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STATE OF MICHIGAN

COURT OF APPEALS

In re BABY BOY DOE, Minor.

FOR PUBLICATION
January 25, 2024
9:00 a.m.

No. 366773
Livingston Circuit Court
Family Division
LC No. 2023-016519-NB

Before: GARRETT, P.J., and LETICA and MALDONADO, JJ.

GARRETT, P.J.

The Safe Delivery of Newborns Law (SDNL), MCL 712.1 *et seq*., provides a legal framework for adjudicating the rights of parents when a newborn baby has been surrendered. In this case, Baby Boy Doe ("the child") was surrendered by his mother and placed with prospective adoptive parents by appellant, Bethany Christian Services (BCS). Petitioner, the child's nonsurrendering father, sought custody under the SDNL. Ultimately, the trial court determined that petitioner was the child's legal father but that it was not in the child's best interests to grant custody to petitioner. The court ordered BCS to petition for jurisdiction in a child-protective proceeding under the juvenile code, MCL 712A.1 *et seq*., in an effort to terminate petitioner's parental rights.

BCS argues that the trial court erred by determining that petitioner was the child's legal father and asserts that it is impossible for the court to obtain jurisdiction and terminate petitioner's parental rights under the juvenile code. We conclude that the SDNL outlines procedures for determining legal parenthood, and the trial court properly complied with those procedures to find that petitioner was the child's legal father. The juvenile code also does not pose the barriers that BCS alleges. We therefore affirm.

I. FACTUAL BACKGROUND

On January 2, 2023, the child was born and surrendered by his mother at the hospital. The child's mother listed the child's father as "Unknown." BCS, a child-placing agency, petitioned to place the child with prospective adoptive parents. Soon after, petitioner appeared at the hospital, asked about the child, and learned about the SDNL. He then petitioned for custody of the child. Petitioner attended initial court proceedings and submitted to DNA testing, which established a

99.99% probability that he was the child's father. Petitioner moved for summary disposition on the issue of paternity, and without objection from BCS, the court granted the motion.[1] The court found that petitioner was "not only the biological father, but the legal father here today." The court issued an "Order Determining Maternity/Paternity of Surrendered Newborn Child"—the relevant form approved by Michigan's State Court Administrative Office (SCAO)—and checked the box finding that petitioner was the child's "biological father." The form included no language about a "legal father."

Petitioner soon stopped participating in the proceedings and failed to appear at a custody hearing. After considering the SDNL's enumerated best-interest factors, the trial court found that it would not be in the child's best interests to grant custody to petitioner. Reviewing the relevant SCAO form for a custody order under the SDNL, the trial court expressed concern that the form conflicted with the court's statutory options. Ultimately, the trial court altered the form to order BCS to petition for jurisdiction in a child-protective proceeding under MCL 712A.2(b).

BCS moved for reconsideration, arguing that proceeding under that statute would be futile. BCS instead asked the trial court to dismiss the custody petition so that it could move to terminate petitioner's parental rights under the Michigan Adoption Code, MCL 710.21 *et seq*. At a hearing on the motion, BCS also argued that petitioner was not the child's legal father but only a "biological father." The trial court disagreed, concluding that its order determining paternity under the SDNL rendered petitioner the child's legal father. The court also believed it had only one option after the custody hearing—to order BCS to petition for jurisdiction over the child under the juvenile code in order to seek termination of petitioner's parental rights. The court therefore denied the motion for reconsideration.

BCS now appeals.

II. LEGAL BACKGROUND

The SDNL is a rarely litigated but vital statute. At its core, the law "encourages parents of unwanted newborns to deliver them to emergency service providers instead of abandoning them." *In re Miller*, 322 Mich App 497, 502; 912 NW2d 872 (2018) (cleaned up). The SDNL distinguishes between surrendering and nonsurrendering parents.

Relevant here, the SDNL provides a statutory framework for determining paternity of a nonsurrendering parent, and if applicable, granting custody of a newborn to that parent. The process typically begins after a newborn has been surrendered by a parent at the hospital. See MCL 712.3(1). "The SDNL allows a parent to surrender a newborn within 72 hours of birth." *In*

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[1] After petitioner confirmed that he wanted to move for summary disposition and wanted the court to find that he was the child's biological and legal father, BCS initially suggested that the court follow the procedures under MCR 2.116, which would require scheduling a hearing date and setting a briefing schedule. See MCR 2.116(G)(1). The court questioned the purpose of delaying the proceedings when BCS did not object to a finding of paternity. After further back-and-forth, BCS agreed that it was "not going to object to moving forward on the summary disposition," so the court moved forward with the motion from petitioner.

re Baby Boy Doe, 509 Mich 1056, 1058 (2022) (cleaned up). After surrender, the child-placing agency assumes responsibility of the newborn, MCL 712.7(a), and then temporarily places the newborn with an approved prospective adoptive parent, MCL 712.7(c). The agency must also "make reasonable efforts to identify, locate, and provide notice of the surrender of the newborn to the nonsurrendering parent." MCL 712.7(f). Within 28 days of published notice of the newborn's surrender, "an individual claiming to be the nonsurrendering parent of that newborn may file a petition with the court for custody." MCL 712.10(1).

If a nonsurrendering father files a petition, the court must determine paternity before holding a custody hearing. MCL 712.10(3). The first step in determining paternity is to order DNA testing. MCL 712.11(1). "If the probability of paternity" proven by the testing is "99% or higher and the DNA identification profile and summary report are admissible, paternity . . . is presumed and the petitioner may move for summary disposition on the issue of paternity . . . ." MCL 712.11(3). But if DNA testing reveals that the petitioner is not the newborn's parent, "the court shall dismiss the petition for custody." MCL 712.11(5).

"[I]f paternity . . . 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.' " *Baby Boy Doe*, 509 Mich at 1059, quoting MCL 712.14(1). The court must consider a list of best-interest factors when making its decision. MCL 712.14(1) and (2). Based on the court's findings, the court may issue an order that does one of the following:

> (a) Grants legal or physical custody, or both, of the newborn to the parent and either retains or relinquishes jurisdiction.
>
> (b) Determines that the best interests of the newborn are not served by granting custody to the petitioner parent and orders the child placing agency to petition the court for jurisdiction under [MCL 712A.2(b)].
>
> (c) Dismisses the petition. [MCL 712.15.]

With that legal framework in mind, we turn to BCS's arguments.

III. PRESERVATION AND STANDARD OF REVIEW

We begin with a brief point about issue preservation. In civil cases, under the "raise or waive" rule of appellate review, a litigant must generally preserve an issue for appellate review by raising it before the trial court. *Tolas Oil & Gas Exploration Co v Bach Servs & Mfg, LLC*, ___ Mich App ___, ___; ___ NW2d ___ (2023) (Docket No. 359090); slip op at 2. This holding, however, "does not apply to termination of parental rights cases, which present different constitutional considerations." *Id.* at ___ n 3; slip op at 5 n 3. In appeals from child-protective proceedings, our appellate courts have applied the plain-error standard adopted in *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). See, e.g., *In re Ferranti*, 504 Mich 1, 29; 934 NW2d 610 (2019); *In re Utrera*, 281 Mich App 1, 8; 761 NW2d 253 (2008). Although SDNL proceedings involve a determination of parental rights and implicate similar constitutional considerations as termination of parental rights cases, our Supreme Court has suggested that the

"raise or waive" rule applies in SDNL cases. See *Baby Boy Doe*, 509 Mich at 1060 n 6 (favorably citing the "raise or waive" rule and declining to consider a constitutional argument that was neither properly preserved nor presented to the Court).

We decline to resolve whether the "raise or waive" rule or plain-error review applies in this case. Even in "raise or waive" cases, we "may overlook preservation requirements if the failure to consider the issue would result in manifest injustice, if consideration is necessary for a proper determination of the case, or if the issue involves a question of law and the facts necessary for its resolution have been presented." *Tolas Oil*, ___ Mich App at ___; slip op at 3 (cleaned up). Assuming that BCS failed to properly preserve its arguments below, we exercise our discretion to consider them on appeal because they present questions of law and the necessary facts are matters of record. See *id.*[2] Specifically, this case involves several important issues of statutory interpretation, which we review de novo. *Miller*, 322 Mich App at 501. That means we review the issues independently, with no required deference to the trial court. *Ferranti*, 504 Mich at 14. "The primary goal of statutory interpretation is to effectuate the Legislature's intent." *Miller*, 322 Mich App at 501. "We do so by applying the statute as written if it is unambiguous." *Id.*

IV. WHETHER PETITIONER WAS A LEGAL FATHER

BCS contends that the trial court erred by concluding that petitioner was the child's legal father. BCS asserts that the SDNL contains no mechanism to establish legal parenthood and suggests that the Paternity Act, MCL 722.730 *et seq.*, is the sole statutory process for determining legal paternity.

In this case, the trial court followed the framework of the SDNL to make a paternity determination. After petitioner filed a timely custody petition claiming to be the newborn's nonsurrendering father, the trial court ordered DNA testing, which established a 99.99% probability of paternity. At a subsequent hearing, BCS did not object to these results or their admissibility, so petitioner's paternity became presumed. See MCL 712.11(3). The court proceeded with an oral motion for summary disposition made by petitioner on the issue of

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[2] We also do not interpret BCS's inconsistent representations to the trial court as an affirmative waiver that extinguishes any error on appeal. See *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000) (distinguishing forfeiture—a failure to timely object—from waiver—the "intentional relinquishment or abandonment of a known right"). For instance, when the trial court said that it would order BCS to petition for jurisdiction under the juvenile code, BCS initially confirmed that it would so. But BCS also acknowledged inconsistencies between the statute and the SCAO form and stated, "There's so little case law on this statute that we'll proceed safely." BCS investigated its options further after the hearing and then moved for reconsideration to argue that it could not proceed under the juvenile code. At the reconsideration hearing, the trial court recognized the difficulty of the issues, acknowledged it could be wrong, and suggested that BCS take them up on appeal. Therefore, considering the dearth of caselaw on the SDNL and the unusual circumstances in this case, we do not believe that BCS intentionally abandoned any of its arguments by comments it made to the trial court. See *id*.

paternity. The court granted the motion and found that petitioner was "not only the biological father, but the legal father here today."

We conclude that the trial court correctly found that petitioner was the child's legal father under the provisions of the SDNL. First, BCS ignores the fact that the trial court granted summary disposition for petitioner on the issue of paternity.[3] Again, the SDNL provides that paternity is "presumed" based on high-probability DNA testing, and then "the petitioner may move for summary disposition on the issue of paternity . . . ." MCL 712.11(3). The most logical understanding of this provision is that the presumption becomes a definitive finding of legal paternity if the petitioner moves for and obtains summary disposition. This interpretation accords with principles of statutory interpretation, which require that we give effect to every word of the statute and "avoid a construction that would render any part of the statute surplusage or nugatory." *Empire Iron Mining Partnership v Tilden Twp*, 337 Mich App 579, 586; 977 NW2d 128 (2021) (cleaned up). BCS argues that the SDNL provides no mechanism to establish legal fatherhood and that under the law, "a DNA test merely establishes biological fatherhood of the surrendered child." Therefore, in BCS's view, moving for summary disposition under MCL 712.11(3) is neither necessary to establish biological paternity nor sufficient to establish legal paternity. This interpretation fails to give meaning to the statute's summary disposition provision. Simply put, nothing in the plain language of the SDNL suggests that summary disposition under MCL 712.11(3) establishes the petitioner's paternity merely as a biological matter rather than a legal one. The trial court followed the statutory procedures under the SDNL and did not err when it determined that petitioner was the child's legal father.

Second, we are unpersuaded by BCS's argument that petitioner could not establish legal fatherhood because he did not file a paternity action under the Paternity Act. Petitioner was pursuing a custody action under the SDNL, not a paternity action under the Paternity Act. As part of petitioner's SDNL filing, the trial court had to determine that petitioner was the child's parent, so it followed the procedures outlined in the SDNL to make that finding. Requiring a petitioner to file a separate action under the Paternity Act would be duplicative of the SDNL. The Paternity Act provides that the court "shall enter an order of filiation declaring paternity" under several circumstances, including when "[g]enetic testing under section 6 [MCL 722.716] determines that the man is the father." MCL 722.717(1)(d). Section 6, in turn, provides that, if DNA testing establishes a 99% or higher probability of paternity, and the DNA test results are admissible, "paternity is established." MCL 722.716(5). Therefore, the SDNL actually contains an extra requirement that the Paternity Act does not—moving for summary disposition—and that additional step turns the presumption of paternity into a finding of legal parenthood. See MCL 712.11(3). The Paternity Act used to provide that paternity was merely "presumed" upon conclusive DNA testing and included a similar provision about summary disposition. MCL 722.716(5) and (6), as amended by 2000 PA 31. But with the enactment of 2014 PA 364, "presumed" was changed to "established" and the language about summary disposition was

[3] At the hearing on BCS's motion for reconsideration, BCS erroneously argued to the court that petitioner had not moved for summary disposition on paternity.

eliminated. MCL 722.716(5) and (6).[4] In sum, the SDNL's procedures for determining paternity are comparable or identical to those of the Paternity Act in several respects. We therefore reject BCS's position that only the Paternity Act provides the statutory mechanism for a nonsurrendering father to establish legal parenthood.

Third, BCS's understanding of the statutory scheme is unworkable in practical terms. In BCS's view, MCL 712.11(3) establishes only whether a petitioner is a biological parent, allowing the trial court to then determine custody at a best-interest hearing. But following this custody hearing, one of the options available to the trial court is issuing an order "[g]rant[ing] legal or physical custody, or both, of the newborn" to the petitioner-parent. MCL 712.15(a). If the SDNL contained no mechanism to establish legal parenthood, then how could the trial court grant legal custody of a surrendered child to a petitioner? Only a legal parent can hold legal custody of a child. See *In re Long*, 326 Mich App 455, 464; 927 NW2d 724 (2018) (explaining that a putative father has no legal obligation to a child). BCS's interpretation is untenable and inconsistent with the SDNL.

Finally, BCS emphasizes that the SCAO form for an order determining paternity under the SDNL uses the term "biological father." In this case, therefore, the trial court checked the box finding that petitioner was the biological father of the surrendered newborn child. BCS's reliance on the SCAO form is unpersuasive. SCAO forms are not binding authority. *In re Guardianship of Malloy*, 343 Mich App 548, 564; 997 NW2d 733 (2022). Thus, if SCAO's interpretation of a statute conflicts with the statute's plain language, we follow the statute. See *id*. The SCAO form at issue, CCFD 04a, was revised in June 2022 and cites MCL 712.10(3) and MCL 712.11. Neither statutory provision uses the term "biological father," nor does the SDNL anywhere reference a "biological" parent. As discussed, the SDNL provides that paternity is "presumed" if DNA testing establishes a 99% of higher probability of parent, and then "the petitioner may move for summary disposition on the issue of paternity . . . ." MCL 712.11(3). Taken together, these provisions allow a trial court to make a finding of legal paternity without requiring additional actions. Thus, despite the language of the SCAO form, the trial court followed the statutory procedures under the SDNL and correctly determined that petitioner was the child's legal father.

V. TERMINATION UNDER THE JUVENILE CODE

BCS also argues that it would be impossible to proceed to terminate petitioner's parental rights under the juvenile code. BCS claims that the trial court should have instead dismissed the petition so that it could move forward under the Adoption Code.

First, we can easily dispense with BCS's argument that the trial court could not assume jurisdiction under MCL 712A.2b of the juvenile code because petitioner is merely the child's putative father. See *Long*, 326 Mich App at 464 (explaining that a putative parent is not a "parent"

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[4] BCS erroneously relies on caselaw citing the outdated version of the Paternity Act, see *In re Moiles*, 303 Mich App 59, 67; 840 NW2d 790 (2013), rev'd in part, vacated in part on other grounds 495 Mich 944 (2014), to argue that DNA testing merely creates a presumption of paternity under the Paternity Act.

for the purposes of exercising jurisdiction under the juvenile code); MCL 712B.3(s) ("Parent does not include the putative father if paternity has not been acknowledged or established."). As discussed, the trial court correctly determined that petitioner was the child's legal parent, not merely a putative parent. For that reason, the jurisdictional obstacle alleged by BCS is not present.

Next, BCS contends that, even if the trial court could take jurisdiction over the child, the juvenile code is still a "dead end" to terminate petitioner's parental rights. BCS's argument relies on MCL 712A.19b(1):

> Except as provided in subsection (4), *if a child remains in foster care* in the temporary custody of the court following a review hearing under section 19(3) of this chapter or a permanency planning hearing under section 19a of this chapter or *if a child remains in the custody of a guardian or limited guardian*, upon petition of the prosecuting attorney . . . or petition of the child, guardian, custodian, concerned person, agency, or children's ombudsman . . . , the court shall hold a hearing to determine if the parental rights to a child should be terminated and, if all parental rights to the child are terminated, the child placed in permanent custody of the court. [Emphasis added.]

BCS contends that § 19b renders it impossible to seek termination because the child is neither placed in foster care nor a guardianship.[5]

This Court has expressly rejected BCS's assumed interpretation of § 19b(1). See *In re Medina*, 317 Mich App 219, 228-236; 894 NW2d 653 (2016). In *Medina*, 317 Mich at 232, we reaffirmed this Court's decision in *In re Marin*, 198 Mich App 560; 499 NW2d 400 (1993). *Marin* interpreted § 19b(1) and held that "it is not necessary that the child be in foster care in order for the termination petition to be entertained." *Marin*, 198 Mich App at 568.[6] The Court explained that, although § 19b(1) "mandates that the [trial] court hold a termination hearing upon a petition where the child remains in foster care," it does not "otherwise limit[] the conditions under which a petition to terminate parental rights may be entertained by the court." *Id*. "That is, while the court is obligated to hold a hearing regarding a petition to terminate parental rights where the child remains in foster care, that does not imply that its authority to conduct a hearing within its discretion regarding a petition where the child does not remain in foster care is otherwise limited." *Id*.

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[5] "Foster care" is defined as "care provided to a juvenile in a foster family home, foster family group home, or child caring institution licensed or approved under 1973 PA 116, MCL 722.111 to 722.128, or care provided to a juvenile in a relative's home under a court order." MCL 712A.13a(e). None of these terms or circumstances, some of which are further defined, cover a child placed with a prospective adoptive family. We therefore agree with BCS that the child in this case is not living in foster care.

[6] Although *Marin* interpreted a now-former version of § 19b(1), the relevant language as interpreted by *Marin* is identical to the current version of § 19b(1).

Medina held that *Marin* was controlling as to the interpretation of § 19b(1) and correctly decided. *Medina*, 317 Mich App at 230. Therefore, this Court in *Medina* rejected the respondent's argument that "§ 19b(1) should be construed to *require* removal and placement with a foster parent or guardian as a condition precedent for termination." *Id*. at 234. Interpreting the statute in this way, the Court continued, would "do violence to the best interests of our state and many of its children" because it would impose "a blanket rule requiring removal in *all* termination cases." *Id*. While *Medina* did not involve a scenario where the child was placed with prospective adoptive parents, its reasoning applies here. Properly interpreted, § 19b(1) does not preclude BCS from seeking termination of petitioner's parental rights. The trial court maintains discretion to hold a termination hearing where, as in this case, the child is in the custody of prospective adoptive parents. See *Marin*, 198 Mich App at 568.[7]

Finally, BCS complains that the trial court improperly altered the SCAO form for an order determining custody of a surrendered newborn child. According to BCS, the trial court should have instead dismissed the petition and allowed BCS to seek termination under the Adoption Code.

The relevant SCAO form, to be entered after a custody hearing under the SDNL, reads as follows:

IT IS ORDERED:

☐ 11. The petition for change of custody is dismissed/denied.

☐ 12. The petition for change of custody is granted and ________ (Name(s)), the ________ (mother or father or both) shall have ☐ legal ☐ physical custody of the newborn child. Custody shall be transferred from the ☐ child-placing agency ☐ prospective adoptive parent(s) as follows:

____

____

Court jurisdiction ☐ shall continue until ________ (Date). ☐ is relinquished.

☐ 13. The parental rights of ________ (Name(s) of parent(s)) are terminated.

☐ Custody and care of the newborn child is granted to ________, a child-placing agency. The prior court order dated ________ that authorizes placement of the surrendered newborn child with the prospective adoptive parent(s) is continued.

In relevant part, the trial court altered the form in paragraph 13 by crossing out "terminated" and writing, "The parental rights of [petitioner] are to be determined under section 2(b) of chapter XIIA [MCL 712A.2b] upon the filing of a petition."

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[7] Another option for BCS, if other statutory requirements are met, is to seek termination at the initial dispositional hearing. See MCL 712A.19b(4) ("If a petition to terminate the parental rights to a child is filed, the court may enter an order terminating parental rights under subsection (3) at the initial dispositional hearing."). As we noted in *Medina*, 317 Mich App at 234-235, "§ 19b(4) empowers trial courts to entertain a termination petition at the initial dispositional hearing regardless of whether the minor child is placed in foster care or with a guardian."

The court correctly declined to follow the language of the SCAO form indicating that it could immediately terminate petitioner's parental rights when the SDNL did not allow it to do so.[8] As noted, following the court's findings at a custody hearing under MCL 712.14, the court may issue an order that does one of the following:

> (a) Grants legal or physical custody, or both, of the newborn to the parent and either retains or relinquishes jurisdiction.
>
> (b) Determines that the best interests of the newborn are not served by granting custody to the petitioner parent and orders the child placing agency to petition the court for jurisdiction under [MCL 712A.2(b)].
>
> (c) Dismisses the petition. [MCL 712.15.]

None of these options authorize immediate termination of parental rights when a parent has petitioned for custody under the SDNL.[9] Only subsection (b) refers to a determination that granting custody to the parent is *contrary* to the child's best interests, stating that the court may then "order[] the child placing agency to petition the court for jurisdiction . . . ." MCL 712.15(b). That's what happened in this case, so the trial court had to enter an order consistent with subsection (b). Thus, the trial court did not err by declining to dismiss the petition under subsection (c). Subsection (b) was the only operative provision under these circumstances.

Because the trial court correctly applied subsection (b), it could not ignore the provision's plain language and order BCS to proceed under the Adoption Code. Additionally, as BCS itself notes, the Adoption Code applies to cases involving the parental rights of *putative* fathers. MCL 710.37. For instance, the Adoption Code allows for the termination of parental rights of "[p]utative fathers who have established no custodial relationship with the child, and who have provided no support for the mother or child . . . ." *In re Barlow*, 404 Mich 216, 229; 273 NW2d 35 (1978). Thus, even if MCL 712.15(b) imposed no obstacle, BCS would not have been able to petition to terminate petitioner's rights under the Adoption Code after the trial court determined that petitioner was the child's legal father.

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[8] We urge SCAO to review the forms it provides to trial courts to adjudicate cases under the SDNL to ensure these forms are harmonious with the statute. Specifically, SCAO should update the forms that we, and the trial court, have identified as containing language that is inconsistent with the SDNL.

[9] The trial court may immediately move to terminate parental rights only if no custody petition has been filed. MCL 712.17.

VI. CONCLUSION

The trial court correctly applied and interpreted the SDNL to the circumstances of this case. First, the court did not err by determining that petitioner was the child's legal father. Second, the court did not err by ordering BCS to petition for jurisdiction under the juvenile code to seek termination of petitioner's parental rights. For these reasons, we affirm the trial court's order determining custody of the child.

/s/ Kristina Robinson Garrett
/s/ Anica Letica
/s/ Allie Greenleaf Maldonado