MICHIGAN SUPREME COURT

IN THE MATTER OF SANDERS MINORS

Supreme Ct No: 146680
Ct of Appeal No: 313385
Trial Ct No: 11-2828 NA

Department of Human Services,
Petitioner/Appellee

v

Lance Laird,
Father/Appellant

and

Tammy Sanders,
Respondent/Appellee

ON APPEAL FROM
JACKSON COUNTY CIRCUIT COURT – FAMILY DIVISION
Hon. Richard N. LaFlamme, Presiding

BRIEF OF AMICUS CURIAE CHILDREN'S LAW SECTION OF THE STATE BAR OF MICHIGAN

Dated: October 30, 2013

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INTRODUCTION

The Children's Law Section of the State Bar of Michigan ("CLS") is governed by the nineteen elected members of the Children's Law Council. The CLS is comprised of approximately 438 legal professionals practicing in the area of juvenile law. The Children's Law Section gratefully accepts the invitation of this Court to file an amicus brief on a controversial procedure for the last twelve years in child protection cases. This is a practice called the one-parent doctrine, a common-law doctrine created in 2002 by the Michigan Court of Appeals in *In re CR,* 250 Mich App 185, 202-203, 205; 646 NW2d 506 (2001). The court called the doctrine an "alternative process", *Id* at 203, and "variations on what would otherwise be a fairly uncomplicated procedural progression from petition, to adjudication, to disposition, to family reunification or termination if necessary." *Id* at 202. Eleven years later, the one-parent doctrine is routinely used and sometimes abused.

Other states have considered one-parent doctrine issues. Like Michigan, some states allow a court to take jurisdiction through one parent to secure authority to protect the child. Something unique to the states of Michigan and Ohio are that children are allowed to be taken into custody, and placed into foster care, without an actual adjudication and finding of parental unfitness against both parents. In Michigan, the doctrine articulated in *In re CR* eliminated the right to trial for the second parent. *Id* at 203. Although *In re CR* did not address custody, in trial practice the doctrine has been extended to deprive a non-offending parent of custody. Now Michigan practice is what the Ohio supreme court adopted: "When a juvenile court adjudicates a child to be abused, neglected or dependent, it has no duty to make a separate finding at the dispositional hearing that a non-custodial parent is unsuitable before awarding legal custody to a non-parent." *In re CR*, 842 NE 2d 1188,1192 (Ohio 2006) (4-3 decision). If Michigan discards

or limits the one-parent doctrine, "Ohio stands alone among the states in drawing no constitutional line at all... [by] granting no protection to the fit parent." Angela Greene, *The Crab Fisherman and His Children: A Constitutional Compass for the Non-Offending Parent in Child Protection Cases"*, 24 Alas L R 173, 181, 198 (2007).

The case of *Stanley v Illinois* is the leading child welfare case that is in direct contrast to the holding in Michigan's *In re CR*. In *Stanley v Illinois*, 405 US 645 (1972), the Court focused on the constitutional rights of parents in proceedings between the state and the family. The case holds that the there must be a showing of parental unfitness before a court can take a child from a parent. 405 US at 649, 658

This Court has long recognized the competing interests at stake in a child protection case, which are reflected in the above state and federal precedents. The agency and court need authority to act in its *parens patriae* authority to ensure swift decisions in the best interest of children, while still being mindful of parental constitutional rights. "The power of parental control, through recognized as a natural right and protected when properly exercised, is by no means an inalienable one." *In re Gould,* 174 Mich 663, 669-670; 140 NW 1013 (1913). "Parental authority is subordinated to the supreme authority of the State", *id,* when there is "a powerful countervailing interest, protection ." *DHS v Miller, 433* Mich 331, 346; 445 NW2d 161 (1989).

The Children's Law Section decided it can best serve as a Friend of the Court by advising the Court on the existing state law on adjudication trials and placement of the child, the procedures affected by a law change. If the Court rules in favor of the appellant, the CLS urges the court to use existing state law to formulate the general rules for non-offending parents and the specific remedies that it provides the appellant.

ARGUMENT

I. THE COURT SHOULD DECLINE TO DECIDE ISSUES NOT PRESENTED BY THESE FACTS

The Children's Law Section has concerns about the Court ruling on issues that are not properly before the court for decision. There are several topics related to the one-parent doctrine issues raised by the parties and amici, which are not suitable for appellate review in this case.

Jurisdiction One concern is that the ruling could abolish the use of one parent's adjudication to establish court jurisdiction. This procedure is not challenged by the appellant. Acquiring state custody and jurisdiction through one parent—or no parent—is essential to provide emergency protective custody and other court actions to protect a child when no parent is available, willing, or identified, such as for orphans, foundlings, wandering toddlers, and crime scene bystanders.

Trials and Verdicts A requirement for adjudication of both parents could require double trials and create a risk of inconsistent verdicts. Whether the adjudication is by two trials, or one trial with separate verdicts, if only one parent wins the trial, this could provoke a dispute about the court's jurisdictional authority to take legal custody of the child.. According to cases cited by the appellant and other amici, some states dismiss the child protection case if one fit parent is available, either based on the state's statutory scheme or the Constitution. In Michigan, the procedure for duplicate trials and split verdicts should be left to the Legislature, court rules, or future cases, because the issue is not present on these facts. Only one parent, appellant father Laird, wants a trial.

Late Parents Frequently, one parent is not involved until later in the case; usually this is a father. Whatever the cause of this late arrival, having to provide a tardy or absent parent full

rights for an adjudication trial and custody at this stage is problematic. It can delay permanency for the child and require the child to move to another home, conceivably to the home of a parent who is a stranger to the child. There are statutes and court rules dealing with this situation that have not been briefed. Fortunately, this problem is not presented by the facts of this case--Mr. Laird having been involved with his children and the court case from day one—which allows the Court to defer ruling on what the process is due for tardy parents.

Case Service Plans for Non-Offending Parent Although briefed by the parties and other amici, the CLS declines to brief the issues about case service plans for non-offending parents. The question of this exercise of the court's dispositional authority to order a service plan for the non-offending parent, and the resulting impact on the termination decision, is complicated and controversial. [1] The issue is not ripe because the appellant's parental rights have not been terminated at all, much less for non-compliance with a service plan. *See Mich Chiropractic Council v Comm'sr Off of Fin & Ins Servs,* 475 Mich 363 Mich 363, 378-382; 715 NW2d 822 (2006) (ripeness focuses on the "timing of the action" and avoids decisions on "hypothetical injury" based on undeveloped facts). Also, there is a better case pending in this Court to decide the legality of this prevalent practice. It is a parental termination case in which the service-plan termination issue had been preserved and decided by the Court of Appeals. *In re Farris,* Supreme Ct Docket No 147636, *lv filed* (8-26-13), unpublished per curiam opinion of the Court of Appeal, issued Aug 8, 2013 (Docket No 311967) (Shapiro, J, dissenting). The CLS urges the court to grant leave in that case rather than address the issue in this case.

[1] There are reasonable differences on the trial court's authority based on possibly conflicting constitutional dictates and state law, including MCL 712A.6; MCL 712A.18 (1); MCL 712A.18f (4); MCR 3.973 (A), (F)(3); and *DHS v Macomber,* 436 Mich 386; 461 NW2d 671 (1990).

Adjudication Required for Termination Another issue that is not raised in this case is this holding of *In re CR*: "the family court's failure to hold an adjudication with respect to Richardson did not bar it from proceeding to terminate his parental rights." 250 Mich App at 203 Other state law is unclear on this issue, *see* MCR 3.977 (E)(2), and it is not ripe for decision in the pre-termination context of this case.

II. IF THE COURT DECIDES BOTH PARENTS HAVE A RIGHT TO A FITNESS HEARING, AN ADJUDCIATION TRIAL IS THE PROCEDURAL REMEDY FOR RESPONDENTS

A. An Adjudication Trial Is the Only Fitness Hearing Before the State Takes Jurisdiction

Stanley v Illinois held that "as a matter of due process of law, Stanley was entitled to a hearing on his fitness as a parent before his children were taken from him[.]" 405 US at 649. This holding was reiterated on page 658: All parents "are constitutionally entitled to a hearing on their fitness before their children are removed from their custody." In Michigan, an adjudication trial is the only procedure that satisfies this due process requirement.

The adjudication trial is the proceeding for making fact-findings about the fitness of a respondent parent before a court takes jurisdiction over the child. MCR 3.972 (A); MCR 3.903 (A)(27) (" 'Trial' means the fact-finding adjudication of an authorized petition to determine if the minor comes within the jurisdiction of the court."); *DSS v Brock,* 442 Mich 101, 108-109, 111; 499 NW2d 21 (1993); *In re Hatcher,* 443 Mich 426, 433, 435; 505 NW2d 834 (1983); *Fritts v Krugh,* 354 Mich 97, 110; 92 NW2d 606 (1958) ("It is necessary first to determine the jurisdictional facts[.]).

The adjudication trial satisfies the *Stanley* fitness hearing requirement because it is a fact-finding procedure focusing on whether the parent or the child's home is currently fit. A child

protection case is not just about obtaining court jurisdiction of a child. A child protection trial determines parental fitness. The question being tried is whether a respondent committed an offense against a child, as defined by the jurisdiction statute, MCL 712A.2 (b). MCR 3.903 (C)(7), (10); *In re Hatcher,* 443 Mich 426, 435; 505 NW2d 834 (1993) (at the adjudicative phase "the court weighs the evidence to determine whether the child is neglected"); *Harmsen v Fizzell,* 351 Mich 86, 92; 87 NW2d 161 (1957) (petition is based on parental failures that constitute child neglect). The offense is charged in a petition, which is "a complaint or other written allegation...that a parent...has harmed or failed to properly care for a child" MCR 3.903 (A)(20). The petition must contain "the essential facts that constitute an offense against the child under the Juvenile Code." MCR 3.961 (B)(3); *see also* MCL 712A.11 (3). An adjudication "is a trial on the merits of the allegations in the petition". *In re AMB,* 248 Mich App 144, 176; 640 NW2d 262 (2001); MCR 3.903 (A)(27). At the trial "the verdict must be whether one or more of the statutory grounds alleged in the petition have been proven" by a preponderance of the evidence. MCR 3.972 (C)(1), (E)

B. The Right to Jury Trial Applies

The law is clear that a respondent can demand a jury trial, if the demand is timely. MCL 712A.17 (2); MCR 3.911 (A), (B); MCR 3.965 (B)(7). Contrary to the assertions of appellee DHS and amicus PAAM, trial by jury is a constitutional right in this civil case. Mich Const, art I, § 14; art IV, § 44. "For the jury, the issue of fact [is] neglect.....Inasmuch as a jury trial is specifically authorized by a statute, when a jury is employed its use is limited to the conventional jury function, that of fact finding." *In re Mathers,* 371 Mich 516, 531, 532; 124 NW2d 878 (1963).

C. Disposition Procedures Are Not a Substitute For an Adjudication Trial

The argument that disposition procedures are an adequate substitute for an adjudication trial started in the decade prior to the ruling in *In re CR.* [2] The earliest known use of this defense to thwart an adjudication trial is in the *Lemmer* case from Clinton County, which is discussed in section I (D) below. In the present case this argument has been advanced by the appellee DHS and two amici. [3] The reasoning is that the disposition phase also determines parental fitness, and so it is an acceptable due process alternative to an adjudication trial for the co-respondent. The procedures cited by its advocates include: notice and opportunity to be heard at all hearings; court appointed attorney; a case service plan for both parents; hearings on rehabilitation progress; permanency decision based on a fitness finding; a termination proceeding requiring higher standards of proof and evidence admissibility for an unadjudicated parent; and the right to counsel at the termination hearing.

Offering disposition procedures in the Juvenile Code and court rules as an adequate substitute for an adjudication trial is erroneous for several reasons.

First, there is no authority in state law supporting that argument. There is no statute or court rule creating any exception to the right to trial. The advocates of this position have "created this new standard out of thin air." *Hunter v Hunter,* 484 Mich 247, 272; 771 NW2d 694 (2009).

Second, the dispositional phase is not a substitute for the adjudicative phase because there is a "clear distinction" between them. *In re Jacobs,* 433 Mich 24, 36, n 12; 444 NW2d 789 (1989); *accord DHS v Cox,* 269 Mich App 533, 536-537; 711 NW2d 426 (2006) ("Child

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[2] *CR* hints at the disposition procedures-as-substitute rationale. *See CR* at 205-206 (admissible evidence at termination), 208 (participation and counsel at hearings), 209 (notice of termination charges). It has not been fully developed in a published case since then.

[3] Br AT 3-4,10 (appellant had multiple "meaningful" hearings); Br Juv App Clinic 12-16, 25; Br Pros Attys Assoc of Mich 13-14.

protective proceedings have long been divided into two distinct phases; the adjudicative and the dispositional phase."). In the adjudicative phase there is "a determination of whether statutory grounds exist for juvenile court jurisdiction." In the disposition phase there are hearings "to determine what action, if any, should be taken with respect to the child." *People v Gates,* 434 Mich 146, 152; 452 NW2d 627 (1990); *accord* MCR 3.972 (E); MCR 3.973 (A)

Third, eliminating the adjudication trial creates a risk of error about parental fitness. The procedures of an adjudication trial, especially the burden of proof and admissible evidence, reduce that risk. *Santosky v Kramer,* 455 US 745, 75, n 9 (1982) ("[T]he standard of proof is a crucial component of legal process, the primary function of which is to minimize the risk of erroneous decisions"); *Stanley v Illinois,* 405 US 645, 657 (1972) ("Procedure by presumption is always cheaper and easier than individualized determination" but it "needlessly risks running roughshod over the important interests of both parent and child"); *DSS v Brock,* 442 Mich 101, 111; 499 NW2d 21 (1993) ("The procedures used in adjudicative hearings protect the parents from risk of erroneous deprivation of this [liberty] interest."). A mistake about parental unfitness has familial and safety implications for the child. *Santosky* at 760-761; *Stanley,* 405 US at 652 ("[T]he state registers no gain towards its declared goals when it separates children from the custody of fit parents."); *DHS v Brock, supra,* at 113, n 19 ("An error in the fact-finding hearing that results in a failure to terminate a parent-child relationship which rightfully should be terminated may well detrimentally affect the child."). Thus, the lack of adjudication findings for both parents can cause over-protection from innocent parents and under-protection from unsafe parents. An adjudication verdict identifies parental problems, informs the services needed to fix them, and at the disposition phase becomes both substantive evidence of unfitness and a gauge

for making permanency decisions. *See In re JK,* 468 Mich 202, 214; 661 NW2d 216 (2003); MCL 712A.19a (5). [4]

Fourth, the United States Supreme Court rejected a similar legal argument, which offered the statutory "package" of procedures to satisfy a due process deficit in the fact-finding phase of a child protection case. *Santosky, supra* at 757, n 9. [5]

D. This Court Should Decide the Precedential Value of a 1995 Peremptory Order on the Identical Issues

In 1995, seven years before *CR* was decided, this Court ruled on the question of whether a parent is entitled to an adjudication trial after the other parent pled to the petition. *In re Lemmer*, 449 Mich 894 (1995), *prior appeal on other grounds,* 191 Mich App 253; 477 NW2d 503 (1991). In *Lemmer* this Court denied the co-respondent father an adjudication trial after the mother pled. The remand order required an advisory jury on the termination grounds, with legally admissible evidence and a preponderance standard. For the trial court finding of a termination ground, the Court allowed the judge to use relevant and material evidence to satisfy the clear and convincing requirement.

These are the procedural facts of *Lemmer* from the Court of Appeals opinion and the Supreme Court file, which contains the appeal application pleadings and the party responses to a show-cause order on the proposed relief. In 1990 both parents were respondents in the initial petition charging the father with sexual abuse and the mother with failure to protect from the abuse and alcohol problems. *Lemmer, supra* at 254; Applic AT The petition requested

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[4] In the disposition phase the court monitors service compliance to determine progress on rectifying the fitness problems found at the adjudication. MCL 712A.18f (1); ;MCL 712A.19 (7). The law allows for termination of parental rights if the provided rehabilitation services have not fixed the parental problems noted at adjudication. MCL 712A.19b (3)(c)(i).

[5] In New York the "fact-finding hearing" is the first phase of a termination proceeding. The value of reducing factual errors is equally applicable to Michigan's fact-finding hearing, the adjudication trial.

termination of parental rights of both parents. Response AE 1 In 1991 the Court of Appeals decided a discovery issue on child interviews in an appeal by the father. *Lemmer, supra,* 191 Mich App 254. During the appeal the state made a plea bargain with the mother, who pled to unknown charges in the petition against her in exchange for the state temporarily dropping the termination request against her. Applic AT 10; Response AE 2 After the appeal, through trial and appeal litigation in 1993-1994, the father succeeded in securing a right to a jury adjudication trial. Applic AT, Exs A, E At the same time, experts were recommending reunification with the father, which the agency refused to implement. Response AE 7 In 1994 the Court of Appeals denied an appeal application by the Department of Social Services (DSS) seeking review of the lower court order granting the father a trial. In January 1995 the DSS filed an application for leave to appeal to this Court. On July 14, 1995, the Court issued a summary disposition order denying the father an adjudication trial with remand procedures for handling a pending petition to terminate the father's rights. Throughout the case, the father demanded a jury and argued the denial of a jury trial was unconstitutional based on a due process violation.

This case has not been cited by any party or other amicus. This Court should decide whether this peremptory order is binding precedent. Arguably, it has no precedential value because it does not contain a concise statement of the applicable facts and reasons for the decision. *See DeFrain v State Farm Mutual Automobile Ass'n,* 481 Mich 359, 371; 817 NW2d 504 (2012).

E. Some Courts Provide Adjudication of Both Respondents

Although not widespread, some Michigan courts are adjudicating both respondent parents. In Washtenaw County, if the second parent demands a trial, he is given a trial or dismissed from the petition. If one respondent pleads to the petition, a Saginaw County probate

court judge allows a trial for the co-respondent before an advisory jury. The Kent County juvenile prosecutor representing DHS usually charges both parents, where the facts support it, and seeks to adjudicate both respondents by plea or trial. In Livingston County the second parent is provided a bench trial by the judge or referee.

III. STATE LAW PROVIDES THE STANDARDS FOR CUSTODY FOR A NON-OFFENDING PARENT DURING A CHILD PROTECTION CASE

As discussed in the Introduction on page 1, the original one-parent doctrine did not apply to putting a child of a non-offending parent in foster care. This is a practice that rapidly developed after the *CR* decision. Remarkably, this loss of custody for an unadjudicated parent has not been addressed in a published opinion from either appeal court. The appellee agency and the other amici briefs do not challenge the merits of the idea that a fit parent should get custody (or "placement" as it is called in child welfare cases). If the Court follows its precedents, and uses state law standards, the general rule should be clear: A non-offending parent cannot be deprived of custody, unless the child is unsafe.

A. For Over a Hundred Years the Michigan Supreme Court Will Not Deny Custody To a Fit Parent in Any Type of Case

The Michigan Supreme Court would be one of the least likely courts to endorse state violations of custodial rights of parents in a child protection case. For a hundred years this Court has been in the forefront of recognition and enforcement of the natural and constitutional right to parental custody as against third parties and the State, unless the child is endangered or abandoned. [6] No matter the type of case, the fit parent gets custody as against any non-parent.

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[6] Under older cases from this Court and the United States Supreme Court, the source of the law was often called "natural law". Modern cases cite the liberty right in the Due Process Clause of the Fourteenth Amendment as the source of the substantive right to family integrity, which is shared by parent and child.

In a 1964 third-party custody case, *In re Ernst,* 373 Mich 337; 129 NW2d 430 (1964), the Court reviewed the then five decades of precedents that have recognized and enforced the custodial rights of fit parents. The oldest case cited was from 1913, *In re Gould,* 174 Mich 663; 140 NW 1013 (1913). The *Ernst* opinion evokes all the modern constitutional concepts mentioned in the party and amici briefs in this case: natural right of parental custody; prior judicial fitness determination; rebuttable presumption of parental fitness; parental custody and decisions are best for the child; and the *parens patriae* authority of the state. The Court summed up the well-established law in Michigan as of that date:

> " '[U]nless it clearly appears that the parent is for some reason unfit to have its possession, the rule is well established in our law that the parent is entitled to the possession of his child against all others.'" [*Ernst* at 363-364, quoting *In re Goldinger,* 207 Mich 99; 173 NW 370 (1919)]
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> Although the Court has varied its language, from time to time, in describing the process by which it reaches its results, it has not deprived a natural parent of its child's custody except upon a finding of unfitness for the exercise of parental responsibility, of parental neglect, or of abandonment. [*Ernst* at 363]
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> Whether we conclude that this Court's concern for the natural parents' rights (and obligations) is based upon "natural law" concepts, statutory preferences, or upon sound common-law principles, the fact remains that in this State our precedential authority requires that we presume the child's best interests lie with his natural parents' exercise of custodial rights absent a showing of the natural parents' unfitness or their neglect or abandonment of the child whose custody they seek. [*Ernst* at 370]

Before *Ernst, the* Court applied the above principles in several child protection cases. *Eg, In re Mathers,* 371 Mich 516; 124 NW2d 878 (1963); *Fritts v Krugh,* 354 Mich 97; 92 NW2d 606 (1958). After *Ernst,* the Court has reaffirmed these core parental rights principles, without exception, as grounds for returning children to their fit natural parents. *Eg, Hunter v Hunter,*

484 Mich 247; 771 NW2d (2009); In *re Clausen,* 442 Mich 648; 502 NW2d 752 (1993); *In re Weldon,* 397 Mich 225; 244 NW2d 216 (1976).

B. Custodial Rights Include Physical Custody and Custodial Management

The CLS cannot improve on the presentation of the familial rights of parents and children in the brief of amicus National Association of Counsel for Children, the preeminent organization for child attorneys and guardians ad litem. The relevant core principle is that a parent has custodial rights to the child, which include the right to choose a substitute custodian. The rule applies regardless of the parent's role in the family court case (respondent or non-respondent), [7] legal status (custodial non-custodial), [8] criminal history (clean or convicted),[9] or absence (free or incarcerated). [10]

In addition to the cases cited in III (A), other binding precedents hold that custody rights include custody management decisions. Although physical custody "is inherently central to the parent's control over his of her child", *Hunter v Hunter,* 484 Mich 247, 263; 771 NW2d 694 (2009), the constitutional right also includes "management of their children". *DSS v Brock,* 442 Mich 101, 111; 499 NW2d 21 (1993). Constitutional law confers a rebuttable presumption

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[7] "Child protective proceedings that divest a nonoffending parent of his or her child's custody implicate that liberty interest, regardless of whether the petitioner has formally identified the parent as a respondent." *In re Williams,* 286 Mich App 253, 280; 799 NW2d 253 (2009) (Gleicher, J, concurring).

[8] *DHS v Rood,* 483 Mich 73, 121-122; 763 NW2d 597 (2009); *DHS v Johnson (In re AP),* 283 Mich App 574; 770 NW2d 403 (2009) at 591 ("Thus, when a parent is fit and a child's needs are met, there is no reason for the state to interfere in a child's life.") at 605-606 ("Because Reid had become a fit parent, the compelling circumstances justifying petitioner's initial interference in the minor child's life no longer existed and the state no longer had any interest or right to intervene in Reid and B.J.'s enjoyment of their parent-child relationship, which they both have a fundamental liberty interest.").

[9] *People v Tennyson,* 487 Mich 730; 790 NW2d 354 (2010) at 742, n 7 ("Criminal punishment should be the only routine consequence of criminal conduct, not the termination of parental rights."), at 756 (court rejected that "a criminal conviction, *by itself,* constitutes a basis for neglect"); *DHS v Mason,* 486 Mich 142; 782 NW2d 747 (2010) ("criminal history alone does not justify termination"); *Rood, supra* at 118.

[10] *DHS v Mason, supra; DHS v Hansen,* 486 Mich 1037; 783 NW2d 124 (2010). Parents can be absent for a variety of more palatable reasons—illness, employment, education, military duty. *See In re Weldon,* 397 Mich 225, 296; 244 NW2d 827 (1976) (Levin, J, concurring).

of fitness of parental decisions, *In re Ernst,* 373 Mich 337, 363; 129 NW2d 430 (1964), which cannot be overruled "simply because a state judge believes a 'better' decision could be made." *Troxel v Granville,* 530 US 57, 72-73 (2000). For a placement decision in a child protection case, this translates to a rule that a non-offending parent can select the caregiver when the state takes custody of his child, provided the child is not endangered.

C. An Incarcerated Non-Offending Parent Has the Right to Choose a Fit Caregiver

As of the dismissal of the charges against him against him on April 12, 2012 (46a, 50a), the appellant father was not a respondent. He was a non-offending parent. He was not charged with any offense against his children. He never had a fitness hearing. There were no judicial fitness findings against him. He was not denied placement based on unfitness. [11] He was denied placement based on the court of appeals decision in *CR.* 88a-90a Therefore, the trial court should have granted his motion for immediate placement filed on August 22, 2012 (75a). But now the facts have changed so the analysis and remedy must also change.

When appeal was granted in this case on January 18, 2013, the remedy for a violation of the father's right to custody would be an order returning the children to him, unless the children would be endangered. Then this appeal would be about deciding the legal standard and procedure the trial court should use on remand to make the safety decision.

During this appeal, material facts have changed that make it imprudent for the court to rule on the alleged due process violation, as applied to deprivation of physical custody rights.

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[11] The appellee DHS's assertion that the court made fitness findings against the father at a motion hearing on September 5, 2012, and then denied him placement, is wrong. BR AT 4 The hearing was oral argument only and the court took the motion for placement under advisement. 69b There is no evidence that the court ever read the psychological report on the father by Dr. Lowder that the appellee filed in this Court. 39b The record shows the court read a caseworker's written summary quoting only the last paragraph in the doctor's report, which the judge said "particularly troubled" him. 67b There is no evidence that Dr. Lowder's report was filed in the trial court—it lacks a clerk stamp or exhibit sticker and is not on the clerk's register of actions filed by appellee. 2b-4b If Dr. Lowder's report was not filed in the trial court, it is inappropriate for the appellee to have included it in its Appendix. It is also notable that some findings in the body of the report contradict the doctor's negative conclusion.

On May 10, 2013, the father was convicted in federal court of felony drug dealing. 98b [12] Contrary to what the appellee DHS implies, this does not end the involvement of the father in the trial court or this appeal. This Court will not "endorse the all too common decisions of the DHS and the circuit courts by ignoring the mandates of statutes and court rules when a parent is in prison." *DHS v Mason,* 486 Mich 142, 167; 782 NW2d 747 (2010). However, the CLS agrees with the appellee DHS that the issue of denied physical custody is moot due to the father's incarceration. Br AT 8 This narrows the justiciable and material issue in this appeal to custody management: does due process require the family court to give a non-offending incarcerated parent his chosen caregiver?

This is the state law on that issue. As a general rule, an incarcerated parent can select a person to care for his children. See page 13 and notes 7-10. If he chooses a fit caregiver, he is not committing child neglect. MCL 712A.2 (b)(1)(B); *Mason, supra,* at 160. "Michigan traditionally permits a parent to achieve proper care and custody through placement with a relative." *Id* at 161, n 11. If the prisoner parent chooses the relative placement option preferred by state law, MCL 722.954a (5), this choice can insulate him from an order terminating his parental rights. *Mason* at 169. The placement standard for assessing the chosen relative is provided in a foster care law: "a child's relative or relatives who are willing to care for the child, are fit to do so, and would meet the child's developmental, emotional, and physical needs." MCL 722.954a (5).

If the Court decides the father has a custody management right that was violated, the Court should order review of the order affirming DHS placement of the children with the aunt, if

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[12] Normally, a party cannot add evidence to an appeal record that is not in the trial court record, especially about events after the appeal was filed. There is an exception for mootness evidence. Although the appellee did not use the proper procedure—a motion to dismiss or motion to amend the record—to get that evidence into the appeal record, the Court should excuse that lapse and decide the issue. This satisfies the Court's justiciability limits, expedites the ruling in a custody case, and clarifies the material issue for court decision.

requested by the father on remand. 36a-37a Perhaps he has changed his mind and wants the aunt to care for the children while he is imprisoned or longer. The review should be with a remand order to make a decision on the father's custody choice based on current facts. In general, the rule should be that the non-offending appellant gets his choice of caregiver, absent a valid safety problem. With those uncertainties and a stale record, it is best for the trial court to make the decision on whether to validate the father's current caregiver choice.

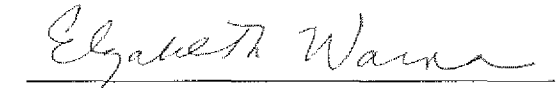
The CLS acknowledges provisions of the same statute, section 4a of the Foster Care and Adoption Act, which vests the placement decision in the agency. MCL 722.954a (1), (4). The validity of this statute as applied to an objecting non-offending parent has not been briefed by the parties. Most importantly, the appellee has not raised it, which constitutes a waiver of any argument that this father's right to choose the caregiver is non-existent or limited by state law. The interplay of this statute with constitutional requirements should be deferred to a future case where the issue is preserved and briefed.

REMEDIES

The Children's Law Section encourages the Court to rule consistent with this shared core value in the child welfare community: To secure the well-being of families, achieved through appropriate legal means, while putting child safety first. Each parent in a child protective proceeding is entitled to due process of law. Every respondent has a right to an adjudication trial to determine if the state can prove by a preponderance of the evidence that the parent has committed an offense against a child. In a child protective proceeding, one parent's position should not be legally determinative of the second parent's position. Parents are entitled to equal protection of the law. Children are ultimately entitled to safety and protection from harm.

The CLS envisions that future legislative and court rule changes will need to be made in order to address the issues raised by changing the one-parent doctrine. For now, the Court will have to use existing state law, with the overlay of constitutional compliance, to set the path for recovery from the one-parent doctrine going forward, while acknowledging that some issues will be left for future cases, the Legislature, or this Court in its rule-making authority. It is in these details of process that the CLS urges the Court to decide in a manner that promotes the section's interests in clarity, consistency, justice, and child well-being.

Dated: October 30, 2013



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