



**ARIZONA SUPREME COURT
ORAL ARGUMENT CASE SUMMARY**



**FRANK R. v. MOTHER GOOSE ADOPTIONS OF ARIZONA, INC.,
CV-16-0051-PR**

PARTIES:

Petitioner/Appellant: Frank R.

Respondent/Appellee: Mother Goose Adoptions of Arizona, Inc.

FACTS:

In the summer of 2013, eighteen-year-old Rachel E. and twenty-one-year-old Frank, both California residents, developed an intimate relationship and in early August learned Rachel was pregnant. Rachel and Frank lived near each other with their respective parents in California, but Rachel intermittently lived with Frank in his parents' home until she moved out permanently in November.

In December, Rachel contacted the Adoption Networks Law Center ("the Center"), an adoption law firm in California, to explore placing the expected child for adoption. Frank and his mother asked Frank's cousin, Alex Joaquin Saenz, a licensed patent attorney in California, to help him assert his parental rights to the child. Saenz testified at the severance hearing that he had contacted the Center in February 2014 and asked to speak to the caseworker on Frank's behalf, conveying that Frank "wanted to claim his right with respect to [Rachel's unborn child]." No one from the Center called him back, all of which Saenz confirmed in a letter to the Center.

Wendy McGreevy, an attorney with the Center, testified at the severance hearing that Rachel had contacted the Center in December 2013. A colleague subsequently asked McGreevy to contact Frank, the person Rachel had identified as the father. When McGreevy spoke to Frank on February 26, 2014, he told her that if the child was his, he would "100% take the baby and raise it." McGreevy therefore recommended that the Center decline working with Rachel because the father of the child was opposed to an adoption.

In March 2014, unbeknownst to Frank, Rachel and her mother called Mother Goose in Arizona and spoke to Deborah O'Kane, the Executive Director. They discussed placing the child for adoption and Rachel completed the requisite paperwork to begin the process. Both verbally and in forms she submitted, Rachel informed Mother Goose she had no idea who the father of

the child was, claiming she had sexual relations with numerous men during the relevant period. She did not tell Mother Goose about having contacted the Center in California, leaving blank a related question in the forms she submitted. Around this time, Rachel and her mother drove to Arizona and met with Mother Goose personnel as well as a physician.

Mother Goose sent Rachel profiles of potential adoptive parents and in April, when Rachel and her mother traveled to Arizona a second time, they met with a Mother Goose counselor and chose the specific adoptive parents she wanted to adopt her child. Mother Goose arranged and paid for accommodations for Rachel and her mother at a hotel in Phoenix while they waited for the birth of the child. Rachel signed an affidavit in which she stated that no man had acknowledged or claimed paternity of the child or had provided or promised to provide her support during the pregnancy, she did not intend to name any man on the birth certificate as the father, and there was no person she had reason to believe had an interest in the child.

On May 5, Rachel gave birth to E.E. The adoptive mother attended the birth and her husband arrived the following day. The adoptive parents are from Tennessee and had adopted another child through Mother Goose four years earlier. On May 8, three days after the birth of E.E., Rachel executed a Relinquishment of Parental Rights for Adoption, which provided that she relinquished her rights to Mother Goose and consented to its placement of E.E. for adoption. The following day, Frank asked Rachel about the baby through Facebook. Rachel responded that the child was African-American and was not his. That same day Frank again asked about the baby, asked Rachel where she had been, and said he was concerned about whether the baby was healthy and whether Rachel was taking care of the child. He also said, "And if it's mine, I'm gonna support the baby." Rachel did not tell him the baby had been born in Arizona.

Rachel and her mother returned to California on May 10. Mother Goose filed a petition for termination of parent-child relationship and appointment of guardian for the child on May 14 in Pima County Superior Court. The petition was verified by its counsel and included various exhibits, including an affidavit from Rachel avowing she did not know the identity of the father and no man had come forward expressing an interest in the child. At oral argument before this court, Mother Goose's counsel, whose firm also represented Mother Goose below, conceded there was no basis under A.R.S. § 12-401 for believing Pima County was an appropriate venue for filing the petition when the child was born in Maricopa County.

O'Kane testified at the severance hearing that she knew Rachel was a California resident who had traveled to Arizona for the sole purpose of placing her child for adoption and had returned to California at the time Mother Goose filed the petition. Nevertheless, Mother Goose alleged in the severance petition that Rachel resided in Arizona and listed her address as that of the hotel where Mother Goose had arranged for Rachel and her mother to stay while in Phoenix. Mother Goose further alleged it had custody of E.E. and that Rachel had relinquished her

parental rights to the child and consented to his adoption by the adoptive parents. *See* A.R.S. § 8-533(B)(7) (providing as ground for termination of parental rights parents' relinquishment of rights to agency or consent to adoption). Mother Goose alleged further that the identity of the child's father was unknown and sought to terminate Rachel's rights pursuant to § 8-533(B)(7) and the rights of any potential father pursuant to § 8-533(B)(5) on the ground that no person claiming to be the father had filed and served Rachel with a paternity action within thirty days of service of a notice to potential father pursuant to A.R.S. § 8-106(G). That notice, which is required in an adoption under § 8-106, was served by publication in Maricopa County, the final of three notices appearing on May 30, 2014. Mother Goose requested that the court appoint the prospective adoptive parents as guardians of the child, and vest legal custody in Mother Goose, pursuant to A.R.S. § 8-538(B)(2).

Mother Goose also initiated a referral pursuant to the Interstate Compact on the Placement of Children (ICPC), *see* A.R.S. § 8-548, requesting that the adoptive parents be permitted to leave Arizona with E.E. James O'Donnell, Arizona's ICPC administrator, processed that referral and sent O'Kane an email on May 13, stating it appeared from the information he had received from her that Rachel was a California resident and determination of which state had jurisdiction should begin there. O'Kane immediately responded that Rachel's father lived in California and falsely stated that her mother lived in Arizona and Rachel had come to Arizona to live with her mother and would "continue to split time between both parents." O'Donnell approved the ICPC request on May 13, and the adoptive parents left Arizona the next day with E.E. and returned to Tennessee. On July 30, 2014, the juvenile court terminated the parental rights of "John Doe" and relinquished jurisdiction to Tennessee pursuant to A.R.S. § 25-1032(A)(2), a provision of the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"). *See* A.R.S. §§ 25-1001 through 25-1067.

In the meantime, Frank had seen a photograph of E.E. on Facebook and believed the child looked like him. In Los Angeles Superior Court, he filed a Petition to Establish Parental Rights (the California petition) in early July 2014, and the court set a hearing on the petition for August 28. Rachel was served with the California petition at the end of July. Rachel's mother called O'Kane on July 30, told her about the paternity action, and sent a copy of the petition. When questioned about Rachel's actions at the severance hearing, O'Kane testified that Rachel had not told the truth when she claimed she had no idea who the father of the child was and when she signed the affidavit to that effect, committing perjury. O'Kane also admitted that by not completing a portion of Mother Goose's application that required Rachel to state whether she had sought the assistance of another adoption agency in her home state or another state, she essentially had "falsified" its records and failed to provide information.

On August 25, Mother Goose filed a motion in the juvenile court pursuant to Rule 60(c)(2), Ariz. R. Civ. P., requesting that the court set aside the July 30 order relinquishing

jurisdiction. It disclosed it had relied on a statement Rachel had provided in a sworn affidavit suggesting she did not know the identity of the father but that it had learned Frank was claiming an interest in E.E. Mother Goose asserted Tennessee could not proceed with an adoption until Frank's parental rights were terminated. It stated counsel for the adoptive parents had opined that, notwithstanding Arizona's initial relinquishment of its continuing jurisdiction for purposes of the adoption, Tennessee did not have jurisdiction to terminate Frank's parental rights. Accordingly, Mother Goose asked the court to reassert jurisdiction to permit it to file an amended petition to terminate Frank's rights. The court granted the motion that day.

On August 27, Mother Goose filed its first-amended petition, seeking to terminate Frank's parental rights under § 8-533(B)(6) on the ground he had failed to file a notice of claim of paternity within thirty days of E.E.'s birth, as required by § 8-106.01. Mother Goose failed to state in the amended petition that Frank had filed the California petition to establish his paternity; rather, it falsely avowed there were no other related proceedings in any jurisdiction and again alleged as Rachel's address the address of the hotel where she and her mother had stayed in Arizona.

On August 28, when Frank appeared for the initial hearing on the California petition, he was served with a motion filed by Rachel through counsel, requesting an order quashing the California proceeding based on the allegation that Arizona was E.E.'s "home state" for purposes of the UCCJEA. *See* Cal. Fam. Code §§ 3421 (setting forth when California has jurisdiction to make initial custody determination), 3422 (identifying when court loses jurisdiction); *see generally* Cal. Fam. Code §§ 3400 through 3465. It was then that Frank first learned E.E. was born in Arizona and that Mother Goose had filed a petition to terminate his parental rights in Arizona the day before. On September 26, Mother Goose filed a motion in the juvenile court in Arizona, asking the court to confer with the California court and retain jurisdiction under the UCCJEA. It argued Arizona had been E.E.'s home state when the proceedings began, *see* § 25-1031, it had made a custody determination, and Mother Goose, the agency with legal custody of E.E., retained strong connections to Arizona, *see* § 25-1032. The court set the motion for hearing on October 8.

Frank called the juvenile court in Arizona on September 15 and, when court staff returned the call on September 18, he learned attorney Scott Myers represented Mother Goose. That day Frank's mother spoke with Myers, who confirmed Mother Goose had filed a petition to terminate Frank's parental rights. Also on September 18, Frank was served with the first-amended petition to terminate parental rights and to appoint a guardian that Mother Goose had filed on August 27.

On October 2, Frank received from Myers a copy of Mother Goose's jurisdiction motion and a notice that the motion would be heard on October 8. Frank traveled to Arizona and filed a pro se response to the first-amended petition on October 6 and attended the hearing on October

8. At that hearing, the juvenile court appointed counsel to represent Frank and ordered genetic testing to determine paternity, which Frank had requested in his response. The court granted the motion to retain jurisdiction and agreed to confer with the California court. On November 4, the court held the UCCJEA hearing, during which the two judges conferred telephonically. The California court set a hearing for December 10, after which it deferred jurisdiction to Arizona and dismissed the California petition. The juvenile court conducted the initial severance hearing on December 11.

On February 6, 2015, Mother Goose filed a second-amended petition, which added abandonment as a ground for terminating Frank's rights. And, with respect to its prior allegation that Frank had failed to file a notice of paternity within thirty days of the child's birth, the second-amended petition added, "or within 30 days after it became possible for him to file," stating in its motion to amend the petition that it was clarifying the previously alleged ground. Once again Mother Goose listed the Arizona hotel address as Rachel's address. Mother Goose also alleged falsely that the identity of the father was unknown and that Frank "may be the father of the child," even though deoxyribonucleic acid (DNA) test results contained in a report dated October 28, 2014, established Frank was E.E.'s father.

The severance hearing took place over six days between February 27 and April 28. On March 24, about a month before the last day of the hearing, Frank filed an ex parte motion in the severance proceeding seeking to establish paternity and incorporating A.R.S. § 25-814(A)(2) (paternity presumed where "[g]enetic testing affirms at least a ninety-five per cent probability of paternity"). He also apparently filed a separate special paternity action under Title 25. During the fourth day of the severance hearing, the court consolidated the two actions "for hearing purposes." The juvenile court also entered an order finding Frank was E.E.'s father. Frank was present for each day of the severance hearing.

In June 2015, the juvenile court terminated Frank's parental rights. In its 35-page under-advisement ruling, the court found Mother Goose had not sustained its burden of establishing Frank had abandoned E.E. The court found Rachel's conduct was deceitful and designed to prevent Frank from asserting his parental rights and found O'Kane's statements regarding the ICPC referral had been "false and misleading." Nevertheless, the court terminated Frank's parental rights pursuant to § 8-533(B)(6), finding Frank had not filed a notice of claim of paternity at all, much less within thirty days of when it had become possible for him to do so, which was, at the earliest on September 27, thirty days after he first learned on August 28 that E.E. was born in Arizona, and at the latest, on November 7, thirty days after the court appointed counsel to represent him on October 8. The court concluded termination of Frank's rights was in E.E.'s best interest. Frank's appeal and Mother Goose's cross-appeal, which it has withdrawn, followed. In his appeal, Frank argued application of the registry to him was unconstitutional because he and E.E.'s mother are California residents and, as a result of her deceptive acts and

false statements in an affidavit and to appellee Mother Goose, he did not know she had given birth to E.E. in Arizona and had consented to the child's adoption. He also challenged the court's finding that termination of his rights was in E.E.'s best interest.

In an opinion filed February 10, 2016, the court of appeals affirmed. The court reviewed de novo the juvenile court's interpretation and application of A.R.S. § 8-533(B)(6). In the end, the court "reluctantly" held that the juvenile court correctly applied § 8-533(B)(6) in terminating Frank's parental rights because "Frank did not file a notice of paternity with the registry at any point, much less within thirty days after he had actual notice of the child's birth in Arizona. Despite their improper conduct, neither Rachel nor Mother Goose prevented Frank from filing a notice of paternity within thirty days after August 28, that is, by September 27 at the earliest or within thirty days of October 8, which was November 7, at the latest; that was Frank's decision. The primary deception had already occurred by the time the thirty-day-period commenced for purposes of the impossibility exception. As the juvenile court correctly found, '[t]he deceitful acts of the mother do not void the duty of the unwed father to strictly comply with registration The father had the ability to register notwithstanding the mother's fraudulent practices and chose not to do so.'" Op. ¶ 48.

Importantly, the court distinguished *Marco C. v. Sean C.*, 218 Ariz. 216, ¶¶ 9, 10, 181 P.3d 1137, 1140-41 (App. 2008) (requirements of A.R.S. § 8-106.01 must be strictly observed), a case relied upon by the juvenile court, and *David C. v. Alexis S.*, 238 Ariz. 174, ¶¶ 16-21, 358 P.3d 595, 599 (App. 2015) (where father has timely filed paternity action, compliance with § 8-106.01 is unnecessary; "the putative fathers registry supplements and does not supplant a father's right to pursue a paternity action"), explaining as follows:

The decision by another division of this court in *David C.*, on which Frank relies in his reply brief, does not persuade us we must reach a different conclusion here. That case, unlike this one, involved an appeal from the juvenile court's grant of the putative father's motion to set aside an adoption. 238 Ariz. 174, ¶ 1, 358 P.3d at 596. The juvenile court in that case had granted the putative father's motion because although the father had not filed a notice of claim of paternity under § 8-106.01, he had filed and served the mother with a paternity action under title 25 within thirty days of the § 8-106(G) notice, which was served by publication. *Id.* ¶¶ 9, 10. The court concluded "the putative fathers registry supplements and does not supplant a father's right to pursue a paternity action." *Id.* ¶ 16. The court distinguished *Marco C.* based on the fact that in that case, the father had not timely served the mother with the paternity action and, therefore, the outcome in that case would have been the same without regard to the waiver provision of § 8-106.01(E). *Id.* ¶ 21. The court added, in any event, "we respectfully disagree with the reasoning of *Marco C.* insofar as it holds that filing with the putative fathers registry is a necessary precondition in all cases in which a father asserts his parental rights." *Id.* ¶ 21.

Op. ¶ 52. Similarly, the court noted that the reasoning of *David C.* does not apply in the context of a severance under § 8-533(B)(6). Op. ¶ 43 n. 14.

In dissent, Judge Eckerstrom agreed with the majority's restatement of the law with one exception:

The majority and the trial court have correctly found that Frank could not have possibly complied with Arizona's requirement that he register as a putative father until, at the earliest, August 28, 2014. Both conclude, however, that his failure to file a notice of paternity pursuant to A.R.S. § 8-106.01 thereafter constituted a lawful ground to terminate his parental rights pursuant to A.R.S. § 8-533(B)(6). *Supra* ¶¶ 49-51. But by that time, when Frank's intention to assert his paternity had been unequivocally demonstrated through a motion in California court, and when Mother Goose had moved in an Arizona court to terminate Frank's parental rights, any § 8-106.01 filing would have served no purpose whatsoever. At that stage in the proceedings, our legislature could not have intended that a putative father perform a futile and superfluous act to preserve his fundamental right to parent. *See Stanley v. Illinois*, 405 U.S. 645, 651 (1972).

Op. ¶ 68. Relying in part on the court of appeals' opinion in *David C.*, *supra*, Judge Eckerstrom concluded that "[t]o require strict compliance under the circumstances here would transform § 8-106.01 into nothing more than a 'pitfall for the unwary.'" *Nielson v. Patterson*, 204 Ariz. 530, ¶ 13, 65 P.3d 911, 914 (2003)." Op. ¶ 72.

Frank filed his petition for review on March 2, 2016, and Mother Goose filed its response on April 4. Since then, this Court granted review in *David C.*, *supra*, and vacated the opinion of the court of appeals. *See David C., Kim C. v. Alexis S., A.C.*, 240 Ariz. 53, 58 ¶ 26, 375 P.3d 945, 950 (2016) (concluding that "[a] father who timely files a paternity action within thirty days of service by publication of the A.R.S. § 8-106(G) notice and timely serves that action on the mother is not precluded from establishing paternity and does not waive his right to contest the child's adoption, merely because he did not file a claim of paternity under the putative fathers registry statute, A.R.S. § 8-106.01").

ISSUE PRESENTED FOR REVIEW:

Should a father's failure to file a superfluous notice of paternity under A.R.S. § 8-106.01, after litigation has commenced with full notice to all parties and each of the statute's legislative purposes already achieved or previously defeated by the unconscionable actions of the adoption agency, lawfully constitute grounds for terminating his parental rights?

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