THE STATE OF MICHIGAN
IN THE SUPREME COURT

IN THE MATTER OF:	SUPREME COURT NO. 146680
PRESTON & CAMERON SANDERS,	COURT OF APPEALS NO. 313385
Minors.	FAMILY DIVISION NO. 11-2828-NA

DEPARTMENT OF HUMAN SERVICES,
Petitioner-Appellee,
v
LANCE LAIRD,
Father-Appellant,
&
TAMMY SANDERS,
Respondent-Mother.

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APPELLEE'S BRIEF
ORAL ARGUMENT REQUESTED

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Where (1) the father is presently incarcerated awaiting a five-year mandatory minimum sentence, (2) has had a hearing on custody, (3) has always had notice and an opportunity to be heard, (4) has not contested the judge's factual findings, and (5) has admitted most of the allegations against him, does the Constitution require that the children be returned to him immediately merely because he has not had an *adjudication* trial?

The Lower Courts answered:	No
Father-Appellant answers:	Yes
Petitioner-Appellee answers:	No

COUNTERSTATEMENT OF FACTS

Petitioner accepts the father-appellant's Statement of Facts with the following additions.

The matter initially began with the September 19, 2011, petition alleging that respondent-mother had, for the second time in a row, given birth to a child positive for cocaine. At the time, Preston Sanders was in the father's custody. Petitioner immediately placed the children in the father's mother's custody. (81b).

The first paragraph on page 5 mentions the January 11, 2012, hearing. In November, DHS had taken the children from the father's mother to his sister, Darlene Adams, who lives in Addison. The father considered Addison too far away from Jackson. (9b).

The last paragraph on page 5 mentions the February 7, 2012, hearing. At one point, after petitioner asked for an adjournment, the father's lawyer stated:

> Their other option Judge they–as they said they have adjudication on the mom, they have jurisdiction over the kids, they can dismiss against Mr. Laird, and make him a non-respondent father, put in the services. (24a).

The first paragraph on page 6 mentions the father testifying that he was convicted of domestic violence. He admitted that the violence dealt with respondent-mother and that he spent thirty days in jail. (27a, 34b).

The last paragraph on page 6 mentions the February 22, 2012, hearing. At this hearing, the father's lawyer, while denying that the father had ever used cocaine, admitted the one positive test. (35a). As it is, the court file shows both another positive test for cocaine, for June 16, 2012, and a failure to submit to various tests. (48b, 75b).

The first paragraph on page 7 mentions petitioner's decision not to proceed with a jury trial. As the father had testified admitting both that he had been convicted of domestic violence and that respondent-mother had come over unsupervised to the house, the only allegation left was cocaine use. Because the father was promising to comply with services, petitioner saw no need to proceed with a jury trial and agreed to strike the allegations against the father and have him considered a non-respondent. (46a, 49a). The father's lawyer responded at the May 2, and August 22, 2012, hearing that the father has been begging for and complying with services. (49a, 59a).

On January 18, 2013, the Court of Appeals denied leave to appeal. (86b).

Subsequently, on April 5, 2013, this Court granted leave to appeal and ordered the parties to "address whether the application of the one-parent doctrine violates the due process or equal protection rights of unadjudicated parents." 493 Mich 959; 828 NW2d 391 (2013). (87b).

On May 10, 2013, the father was convicted in Michigan's Western District of conspiracy to distribute over 500 grams cocaine. 21 USC 841(b)(1)(B)(*ii*). He is presently incarcerated awaiting a presently scheduled September 10, 2013, sentencing before Judge Robert Jonker. (88b-101b).

ARGUMENT

Because (1) the father is presently incarcerated awaiting a five-year mandatory minimum sentence, (2) has had a hearing on custody, (3) has always had notice and an opportunity to be heard, (4) has not contested the judge's factual findings, and (5) has admitted most of the allegations against him, the Constitution does not require that the children be returned to him immediately merely because he has not had an *adjudication* trial.

For two reasons, the father is entitled to no relief. First, his constitutional rights were not violated. His facially appealing argument misses a very important point–it never explains why due process requires a hearing through nothing but an *adjudication*. As it is, all that due process requires is (1) notice, (2) an opportunity to be heard, and (3) ample consideration. All three occurred in this case. Whether or not the statutory and court rule system is unconstitutional as applied in some other case, the father's rights were not violated in this case. Second, the only issue properly before this Court, custody, is moot simply because the father is now incarcerated–for the next five or so years.[1]

The first reason to affirm is that the father's constitutional rights were not violated. One of the cases that he cites, *In re Amber G*, 250 Neb 973, 982; 554 NW2d 142 (1996), points out that due process is satisfied by: "(1) notice, (2) an opportunity to be heard, and (3) the court's ample consideration." All three were met in this case. First, the father has never claimed that he has not received adequate notice at any time.

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[1]On the other hand, the father correctly identifies "*de novo*" as the proper review standard for constitutional issues.

Second, he has received an opportunity to be heard. The family court specifically held an evidentiary hearing on February 7, 2012, as to the children's custody. Not only did the father have an opportunity to present his own side, but he himself specifically testified. (59a-66a, 13b-37b). He had the right to cross examine witnesses and put witnesses on himself. He has also since had every opportunity to present whatever evidence he wishes and challenge whatever evidence petitioner has.

Third, the family court specifically considered the various factors and decided against giving custody to the father. In February 2012, the father was not even asking for custody for himself. Instead, he merely wanted custody switched back from his sister to his mother. Later, in September 2012, the judge cited the father's violence and criminality (and refusing to even acknowledge them) in not giving him custody. (67b). The judge based these findings on Dr. Shannon Lowder's psychological evaluation:

> It does not appear that Mr. Laird is a candidate for reunification with his young children based on his violent history, the fact that he denies his entire history of violence and takes absolutely no responsibility for it, his substance abuse issues, and his severe psychopathology. He has no insight into his own functioning, and sees no need to change anything about himself as he believes he is good the way he is and that other people simply need to realize what he believes. (47b).

Not only does the father not factually challenge the judge's findings, but, even though Dr. Lowder's report was written over a year ago, he has never challenged what she said.

As it is, the cases that have addressed this issue have *all* rejected the father's claim. *In the interest of AR*, 330 SW3d 858 (Mo App, 2011), is even factually

very similar to the present case. In *AR*, the mother tested positive for both cocaine and marijuana and her newborn child tested positive for marijuana. Based on these facts and other things, the government adjudicated the child as neglected based on the allegations against the mother only. The allegations against the father were dismissed. Then, at the disposition hearing, the government presented hearsay evidence showing that the father had smoked marijuana and was not complying with drug treatment and tests. In challenging the custody decision, the father made the same argument that the father in the present case is making, that he is constitutionally entitled to custody absent an adjudication trial. In rejecting the father's claims, the Missouri Court of Appeals noted that the father had notice, had participated in the hearings, and had received an opportunity to present evidence and cross examine witnesses:

> To the extent that Father argues that he was denied custody of A.R. without any allegation or finding that he had done anything wrong, that is not what occurred here. As discussed above, the juvenile court exercised its discretion and granted custody of A.R. to the Children's Division for placement with a grandmother only after examining the evidence of Father's history of drug abuse, which demonstrated that Father did not meet the condition for placement under the non offending parent statute. 330 SW3d 865.

Amber G, *supra*, also rejected the father's constitutional claim. Here, too, the court took jurisdiction based on allegations against the mother alone. The court then placed the child in foster care. The Nebraska Supreme Court first pointed out that the petition is to protect the children, not to punish the parents. 250 Neb 980. In this situation, the father's fitness to have custody was not proper until the disposition. *Id.* The court properly took jurisdiction based on the mother's admissions. *Id.* Although a

fit biological parent has the superior right to custody, the children's interests are the most important. 250 Neb 982. Thus, the court can give custody to a third party where the home is unfit or the parents have forfeited their superior right to custody. *Id.* The Constitution was not violated simply because the father had received (1) notice, (2) an opportunity to be heard and (3) ample consideration. *Id.*

The father's arguments about just how important parental rights are misses the point. He never really explains why the Constitution necessarily requires an actual *adjudication*, rather than any other type of hearing. First, not only does he fail to explain how the Constitution necessarily entitles him to a jury trial, but he cites nothing to that effect. As it is, the constitutional right to a jury trial is limited. Even a juvenile charged with a serious felony is not constitutionally entitled to a jury trial for the adjudicative stage. *McKeiver v Pennsylvania*, 403 US 528, 545; 91 S Ct 1976; 29 L Ed 2d 647 (1971).

Second, the father fails to explain how he is constitutionally entitled to discovery and or even to cite any case to that effect. As it is, even criminal defendants have no general constitutional right to discovery. *Weatherford v Bursey*, 429 US 545, 559; 97 S Ct 837; 51 L Ed 2d 30 (1975).

Third, the father both fails to cite any cases or even explain how the Constitution requires that Michigan's evidentiary rules be followed. Evidentiary rules are not constitutional mandates. *AR* found no constitutional violation despite hearsay evidence being presented. In any event, because the father is a non-respondent, any evidence presented at any termination hearing must follow Michigan's Rules of Evidence. *In re CR*, 250 Mich App 185, 201-202; 646 NW2d 506 (2001).

Fourth, the father never does explain just how the statutes and court rules somehow shift the burden to him. He certainly has not explained how anything like that happened in the present case. For whatever reason (Constitution, statutes, court rules, or just plain policy), the courts should always seriously consider placing the child with the biological parent. If the parent if fit and willing to take custody, a very strong presumption should favor giving that parent custody. Yet, no burden shifting occurred in the present case. Petitioner put on the first witness at the February 7, 2012, hearing. (25a, 19b-33b). The father then put on a witness (himself). (26a-28a, 33b-37b). The judge then eventually made a decision. Later, in September 2012, the judge decided not to give the children back to the father simply because DHS had presented evidence (Dr. Lowder's report) showing that reunification is not yet appropriate. (39b-48b). The father has never factually challenged this report. Instead, because he has instead relied exclusively on his claim that non-respondent parents necessarily (and constitutionally) must have custody, the burden has never been shifted.

Even in criminal law, Michigan does not always exult form over substance. In Michigan, in 1975, the prosecutor could try a juvenile as an adult only if two hearings were held: (1) probable cause that he committed the crime and (2) child's and public's best interests. In *People v Saxton*, 118 Mich App 681; 325 NW2d 795 (1982), lv den 414 Mich 931 (1982), for all intents and purposes, the probate court bothered with only the first hearing. It waived jurisdiction for no other reason than the crime was unusually heinous. It just ignored the statute's five-step analysis for deciding best interests: "Because the juvenile judge failed to hold a phase two hearing, no evidence was presented on these criteria. Therefore, the juvenile judge's waiver order was not based

upon substantial evidence nor was it a product of a thorough investigation." 325 NW2d 398. Even so, the Court of Appeals affirmed (on this issue) finding that the necessary information had come out later in the proceedings. *Id.*

The second reason to affirm deals with mootness and what is properly before this Court. As it is, the father's arguments have significantly changed since he argued the case at the trial level. At the trial level, he asked for concrete relief–immediate custody. On the other hand, now, on appeal, he asks for nothing but abstract relief–just declare the statutory/court rule system unconstitutional. He never clearly outlines what concrete relief he is requesting in this case.[2] In fact, most of his arguments have very little to do with the record. To a certain extent, he is asking more for an advisory opinion than for a decision in an appeal. This Court, however, seldom issues advisory opinions without a real controversy. *Johnson v Muskegon Heights*, 330 Mich 631, 633; 48 NW2d 194 (1951).

The order that has been appealed deals with only one issue, custody. Not only does it not deal with the family court taking jurisdiction taking over the children, but the father has never argued that it cannot. To the contrary, on February 7, 2012, his lawyer stated:

> Their other option Judge they–as they said they have adjudication on the mom, they have jurisdiction over the kids, they can dismiss against Mr. Laird, and make him a

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[2]The father's relief section does not even ask for any specific relief. It does not ask this Court to say what the trial court should do. Instead, it asks for declaratory relief that the "one-parent doctrine" is unconstitutional." As for what happens next, all that it says is: "Accordingly, the trial court's order denying Mr. Laird's motion should be reversed." (P 30). Of course, given the father's continued incarceration, reversing the order with instructions that the father received custody is not feasible.

non-respondent father, put in the services. (24a).

Likewise, the order appealed from did not deal with any claim that the court has no authority to order a non-respondent parent to do any services. In fact, at least for quite a while, the father had no problem with court-ordered services. As pointed out above, on February 7, 2012, he made such a suggestion. (24a). Then, on both May 2, 2012, and August 22, 2012, he stated that he has been begging for services (though he qualified his statements the last time). (49a, 59a). In any event, although his motion at one point somewhat alluded to this point (68a), in the end, the requested relief did not include releasing him from any court-ordered service plans (73a).[3] Further, the trial court's opinion did not deal with whether or not a family court may impose services on a non-respondent parent either. (63a-70a, 88a-90a). Likewise, neither the motion nor the opinion appealed from even hints at such issues as a jury trial and the evidentiary rules. This Court ordinarily does not consider issues raised for the first time on appeal. *Durant v State Bd of Educ*, 424, Mich 364, 396; 381 NW2d 662 (1985).

In the end, the motion and the order appealed from deal with only one issue, custody. The father's lawyer made that point clearly at the September 12, 2012, hearing:

> THE COURT: As I understand your argument, what you're telling me, these cases say is, if dad hasn't been adjudicated unfit, that the Court always has to place with dad. That the Court can't exercise its discretion and its jurisdiction over the children to do anything but - - although I can keep them from

[3]He did not make any such request during oral arguments at the trial level either. (63b-64b, 67b-68b).

> the mother, that, without the dad being a respondent and without him being adjudicated unfit, that constitutionally, I am required to place the children with the father. That's your position?
>
> MS. O'BRIANT: That's exactly my position.
>
> THE COURT: And you believe that these cases state that?
>
> MS. O'BRIANT: I believe these cases state exactly that. (67b).

And that issue is now moot. The father is presently incarcerated pending a September 10, 2013, sentence for an offense that carries a five-year mandatory minimum. No matter what this Court does, it will not be giving the father immediate custody. Where the requested remedy is no longer available, the issue is moot. *GP Graham Construction Co v Chesaning Union Schools*, 468 Mich 906; 661 NW2d 582 (2003).

As it is, none of the father's cases support his conclusion that the Constitution mandates that a non-respondent parent receive custody. The case that he relies on the most, *In the Matter of the Parental Rights as to AG*, 295 P3d 589 (Nev, 2013), did not even deal with custody. Instead, it was a parental termination case, something that has not even yet occurred in the present case. The court merely said that the family court may not terminate parental rights merely because a non-respondent parent has not adequately followed case plans. As pointed out above, however, the court-ordered services issue is not properly before this Court because it was not litigated below. Neither the motion nor the opinion dealt with this issue. As it is, *AG* did say that the family court properly took jurisdiction over the child, as only one parent's neglect is needed. 295 P3d 596.

Next, as pointed out above, *Amber G, supra*, supports petitioner, not the

father. *Amber G* specifically rejected the father's constitutional claims.

Next, *State ex rel Children, Youth & Families Dept v Benjamin O*, 141 NM 692; 160 P3d 601 (2007), was also a termination case. Rather than concluding that the Constitution requires that a non-respondent parent receive custody, the New Mexico Supreme Court reversed merely because the trial court's findings were not sufficiently developed for this non-adjudicated parent. 141 NM 700. Significantly, although the New Mexico Supreme Court preferred that a new petition be filed, one is not necessary. 141 NM 702. In other words, the State may proceed against this non-respondent father even without an adjudication trial (contrary to Lance Laird's position).

Likewise, none of the other cases concluded that the Constitution requires that a non-respondent parent receive custody. As it is, the father's assertion that "the overwhelming majority of States to address the rights of un-adjudicated parents have rejected the one-parent doctrine" (P 21), is very difficult to reconcile with the following from Sankaran, *Parens Patriae* Run Amuck: "The Child Welfare System's Disregard For the Constitutional Rights of Non-Offending Parents," 82 Temp L Rev 55, 57 (2009): "Nearly every state permits juvenile courts to deprive non-offending parents of custodial rights to their children based solely on findings or admissions of child maltreatment by the other parent." In fact, this article says the following about a large number of the cases that the father cites in the present case to support his position: "A number of other jurisdictions have adopted a more nuanced approach while continuing to deprive non-offending parents of their full custodial rights." *Id* at 73. The two jurisdictions that the article cites favorably, Maryland and Pennsylvania, *id* at 76, do not apply in the present case because both deal with statutes that specifically say that the family court

may not take jurisdiction if a parent is ready, willing, and able to provide appropriate care. *In re Sophie S*, 167 Md App 91, 105; 891 A2d 1125 (2006); *In re ML*, 562 Pa 646; 757 A2d 849, 852-853 (2000). The father makes no such claim that Michigan's system is the same.[4]

Last, the father's equal protection arguments also lack merit. A statutory scheme treating different people differently does not violate the Equal Protection Clause. *People v Perlos*, 436 Mich 305, 331-333; 462 NW2d 310 (1990). The essence of the child welfare system is the child's best interest. The state may take jurisdiction and even terminate without showing fault. *In re Jacobs*, 433 Mich 24, 39; 444 NW2d 789 (1989). As pointed out above, Michigan's system adequately safeguards the parents' rights. Whether or not all of the parents were involved in the adjudication, due process requires: (1) notice, (2) an opportunity to be heard, and (3) due consideration. Each occurred in this case. The Equal Protection Clause is not so strict as to strike down such a system.

In any event, the equal-protection argument is not properly before this Court either. Although the trial motion eleven times mentions "due process" (63a-72a), it never once even contains the words "equal protection." Likewise, the oral argument dealt exclusively with "due process" without even once mentioning "equal protection." (63b-64b, 67b-68b). He is raising this issue for the first time on appeal. In *Durant*, *supra*, 424 Mich 396, this Court specifically declined to address an equal-protection claim simply because it had not been first raised below.

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[4]In addition, the father's trial-level motion conceded jurisdiction over the children: "Although this Court has jurisdiction through the mother's adjudication, ..." (71a).

RELIEF

ACCORDINGLY, petitioner asks this Court to either affirm or dismiss this appeal as moot.

Respectfully submitted,

July 16, 2013

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