

**ARIZONA SUPREME COURT**

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

No. CV-24-0114-PR

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

Coconino County Superior Court  
No. S0300SV202100003

**BRIEF OF AMICUS CURIAE CENTER FOR THE RIGHTS OF ABUSED  
CHILDREN IN SUPPORT OF APPELLANT FATHER**

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## STATEMENT OF INTEREST

The Center for the Rights of Abused Children works in legislatures and courtrooms nationwide to advance and protect the constitutional rights of abused and abandoned children. The Center has been instrumental in passing numerous legislative reforms in a bipartisan manner to protect children's rights, including landmark legislation in Arizona to guarantee independent, client-directed legal counsel for every child in foster care throughout their dependency proceedings. More recently, the Center shepherded a reform through Arizona's legislature requiring the Department of Child Safety to advise parents of their legal rights upon contact with the agency. And each year, through its Children's Law Clinic, the Center for the Rights of Abused Children provides *pro bono* legal assistance to hundreds of children and families involved in the foster care system, including direct representation and training regarding their legal and constitutional rights. This case implicates one of the Center's core missions: to ensure no child's natural right to a relationship with his or her fit parent is errantly terminated.

## INTRODUCTION

This case involves the termination of a man's parental rights for failure to file a notice of claim of paternity on the putative fathers registry after establishing paternity by genetic testing. This Court granted review on the following question:

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 a notice of claim of paternity with the putative fathers registry under A.R.S. § 8-106.01?

Docket 12. Although the answer to this question is no, the question itself is inapposite to the facts of this case. Here, Appellant Father established his paternity via genetic testing. Statutorily, this rendered him a 'presumed' father under Arizona's adoption code, rather than a 'putative' or 'potential' father. Being a statutorily presumed father afforded him a status below that of a person with a judicial determination of paternity, but above that of a person who falls into the statutorily established categories of either a putative or a potential father. Under Arizona's termination-of-parental-rights statute, a presumed father's parental rights cannot be terminated under the statutory grounds aimed at putative or potential fathers.

As such, this case presents this Court with the opportunity to correct the errant analysis it adopted in *Frank R. v. Mother Goose Adoptions*, 243 Ariz. 111 (2017). In *Mother Goose*, this Court held that the superior court could terminate a man's parental rights for failure to file a notice of claim of paternity on the putative fathers registry, under A.R.S. § 8-533(B)(6), even though he had established his paternity

via genetic testing. 243 Ariz. at 114, ¶ 12. That testing should have statutorily qualified him as a presumed father and not a putative father.<sup>1</sup> Because our Legislature has created three distinct statutory classes of men who may seek to establish paternity—and has applied different statutory termination grounds to each category—this Court should repudiate its analysis in *Mother Goose* and affirm the appellate court’s reversal of the order terminating Appellant Father’s rights under the putative fathers ground.

## ARGUMENT

**I. Once a man establishes paternity via genetic testing, he is a presumed father, not a putative or potential father. Therefore, he need not file a notice of claim of paternity on the putative fathers registry to avoid termination of his parental rights.**

Arizona’s adoption code recognizes three classes of men who have not yet fully established paternity, but may have some claim of paternity: putative, potential, and presumed. Arizona statutes establish these three classes of men in different ways, and each class has different rights and responsibilities to the child at issue. In the same vein, Arizona statutes prescribe different grounds to terminate the parental

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1. The father in *Mother Goose* should never have been considered a putative father because the mother in that case should have identified him as a potential father. It was mother’s subterfuge in fleeing to Arizona from California, switching adoption agencies, and hiding the father’s identify and demonstrated desire to know and raise his child (including instituting proceedings in California to establish paternity) that resulted in the confounding legal quandaries this Court confronted in *Mother Goose*. As the adage states, bad facts make bad law.

rights of men who have not fully established paternity. One ground explicitly covers putative fathers. A.R.S. § 8-533(B)(6). Another explicitly covers potential fathers. A.R.S. § 8-533(B)(5). The other ten grounds listed in A.R.S. § 8-533(B) cover presumed fathers (and fathers who have established court-recognized paternity). Through these statutes, our Legislature has expressed the State’s policy that, after genetic testing has shown a man is a child’s father, a court cannot terminate that man’s parental rights under the grounds applicable to putative or potential fathers, unless clear and convincing evidence rebuts his presumption of paternity.

“Although parents with an existing parental relationship, either in fact *or law*, are entitled to the highest constitutional protection, an unwed father must first take steps to establish a parent-child relationship before he may attain the same protection.” *In re Pima Cty. Juv. Severance Action No. S-114487*, 179 Ariz. 86, 93-94 (1994) (emphasis added). The U.S. Supreme Court has held it constitutional for a state not only to establish lower procedural safeguards to terminate the rights of a man who has not taken such steps, but also to create “several other classes of possible fathers of children born out of wedlock,” including “those who have been adjudicated to be the father,” and “those who have been identified as the father by the mother in a sworn written statement.” *Lehr v. Robertson*, 463 U.S. 248, 251 (1983).

**A. Arizona’s adoption statutes create three categories of men who may claim paternity.**

Arizona’s adoption statutes create or incorporate three classes of men who may seek to establish paternity. First, a “putative father” is statutorily defined as a “person who is seeking paternity, who wants to receive notice of adoption proceedings and who is the father or claims to be the father of a child” and who files a timely notice of a claim of paternity with the department of health services. A.R.S. § 8-106.01(A). Second, Arizona Revised Statutes § 8-106(F) defines a “potential father” as one identified by the mother in a notarized affidavit filed with the superior court in an adoption proceeding. Third is presumed fathers. Section 8-106 states that a court may not grant an adoption without the consent of any man who has established paternity “under title 25, chapter 6, article 1.” A.R.S. § 8-106(A)(2)(c). As relevant for this case, that article includes A.R.S. § 25-814, which says, “[a] man is presumed to be the father of the child if . . . [g]enetic testing affirms at least a ninety-five per cent probability of paternity.”

In summary, a putative father is one who self-identifies as possibly being the child’s father and who timely files a notice of a claim of paternity, a potential father is one whom the mother identifies as possibly being the child’s father by way of an affidavit, and a presumed father is one whom genetic testing has identified as being the child’s father.

**B. Each category has a different set of rights and responsibilities that correspond to the evidence required to establish a claim for paternity.**

Given that each of these categories is established by different evidence, from self-identification on a government form, to being identified by the mother in an affidavit, to establishing paternity by a genetic test, it follows logically that each of these categories correspond to a different level of rights and responsibilities. Putative fathers have almost no rights and must file with the putative fathers registry to preserve their claim of paternity. A.R.S. § 8-106.01(B). Potential fathers have a limited right to notice and to bring a cause of action to establish paternity. A.R.S. § 8-106(G), (J). Presumed fathers, however, are afforded the protections in Arizona’s parents’ bill of rights and have the corresponding responsibility to pay child support. *See* A.R.S. § 1-602(H) and A.R.S. § 25-817(A).

A putative father has a low burden to establish his paternity claim and accordingly has few rights. As this Court addressed in *Mother Goose*, a putative father must file a “notice of a claim of paternity,” which he may file before the child’s birth, but which he “shall” file “within thirty days after the birth of the child.” *Id.* at 115, ¶ 18 (quoting A.R.S. § 8-106.01(B)). Putative fathers who do not file a notice of a claim of paternity have no right to notice of adoption proceedings because “[t]he fact that the putative father had sexual intercourse with the mother is deemed to be notice to the putative father of the pregnancy.” A.R.S. § 8-106.01(F).

A potential father has a somewhat higher burden and accordingly has greater rights and responsibilities. A potential father is entitled to notice once a mother files a notarized affidavit in her child's adoption case identifying him as such. A.R.S. § 8-106(G). This notice of entitlement includes a notice of his rights to withhold consent to the adoption and to seek custody, and his "responsibility to initiate paternity proceedings." *Id.*; *see also* A.R.S. § 8-106(I). If a potential father fails to live up to this latter responsibility, he is no longer entitled to notice, and his consent to the adoption is no longer necessary. A.R.S. § 8-106(J).

Finally, the burden is highest to establish a presumption of paternity, and the presumed father thus has the greatest rights and responsibilities of any man who has not fully established paternity.<sup>2</sup> A presumed father has the right to contest the results

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2. The reasoning in *Mother Goose* is troubling for all presumed fathers. Under title 25, chapter 6, article 1, a man is presumed to be a child's father through three other means: 1) if he was married to the child's mother "at any time in the ten months immediately preceding the birth or the child is born within ten months after the marriage is terminated," A.R.S. § 25-814(A)(1); 2) if a "birth certificate is signed by the mother and father of a child born out of wedlock," *id.* at (A)(3); and 3) if a notarized or witnessed acknowledgment of paternity is signed by both parents, or if they each file a "substantially similar" acknowledgment, *id.* at (A)(4). It would be incongruous with statute, and fundamentally unfair, to terminate a father's rights for failure to file with the putative fathers registry after being listed on the child's birth certificate or after he and the mother signed a notarized affidavit establishing him as the child's father. But this is precisely what *Mother Goose* allows. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 170 (2012) ("A word or phrase is presumed to bear the same meaning throughout a text."). Just as genetic tests do not protect fathers from termination of their rights under (B)(6), nor do any of these other methods of establishing presumed paternity protect fathers. This offers endless opportunities for shenanigans and chicanery.

of a genetic test and to request subsequent genetic testing. A.R.S. § 25-816(C). A presumed father's written consent is necessary to give effect to any other man's acknowledgement of paternity. A.R.S. § 25-814(B). A presumed father must pay child support and may be awarded custody or parenting time. A.R.S. § 25-817(A). Importantly, once genetic testing has revealed that a man is a presumed father, he is entitled to the benefits of the parents' bill of rights. A.R.S. § 1-602(H) ("For the purposes of this section, 'parent' means the *natural* or adoptive parent or legal guardian of a minor child.") (emphasis added). All that awaits the presumed father is for a court to enter a judicial determination of paternity. A.R.S. § 25-814(C).

**C. Arizona's termination of parental rights statutes apply differently to each category.**

Recognizing that the Legislature established three categories of men who may assert paternity claims under Arizona's adoption code, however, does not answer the question of the applicable means of terminating their parental rights to facilitate timely and secure adoptions. Fortunately, the Legislature made this part easy: the termination statute contains one ground specifically for putative fathers, one ground specifically for potential fathers, and the rest apply to presumed fathers (and fathers who have established paternity).

The fact that all three levels are articulated within the adoption statutes is important. This Court recognized as much in *Mother Goose*:

[T]his 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 § 8-533(B)(6) on the independent ground that he failed to register with the putative fathers registry as § 8-106.01 requires.

243 Ariz. at 117, ¶ 28. Unfortunately, that analysis failed to get at the heart of the issue: § 8-533(B)(6) allows only for the termination of a *putative* father's rights. *See* A.R.S. § 8-533(B)(6) (permitting the superior court to terminate the rights of a merely putative father under the ground "[t]hat the putative father failed to file a notice of claim of paternity as prescribed in § 8-106.01."). And like Appellant Father here, the father in *Mother Goose* was not a putative father. He was a presumed father because he established paternity via genetic testing. 243 Ariz. at 114, ¶ 12. Section 8-533 also specifies termination grounds for potential fathers. The superior court may terminate the rights of a potential father under the ground "[t]hat the potential father failed to file a paternity action within thirty days of completion of service of notice as prescribed in § 8-106, subsection G." A.R.S. § 8-533(B)(5). This tracks neatly from the adoption statutes.

Important to this case, and to the unfortunate father in *Mother Goose*, is that the Legislature has not specified any ground by which the superior court may terminate a *presumed* father's rights for failure to comply with either § 8-106 or § 8-106.01. In *Mother Goose*, the father established his paternity by DNA testing over six months before his rights were terminated as a putative father. 243 Ariz. at

114, ¶¶ 11-14. Likewise, Appellant Father here established his paternity by a probability of 99.99% over five months before the juvenile court terminated his rights for failing to register as a putative father. *In re Termination of Parental Rights as to M.N.*, 1 CA-JV 22-0227 at \*3, ¶ 8 (Ariz. Ct. App. Apr. 30, 2024). Once Appellant Father established paternity by a genetic test of over 95% confidence, he became a presumed father. At that point, the (B)(5) and (B)(6) termination grounds, which only affect the rights of potential and putative fathers, no longer applied because he was no longer a *putative* or *potential* father. He was a *presumed* father.

Put another way, the results of the genetic testing created a legal presumption that Appellant Father was the father of the child at issue, M.N., and the petitioning party then had the burden to rebut that presumption by clear and convincing evidence. With the presumption intact, the juvenile court was not legally allowed to terminate his rights under either (B)(5) or (B)(6) because he had met a higher burden to establish his paternity and was accordingly entitled to a higher level of rights and responsibilities.<sup>3</sup> Of course, any of § 8-533's ten other grounds were available to sever Appellant Father's rights.

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3. Interestingly, the interplay of adoption and termination statutes appears to also require that an adoption case be filed and notice given to a potential father before a court may terminate a potential father's parental rights. *Compare* A.R.S. § 8-533(B)(5) (requiring completion of service pursuant to § 8-106(G)) *with* A.R.S. § 8-106(G) (requiring notice to be served on men who has been identified by mother in a notarized affidavit filed in an adoption action). It does not appear that an adoption case is a prerequisite to terminating either a putative or presumed father's rights.

To be sure, this amicus is aware of no statute or rule requiring the superior court to grant intervention to putative fathers, *see* Ariz. R.P. Juv. Ct. 113, or to order genetic testing for either putative or potential fathers before severing their rights under A.R.S. § 8-533(B)(5) or (6). Of course, the superior court may entertain requests for genetic testing within its inherent discretion, just as it did with Frank in *Mother Goose*. 243 Ariz. at 114, ¶ 11 (“The juvenile court appointed counsel for Frank at that hearing and, *at Frank’s request*, ordered a paternity test, which established him as E.E.’s father.”) (emphasis added). This amicus is only aware of one statute requiring a man to undergo genetic testing. A.R.S. § 25-816(A) (giving the power to the Arizona Department of Economic Security to help defray the government’s welfare burden under Title IV-D of the Social Security Act). But once the superior court exercises its discretion and orders or accepts genetic testing, a man identified as a child’s biological father then becomes a presumed father who clears the hurdles of A.R.S. § 8-533(B)(5) and (6) by definition.

\* \* \*

Given that the Legislature created three categories of men who may assert paternity under the adoption code, and established specific termination grounds affecting only the lower two of those three classes, if a man is, or becomes, a presumed father, whether by genetic testing or other means, it is legal error to terminate a presumed father’s rights under either (B)(5) or (B)(6). As such, the

termination of Appellant’s Father’s parental rights under (B)(6) must be reversed. Of course, this Court’s errant reasoning in *Mother Goose* permits termination of a presumed father’s rights under (B)(6) for failing to file with the putative fathers registry, which is why this Court must now reject its decision in *Mother Goose*.

**II. Accepting the above construction of Arizona’s statutory scheme leads to the inescapable conclusion that this Court wrongly decided *Frank R. v. Mother Goose Adoptions*.**

The fact that Appellant Father became a presumed father after the genetic testing and “no longer met the definition of a putative father or potential father” was readily apparent to the court of appeals. *In re Termination of Parental Rights as to M.N.*, 1 CA-JV 22-0227, \*4, ¶ 18 (Ariz. Ct. App. Apr. 30, 2024). So was the legal implication of that fact—namely that “the superior court erred by terminating his rights under A.R.S. § 8-533(B)(6).” *Id.* at \*4, ¶ 20. However, to reach this conclusion, the appellate court ignored this Court’s *Mother Goose* decision, which itself deviated from Arizona’s statutory scheme (as shown above). To justify its deviation from the plain language of Arizona’s statutes in *Mother Goose*, this Court reasoned that its application of the termination of parental rights statute to permit the severance of a presumed father’s rights under § 8-533(B)(6) was consistent with the Legislature’s stated goal of affording children with timely and secure adoptions. 243 Ariz. at 115, ¶ 22. But even there, this Court’s reasoning cannot be squared with Arizona’s statutes.

According to *Mother Goose*, the (B)(6) ground may be applied against presumed fathers because of the “legislative intent and the finality of adoptions,” 243 Ariz. 116, ¶ 25, at least regarding the thirty-day window for filing with the putative fathers registry. That reasoning, however, is not supported by Arizona’s statutory scheme. Arizona law allows adoptions to be attacked, either directly or collaterally, for up to one year (and *then* no further). A.R.S. § 8-123 (“After one year from the date the adoption decree is entered, any irregularity in the proceeding shall be deemed cured and the validity of the decree shall not thereafter be subject to attack on any such ground in any collateral or direct proceeding.”). This is a clear statement of Arizona’s policy regarding the balance between the finality of adoptions and the rights of biological parents. No father, whether putative, potential, or presumed, may attack the validity of any adoption decree after one year, no matter how heinous the reasons nor how malicious the fraud. *Mother Goose* gave no reason why its determination on this important policy matter should supersede the Legislature’s and, without some constitutionally sound reason, it should not.

Moreover, children possess a fundamental natural right to know and be raised by their fit biological parents. See Shanta Trivedi, *My Family Belongs to Me: A Child’s Constitutional Right to Family Integrity*, Harv. 56 C.R.-C.L.L. Rev. 267 (2021); see also Tim Keller, *Asserting, Arguing and Appealing the Constitutional Rights of Children in Foster Care*, Center for the Rights of Abused Children, 25-32

(2024) (collecting cases). The mothers in both this case and in *Mother Goose* sought to violate their children’s rights to know and be raised by their natural and fit fathers—who wanted to raise their children—through knowingly false statements. While children do need, and should have a recognized right to timely and secure adoptive placements when there is no fit and willing biological parent to care for the child, *see* Keller, *supra*, at 36-41 (collecting cases), children should not be denied their fundamental natural right to know and be raised by their fit and willing natural fathers as a result of an errant construction and application of Arizona’s adoption and termination-of-parental-rights statutes. This Court should disavow its *Mother Goose* decision and correct its prior misapplication of law.

### **CONCLUSION**

This Court should affirm the decision below and repudiate its opinion in *Mother Goose*.

Respectfully submitted this 19th day of November, 2024.

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## CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies this brief complies with Rule 16, ARCAP, and does not exceed 20 pages. Docket 9.

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## CERTIFICATE OF SERVICE

Undersigned counsel served a copy of the foregoing amicus brief upon the individuals listed below via e-mail this 19th day of November, 2024:

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