as a §8-106 potential father. *Mathews*, 424 U.S. at 334, 96 S.Ct. at 903. Regarding government's interest, "The law favors rapid placement so that the child can bond with those who will be the legal parents and not with those from whom the child may be taken. This sound policy benefits the child, the natural parents, the prospective adoptive parents, and society." *Id.*; *see also Lehr*, 463 U.S. at 263, 103 S.Ct. 2985. Father's strict compliance with §8-106 within 62 days of the Child's birth likewise fulfills the government's interests in the statutory framework. In this case, court delays, Choices' wait-and-see attitude, possible bad faith litigation, and judicial misapplication of the law have been contrary to the underlying public policy of the statutory framework and contrary to the best interests of the Child.

In *Lehr*, the United States Supreme Court ruled that New York's "putative father registry" was only constitutional procedurally as a mechanism for due process **notification** to unknown, unidentified men. *See generally* [463 U.S. 248, 249, 103 S. Ct. 2985, 2987, 77 L. Ed. 2d 614](#). The Arizona Supreme Court harmonized §8-106 and §8-106.01 in *David C.* making clear that a due process

notification to potential fathers is inherent in §8-106(G). Furthermore, *David C.* holds that a potential father is not a putative father per *Lehr* and §8-106.01. *See statutory interpretation argument supra.*

The plain language of Arizona's termination statutes -533(B)(5) and -533(B)(6) have always recognized *Lehr's* distinction between putative and possible fathers. New York's possible fathers are identical to Arizona's static statutory class of potential fathers to whom only §8-533(B)(5) is applicable.

While the state may not unduly interfere with an unwed father's ability to develop this relationship, it need not protect the mere biological link that exists if the father fails to step forward.

Matter of Appeal in Pima Cnty. Juv. Severance Action No. S-114487, 179 Ariz. 86, 94, 876 P.2d 1121, 1129 (1994) (*quoting Lehr*). Regardless of how notified, timely filing a paternity case after A.R.S. § 8-106(G) notice is the statutory framework's means to establish more than a "mere biological link".

The Juvenile Court's statutory construction of the registry ground violates Father's procedural due process because it renders Father's strict compliance with §8-106 procedurally, substantively, and *de facto* meaningless.

C. Legislative History

When promulgating [A.R.S. § 8-533\(B\)\(6\)](#), the legislature clearly knew that a "putative father" was a person who is or claims to be a father without paternity and

that a “potential father” is someone who is identified by the Mother as someone who is or could be the father.

There are three categories of fathers recognized in adoption statutes. A *putative father* is a person who is or claims to be the father of the child but paternity has not been established. A *potential father* is a person who is or could be the father of the child according to the mother of the child but paternity has not been established. The *legal father* is the person who was married to the mother of the child at the time of conception or at any time between conception and the birth of the child, the person who has adopted the child or the person for whom paternity has been established by law.

Final Revised Senate Fact Sheet, S.B.1287, 45th Leg., 2d Reg. Sess. May 15, 2002 (Emphasis in Original). The legislature recognized the distinct definitions between “putative father” and “potential father” when it wrote the plain language of [A.R.S. § 8-533\(B\)\(6\)](#).

D. Effects and Consequences

If [A.R.S. § 8-533\(B\)\(6\)](#) is applicable to Appellant, a potential father provided [A.R.S. § 8-106\(G\)](#) notice, who timely filed and served a paternity suit on mother, then the legislature appears to have created a race to severance or establishment of paternity. However, paternity proceedings take precedence over all other civil matters including Title 8 matters. See *In re G.R.*, 255 Ariz. 444, 448, 532 P.3d 1180, 1184 (Ct. App. 2023); [Ariz. Rev. Stat. Ann. § 25-807](#). Therefore, the distinct definitions of “putative father” and “potential father” set forth above

have better effects and consequences than constructing the statutes to create a race to judgment that is barred under Arizona law.

A race to judgment is contrary to the orderly administration of justice. In Appellant's case, Adoption Choices moved the Family Court to stay the paternity case. The Family Court stayed the paternity case preventing Father from obtaining a Family Court order of paternity.¹ Choices then joined the non-colorable claims in Family Court with a request for stay of Father's paternity case creating a substantial court restriction to finalization of his paternity claim. The family court granted the stay of Appellant's paternity matter contrary to the law that paternity matters have precedence over all other matters. Statutory construction that creates a race to judgment encourages gamesmanship and non-colorable claims being presented in trial courts.

¹ The legal basis for the Motion to Stay is non-colorable. Choices requested stay pursuant to A.R.S. §8-202(F), "The orders of the Juvenile Court under the authority of this chapter or chapter 3 or 4 of this title 2 take precedence over any order of any other court." EX 20. Despite the plain language of the statute that juvenile orders take precedence over other court orders, Choices asserted to the Family Court, "the Juvenile Court proceeding takes precedence over this Family Court case and therefore, this case should be stayed." Choices' assertion cannot be true. Otherwise, parents in termination cases could stay their criminal cases, civil creditor suits, eviction proceedings, etc. Notably, pursuant to unequivocal statutory law, paternity proceedings take precedence over all other civil matters including Title 8 matters. *See In re G.R.*, 255 Ariz. 444, 448, 532 P.3d 1180, 1184 (Ct. App. 2023); Ariz. Rev. Stat. Ann. § 25-807.

E. Court of Appeals Opinion

Appellant hereby incorporates § II of the Court of Appeals Opinion in this matter and argues that because Father diligently pursuing his paternity case through to court ordered DNA testing with results demonstrating that he was 99.99% likely the Child's Father, he was no longer a putative father at the time the court granted summary judgment on the [A.R.S. § 8-533\(B\)\(6\)](#) procedural ground.

F. Critical Points for the Court's Consideration

In its termination order the Juvenile Court designates Father as a potential father. "Mother identified [Father] as a potential father of the child." IR 127 at 1. Nowhere in its Termination Order does the Juvenile Court make a finding that Father is a putative father, a specific finding required by the plain language of [A.R.S. § 8-533\(B\)\(6\)](#).

On 05/31/2022, in Juvenile Court, Father's newly appointed counsel on the eve of trial filed a Motion for Summary Judgment re: Paternity seeking a paternity order based on the Family Court DNA test. IR 90. On 07/26/2022, the Juvenile Court granted Father's Motion for Summary Judgment for an order of paternity

