

Furthermore, absent a contractual agreement, the substance of village ordinances and regulations would not relate to matters for which the county would be liable, and as a consequence the responsibility for the enforcement of the same would lie with the village president, 1895 PA 3; MCLA 67.2; MSA 5.1244; the village marshal, 1895 PA 3; MCLA 67.13; MSA 5.1255; or the village police force, 1895 PA 3; MCLA 67.44; MSA 5.1328.

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ADOPTION OF CHILDREN: Notice to putative father

When the mother of an expected child executes a release of her rights to her child in anticipation of placing the child for adoption upon its birth, the putative father is entitled to notice. If, however, the putative father's identity is not known or his whereabouts cannot be determined, it is not necessary to publish notice of the adoption as such publication is unlikely to reach the father and would not be in the best interest of the child or the mother.

Opinion No. 4942

April 7, 1976.

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As civil counsel for the County of Kent, and upon inquiry from the judges of the probate court of that county, you have asked me whether the Michigan Adoption Code, 1974 PA 296, MCLA 710.21 *et seq*; MSA 27.3178(555.21) *et seq*, requires notice by publication when the mother of an expected child executes a release of her rights to the child in anticipation of placing the child for adoption upon its birth and when personal service of notice of such release cannot be made on the putative father.

The statute requires notice to be given the putative father before his rights may be terminated when his identity is known, or, if his identity is unknown, when his whereabouts can be determined. 1974 PA 296, § 34, 36; MCLA 710.34, 710.36; MSA 27.3178(555.24), 27.3178 (555.36). In such cases notice is to be served under existing state statutes, and nothing short of personal service, or in appropriate cases service by mail, will suffice. *Mullane v Central Hanover Bank & Trust Co*, 339 US 306; 70 S Ct 652; 94 L Ed 865 (1950).

The problem is in giving notice to a putative father when his identity is not known, or when his identity is known but his whereabouts cannot be determined. In such cases 1974 PA 296, § 37, MCLA 710.37; MSA 27.3178(555.37), provides that his rights may be terminated as follows:

"(2) If the identity of the father cannot be determined, or if the identity of the father is known but his whereabouts cannot be determined, the court shall take evidence to determine the facts in the

matter. The court may terminate the rights of the putative father if the court finds from the evidence that *reasonable effort* has been made to identify and locate the father and that any of the following circumstances exist:

(a) The putative father, whose identity is not known, has not made provision for the child's care and did not provide support for the mother during her pregnancy or during her confinement.

(b) The putative father, whose identity is known but whose whereabouts are unknown, has not provided support for the mother; has not shown any interest in the child, and has not made provision for the child's care, for at least 90 days preceding the hearing required under section 36." MCLA 710.37; MSA 27.3178(555.37) (emphasis supplied.)

Thus, the question you have asked requires a determination of what is "reasonable effort."

The case law defines "reasonable effort" and diligence as such effort and diligence as men would ordinarily exercise to protect their own rights and interests. *Springett v Colerick*, 67 Mich 362; 34 NW 683 (1887). It is not necessarily the most expedient means, nor the wisest or best, but that which is fit and appropriate to the end in view and which is adopted in good faith for that purpose. *Parkes v Judge of Records Court*, 236 Mich 460; 210 NW 492 (1926); *Bonnett v Vallier*, 136 Wis 193; 116 NW 885 (1908). What is fit and appropriate to protect one's own best interests involves essentially the same considerations as a due process analysis.

In *Stanley v Illinois*, 405 US 645; 92 S Ct 1208; 31 L Ed 2d 551 (1972), the court held in a custody contest that the putative father had substantial rights which needed protection and that due process required that he be afforded a hearing on the question of his fitness. While *Stanley, supra*, was decided on the issue of custody, it has consistently been interpreted as extending to parental rights in adoption. See, e.g., *State ex rel Lewis v Lutheran Social Services*, 47 Wis 2d 460; 178 NW2d 56 (1970), *vacated sub nom, Rothstein v Lutheran Social Services*, 405 US 1051; 92 S Ct 1488; 31 L Ed 2d 786 (1972), *on remand*, 59 Wis 2d 1; 207 NW2d 826 (1973); *Vanderlaan v Vanderlaan*, 405 US 1051; 92 S Ct 1488; 31 L Ed 2d 787 (1972), *vacating*, 126 Ill App 2d 410; 262 NE2d 717 (1970), *on remand*, 9 Ill App 3d 260; 292 NE2d 145 (1972); *People ex rel Slawek v Covenant Children's Home*, 52 Ill 2d 20; 284 NE2d 291 (1972).

Although the court in *Stanley, supra*, 657 n 9, seemed to indicate that notice to an unknown father in the style of "All Whom It May Concern" would fulfill the requirements of due process, it is not clear that it is mandatory. Such a scheme fails to take into account the rights of the mother and the best interests of the child. If account of these interests is properly taken, then notice by publication is not available as a process, because publicity must be avoided to the fullest possible extent in adoption proceedings. *In re Adoption of a Minor*, 115 F2d 870 (CA DC, 1946). Service by publication would be meaningless to the putative father unless it contained the name of the mother or child. *Grannis v Ordean*, 234 US 385; 34 S Ct 779; 58 L Ed 1363 (1913). This would be contrary to the basic aims of the

adoption process. Confidentiality is its cornerstone, and publication would have an adverse effect on the sensibilities of the parties involved. Furthermore, publication is unlikely to give actual notice to an unknown or missing putative father. It would be an empty formality; an obstacle which is not meant to exist. *Catholic Charities of the Archdiocese of Dubuque v Zalesky*, ... Iowa ...; 232 NW2d 539 (1975); Cf., *Mullane, supra*, 313-314; *Stanley, supra*, 657 n 9.

The requirements of due process are not technical. *Inland Empire Council v Millis*, 325 US 697; 65 S Ct 1316; 89 L Ed 1877 (1945). The courts have made it clear that due process is an amorphous concept. *Hannah v Larche*, 363 US 420; 80 S Ct 1502; 4 L Ed 1307 (1960). Commenting upon *Mullane, supra*, the court in *Walker v City of Hutchinson*, 352 US 112, 115-116; 77 S Ct 200; 1 L Ed 2d 178 (1956), said:

“We there called attention to the impossibility of setting up rigid formula as to the kind of notice that must be given; notice required will vary with circumstances and conditions. We recognized that in some cases it might not be reasonably possible to give personal notice, for example where people are missing or unknown.”

Therefore, the form of notice required to comply with due process under the fourteenth amendment varies according to specific factual context, the nature of the right involved, the nature of the proceeding and the possible burden on that proceeding. *Goldberg v Kelly*, 397 US 254; 90 S Ct 1011; 25 L Ed 2d 287 (1970); *Cafeteria Workers v McElroy*, 367 US 886; 81 S Ct 1743; 6 L Ed 2d 1230 (1961); *Hannah v Larche, supra*. Essentially, this is a balancing process, where the interests of society are weighed against the interests of the parties. *Board of Regents v Roth*, 408 US 564; 92 S Ct 2701; 33 L Ed 2d 548 (1972); *Boddie v Connecticut*, 401 US 371; 91 S Ct 780; 28 L Ed 2d 113 (1971). Where the interests of the unknown father compared to the possibility of injury to the mother and child are unequal, the father's interest should be subordinated. *Catholic Charities, supra*.

This view is consistent with the legislative intent as determined by accepted canons of statutory construction. See, e.g., *In re School Dist No 6*, 284 Mich 132; 278 NW 792 (1938); *Commissioner of Insurance v American Life Ins Co*, 290 Mich 33; 287 NW 368 (1939); *Crawford v School Dist No 6*, 342 Mich 564; 70 NW2d 789 (1955). Repealed 1939 PA 288, § 3a, MCLA 710.3a; MSA 27.3178 (543a), expressly provided for publication and its specific contents. However, in enacting the new law the legislature never once mentioned publication. It appears, therefore, that the present statute was intended to remain flexible; allowing for publication when the court felt it necessary, but not mandating it. This view is also consistent with the statutory placement of the responsibility for notification in the hands of the court rather than the petitioning party.

In answer to your question, it is my opinion that the Adoption Code itself requires no publication in the situation described at the outset of this discussion when the identity of the putative father is unknown or when his identity is known but his whereabouts cannot be determined. However,

notice may be required as a matter of due process when, under appropriate circumstances, the possible injury to the interests of the mother and child are outweighed by the father's interest in preserving his rights.

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CONSTITUTION OF MICHIGAN: Art 5, § 28

HIGHWAYS AND ROADS: Jurisdiction of State Highway Commission

Jurisdiction and control over tourist information centers appurtenant to state trunkline highways may not be transferred from the Department of State Highways and Transportation to the Department of Commerce.

Opinion No. 4962

April 8, 1976.

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This is in response to your request for my opinion as to whether Highway Funds can be used for administration and staffing of Tourist Information Centers if they were transferred to the jurisdiction of the Travel Commission.

In your letter you state that you have introduced House Bill No. 5752 which would transfer, by a type II transfer, the administration and operation of the Tourist Information Centers, now under the jurisdiction of the Department of State Highways and Transportation, to the Michigan Travel Commission within the Department of Commerce.

The State Highway Commission is a constitutional body. It was established by Const 1963, art 5, § 28 which in part reads:

"There is hereby established a state highway commission, which shall administer the state highway department and have jurisdiction and control over all state trunkline highways and *appurtenant facilities*, and such other public works of the state, as provided by law." (Emphasis supplied)

The above-quoted constitutional provision established the Department of State Highways and Transportation and gives the Commission jurisdiction and control of all state trunkline highways and appurtenant facilities. In OAG 1971-1972, No 4713, pp 3, 4 (January 20, 1971) states with respect to Const 1963, art 5, § 28:

"The language is unambiguous and expresses the mandate that only the State Highway Commission shall administer the highway department and exercise control over state trunkline highways and appurtenant facilities. . . .

"The scheme is so plain as to leave no doubt that the legislature is thus limited in respect of its power over the highway commission as