STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Court of Appeals,
David H. Sawyer, P.J., William B. Murphy, C.J., and Joel P. Hoekstra, J.J.

IN THE MATTER OF

PRESTON SANDERS AND CAMERON SANDERS,
MINORS

Supreme Court No.: 146680

BRIEF OF THE PROSECUTING ATTORNEYS ASSOCIATION OF MICHIGAN AS AMICUS CURIAE IN SUPPORT OF THE DEPARTMENT OF HUMAN SERVICES, PETITIONERS

DAVID S. LEYTON
President,
Prosecuting Attorneys Association of Michigan

BY: TERRENCE E. DEAN
Assistant Prosecuting Attorney
Muskegon County Prosecutor's Office
County Building, Fifth Floor
990 Terrace Street
Muskegon, Michigan 49442
Telephone: (231) 724-6435

STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Court of Appeals,
David H. Sawyer, P.J., William B. Murphy, C.J., and Joel P. Hoekstra, J.J.

IN THE MATTER OF

Supreme Court No.: 146680

PRESTON SANDERS AND CAMERON SANDERS,
MINORS

BRIEF OF THE PROSECUTING ATTORNEYS ASSOCIATION OF MICHIGAN AS AMICUS CURIAE IN SUPPORT OF THE DEPARTMENT OF HUMAN SERVICES, PETITIONERS

DAVID S. LEYTON
President,
Prosecuting Attorneys Association of Michigan

BY: TERRENCE E. DEAN
Assistant Prosecuting Attorney
Muskegon County Prosecutor's Office
County Building, Fifth Floor
990 Terrace Street
Muskegon, Michigan 49442
Telephone: (231) 724-6435

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes

Rules

Constitutional Provisions

COUNTER-STATEMENT OF THE BASIS OF JURISDICTION

Jurisdiction is conferred by MCR 7.301(A)(2). The Prosecuting Attorneys Association of Michigan appears as Amicus Curiae ("Amicus") by operation of MCR 7.306(D)(2).

COUNTER-STATEMENT OF QUESTIONS INVOLVED

I. DOES THE ONE-PARENT DOCTRINE VIOLATE THE DUE PROCESS RIGHTS OF NONADJUDICATED PARENTS WHEN THOSE PARENTS ARE AFFORDED THE OPPORTUNITY FOR A MEANINGFUL HEARING?

The Trial Court answers: "No."

Petitioner-Appellee answers: "No."

Appellant answers: "Yes."

Amicus Curiae answers: "**No.**"

I. DOES THE ONE-PARENT DOCTRINE VIOLATE THE EQUAL PROTECTION RIGHTS OF NONADJUDICATED PARENTS WHEN THERE IS NO CONSTITUTIONAL DISTINCTION BETWEEN THE RIGHTS OF AN ADJUDICATED PARENT AND A NONADJUDICATED PARENT?

The Trial Court answers: "No."

Petitioner-Appellee answers: "No."

Appellant answers: "Yes."

Amicus Curiae answers: "**No.**"

COUNTER-STATEMENT OF FACTS

[Citations to Appellant-Father's Appendix will be denoted with an "a"; citations to Appellee's Appendix will be denoted with a "b".]

1. The mother of the children in this case is Tammy Sanders. The family court obtained jurisdiction over Ms. Sanders' children based upon her plea under MCL 712A.2(b)(1) and MCR 3.971. However, Appellant father, Lance Laird, never pleaded to the neglect petition. Thus, the three children came under the jurisdiction of family court because of one parent's conduct. See MCL 712A.2(b). Appellant did not have an adjudication hearing under MCL 712A.17(2) and MCR 3.972(A).[1]

2. The amended petition alleged that Appellant was involved in domestic violence involving Tammy Sanders; had been using drugs in the presence of the children; had a positive drug screen for Cocaine-Benzoyulecgonine; had used cocaine at various motels with Tammy Sanders; and had been "getting high" with Tammy Sanders at motels on weekends. 3a-4a.

---

[1] MCL 712A.17(2) states in part: "Except as otherwise provided in this subsection, in a hearing other than a criminal trial under this chapter, a person interested in the hearing may demand a jury of 6 individuals, or the court, on its own motion, may order a jury of 6 individuals to try the case."

MCR 3.972(A) states in part: "If the child is not in placement, the trial must be held within 6 months after the filing of the petition unless adjourned for good cause under MCR 3.923(G). If the child is in placement, the trial must commence as soon as possible, but not later than 63 days after the child is removed from the home unless the trial is postponed . . . ."

3. Appellant was represented by counsel at several hearings, including the preliminary hearing on November 16, 2011. 7a. At that hearing, although he requested a jury trial and contested the allegations, Appellant apparently did not challenge the placement of his children. 7a. His attorney waived probable cause. 7a. After the preliminary hearing, the court ordered the removal of the children from the parents. 8a-9a.

4. At a pretrial hearing on January 11, 2012, Appellant's attorney argued for the return of his children to him. 13a-14a. The court set the matter for a placement hearing and jury trial, but then Appellant waived the jury trial. 14a.

5. At the adjudication hearing dated February 7, 2012, at which the mother pleaded to the petition, the court conducted a placement hearing in which testimony was presented. 19a-29a. Appellant testified that he pled no contest to domestic violence and that he was still on probation for the crime. 27a. Appellant's counsel demanded a trial immediately, as a trial had been scheduled for that day. 22a-23a. The court postponed its decision on placement in order for the Tribal Council to make a ruling. 29a; 33a. Appellant revoked his waiver. 22a.

6. The dispositional hearing was on February 22, 2012. At that hearing Appellant's attorney argued placement of the children with him based upon some clean drug screens. 35a. The attorney admitted that Appellant had one positive result for cocaine. 35a. The family court denied the request to change placement based on the evidence, but allowed

the opportunity of renewing the motion at a later time. 36a-37a. The written order followed. 43a.

7. At the hearing dated April 18, 2012, the prosecutor noted that Appellant had a positive test for cocaine, but she would not proceed on the cocaine allegation in the petition. 45a, 49a. Thus, the petition was amended to delete paragraph 2m regarding a positive screen for cocaine, and the jury trial pertaining to him was cancelled. 44a-46a, 50a. The court said Appellant was not a respondent, but the prosecutor asserted that he still had domestic violence problems and that whether or not he was a respondent, the court could order him to participate in services because it has jurisdiction over the children. 45a; 50a-51a.

8. An additional hearing was held May 2, 2012, where Appellant's attorney argued again for the return of his children to his custody. 52a. In an order following that hearing, the family court determined that returning the children to the parents would cause a substantial risk of harm to the children's life, physical health, or mental well-being. 53a. Appellant confirmed that the jury trial was cancelled because the court said it would dismiss this allegation. 49a.

9. The court file shows that Appellant had a positive test for cocaine on June 16, 2012. 35b. Appellant refused to submit to drug tests on various occasions. 48b; 75b.

10. Appellant's attorney argued at a hearing dated August 22, 2012, that, because Appellant was not a respondent, a service plan for him was inappropriate. 59a-60a. She also argued that the Court lacks jurisdiction over him because he was not adjudicated. 59a-60a.

11. Appellant filed a motion for immediate placement (61a), and, based upon the one-parent doctrine, the Court denied the motion in an order. 88a.

12. Appellant applied for leave to appeal to the Court of Appeals, which denied leave in an order dated January 18, 2013. The Michigan Supreme Court granted leave on April 5, 2013.

SUMMARY OF ARGUMENT

The one-parent doctrine holds that a nonadjudicated parent is subject to the orders of the court based on jurisdiction over the children derived from the plea of the other parent. Before the court can issue orders to a nonadjudicated parent, however, it must give him the due process owed to him under the Fourteenth Amendment. No allegations were adjudicated against Appellant, but the family court removed Appellant's children from his custody. Nevertheless, Appellant received the process he was owed. The doctrine did not infringe on his due process rights.

Children cannot be removed from their parents unless they are first given the opportunity for a meaningful hearing. *Stanley v Illinois*, 405 US 645,649, 658; 92 S Ct 1208; 31 L Ed 2d 551 (1972); *Smith v Organization of Foster Families for Equality and Reform*, 431 US 816, 848; 97 S Ct 2094; 53 L Ed 2d 14 (1977). Appellant had that opportunity. He was given numerous hearings in which he had the opportunity to argue his fitness as a parent.

That a nonadjudicated parent is no longer entitled to a jury trial under the Probate Code[2] has no bearing on his due process rights. A jury trial is not a constitutional right under the Code. *McKeiver v Pennsylvania*, 403 US 528, 545; 91 S Ct 1976; 29 L Ed 2d 647 (1971). The right to a jury trial under the Sixth Amendment only applies to criminal cases. An adjudication hearing, therefore, has no unique constitutional significance. It is

---

[2] Probate Code of 1939, MCL 711.3-712A.32 [hereinafter Code].

merely one of many hearings in which a nonadjudicated parent may present evidence and argument.

The State has the burden of showing that the nonadjudicated parent is unfit before the court can remove his children. Under the one-parent doctrine, a nonadjudicated parent is presumed fit until the State demonstrates that he is not. The Constitution, however, does not require this showing to occur at an adjudication hearing, nor does it require the evidence of unfitness to be alleged in the petition.

The one-parent doctrine does not violate the Equal Protection Clause of the Fourteenth Amendment. Because the nonadjudicated parent has the same constitutional right to a meaningful hearing as the adjudicated parent, there are no constitutionally relevant distinctions between the procedural rights afforded adjudicated and nonadjudicated parents. To the extent that there are any distinctions, equal protection does not require equal advantages. *San Antonio Independent School District v Rodriguez*, 411 US 1, 23-24; 93 S Ct 1278; 36 L Ed 2d 16 (1973).

ARGUMENT

I. THE ONE-PARENT DOCTRINE DOES NOT VIOLATE THE DUE PROCESS RIGHTS OF NONADJUDICATED PARENTS BECAUSE THOSE PARENTS ARE AFFORDED THE OPPORTUNITY FOR A MEANINGFUL HEARING.

1. Standard of Review

The question whether the proceedings comport with due process is reviewed de novo. *In re Rood*, 483 Mich 73, 91; 763 NW2d 587 (2009) (Cavanagh, J., Weaver, J., and Young, J., concurring in part) ("fundamental requisite of due process of law is the opportunity to be heard," and the Code provides for this opportunity).

2. Analysis

The Michigan Supreme Court has instructed the parties to brief two issues. The first is whether the application of the one-parent doctrine violates the due process rights of nonadjudicated parents. The one-parent doctrine meets constitutional standards.

A. The real issue in this case is what process is owed Appellant under the Due Process Clause.

The one-parent doctrine means that a nonadjudicated parent[3] is subject to the orders of the court based on jurisdiction over the children obtained from the plea of the other parent. *In re C.R.*, 250 Mich App 185, 205; 646 NW2d 506 (2001). Appellant contends that the doctrine deprives nonadjudicated parents of the right to custody of their children without the State first proving their lack of fitness, contrary to the holding in

---

[3] Children, not parents, are adjudicated under the Code. The use of the term "nonadjudicated" is meant only to be a convenient way to characterize a parent who has not had a hearing pursuant to MCL 712A.17(2) and 3.972(A).

Stanley v Illinois, 405 US 645, 649, 658; 92 S Ct 1208; 31 L Ed 2d 551 (1972) ("parents are constitutionally entitled to a hearing on their fitness before their children are removed from their custody"). He argues that the State cannot remove his children from his care—indeed, cannot so much as order him to do anything—without satisfying this prerequisite.

Appellant readily acknowledges that the Code and the court rules, when followed, protect a parent's rights under the Due Process Clause of the Federal Constitution.[4] Appellant, therefore, is clearly not arguing that the Code is unconstitutional; rather, his attack is on the constitutionality of the one-parent doctrine. He believes that the doctrine misapplies the constitutionally sound provisions of the Code and court rules. Thus, the issue is not whether the Code should be written differently, or whether the Code should require a parent to have an adjudication trial before family court can order that parent to participate in services. The real issue in this case is what process a nonadjudicated parent must be afforded under the Due Process Clause.

B. Due process means fundamental fairness.

The due process Appellant contends is defective in the one-parent doctrine is not substantive due process. Substantive due process forms the basis of a firmly established liberty interest—the "interest of parents in the care, custody, and control of their children." *Troxel v Granville*, 530 US 5, 65; 120 S Ct 2054; 147 L Ed 2d 49 (2000); *Stanley, supra*, 405 US at 651; *Santosky v Kramer*, 455 US 745, 753; 102 S Ct 1388; 71

---

[4] The Due Process Clause of the Fourteenth Amendment states: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." US Const, Am XIV, § 1.

L Ed 2d 599 (1982) (natural parents have a fundamental liberty interest "in the care, custody, and management of their child"). There is no controversy in the present case that this liberty interest exists.

Rather, an impingement of *procedural* due process is the thrust of Appellant's thesis. But what does this mean? The United States Supreme Court long ago dispelled any notion (which Appellant has injected, however subtly, into the present case) that due process is a technical concept "with a fixed content unrelated to time, place, and circumstances." *Lassiter v Department of Social Services of Durham County, North Carolina*, 452 US 18, 24; 101 S Ct 2153; 68 L Ed 2d 640 (1981) (failure to appoint counsel for indigent parent in termination proceedings did not violate her due process rights); *Cafeteria and Restaurant Workers Union, Local 473, AFL-CIO v McElroy*, 367 US 886, 895; 81 S Ct 1743; 6 L Ed 2d 1230 (1961). On the contrary, due process probably can never be precisely defined. *Lassiter*, 452 US at 24. Due process really means fundamental fairness, "a requirement whose meaning can be as opaque as its importance is lofty." *Lassiter*, 452 US at 24. The term certainly cannot be reduced to a checklist of procedures which, if not met in every situation, triggers a violation of the Due Process Clause.

Instead, when there is a liberty interest at stake, as there is here, the Court must determine "'what process is due' in the particular context." *Smith v Organization of Foster Families for Equality and Reform*, 431 US 816, 847; 97 S Ct 2094; 53 L Ed 2d 14 (1977). Due process is a flexible concept and "calls for such procedural protections as the particular situation demands." *Smith*, 431 US at 848 (citation and internal quotation marks omitted). The United States Supreme Court has made it clear that the

"fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v Eldridge*, 427 US 319, 333; 96 S Ct 893; 47 L Ed 2d 18 (1976) (internal citations omitted). Yet, although due process generally requires the *opportunity* for a hearing, *Smith*, 431 US at 848, its precise nature must match the circumstances of the case. *Id.*, citing *Mullane v Central Hanover Bank & Trust Co*, 339 US 306, 313; 70 S Ct 652; 94 L Ed 865 (1950). The procedural protections, in other words, must be tailored to the particular situation. *Smith*, 431 US at 848; *Lassiter*, 452 US at 25.

C. Appellant received the process he was owed under the United States Constitution because that process afforded him fundamental fairness.

Appellant argues that his due process rights were impinged when his children were removed from his care without his first being adjudicated as unfit pursuant to MCL 712A.17(2). The critical question, however, is not whether he was adjudicated, but whether he received the process he was owed under the Federal Constitution. Indeed, from a constitutional standpoint adjudication under the Code has no unique legal significance. Appellant has no constitutional right to be adjudicated before the Court removes his children. Rather, he (as are other nonrespondent parents) is entitled to a hearing on his fitness before his children are removed.[5] *Stanley*, 405 US at 658. He got

[5] Appellant does not appear to be challenging the temporary removal of children when they are "threatened with imminent harm" in an emergency. Federal courts have recognized that such removal by the state is constitutional. See, e.g., *Doe v Kearney*, 329 F3d 1286, 1293-1294 (CA 11, 2003), citing *Mabe v San Bernadino County, Dep't of Pub Soc Servs*, 237 F3d 1101, 1106 (CA 9, 2001); *Brokaw v Mercer County*, 235 F3d 1000, 1020 (CA 7, 2000); *Tenenbaum v Williams*, 193 F3d 581, 593-594 (CA 2, 1999); *Hillingsworth v Hill*, 110 F3d 733, 739 (CA 10, 1997); *Jordan by Jordan v Jackson*, 15 F3d 333, 346 (CA 4, 1994).

this hearing. Appellant received the process he was owed. The procedural protections afforded Appellant are the same protections afforded all nonadjudicated parents.

To assist courts in determining what process is due in a particular situation, the Supreme Court in *Smith*, *supra*, imported a three-pronged test from *Mathews v Eldridge*, 427 US at 335, summarized as follows: "the private interests affected by the proceeding; the risk of error created by the State's chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure." See *Smith*, 431 US at 848-849, as paraphrased in *Santosky*, 455 US at 754. These elements must be balanced "against each other." *Lassiter*, 452 US at 27.

In *Lassiter*, for example, the Supreme Court applied the test in holding that an indigent parent in a termination proceeding is not entitled to appointed counsel. *Lassiter* is especially relevant to the present case because it illustrates the critical distinction between what is constitutionally required and what is statutorily required. In that termination case, the respondent, the mother of an infant son, was indigent but did not inform the court of this fact and in any event was not appointed counsel. After her parental rights were terminated, she appealed on the grounds that the Due Process Clause entitled her to the assistance of counsel. Applying the *Eldridge* test, the Supreme Court first recognized the parent's interest in the care and custody of her child under *Stanley*. Yet, it also acknowledged the State's "urgent interest in the welfare of the child," as well as sharing the "parent's interest in an accurate and just decision." *Lassiter*, 452 US at 27. Thus, "the State's interest in the child's welfare may perhaps best be served" by a hearing in which each party is represented by counsel. *Id.* at 28. The Supreme Court acknowledged the State's interests in conducting a termination proceeding economically,

but ruled that this weak pecuniary interest did not outweigh the private interests of the parent. *Id.* Moreover, the Supreme Court recognized the risk that a parent would be "erroneously deprived of his or her child because the parent is not represented by counsel." *Lassiter*, 452 US at 28.

The Supreme Court phrased the ultimate issue as whether the three factors are sufficient to overcome the presumption of no right to appointed counsel, thus requiring appointed counsel under the Due Process Clause. *Lassiter*, 452 US at 31. The Court concluded that, because due process is a flexible concept, the appointment of counsel was not required by the Federal Constitution in every parental termination proceeding. *Id.* at 31, 33-34. Rather, the appointment of counsel should be determined case-by-case. *Id.* at 31-32.

Likewise, the procedures used in this and in other one-parent doctrine cases are constitutional under the *Eldridge* test:

First, the preeminent interest affected is that of the children. Their well-being, their right to be free from harm, their placement "in as close proximity to the child's parents' home", and their "best interests and special needs", serve as the foundation of the Code. See MCL 712A18f(1)(c) and (3). Indeed, the emphasis on the Code is on protecting the child, not placing blame on a parent. See *In re Jacobs*, 433 Mich 24, 39; 444 NW2d 789 (1989). The one-parent doctrine fosters these interests by providing an expedient and efficient approach to engaging nonadjudicated parents in services. The doctrine also allows the court to remove the children from a nonadjudicated parent, provided that the State can show that his care of the child is inadequate. If a parent, for example, is thought to have substance abuse issues, the family court may remove the

child, albeit temporarily, for the protection of the child and to give the parent time to bring his problem under control. In fact, Appellant is alleged to have serious drug abuse problems and has been reported to use cocaine in front of his children. The procedural characteristics of the one-parent doctrine promote, not hinder, the children's interests.

Of course, there is no question that Appellant's private liberty interest in the care and custody of his children was affected by the dispositional review proceedings in which his attorney challenged the application of the one-parent doctrine. The family court ruled against his motion for immediate placement. 88a-90a. Yet, although his private interest was affected as well, he was repeatedly given the opportunity for a meaningful hearing so that his due process rights were protected.

In sum, both the parents' and the children's interests are protected by the procedures.

Second, because of the redundant provisions in the Code that allow for a nonrespondent parent to challenge any service plan or custody of the children in a hearing, the risk of violation of his due process rights is low. At any of these hearings the question of Appellant's fitness for the purpose of custody or receiving services would obviously be at issue, and the family court would have to make a ruling about the appropriateness—in other words, his fitness—to have custody or to receive services. The various Code provisions and court rules provide for periodic dispositional review hearings and other hearings in which Appellant can challenge any order, present testimony, and argue for the return of his children to his custody. The one-parent doctrine does absolutely nothing to hinder a nonadjudicated parent from availing himself of these hearings. It is hard to envision any procedural safeguards beyond the multitude

offered in the Code and court rules that would expand the protection of Appellant's due process *rights* (as distinguished from what additional, but not constitutionally supported, procedures he would prefer). Thus, to require Appellant to be "adjudicated" under the Code makes no sense from a *constitutional* standpoint because he is already entitled to a meaningful hearing—indeed, he is entitled to multiple meaningful hearings.

Multiple hearings are, in fact, what Appellant got. See dispositional review hearing transcripts dated May 2, 2012, (47a-52a), and August 22, 2012, (57a-60a). These dispositional review hearings were held pursuant to applicable provisions in the Code and court rules: MCL 712A.18a, MCL 712A.18f, MCR 3.973, MCR 3.974, and MCR 3.975. Appellant could have challenged the application of the one-parent doctrine at the permanency planning hearing. MCL 712A.19a; MCR 3.976. At another hearing, on his motion, he could have challenged the placement of his children. MCR 3.966(A). Of course, he could have challenged custody at the preliminary hearing. MCR 3.965.

Appellant was represented by counsel at all the hearings in this case. See Counter-Statement of Facts. At each of these hearings he could have, and in some cases did, argue his fitness as a parent, and his attorney repeatedly asked for the return of his children. In one hearing he examined a witness. And throughout the course of the neglect case he made meaningful objections, when appropriate. In addition, he filed a motion for immediate placement and argued this motion at the hearing of August 22, 2012. In sum, Appellant got his due process rights at each and every one of these hearings. Nothing in the one-parent doctrine is repugnant to Appellant receiving these rights.

Respondent counters that his due process rights were impinged because, under the one-parent doctrine, he is no longer entitled to a jury trial under MCL 712A.2(b)(1) and

MCR 3.911(A), the right to discovery under MCR 3.922, to have the case proved by a preponderance of the evidence and the application of the rules of evidence under MCR 3.922(C)(1). But a trial by jury is not a constitutional right in juvenile court. *McKeiver v Pennsylvania*, 403 US 528, 545; 91 S Ct 1976; 29 L Ed 2d 647 (1971). The United States Supreme Court has never ruled that a parent has the constitutional right to a jury trial. And nowhere in the United States Constitution is Appellant afforded the right to a jury trial or any of the other rights he contends belong to him.

The Sixth Amendment does state that, "[i]n all *criminal* prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." US Const, Am VI. (Emphasis supplied.) But the present case is not a criminal prosecution. Despite this brute fact, Appellant wants to be treated like a criminal defendant with all the attendant rules, privileges, and rights. In that distorted view of the Code, he should be convicted or adjudicated of some wrongdoing before he is ordered to do anything. There is absolutely no constitutional basis for his argument. See, e.g., *In re Blessen H.*, 163 Md Ct Spec App 1; 877 A2d 161 (2005) (process due a parent facing termination of parental rights is "not the degree of process due a criminal defendant, probationer, or alleged juvenile delinquent who faces the loss of personal liberty").

Nor can Appellant find succor in the Seventh Amendment, which states: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." US Const, Am VII. Child protection proceedings are statutory and therefore not

proceedings under the common law, but in any event the Seventh Amendment does not apply to the states. *Curtis v Loether*, 415 US 189, 192 n 6; 94 S Ct 1005; 39 L Ed 2d 260 (1974) ("The Court has not held that the right to jury trial in civil cases is an element of due process applicable to state courts through the Fourteenth Amendment").

Aside from the lack of constitutional authority for Appellant's stance, the criminal law model of justice is totally inappropriate in neglect cases. Whereas the focus in a criminal case is on determining a defendant's guilt or innocence, the welfare of children is the foundation of neglect law. Thus, family court may obtain jurisdiction over a child even in the case of a parent who is completely blameless. *In re Jacobs*, *supra*, 433 Mich at 27. For example, a mother may be in a coma as a result of an accident, and can no longer care for her children. No one would dispute the proposition that the mother is not at fault. Yet, her lack of moral culpability poses no barrier to obtaining jurisdiction. Even the status of parenthood itself is not a prerequisite to court jurisdiction in some cases. The family court may obtain jurisdiction on the grounds that a *nonparent* adult engaged in cruelty, for example. MCL 712A.2(b)(2). The parents would be blameless in that situation as well.

The rights Appellant desires fall within the domain of the legislative branch; they are not supported by the Constitution. Under this sacred document, he got—and is getting—all the procedural due process rights to which he is entitled. The fundamental fairness of these procedural rights should be abundantly self-evident.

Third, because the government has an "urgent interest in the welfare" of the children, *Lassiter*, 452 US at 27, procedures have been established by the Code and the one-parent doctrine to allow the family court to make orders affecting any adult—

including a nonrespondent parent—that "are necessary for the physical, mental, or moral well-being of a particular juvenile or juveniles under its jurisdiction." See MCL 712A.6.[6] These procedures include removal of the children from the nonrespondent parent's custody. The family court, under this doctrine, obtains jurisdiction over the children (as opposed to the parents), and through this jurisdiction is empowered to order the services necessary to resolve the problems that led to court intervention and, in cases where the children have been removed, reunite the family.

By comparison, the fiscal and administrative burdens imposed by the abandonment of the one-parent doctrine would, in the larger scheme of things, diminish the State's ability to protect children. The immediate consequence of the abandonment of the doctrine is that every nonrespondent—not just a parent, but *any adult*—could demand a trial, even a jury trial, under the adjudication provision of the Code. See MCL

---

[6] This section states: "The court has jurisdiction over adults as provided in this chapter and as provided in chapter 10A of the revised judicature act of 1961, 19061 PA 236, MCL 600.1060 to 600.1082, and may make orders affecting adults as in the opinion of the court are necessary for the physical, mental, or moral well-being of a particular juvenile or juveniles under its jurisdiction. However, those orders shall be incidental to the jurisdiction of the court over the juvenile or juveniles."

The corollaries in the Michigan Court Rules are found at MCR 3.973 (A) and (F)(2), which state:

(A) Purpose. A dispositional hearing is conducted to determine what measures the court will take with respect to a child properly within its jurisdiction and, when applicable, against any adult, once the court has determined following trial, plea of admission, or plea of no contest that one or more of the statutory grounds alleged in the petition are true.

. . . .

(F)(2) The court shall not enter an order of disposition until it has examined the case service plan as provided in MCL 712A.18f. The court may order compliance with all or part of the case service plan and may enter such orders as it considers necessary in the interest of the child.

712A.17(2). A relative living with the family who is believed to be sexually abusing one of the children could refuse the court's order to leave the house on the ground that he has not yet been adjudicated. He could demand a jury trial—an expensive and burdensome process—merely to obtain jurisdiction over him for the purpose of expelling him from the home.

Criminal defendants, of course, because they have the constitutional right to a jury trial and because their freedom is at stake, are entitled to the additional protections from the State, including a jury trial, notwithstanding any additional cost or time required. But a nonrespondent, whether he is a parent or another adult, does not possess this constitutional right. Giving a nonrespondent parent a jury trial after the Court has assumed jurisdiction over the children would impose an undue burden on the State. In the final analysis, abused and neglected children would suffer and would, in many circumstances, experience more abuse or suffer longer periods of neglect.

When all of the foregoing factors are considered in their totality, the one-parent doctrine satisfies constitutional standards under the *Eldridge* test. The process entailed by the one-parent doctrine is fundamentally fair and should be left intact.

D. Under the one-parent doctrine, a nonadjudicated parent is presumed fit until the State shows his lack of fitness at a hearing.

The phrase "parental fitness" itself, as used in *Stanley*, 405 US at 658, is a term of art. The phrase clearly does not mean that a parent is so incorrigible that his parental rights must be terminated with all due speed. The United States Supreme Court aptly described what parent fitness means in *Troxel*: "[S]o long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject

itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." *Troxel*, 530 US at 68-69. When one parent pleads to the neglect petition, the State has already injected itself into the private realm of the family because the State had a reason for this intrusion—to wit, the allegations in the petition.

The nonadjudicated parent, of course, is presumed to adequately care for his children. If the State believes that this parent cannot meet this obligation, as it did in this case, the constitutional burden is on the State to show that the parent—here, the nonadjudicated parent—is unfit. *Stanley*, 405 US at 647-650. There were ample reasons to believe that Appellant was unable to adequately care for his children—indeed, he has serious drug abuse problems. But in any case a nonadjudicated parent would have multiple opportunities for a hearing in which he could challenge the proposition that he is unfit, as a parent, in some way. The point, however, is that he is "constitutionally entitled" to a hearing on that fitness before his children are removed. *Stanley*, 405 US at 658. This protection does not mean that he is presumed unfit as in the unique situation in *Stanley*, where an Illinois statute made children of unwed fathers "wards of the State upon the death of the mother." *Id.* at 646. The one-parent doctrine does not operate to presume unfitness of any parent.

In this context Appellant argues, in effect, that removing children from a nonadjudicated parent without an adjudication hearing is equivalent to presuming him to be unfit. The adjudication hearing, in Appellant's view, is the threshold through which all parents must pass before the court can subject him to its orders. The relationship between the adjudication hearing and the due process right to a hearing has been a source

of confusion in this and in other one-parent doctrine cases. In the constitutional analysis of the one-parent doctrine, however, the absence of adjudication has absolutely no legal significance. The nonadjudicated parent is still presumed fit in the constitutional sense, and the State must show his unfitness at a hearing.

The process of acquiring jurisdiction in the first instance under MCL 712A.2(b) is commonly labeled an "adjudication" or an "adjudicatory hearing." But there is nothing constitutionally unique about this particular hearing as compared with any other hearing under the Code. The right to a jury trial provided in the Code is not a constitutional right. See *McKeiver, supra.* So the legally relevant question is not whether a parent was adjudicated, but whether he had the opportunity for a hearing. *Smith*, 431 US at 848. It does not matter what the hearing is called. At an adjudicatory hearing, or any at any other hearing under the Code, a "nonadjudicated" parent may present argument, witnesses, and meaningful objections to removal of his children from his custody and to being ordered to participate in the service plan. Until the State shows otherwise, the nonadjudicated parent is presumed fit.

This presumption was not altered by dismissal of the allegations against him in the petition. The court had already obtained jurisdiction over the children through the mother's plea; thus, an allegation against the nonadjudicated parent was not a prerequisite for the court to make orders necessary for the well-being of the children. Appellant argues that the burden was thereby improperly shifted to him to show that he was a fit parent. This is incorrect. The State was and is constitutionally required to show that Appellant is unable to adequately care for his children. Appellant still had a substance abuse problem as evidenced by numerous positive tests for cocaine and refusals to submit

to drug screens. 35a; 35b; 48b; 75b. Nothing in the Constitution requires that this inadequacy be alleged in the petition.

The State is not at liberty to remove his children or order him about at random; rather, it must have reasons, MCL 712A.6[7], and the State had compelling reasons in this case. See Counter-Statement of Facts. An order necessary for a child's well-being can only be logically necessary if it is supported by a reason. For example, the State could show that he has drug problems, as in the present case, or that he is physically abusive. These sorts of problems would require treatment or intervention necessary for the well-being of the children. Their existence would rebut the constitutional presumption of fitness.

---

[7] "The court has jurisdiction over adults as provided in this chapter and as provided in chapter 10A of the revised judicature act of 1961, 191 PA 236, MCL 600.1060 to 600.1082, and may make orders affecting adults as in the opinion of the court *are necessary for the physical, mental, or moral well-being of a particular juvenile or juveniles under its jurisdiction.* However, those orders shall be incidental to the jurisdiction of the court over the juvenile or juveniles." (Emphasis supplied.)

II. THE ONE-PARENT DOCTRINE DOES NOT VIOLATE THE EQUAL PROTECTION RIGHTS OF NONADJUDICATED PARENTS BECAUSE THERE IS NO CONSTITUTIONAL DISTINCTION BETWEEN THE RIGHTS OF AN ADJUDICATED PARENT AND A NONADJUDICATED PARENT.

1. Standard of Review

Unpreserved claims of constitutional error are reviewed for plain error affecting substantial rights. *People v Pipes*, 475 Mich 267, 270; 715 NW2d 290 (2006).

2. Analysis

The second issue the Supreme Court has asked the parties to address is whether the one-parent doctrine violates the equal protection rights of nonadjudicated parents.[8] It does not.

Appellant's equal protection argument is relatively simple: He argues that the one-parent doctrine violates the Equal Protection Clause because nonadjudicated parents, such as him, are denied arbitrarily the right to an adjudication trial accorded other similarly situated parents. On the one hand are cases in which there is only one parent respondent, who has the statutory right to an adjudication trial. On the other hand are cases in which both parents are respondents. In this second category, after one parent is adjudicated by plea or trial, the other parent loses his statutory right to an adjudication trial.

---

[8] The Fourteenth Amendment states in part: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." US Const, Am XIV, § 1.

An equal protection analysis, however, fails to support Appellant's thesis. As the Michigan Supreme Court has noted, "even if a law treats groups of people differently," it does not necessarily follow that the guarantees of equal protection are violated. *Doe v Department of Social Services*, 439 Mich 650, 661; 487 NW2d 166 (1992). The Equal Protection Clause, the United States Supreme Court explained, "does not require absolute equality or precisely equal advantages." *San Antonio Independent School District v Rodriguez*, 411 US 1, 23-24; 93 S Ct 1278; 36 L Ed 2d 16 (1973), cited in *Doe*, 439 Mich at 661. Nor does the Constitution "require things which are different in fact . . . to be treated in law as though they were the same." *Rinaldi v Yeager*, 384 US 305, 309; 86 S Ct 1497, 1500; 16 L Ed 2d 577 (1966) (appellate system, once established, "must be kept free of unreasoned distinctions"). In the same vein, the Equal Protection Clause "confers no substantive rights and creates no substantive liberties." *San Antonio*, 411 US at 59 (Stewart, J. concurring), cited in *Doe*, 439 Mich at 661. Instead, its function is to "measure" the constitutionality of "classifications created by state law." *San Antonio*, 411 US at 59.

Because equal protection does not entail equal advantages, it cannot be constitutionally maintained that the nonadjudicated parent is denied equal protection under the one-parent doctrine solely on the grounds that he no longer has the right to an "adjudication" trial. What does the Equal Protection Clause require? The essential requirements are "some rationality in the nature of the class singled out" and the absence of unreasoned distinctions. *Rinaldi*, 384 US at 308-309, 310, citing *Griffin v Illinois*, 351 US 12; 76 S Ct 585; 100 L Ed 891 (1956) ("a State cannot arbitrarily cut off appeal rights for indigents while leaving open avenues of appeal for more affluent persons", as quoted

in *MLB v SLJ*, 519 US 102, 111; 117 S Ct 555; 136 L Ed 2d 473 (1996)), and other cases. Legislation, in defining a class, must draw distinctions having "some relevance to the purpose for which the classification is made." *Rinaldi*, 384 US at 310.

Of course, arbitrary or unreasoned distinctions do, in some situations, constitute a violation of the Equal Protection Clause. For instance, in *Renaldi*, the Supreme Court struck down a statute that imposed on indigent prisoners the obligation to reimburse the State for the cost of transcripts after an unsuccessful appeal as violative of equal protection. But unreasoned distinctions do not exist in the context of the one-parent doctrine because the doctrine does not create two classifications of parents in the constitutional sense. It is accurate to say that, under the statutory scheme, the first parent who is adjudicated, either by plea or by trial, enjoys the statutory right to a jury trial. But a jury trial in family court is not a constitutional right. *McKeiver*, *supra*. The due process protections enjoyed by the nonadjudicated parent remain intact.

Because the nonadjudicated parent has the same constitutional right to a meaningful hearing as the adjudicated parent, there are no constitutionally relevant distinctions between the procedural rights afforded adjudicated and nonadjudicated parents. To the extent that there are any distinctions, equal protection does not require equal advantages. *San Antonio, supra.* The Equal Protection Clause, therefore, is not invoked by the one-parent doctrine.

CONCLUSION

For these reasons, this Honorable Court should hold that the one-parent doctrine violates neither the due process nor the equal protection rights of nonadjudicated parents.

Respectfully submitted,

DAVID S. LEYTON
President,
Prosecuting Attorneys Association of Michigan

Dated: 7/25, 2013

By: TERRENCE E. DEAN (P40197)
Assistant Prosecutor
Muskegon County
Prosecutor's Office