IN THE MICHIGAN SUPREME COURT

Appeal from the Michigan Court of Appeals
Saywyer, PJ and Murphy and Hockstra, JJ

In the Matter of SANDERS, Minors	**Circuit Court No: 11-2828-NA** **Court of Appeals No: 313385** **Supreme Court No: 146680**

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AMICUS CURIAE BRIEF
JUVENILE APPELLATE CLINIC
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QUESTION PRESENTED FOR REVIEW

Does the application of the "one-parent doctrine" as enunciated in *In re C R*, 250 Mich App 185; 646 NW2d 506 (2001) violate the constitutional rights of unadjudicated parents?

Trial court held: No
Appellant answers: Yes
Department of Human Services answers: No
LGAL –appellee answers: Failed to answer
Amicus Curiae Juvenile Appellate Clinic answers: No

STATEMENT OF INTEREST OF *AMICUS CURIAE* JUVENILE APPELLATE CLINIC – UNIVERSITY OF DETROIT MERCY SCHOOL OF LAW

Amicus curiae Juvenile Appellate Clinic at the University of Detroit Mercy School of Law [Juvenile Appellate Clinic] submits this brief to the Michigan Supreme Court in *In re Sanders*. The Juvenile Appellate Clinic provides instruction to law students in the representation of children in cases on appeal to the Michigan Court of Appeals in child protective and delinquency proceedings. The Juvenile Appellate Clinic submits this brief on behalf of the interests of the children.

This case involves a number of issues of jurisprudential importance, particularly as it relates to how the juvenile courts in this state deal with the various parties in child protective proceedings. It is particularly important that the point of view and interests of children are heard in this case, as in every case involving abused and neglected children. The Juvenile Appellate Clinic believes that the interests of unadjudicated parents are adequately protected in Michigan's child protection statutory scheme and respectfully requests that this Court hold that neither the statutory scheme nor the "one parent doctrine" violates the due process rights of unadjudicated parents.

ANALYSIS

I. IN CHILD PROTECTION PROCEEDINGS, PARENTS' LIBERTY INTERESTS IN THE CARE AND CUSTODY OF THEIR CHILDREN MUST GIVE WAY TO THE STATE'S PARENS PATRIAE INTEREST IN PROTECTING THE HEALTH AND WELFARE OF THE CHILDREN.

The United States Supreme Court has long recognized that parents have a fundamental liberty interest in the care, custody, and management of their children, however these rights are not inalienable. This is particularly true in cases where a parent's interests clash with those of the State.

The Court first recognized that family relationships are entitled to constitutional protection in the early part of the twentieth century in its decisions in *Meyers v Nebraska*, 262 US 390; 43 S Ct 625; 67 L Ed 1042 (1923) and *Pierce v Society of Sisters*, 268 US 45; S Ct 571; 69 L Ed 1070 (1925). In these cases, the Court recognized that the Fourteenth Amendment places limits on a state's ability to interfere with a parent's decisions regarding education and childrearing. The Court affirmed this protection in a series of subsequent cases. *See West Virginia State Board of Education v Barnette*, 319 US 624; 63 S Ct 1178; 87 L Ed 1628 (1943) (holding that the State could not require children to recite the Pledge of Allegiance over a parent's objection); *Wisconsin v Yoder*, 406 US 205; 92 S Ct 1526; 32 L Ed2d 15 (1972) (finding a state law requiring children to attend school until the age of sixteen to be unconstitutional as to Amish children because it interfered with the parents' rights under the Free Exercise Clause of the First Amendment and violated their liberty interest under the Fourteenth Amendment); *Cleveland Board of Education v LaFleur*, 414 US 632, 639-40; 94 S Ct 791; 39 L Ed2d 52, 67 (1974)(noting: "freedom of personal choice in matters of . . . family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment").

Although the Court has recognized parents" liberty interest in the care and custody their children, there are numerous and varied circumstances in which it has severely limited, or refused, to recognize these rights. On several occasions, the Court has refused to bestow these constitutional rights on unwed fathers. In *Lehr v Robertson,* 463 US 248; 103 S Ct 2985; 77 L Ed2d 614 (1983) the Court held that because a putative father had not established a substantial relationship with his daughter, failure to provide him with notice of pending adoption proceedings did not violate his due process or equal protection rights. In addressing the father's constitutional rights, the Court noted the important distinction between a mere biological relationship and a parental relationship based on parental responsibility. It also noted that unwed parents are not necessarily entitled to parental rights, stating: "*Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring.*" *Id* at 260, *quoting Caban v Mohammed,* 441 US 380, 397 (1979)(emphasis in original). The Court further explained that a father is only entitled to the protection of the Due Process Clause when he demonstrates a commitment to the "responsibilities of parenthood by 'coming forward to participate in the rearing of his child.'" *Id* at 261, *quoting Caban,* 441 US at 392. *See also, Quilloin v Walcott,* 434 US 246; 98 S Ct 549; 54 L Ed2d 511 (1978)(holding that an unwed father's due process and equal protection rights were not violated by a state statutory scheme that denied him veto power over the adoption of his daughter where he had failed to petition for legitimation of his child during the years between the child's birth and the filing of the adoption petition.)

In *Michael H. v Gerald D.,* 491 US 110; 109 S Ct 2333; 105 L Ed2d 91 (1989) the Court upheld a California statute that created a rebuttable presumption that a child born to

a married woman was the child of the woman's husband. The statute provided that the presumption could only be rebutted in limited circumstances and only by the parties to the marriage. The biological father of a young child challenged the statutory scheme on equal protection grounds. The Court rejected his argument. Justice Scalia, writing for four justices, found that the biological father did not have a fundamental liberty interest in his relationship with his daughter. The Court held that the presumption could not be rebutted by a man who claimed to be the biological father of a child, since the child was born to a woman who was married to another man.

Finally, in *Stanley v Illinois*, 405 US 645; 92 S Ct 1208; 31 L Ed2d 551 (1972), the Court held that an unwed father, who had lived with and supported his children for eighteen years, could not have his children removed from his custody after the death of their mother without a judicial finding of unfitness. In this case, the petitioner challenged an Illinois law that automatically made his children wards of the court upon the death of the children's mother, claiming his equal protection rights were violated because he had not been found to be an unfit parent and because married fathers and mothers could not be deprived of their children without a showing of unfitness.

The Court held that the petitioner was entitled to a hearing on his fitness as a parent before the State could remove his children from his custody and that the State's failure to do so violated his equal protection rights. In reaching its decision, the Court balanced the father's interest against those of the state, commenting that "the State's interest in caring for Stanley's children is de minimus if Stanley is ***shown*** to be a fit father." *Id* at 658 (emphasis added). It is noteworthy that the Court did not presume that the petitioner was a fit parent despite the fact that he had lived with and cared for his children for nearly two

decades; rather the Court proclaimed that the biological and custodial father should have been provided an opportunity to prove his fitness.

The above cases demonstrate that although the Court has recognized parents' liberty interests in the care and custody of their children, it has restricted the exercise of these rights where important state interests are at stake. For this reason, it has long been understood that the states' parens patriae authority (the role of the state as guardian of persons operating under a legal disability) can supersede parents' rights in family automony. In 1836 Justice Joseph Story wrote:

> [P]arents are entrusted with the custody of the person and the education of their children, yet this is done upon the natural presumption, that the children will be properly taken care of. . . and that they will be treated with kindness and affection. . . But whenever. . . a father. . . acts in a manner injurious to the morals or interests of his children -- in every case, the Court of Chancery will interfere.

Julia Halloran McLaughlin, *The Fundamental Truth About Best Interests*, 54 St Louis Univ L J 113, 120-122 (2009) *quoting* 2 Joseph Story, *Commentaries on Equity Jurisprudence as Administered in England and America* 676 (Melville M. Bieglow ed Little Brown and Co. 13th ed 1886).

In *Prince v Massachusetts*, 321 US 158; 64 S Ct 438; 88 L Ed 645 (1944), the Court upheld the application of a state law, that prohibited the sale of merchandise in public places by a minor, to a young child who was distributing religious literature alongside her parent. The Court found that the state's interest in the health and welfare of the child outweighed the parent's constitutional rights to family autonomy and the incidental burden that the law placed on the exercise of religion. *Prince* is one of the first cases in which the Court recognized a child's rights and interests, separate from those of her parents.

Nowhere is a state's parens patriae interest more powerful, and the exercise of its authority under these interests more necessary, than in child protection proceedings. *Santosky v Kramer*, 455 US 745, 753; 102 S Ct 1388; 71 L Ed2d 599 (1982) presented a Fourteenth Amendment Due Process challenge to New York's child protection statutory scheme which allowed a court to terminate parents' rights to their children based on a finding of abuse or neglect by a preponderance of the evidence standard. The Court noted the conflicting interests at stake in these types of proceedings; the fundamental liberty interest of the parents in the care, custody and management of their children and the states' "parens patriae interest in preserving and promoting the welfare of the child." *Id* at 766. It held that a state may completely sever the parent-child relationship, provided it prove its allegations of parental unfitness by clear and convincing evidence. *Id* at 747-748.

II. MICHIGAN'S STATUTORY SCHEME PROVIDES ADEQUATE PROCEDURAL DUE PROCESS PROTECTION TO UNADJUDICATED PARENTS.

The substantive due process rights of a parent must be balanced against the fundamental rights of the child to safety and well-being. *Stanley supra* at 752. However, state intervention into such an important relationship must be accomplished by procedures meeting the requisites of the Due Process Clause. *Santosky, Id.* The resolution of whether the procedures provided are constitutionally sufficient requires analysis of the governmental and private interests that are affected. *Mathews v Eldridge*, 424 US 319, 334-35; 96 S Ct 893; 47 L E 2d 18 (1976).

"The essence of due process is fundamental fairness." *In re Adams Estate*, 257 Mich 230, 233-234; 667 NW2d 904 (2003). Due process is a flexible concept, and the determination of what process is due in a particular proceeding will turn on the nature of

the proceeding, the risks of an erroneous decision, and the private and governmental interests that might be affected. *In re Brock*, 442 Mich 101,111; 499 NW2d 752 (1993). Furthermore, procedural due process demands that a party is provided notice and a sufficient opportunity to be heard by a neutral decision maker at a "meaningful time and in a meaningful manner." *Reed v. Reed*, 265 Mich App 131,159; 693 NW2d 825 (2005). Providing an "opportunity to be heard" requires that parties be given notice and the chance to respond to the evidence against them. *Hanlon v Civil Service Comm*, 253 Mich App 710, 723; 660 NW2d 74 (2002).

A. **The Due Process Rights of Unadjudicated Parents Are Not Violated by the Statutory Scheme That Allows a Court to Take Jurisdiction Over a Child Based on the Conduct of One Parent or Requires the Unadjudicated Parent to Comply with Court Orders.**

The procedures set out in the Juvenile Code, MCL 712A.1 et.seq. and the related court rules, MCR 3.901 et.seq. adequately protect the rights and interests of both the child and the parent(s). The general intent section of the Juvenile Code, MCL 712A.1(3) provides:

> This chapter shall be liberally construed so that each juvenile coming within the court's jurisdiction receive the care, guidance, and control, preferably in his own home, conducive to the juvenile's welfare and the best interest of the state.

The jurisdictional section of the statute, MCL 712A.2(b), is directed at the treatment or living conditions of the child, therefore the clear intent of the statute is to allow the court to take jurisdiction over the child(ren) based upon the actions of one or more parents or a caretaker or guardian. MCL 712A.2(b) provides that the court can take jurisdiction over a child under 18 years

(1) Whose parent or other person legally responsible for the care and maintenance of the juvenile, when able to do so, neglects or refuses to provide proper or necessary support, education, medical, surgical, or other care necessary for his or her health or morals, who is subject to a substantial risk of harm to his or her mental well-being, who is abandoned by his or her parents or, guardian, or other custodian, or who is without proper custody or guardianship

....

(2) Whose home or environment, by reason of neglect, cruelty, drunkenness, criminality, or depravity on the part of a parent, guardian, nonparent adult, or other custodian, is an unfit place for the juvenile to live in.

The Child Protection Statute and court rules provide an elaborate procedure both before and after an adjudication. The proceedings are initiated by the filing of a petition, which must include the "essential facts that constitute an offense against the child under the Juvenile Code." MCR 3.961(B). Once a petition is filed, the court has the authority to issue an order to take the child into custody if it finds:

> . . . reasonable grounds to believe that the conditions or surroundings under which the child is found are such as would endanger the health, safety, or welfare of the child and that remaining in the home would be contrary to the welfare of the child. MCR 3.963(B)

Once a child is taken into custody the parent must be notified of the date, time, and place of the preliminary hearing. MCR 3.921(B); MCR 3.963(C); MCR 3.965(A)(1). If the child(ren) remains in custody at the time of the preliminary hearing, the parents must be informed of the allegations against them. At the preliminary hearing, the court can either release the child to the parents or order that the child be placed out of the home. The court can only order a child in out of home placement after explicitly finding on the record that it " is contrary to the welfare of the child to remain at home." MCR 3.965(C)(3). Furthermore if the court orders the child in out of home placement, it is required to determine "whether reasonable efforts to prevent the removal of the child have been made

or that reasonable efforts to prevent removal are not required." MCR 3.965(D)(1). In addition, at the parent's first appearance in court, the court must inform the respondent-parent of their right to counsel, including the right to court appointed counsel if the respondent is financially unable to retain counsel. MCR 3.915(B); see also MCL 712A.17c(4).

To allow the court to establish its jurisdiction over the child the court must hold an adjudication, which is a trial on the merits of the allegations in the petition. In the case of *In re AMB*, 248 Mich App 144, 176-177; 640 NW2d 262, 281 (2001), the Court of Appeals noted that:

> Following the adjudication hearing, the family court must find that a preponderance of legally admissible evidence demonstrates that there is factual support for one of the grounds permitting judicial involvement under M.C.L. §712A.2(b). Once the family court determines that the child comes within its jurisdiction, it can enter dispositional orders that govern all matters of care for the child.

After the court assumes jurisdiction over a child, the parties enter into the dispositional phase of the child protection proceedings, where the children's interests become paramount and courts must make decisions based on the best interest of the children involved. At this stage, if the agency advises against placement of the child in the home of the parent or guardian, it must report in writing the efforts that were made to prevent the child's removal from his home. MCL 712A.18f(1). The agency is also required to prepare a case service plan to be presented to the court and the parties. MCL 712A.18f. The statute also requires the agency to document in the case service plan the efforts that were made to prevent the removal of the child from his or her home or the efforts made to rectify the conditions that caused the child to be removed. The case service plan must also

document the efforts that are to be made by the parent in order to enable the child to be returned to the parent's home.

There are numerous sections within the Juvenile Code and related court rules that grant the court authority under a variety of circumstances to enter orders and require persons who are not parties to the proceedings to comply with its orders. The dispositional section of the statute, MCL 712A.18(1)(g), empowers the court to order the parents, guardian, custodian or any other person to:

> ... refrain from continuing conduct that the court determines has caused or tended to cause the juvenile to come within or to remain under this chapter, or that obstructs placement or commitment of the juvenile by an order under this section.

Additionally MCR 3.973 requires a court to hold a dispositional hearing to "determine what measures the court will take with respect to a child properly within its jurisdiction and when applicable, against any adult. . ."

Another grant of authority is found in MCL 712A.6, which provides:

> The court has jurisdiction over adults as provided in this chapter and as provided in chapter 10A of the revised judicature act of 1961, 1961 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. *Id.* (emphasis added).[1]

Other sections of the statute also confer authority on the court to issue orders against parents, guardians, and other persons not a party to the proceedings. A parent or guardian of a delinquent child who fails to attend the juvenile's court hearing without good cause can be held in contempt and be subject to fines. MCL 712A.6a. Similarly, the

[1] The inclusion of the term "necessary" in this statute should not be read as a limit on the court's power pursuant to its consideration of a parent's interests. Rather, it should be read to impose the authority to allow the court to enter any order that the court finds "necessary" for the well-being of the child.

statute authorizes the court to order that a parent, guardian, custodian, nonparent adult or other person residing in the child's home to leave the home and not return under certain circumstances. MCL 712A.13a(4). Finally, the dispositional statute requires a court to set the terms and conditions of probation for delinquents along with reasonable rules for the conduct of the parents, guardian, or custodian as the court finds necessary for the mental, physical and moral well-being of the juvenile placed on probation. MCL 712A.18(1)(b).

In conclusion, as the above discussion clearly demonstrates, Michigan's child protection statutes and the related court rules promulgated by this Court, grant the family court broad discretion and authority to issue orders that it determines are necessary to protect the interests of the child(ren) that come within its jurisdiction. (There is no requirement that a child must be placed with a parent who has not had a finding of adjudication against them, or that the agency can or should excuse the parent from the services requirement if they were not subject to an adjudication.) Furthermore, these provisions are wholly consistent with the broad intent of the Juvenile Code, as stated in MCL 712A.1(3) and just as important, they comport with the requirements of due process. Even appellant admits that the statutory scheme, on its face, comports with due process.

B. <u>The Due Process Rights of Unadjudicated Parents are Properly Protected During the Dispositional Phase of the Child Protection Proceedings.</u>

In granting leave to appeal, this Court directed the parties to address "whether the application of the one-parent doctrine violates the due process or equal protection rights of unadjudicated parents." *In re Sanders*, 493 Mich 959; 828 NW2d 391 (2013). Appellant asks this Court to find that parents who has not been found unfit, based upon evidence

presented at an adjudication hearing, has been deprived of due process if they are denied custody of their child.

The "one-parent doctrine" which the appellant complains of, was enunciated in 2002 by the Michigan Court of Appeals in *In re C.R.*, 250 Mich. App 185, 646 N W 2d 506 (2002). This case was an appeal from an order terminating a father's parental rights in which the court held that the family court's termination of his rights did not violate due process even though the court did not conduct an adjudication hearing with respect to him.

In this case, the children were made temporary court wards based upon an agreement in which the mother plead no-contest to allegations in a petition after which the allegations against the father were dismissed. At the dispositional hearing, the court ordered the children to be placed with the father and ordered both parents to participate in specific services. When the parents failed to cooperate or respond to the services the children were removed from the father's custody. The agency subsequently moved to terminate the parents' parental rights, and following a hearing, the court terminated both the mother's and the father's rights. The father challenged the termination on due process grounds, arguing that his due process rights to notice (of the state's charges of unfitness against him) were violated when the court terminated his parental rights without first holding an adjudication hearing.

The Court of Appeals upheld the termination decision. It noted that Michigan's child protection statutory scheme authorizes a court to take jurisdiction over a child based on findings that one parent has contributed to the abuse or neglect of a child. The court held:

> As we have explained, the court rules simply do not place a burden on a petitioner like the FIA to file a petition and sustain the burden of proof at an

> adjudication with respect to every parent of the children involved in a protective proceeding before the family court can act in its dispositional capacity. The family court's jurisdiction is tied to the children, making it possible, under the proper circumstances, to terminate parental rights even of a parent who, for one reason or another, has not participated in the protective proceeding. *Id* at 205.

It further explained that once the family court acquires jurisdiction over a child, the Michigan Court Rules authorize a court to hold a dispositional hearing "to determine measures to be taken. . . against any adult." *Id* at 202-203 *citing* MCR 3.973(A). The court also explained that pursuant to MCR 3.972(A)(5)(b) the family court's jurisdiction over a child allows it " to 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." *Id.* The court also found that this rule allowed it to order the father to submit to drug testing and to comply with other conditions that it believed were necessary to ensure the children's safety.

The court then addressed the central issue in this case: whether due process required the court to conduct an adjudication hearing with respect to the father before it could terminate his parental rights. The Court of Appeals held that the father's due process rights were not violated for several reasons. It found that the father had sufficient notice of the charges against him, he was present and actively involved in many of the hearings throughout the case, and was represented by court appointed counsel at those times. Furthermore, the petition for termination filed by the State contained an extensive list of factual allegations that set forth his unfitness. Finally, the State was required to prove these allegations at the termination hearing by legally admissible evidence. *Id* at 206-207.

It is important to take notice of the fact that in *In re C.R.,* the parent was appealing the termination of his parental rights. In the present case before this Court, the appellant is challenging only the trial court's denial of his request for placement of his children with

him. Given this, the interest involved is both different from, and diminished from, that in a termination case, particularly as it relates to due process analysis.

The statutory scheme and court rules that relate to dispositional hearings and to post-dispositional review hearings, MCR 3.973 and MCR 3.975, particularly with respect to the placement of children within the court's jurisdiction were recently reviewed by the Michigan Court of Appeals in *In re Mays II,* 2012 WL 6097295, Dkt No 309577 (Dec. 6, 2012). In this case, the court upheld the lower court's denial of an unadjudicated father's motion for custody of his two girls. It found that the statutes and court rules, taken together, satisfied due process requirements. It also found that the father in this case was provided a hearing as to his fitness before the court denied his motion. It stated:

> The parent is entitled to notice of the dispositional hearing and an opportunity to be heard before the court makes its dispositional ruling. When it is recommended that the child not be placed with a parent, the court must consider whether the child is likely to be harmed if placed with the parent, which would necessarily entail a determination regarding that parent's fitness as a custodial parent. Once the court determines that the child should not be placed with the parents, it may continue the child in alternative placement or return to the parents depending on the circumstances of the parents and the child, again considering whether the child is likely to be harmed if placed with the parent, which would necessarily entail a determination regarding that parent's fitness as a custodial parent. *In re Mays II, supra* at pp. 4-5.

Thus, the requirements of due process are clearly met given the procedural protections afforded unadjudicated parents in dispositional proceedings. What the process does, as set out in the rules, is provide a continuing analysis of whether a parent is fit to provide care for the child. In fact, this procedure provides more than the required procedural protections to the parent, because the determination of fitness is not limited to an adjudication hearing. Rather, the issue is revisited at every stage of the proceeding by

the court's determination of whether the parent can properly care for the child and whether it is safe to place the child in the parent's custody.

III. MICHIGAN IS IN THE MAINSTREAM WITH RESPECT TO THE TREATMENT AFFORDS NON-ADJUDICATED PARENTS IN CHILD PLACEMENT DECISIONS.

The presence of unadjudicated parents in child protection proceedings raises four distinct, but related issues. The first issue is whether a family court can take jurisdiction over a child based on the conduct of only one parent, where there is another parent ready and willing to care for the child. The second issue is whether these parents should be given priority with respect to the legal custody of the child. The third issue involves the degree of authority a court may exercise over this parent during the ongoing child protection proceeding. The last issue is whether a family court may terminate the parental rights of a parent that has never been provided with an adjudication hearing.

There are only a small number of states in which juvenile courts will never take jurisdiction over a child if they find a parent who is ready and willing to care for the child. *See In re ML* 757, A2d 849 (Penn 2000)(holding that a court may not find a child dependant upon finding that a non-custodial parent is ready, willing and able to provide adequate care to a child.); *In re Russell G.*, 105 Md App 366; 672 A2d 109 (Md Ct Spec App 1996) (finding that a child is a "Child in Need of Assistance" according to the plain meaning of the statute only if both parents are "unable or unwilling to give proper care and attention to the child."); *In re Cheryl K*, 126 Misc2d 882; 484 NYS2d 476 (NY Fam Ct 1985)(holding that a mother had a superior right to the custody of her daughter over third parties where she had not been adjudicated guilty of abuse or neglect.)

In the vast majority of other states, a juvenile court will assume jurisdiction over a child after finding only one parent to be responsible for the abuse or neglect of the child. However, the treatment afforded the unadjudicated parent varies across these states. In New Hampshire, courts give preference to the unadjudicated parent with respect to custody of the child. In *In re Bill F.*, 145 NH 267; 761 A2d 470 (2000) the court held that parents who have not been charged with abuse and neglect are entitled to a hearing with respect to the custody of their child. It also held that a court should award custody to the parent, absent a finding by a preponderance of the evidence, that the parent has "abused or neglected the child or is otherwise unfit to perform his or her parental duties." *Id* at 476. (This rule was subsequently codified by the New Hampshire Legislature. NH Rev Stat Ann §169-C:19-e (2006)).

Other jurisdictions allow a court to take jurisdiction over a child based on the conduct of only one parent, but, unlike New Hampshire, courts in these states are not required to award custody to the unajudicated parent, even if the parent is deemed to be fit. California Courts are given discretion to award the unadjudicated parent custody of the child and terminate the case. It may also award legal custody to this parent but maintain court supervision over the case. *See* Leslie Joan Harris, *Involving Nonresident Fathers in Dependency Cases: New Efforts, New Problems, New Solutions*, 9 J Law & Fam Stud 281, 303-304 (2007) *citing* Cal. Wel & Inst Code § 361. 2b. *See also In re Austin P.*, 118 Cal App 4th 1124; 13 Cal Rptr3d 616 (2004)(holding that although a statute required the court to place the child in the temporary custody of his father provided it would not be detrimental to child, the court could not terminate its jurisdiction until it analyzed whether ongoing supervision of the child was necessary). Florida has a similar statute, which gives

a court discretion to either close a case or continue court supervision after awarding custody to the unadjudicated parent. Harris at 304, *citing* Fla Stat. Ann.§ 39.521(3)(b)(2012). Importantly, courts in these states will make these placement decisions based on the best interest of the child standard. *See e.g.*, Fla. Stat. Ann § 39.521(3)(b)(2)("The standard for changing custody of the child from one parent to another or to a relative or another adult approved the court shall be the best interest of the child."); *See also R.W. v Dep't of Children & Families*, 909 So2d 402, 403 (Fla App 1st Dist. 2005) (holding that the trial judge is to make child custody decisions based on the best interests of the child standard.)

Many other states have similar statutory schemes. Maine and North Carolina both allow a juvenile court to take jurisdiction over a child based solely on the custodial parent's abuse and neglect. Me Rev Stat Ann 22 § 4035 (2008); NC Gen Stat. Ann § 7B-503 (2011). Furthermore, courts in these states have discretion to place the child with the non-offending parent. Me Rev Stat Ann 22 § 4035 provides that after a hearing, the court "shall make a finding, by a preponderance of the evidence, as to whether the child is in circumstances of jeopardy to the child's health or welfare." In addition, after finding that a child is in "jeopardy," the court may order "[r]emoval of the child from his custodian and grant custody to a noncustodial parent, other person or the department." *Id* at § 4036. Furthermore, the court is empowered to award custody to the noncustodial parent and dismiss the case if the court finds that the child will not be in "jeopardy" and the change is in the best interest of the child. *Id* at § 4036(1)(A).

North Carolina's placement statute does not give preference to unadjudicated parents. Instead, the statute gives preference to relatives and includes unadjudicated

parents within this category. NC Gen Stat Ann § 7B-506(h)(2) (2007) provides: "If the court finds that a relative is willing and able to provide proper care and supervision in a safe home, then the court shall order temporary placement of the juvenile with the relative unless the court finds that placement with the relative would be contrary to the best interests of the juvenile."

Missouri also allows a court to assume jurisdiction over a child based on the conduct of one parent. Mo Rev Stat Ann § 211.011(1995). In this state, the juvenile court assumes jurisdiction upon finding by clear and convincing evidence that the "child is in need of care and treatment." *Id.* Moreover, Missouri's child protection statutes contain a "non-offending parent" statute, which sets forth conditions under which a child may be placed in the care and custody of this parent. *See* Mo Rev Stat Ann § 211.037 (2005). However, the Missouri Court of Appeals has recently held that the statute does mandate placement with an unadjudicated parent, it simply establishes a preference for placement with this parent provided the requisite conditions are met. *In re A.R.*, 330 SW3d 858 (Mo App WD 2011). It is noteworthy, that in this case the court rejected the father's procedural and substantive due process claims. It also upheld the juvenile court's denial of his custody claims after finding that his drug abuse and lack of suitable housing would be harmful to the child.

In *In re Amber G*, 250 Neb 973; 554 NW2d 142 (1996) the Nebraska Supreme Court rejected a father's argument that the juvenile court could not take jurisdiction over his children because there were no allegations against him. The Nebraska Supreme Court found, pursuant to the state's statute that the purpose of the adjudication was to protect the interests of the children and to determine whether the children lacked proper care while in

the custody of the mother. The court held that the propriety of the father's custody was a question for the dispositional phrase of the proceedings once the court took jurisdiction over the children.

The issue in the case before this Court is identical to one that was addressed by the Supreme Court of Ohio in 2006. In *In re C.R.*, 108 Ohio St3d 369; 843 NE2d 1188 (2006), a petition was filed in the family court alleging the child was a neglected child based on the mother's substance abuse. The child's biological father, her aunt and uncle, and her grandmother all filed petitions for legal custody. Following a three-day hearing, the court awarded custody of the child to her aunt and uncle. The court of appeals reversed, holding that the family court was required to make a finding of unsuitability on the part of the father before it could award custody to a nonparent.

The Supreme Court of Ohio disagreed. It began by noting that this case involved an award of legal, not permanent custody. It also noted that a juvenile court adjudication "is a determination about the care and condition of a child and implicitly involves a determination of the unsuitability of the child's custodial and/or noncustodial parents." *Id* at 1192. The court explained that the distinction is important because an award of legal custody does not "divest parents of their residual parental rights, privileges, and responsibilities" and further explained that either parent could petition the court for a modification of the order in the future. *Id* at 1191. The court further held that a juvenile court has no duty to make separate findings with respect to the unsuitability of a noncustodial parent before it can award custody to a nonparent. *Id* at 1192.

Entirely different due process questions are presented by cases in which a court has terminated the parental rights of an unadjudicated parent. In reviewing cases in which this

has occurred, appellate courts have focused their inquiry on whether there was proper notice of the charges against the parent and on the sufficiency of the procedural due process provided at the termination proceedings.

Alaska's child protection statute allows a court to assume jurisdiction over a child based on the conduct of only one parent. *See* Alas Stat § 47.10.011(1998). The statutes also allow a court to terminate a noncustodial parent's rights even though the parent was never found to be unfit in a prior adjudication hearing. Alas Stat § 47.10.088(g)(2008) provides: "This section does not preclude the department from filing a petition to terminate the parental rights and responsibilities to a child for other reasons, or at an earlier time than those specified in (d) of this section, if the department determines that filing a petition is in the best interests of the child."

The Supreme Court of Alaska was presented with a challenge to this statutory scheme in *Jeff A.C. Jr. v State,* 117 P3d 697 (Alas 2005). In this case, the court assumed jurisdiction based on the mother's drug use and risk of mental injury to a child. However, the court also terminated the father's parental rights, based on abandonment and neglect, even though he was never provided an adjudication hearing. In upholding the termination order, the court noted that the language of the termination statute specifically provides that a parent's acts need not have been the subject of a prior adjudication hearing. The court explained: "A termination requires the state to show by clear and convincing evidence that 'the child has been subjected to conduct or conditions described in [the adjudication statute]' and that the parent has not remedied these conditions. Thus, it is *not* required that such conduct or conditions be the same as those which formed the basis for the previous CINA adjudication." *Id* at 708 (emphasis in original).

In *In re A.G.*, 295 P3d 589 (Nev 2013), a Nevada family court took jurisdiction over a two year old child after the mother had admitted to drug use and her inability to care for her child. A petition was originally filed alleging domestic violence on the part of the father, but was subsequently withdrawn. Even so, the court ordered the father to submit to drug testing, undergo a domestic violence evaluation, and pay child support. Eighteen months later, Social Services filed a petition to terminate the father's parental rights on the grounds that he had not substantially complied with the treatment plan.

Nevada's termination of parental rights statute contains presumptions that give rise to grounds for termination. One presumption arises if a child has been placed outside of his home for fourteen of twenty consecutive months. In such cases, it is presumed that the parents have demonstrated only "token efforts" which is evidence of unfitness and grounds for termination of parental rights. Additionally, the failure of a parent to substantially comply with a case service plan within six months of the date the plan was entered into is presumed to be evidence of "failure of parental adjustment" which is also grounds for termination of parental rights.

The court recognized that under Nevada's statutory scheme, once there is a finding that a child is in "need of protection," a court may make a variety of dispositions which can include placing the child in foster care and ordering any parent to undergo a variety of different treatments. However, the court held that because the father in this case had never been found to have abused or neglected the child, the statutory presumptions that arose from the length of foster care placement and his failure to comply with the treatment plan could not be used against him as grounds for termination of his parental rights.

Michigan's statutory scheme provides for outcomes that are in line with these other states. Although Michigan courts are not required to refrain from exercising jurisdiction over a child when an unadjudicated parent is willing to assume care of the child as is the case in Pennsylvania, Maryland and New York, Michigan courts are clearly allowed to do so. MCL 712A.19(1) specifically provides:

> Subject to section 20 of this chapter, if a child remains under the court's jurisdiction, ***a cause may be terminated*** or an order may be amended or supplemented, within the authority granted to the court in section 18 of this chapter, ***at any time the court considers necessary and proper***. *Id* (emphasis added).

With respect to custody decisions involving unadjudicated parents, Michigan's statutory scheme is also in line with the significant number of other states. A Michigan family court may assume jurisdiction over a child based on the actions of only one parent. The same is true for courts in California, Florida, Maine, North Carolina, Missouri, Nebraska, Ohio, Alaska and Nevada. Although, as noted above, some jurisdictions give preference to an unadjudicated parent in custody determinations, nothing in the Michigan statutes prevent a court from doing the same. Furthermore, it has long been a practice of the Agency and the courts to give preferential treatment to family members in custody decisions.

The question of whether a court could order an unadjudicated parent to participate in services, absent a finding of unfitness, and then proceed to terminate that parent's parental rights solely on the grounds that he or she failed to participate in the services does raise serious constitutional questions. This question presents a situation analogous to the facts in *In re A.G., supra*, where the Nevada Supreme Court overruled, on constitutional grounds, the use of statutory presumptions in parental termination cases. However, this

question is simply not before this Court. Here, appellant is only appealing from the family court's decision denying his request for legal custody of his children.[2]

IV. MICHIGAN'S STATUTORY SCHEME ADEQUATELY PROTECTS THE PARENTS' CONSTITUTIONAL RIGHTS WHILE IT SERVES THE STATE'S IMPORTANT INTEREST IN PROTECTING CHILDREN FROM HARM. IMPORTANTLY, IT ALSO ALLOWS A COURT TO MAKE DECISIONS BASED ON THE CHILD'S BEST INTERESTS.

In child welfare proceedings, once a child has been found to have been abused or neglected, a tension naturally develops between the rights of the child and those of the parents. At this point, children's needs must be untangled from their parents' rights and courts must be free to make decisions that are predicated principally on the child's best interests.

The states that require a court to award custody to an unadjudicated parent, and dismiss the child protection proceeding because a parent appears who is ready and willing to care for the child, without requiring an independent determination of the child's interests, fail to conform to modern notions of morality and justice with respect to the children involved. The statutes and judicial opinions that require this treatment are a throw back to Roman law that treated children as chattels and afforded fathers the right to sell them at will or even kill them. These rules continue to perpetuate the notion that children are the mere property of their parents and incorrectly place the focus in these types of custody disputes on the physical control and possession of the children involved, rather than concern for the children's wellbeing. *See* Barbara Bennett Woodhouse, *Hatching the*

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[2] Neither was this particular question before the court in *In re C.R., supra.* Although this was a termination of parental rights case, the father was served with an amended petition that set out numerous allegations of his unfitness and he was afforded a hearing on allegations contained in the petition where the state was required to prove the allegations by legally admissible evidence.

Egg: A Child-Centered Perspective on Parents' Rights, 14 Cardozo L. Rev. 1747 1810-1827 (1993)(critiquing the traditional notion of parental rights).

This case brings to the center stage the dispute between those that advocate for the conservative "ownership of children" approach along with a return to the condition of patriarchy, and those that recognize that children have independent constitutional rights to loving and nurturing relationships which are best protected by the best interest of the child standard. *See* James G. Dwyer, *A Constitutional Birthright: The State, Parentage, and the Rights of Newborn Persons*, 56 UCLA L Rev 755 (2009)(arguing that courts should recognize that drug addicted newborn babies, more than their birth parents, have fundamental liberty interests against being forced into intimate relationships that are likely to be extremely detrimental to their well being).

As demonstrated above, neither Michigan's child protection statutory scheme nor the "one parent doctrine" as enunciated in *In re C.R., supra,* represent an unconstitutional intrusion into the parent child relationship. Instead, the statutes and the court rules provide the necessary level of due process protections to parents while, at the same time, appropriately grant the family court the discretion it requires in these difficult cases to enable it to make decisions that are in the best interest of the children involved.

Furthermore, the validity of the legal analysis set out above is confirmed when considered in the light of this and other cases. In the case before this Court, while the children had been living with appellant and his mother at the time of the adjudication, it was at best unclear who was the primary caretaker of the children. (Appellee's Appendix, at 13a, Pretrial Hrg. 1/11/12, p. 6). The children were subsequently removed from that home and placed with appellant's sister. (The family court conducted a full hearing on

appellant's motion for legal custody of his children in which he was represented by court appointed counsel.) Appellant's complaint during the pendency of the case was not that this placement interfered with his actual custody of the children; rather it was addressed at the fact that placement of the children with his sister adversely affected his ability to visit with them. (Dispositional Hearing, 2/22/12, 19-21) Finally, during the pendency of this appeal, appellant was convicted in the federal district court of conspiracy to distribute over 500 grams of cocaine under 21 USC 841(b)((1)(B)(ii). (Appellee's Brief, at p. 2; Appellee's Appendix pp. 88b-101) Regardless of the outcome of those separate proceedings, it emphasizes that what appellant is asserting here is solely an abstract notion of custody, while the actual physical custody of the children are in the hands of others. Abstract notions of custody clearly have limited practical effects on the lives of children, and legally the fact that appellant may not be able to offer any real custody of his children diminishes his due process interests.

A similar issue was before the Michigan Court of Appeals in *Mays II*, *supra*, where an unajudicated father appealed the court's denial of his motion for custody of his two daughters. Judge Murray, concurring, questioned whether the father had established a meaningful relationship with his children. He noted:

> Specifically, the evidence presented showed that there was a significant factual question as to whether respondent had *any* contact with his children for a number of years prior to the February 24, 2012 hearing.
>
> ....
>
> However, testifying directly to the contrary was his ten-year-old daughter, who testified that she did not see respondent on her tenth birthday and had not seen him in quite some time. Indeed the child testified that she could not remember the last time she saw her father. As a result of this testimony and the trial court's findings, the liberty interest recognized by the due process clause as enunciated in *Stanley v. Illinois*, 405 U.S. 64; 92 S.Ct. 1208; 31 L.Ed. 2d 551 (1972), is simply not applicable here. *Mays II, supra* at 6.

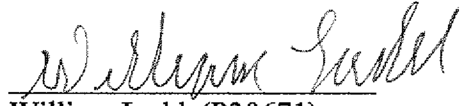
Clearly, determinations as to the propriety of out of home placements are very fact specific and must be analyzed on a case-by-case basis, both to protect the best interests of the children and to afford parents the requisite due process protections. Attempts to promulgate a broad based prohibition against placing children outside the homes of their unadjudicated parents would lead to an absurd result in this and many other cases. Without a doubt, such a new rule, which is clearly not required by the mandates of due process, would jeopardize both the rights and best interests of the children involved.

CONCLUSION

"Out of the nature of children arise their needs; and out of children's needs, children's rights." Raymond G. Fuller, *Child Labor and Child Nature*, 29 Pedagogical Seminary 44 (1922), quoted in Barbara Bennett Woodhouse, *"Who Owns the Child?" Meyer and Pierce and the Child as Property*, 22 W & Mary L Rev 995, 1043-1044 (1992).

There are significant and conflicting interests at stake in child protection proceedings; the liberty interests of parents in the case and custody of their children, the state's parens patriae interest in promoting the health and welfare of the children and the rights of the children involved. The procedures set forth in the Michigan's child protection statutory scheme properly protects parents' constitutional rights while also affording the trial courts their proper authority to weigh those interests based upon the facts of each individual case and the best interests of the children involved. For all of the reasons stated above, *amicus curiae,* the Juvenile Appellate Clinic at the University of Detroit Mercy School of Law respectfully requests that this Court hold that Michigan's child protection statutory scheme does do not violate the due process rights of unadjudicated parents.

Respectfully submitted,



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