IN THE MICHIGAN SUPREME COURT
Appeal from the Michigan Court of Appeals
Sawyer, PJ, and Murphy and Hoekstra, JJ

IN THE MATTER OF PRESTON SANDERS and CAMERON SANDERS Minor children	Circuit Court No. 11-2828-NA Court of Appeals No. 313385 Supreme Court No. 146680

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ORAL ARGUMENT REQUESTED

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Dated: June 20, 2013

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TABLE OF CONTENTS

Page

INDEX OF AUTHORITIES iii

INTRODUCTION 1

STATEMENT OF QUESTIONS PRESENTED 2

STATEMENT OF JURISDICTION 3

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS 4

ARGUMENT 10

I. THE TRIAL COURT VIOLATED MR. LAIRD'S SUBSTANTIVE DUE PROCESS RIGHTS WHEN IT STRIPPED HIM OF THE RIGHT TO DIRECT THE CARE, CUSTODY, AND CONTROL OF HIS CHILDREN WITHOUT ADJUDICATING HIS PARENTAL UNFITNESS 10

II. THE TRIAL COURT VIOLATED MR. LAIRD'S EQUAL PROTECTION RIGHTS BY ARBITRARILY DENYING HIM A STATE-BASED PROCEDURAL RIGHT AVAILABLE TO SIMILARLY- SITUATED PARENTS 26

CONCLUSION 30

ATTACHMENTS

A. *In re Sanders*, unpublished order per curiam of the Court of Appeals, issued January 18, 2013 (Docket No. 313385)

B. *In re Mays II*, unpublished decision per curiam of the Court of Appeals issued December 6, 2012 (Docket No. 309577)

INDEX OF AUTHORITIES

Page

CONSTITUTIONS

Const 1963, art 6 §4 3

STATUTES

25 USC 1903(4) 5

25 USC 1912(e) 5

MCL 600.212 3

MCL 600.215(3) 3

MCL 712A.2(b) 4, 13, 20

MCL 712A.6 ....13, 19

MCL 712A.11 13

MCL 712A.17(2) 13

MCL 712A.18 ....14, 19

MCL 712A.18(1) 14

MCL 712A.18f(1)(c) 19

MCL 712A.19(6) 19

COURT RULES

MCR 3.911 4

MCR 3.912 20

MCR 3.922 ....20, 21

MCR 3.922(A) 21

MCR 3.961 ....13, 20

MCR 3.965 13

MCR 3.971 5

MCR 3.972 13

MCR 3.972(A) 13

MCR 3.972(C)(1) 20

MCR 3.973(E)(1) 21

MCR 3.973(E)(2) 21

MCR 3.973(F)(3) 19

MCR 3.975(E) 21

MCR 3.975(F)(1)(f) 19

MCR 3.993(A) 13

MCR 7.301(A)(2) 3

MCR 7.302(C)(2) 3

CASES

Michigan

Dep't of Human Svs v Cox,
269 Mich App 533; 711 NW2d 426 (2006) 10

Doe v Dep't of Soc Svs,
439 Mich 650; 487 NW2d 166 (1992) 26

El Souri v Dep't of Soc Svs,
429 Mich 203; 414 NW2d 679 (1987) 26

Hunter v Hunter,
484 Mich 247; 771 NW2d 694 (2009) 11

In re Adams Estate,
257 Mich App 230; 667 NW2d 904 (2003) 20

In re AH,
245 Mich App 77; 627 NW2d 33 (2001) 26

In re AMB,
248 Mich App 144; 640 NW2d 262 (2001) 13

In re AP,
283 Mich App 574; 770 NW2d 403 (2009) 12

In re Brock,
442 Mich 101; 499 NW2d 752 (1993) 12, 13

In re Clausen,
442 Mich 648; 502 NW2d 649 (1993) 12

In re CR,
250 Mich App 185; 646 NW2d 506 (2001) 1, 9, 15

In re JK,
468 Mich 202; 661 NW2d 216 (2003) 11, 12

In re Macomber,
436 Mich 386; 461 NW2d 671 (1990) 14

In re Mays II,
unpublished opinion per curiam of the Court of Appeals, issued
December 6, 2012 (Docket No. 309577) 18, 19

In re Rood,
483 Mich 73; 763 NW2d 587 (2009) 10, 20

People v Carines,
460 Mich 750; 597 NW2d 130 (1999) 10, 26

People v Tennyson,
487 Mich 730; 790 NW2d 354 (2010) 20

Reist v Bay County Circuit Judge,
396 Mich 326; 241 NW2d 55 (1976) 11, 12

State Fire Marshall v Lee,
101 Mich App 829; 300 NW2d 748 (1980) 14

Federal

Burke v County of Alameda,
586 F3d 725 (9th Cir 2009) 17

Lindsey v Normet,
405 US 56; 92 S Ct 862; 31 L Ed 2d 36 (1972) 27, 29

Michael H v Gerald D,
491 US 110; 109 S Ct 2333; 105 L Ed 2d 91 (1989) 11

MLB v SLJ,
519 US 102; 117 S Ct 555; 136 L Ed 2d 473 (1996) 27, 28

Parham v JR,
442 US 584; 99 S Ct 2493, 61 L Ed 2d 101 (1979) 12, 17

Rinaldi v Yeager,
384 US 305; 86 S Ct 1497; 16 L Ed 2d 577 (1966) 27

Smith v Organization of Foster Families for Equality and Reform,
431 US 816; 97 S Ct 2094; 53 L Ed 2d 14 (1977) 12

Stanley v Illinois,
405 US 645; 92 S Ct 1208; 31 L Ed 2d 551 (1972) 2, 11, 12, 16, 17, 27

Troxel v Granville,
530 US 57; 120 S Ct 2054; 147 L Ed 2d 49 (2000) 12, 25

Wallis v Spencer,
202 F3d 1126 (9th Cir 2000) 18

Other States

In re Austin P,
118 Cal App 4th 1124; 13 Cal Rptr 3d 616 (2004) 22

In re Bill F,
761 A2d 470; 145 NH 267 (2000) 22

In re DS,
52 A3d 887 (DC Ct App 2012) 22

In re DS,
60 A3d 1225 (DC Ct App 2013) 22

In re JAG,
617 SE2d 325; 172 NC App 708 (2005) 22

In re MK,
649 NE2d 74; 271 Ill App 3d 820 (1995) 22

In re ML,
757 A2d 849; 562 Pa 646 (2000) 22

In re MML,
900 P2d 813; 258 Kan 254 (1995) 22

In re NH,
373 A2d 851; 135 Vt 230 (1977) 22

In re Parental Rights as to AG,
295 P3d 589 (Nev 2013) 23, 24, 25

In re Russell G,
672 A2d 109; 108 Md App 366 (1996) 22

In re Sophie S,
891 A2d 1125; 167 Md App 91 (2006) 22

In the Interest of Amber G,
250 Neb 973; 554 NW2d 142 (1996) 22

JP v Dep't of Children and Families,
855 So 2d 175 (Fla Dist Ct App 2003) 22

Meryl R v Ariz Dep't of Econ Sec,
992 P2d 616, 618; 196 Ariz 24 (1999) 21

New Mexico ex rel. Children Youth & Families Dep't v Benjamin O,
160 P3d 601; 141 NM 692 (2007) 22

People ex rel AH,
271 P3d 1116 (Colo Ct App 2011).....22

People ex rel US,
121 P3d 326 (Colo Ct App 2005).....22

INTRODUCTION

Respondent-Appellant, Lance Laird, appeals the trial court's order dated October 26, 2012, denying his request that the court immediately return his children to his custody. The trial court erred in denying the motion because Mr. Laird is a presumptively fit, unadjudicated parent against whom allegations of unfitness were never proven at an adjudication trial. The trial court – applying Michigan's "one parent doctrine"[1] – denied Mr. Laird his right to an adjudication trial, and instead obtained jurisdiction over the children solely through a no contest plea entered into by the children's mother. It then used its dispositional authority to place the children in foster care, restrict Mr. Laird's parenting time to supervised visits, and require him to complete an extensive court-ordered service plan. The trial court's intrusion into Mr. Laird's constitutional right to direct the care, custody and control of his children without making unfitness findings after an adjudication trial violated his substantive due process and equal protection rights under the Constitution.

Mr. Laird is requesting that this Court reverse the trial court's order and hold that absent an adjudication finding of unfitness against a parent, a juvenile court lacks the constitutional authority to issue dispositional orders that infringe upon the unadjudicated parent's rights.

---

[1] The "one parent doctrine" refers to the pervasive practice in child protective proceedings in which a court obtains jurisdiction over a child based solely on unfitness findings against one parent and then exercises its dispositional authority to infringe upon the constitutional rights of the unadjudicated parent. The practice is described in *In re CR*, 250 Mich App 185, 202-205; 646 NW2d 506 (2001).

STATEMENT OF QUESTIONS PRESENTED

I. **The Substantive Due Process Clause of the Fourteenth Amendment requires the State to prove that a parent is unfit prior to infringing upon that parent's right to direct the care of his children. *Stanley v Illinois*, 405 US 645; 92 S Ct 1208; 31 L Ed 2d 551 (1972). In Michigan, a parent's fitness is determined at an adjudication trial, which can be before a jury or a judge. The "one parent doctrine," however, allows a trial court to deny a parent his right to an adjudication trial if findings are made against the other parent, either after the acceptance of a plea or a trial. It then allows the court to place the children in foster care, restrict the unadjudicated parent's contact with his children and order him to comply with services. Does the "one parent doctrine" violate the substantive due process rights of unadjudicated parents by permitting trial courts to place their children in foster care and to condition their rights on complying with a service plan without adjudicating their parental unfitness?**

The trial court answered "No" to the question.
Respondent-Appellant answers "Yes" to the question.
The Court of Appeals did not answer the question.

II. **The Equal Protection Clause of the Fourteenth Amendment prohibits states from making distinctions that impinge on parental rights unless the distinctions are narrowly tailored to serve a compelling state interest. The "one parent doctrine" permits trial courts to deny some parents the right to an adjudication trial while granting that right to others. Thus, the doctrine creates a distinction that gives co-respondent parents, like the father in this case, fewer procedural rights than sole-respondent parents, who have an unconditional right to an adjudication trial. Does the "one parent doctrine" – which authorizes trial courts to deprive certain parents of their right to an adjudication trial – violate the Equal Protection Clause?**

The trial court did not answer this question.
Respondent-Appellant answers "Yes" to the question.
The Court of Appeals did not answer the question.

STATEMENT OF THE BASIS OF JURISDICTION

This Court has jurisdiction pursuant to Const 1963, art 6, §4; MCL 600.212; MCL 600.215(3); and MCR 7.301(A)(2) to review by appeal a case after a decision by the Court of Appeals.

An application for leave to appeal was filed in the Court of Appeals on November 16, 2012. On December 11, 2012, Mr. Laird filed a motion for immediate consideration. On January 18, 2013, the Court of Appeals granted Mr. Laird's motion for immediate consideration but denied his application for leave to appeal "for lack of merit in the grounds presented." See *In re Sanders*, unpublished order per curiam of the Court of Appeals, issued January 18, 2013 (Docket No. 313385), Attachment A.

An application for leave to appeal was filed with this Court within 42 days of the Court of Appeals' decision. MCR 7.302(C)(2). On April 5, 2013, this Court granted the application.

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

Lance Laird is the father of Preston and Cameron Sanders. His sons were placed in foster care, and he was ordered to comply with a service plan, despite the fact that he was never adjudicated to be an unfit parent under the standard set forth in MCL 712A.2(b).

The Trial Court Orders The Removal Of The Children From The Home. Mr. Laird Requests A Jury Trial.

On November 7, 2011, the Department of Human Services ("DHS") filed an amended petition requesting that Preston and Cameron be removed from their father's home, where they had been living, and placed into foster care under the court's jurisdiction. 1a. The petition alleged that Mr. Laird had been the subject of several substantiated complaints to Child Protective Services involving domestic violence and substance abuse in front of the children, that he had used cocaine with the children's mother, and that he had permitted the mother to have contact with the children without supervision by the DHS. 1a.

The court held a preliminary hearing on November 16, 2011. After the hearing, the court ordered the removal of the children and placed them with the DHS but granted Mr. Laird unsupervised parenting time. 8a. Mr. Laird contested the allegations in the petition and requested an adjudication trial before a jury.[2] 6a.

[2] MCR 3.911 affords parents a right to a jury trial in child protective proceedings.

A pretrial hearing was held on January 11, 2012, at which a trial date was set.[3] 16a. Mr. Laird filed a motion requesting that the children be returned to his mother's home, where he had been living when the children were in his care. 13a. Mr. Laird's counsel repeated her request for a trial but agreed to waive her jury demand in exchange for an earlier trial date. 14a-15a. Mr. Laird's parenting time remained unsupervised. 16a.

The Trial Court Assumes Jurisdiction Over The Children Based On The Mother's No Contest Plea. The Trial Is Continued As To The Allegations Against Mr. Laird.

On February 7, 2012 – the date set for the adjudication trial – the children's mother entered into a no contest plea, which the court accepted. 20a; 30a.[4] The prosecutor noted that "we'll have to proceed to adjudication on the aspects of the petition that pertain themselves to dad," 20a, but then requested an adjournment because she was not prepared to proceed. 22a. The court adjourned the trial over the objection of Mr. Laird's attorney, but reinstated Mr. Laird's request for a jury trial in light of the adjournment. 24a.

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[3] Although there is no specific judicial finding in the record that Preston and Cameron are Indian children as defined in the Indian Child Welfare Act, 25 USC 1903(4), a representative from the Larsen Bay Indian Tribe in Alaska appeared via phone at the hearing on January 11, 2012 and actively participated in that hearing and in all subsequent hearings. 12a. On September 4, 2012, the tribe filed an affidavit indicating that the children were members of the tribe. 79a. At no point in the proceedings did the trial court make a finding by clear and convincing evidence – and supported by expert testimony – that "continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child" as required by 25 USC 1912(e).

[4] MCR 3.971 permits parents to enter pleas of no contest in child protective proceedings.

The court then held an evidentiary hearing on Mr. Laird's motion to place the children with his mother.[5] Several witnesses, including Mr. Laird, testified. Mr. Laird testified that Preston had lived at his mother's house for most of his life. 28a. Mr. Laird also stated that he had allowed the children's mother to spend one night at the home but that the children never saw her. 26a. In addition, he testified that he had pled no contest to a domestic violence charge stemming from an incident in 2010 for which he was still on probation. 27a. The court continued the placement hearing to another date. 29a. The court maintained the placement of the children with the DHS and scheduled a jury trial to adjudicate the allegations against Mr. Laird. 29a. Mr. Laird's parenting time remained unsupervised. 29a.

On February 22, 2012, the court held a dispositional hearing as to the mother at which it ordered the mother to complete a service plan. 40a. Both the foster care worker and the L-GAL noted that they did not believe they could make recommendations as to Mr. Laird until he was adjudicated. 35a; 38a. The court agreed. 39a. Although the court did not order Mr. Laird to complete a service plan, it restricted his contact with his children to supervised parenting time. 39a. The court also denied Mr. Laird's request that the children be returned to his mother's care. 36a-37a. The jury trial to resolve the allegations against Mr. Laird remained scheduled for May 1, 2012. 39a.

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[5] The trial court made clear that the placement hearing was not the adjudication trial. In addition to setting the adjudication trial for another date, 24a, the trial court allowed hearsay testimony at this hearing. 25a.

The Prosecutor Strikes The Allegations Against Mr. Laird. The Trial Court Cancels The Jury Trial And Applies The "One Parent Doctrine."

On April 18, 2012, the court held a dispositional review hearing. At the hearing, the prosecutor announced her intention to strike the allegations in the petition against Mr. Laird. She declared that she would not be proceeding to trial against him. 45a-46a. Based on the prosecutor's decision, the court removed the jury trial from its calendar. 46a.

A dispositional review hearing was held on May 2, 2012. The parties engaged in an extensive conversation about the effects of the prosecutor's decision to strike the allegations against Mr. Laird. The court noted that the "affirmative allegations of abuse or neglect against the father was [sic] stricken from the petition" and thus he was "not a respondent." 50a. The court questioned whether it had the authority to move forward to disposition on Mr. Laird because he was an unadjudicated parent. 48a.

The prosecutor argued that the "one parent doctrine" applied and that since jurisdiction had been obtained through a plea by one parent, the court now had the authority to enter orders against any party. 51a. The court immediately questioned the prosecutor's argument. The judge noted, "[T]he adjudication that was based on moms [sic] no contest plea does not adjudicate at all with respect to dad, I mean how can it? How can her admission constitute adjudication as to any affirmative allegation against him?" 51a.

Mr. Laird's counsel repeatedly objected to the prosecutor's attempt to bypass proving that Mr. Laird was an unfit parent. She argued that absent an adjudication

finding against him, he was legally entitled to have his children returned to his custody. 52a. In the alternative, she argued that if the prosecutor insisted on asserting that Mr. Laird was an unfit parent, he deserved a right to defend himself at trial. 52a. In the interim, she noted that Mr. Laird was agreeable to voluntarily engaging in some services. 52a.

At the conclusion of the hearing, the court ordered Mr. Laird to complete a psychological evaluation, a parenting class, a substance abuse assessment, and random drug screens, obtain housing and employment, and follow the terms of his probation. 53a. The children continued to be placed in foster care. Mr. Laird was granted supervised parenting time with the children. 53a.

Mr. Laird attended the next dispositional review hearing, which was held on August 22, 2012. 58a. His counsel again raised the fact that he was an unadjudicated parent and the service plan that the agency wished him to complete was inappropriate. 59a. The court replied that it had jurisdiction over the children, and that was all it needed to order Mr. Laird to complete services. 60a. The court further stated that it could make reunification of the children with Mr. Laird contingent on him completing services, despite the fact that Mr. Laird had not had an adjudication trial. 60a. The court continued the existing orders as to Mr. Laird. 75a.

Mr. Laird Files A Motion For Immediate Placement.

That same day, Mr. Laird filed a motion requesting that his children be returned to his custody immediately. 61a. In his motion, he argued that the court – by placing his children in foster care without adjudicating his unfitness at an adjudication trial –

violated his substantive due process right to direct the care of his children. 61a. Both the L-GAL and the DHS argued that the "one parent doctrine" permitted the court to take jurisdiction over Mr. Laird's children, place them in foster care, and order Mr. Laird to complete a service plan based solely on the no contest plea entered into by the children's mother. 81a; 83a.

The Trial Court Denies Mr. Laird's Motion For Immediate Placement.

The hearing on Mr. Laird's motion was held on September 5, 2012. On October 26, 2012, the court issued a written opinion denying Mr. Laird's motion for immediate placement. 88a. The court acknowledged that jurisdiction over Mr. Laird's children was obtained through the mother's no contest plea without adjudicating the allegations against Mr. Laird. 88a. But, the court ruled that the "one parent doctrine" allowed it to proceed in this manner. 88a-90a. The court further upheld the constitutionality of the doctrine, finding that Mr. Laird had "been provided with appointed counsel," was "informed of the conditions that necessitated removal," and had "been offered services to address these conditions." 88a-90a. The court cited the Court of Appeals' decision in *In re CR, supra,* to support its ruling. 88a-90a.

ARGUMENT

I. THE TRIAL COURT VIOLATED MR. LAIRD'S SUBSTANTIVE DUE PROCESS RIGHTS WHEN IT STRIPPED HIM OF THE RIGHT TO DIRECT THE CARE, CUSTODY, AND CONTROL OF HIS CHILDREN WITHOUT ADJUDICATING HIS PARENTAL UNFITNESS.

Standard of Review

Constitutional questions and issues of statutory interpretation, as well as family division procedure under the court rules, are reviewed de novo. *In re Rood*, 483 Mich 73, 91; 763 NW2d 587 (2009); *Dep't of Human Svs v Cox*, 269 Mich App 533, 536; 711 NW2d 426 (2006). If a constitutional error exists, the beneficiary of the error must establish that it is harmless beyond a reasonable doubt. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

Mr. Laird preserved his claim that the application of the "one parent doctrine" violated his substantive due process rights. On August 22, 2012, counsel for Mr. Laird filed a written motion requesting that his children be returned to his care immediately because he was a presumptively fit parent who had not been found to be unfit after an adjudication trial. 61a. The motion was argued on September 5, 2012. Counsel also made similar arguments at the dispositional review hearings held on May 2, 2012 and August 22, 2012. 52a ("[I]f he is not a respondent father, he should have his kids."); 59a-60a ("[T]he Court doesn't have jurisdiction over Mr. Laird because he has not been adjudicated."). The trial court, after considering the written motion and hearing argument, denied the request. 88a.

Argument

A. Parents Have A Substantive Due Process Right To Direct The Care, Custody And Control Of Their Children.

This appeal squarely confronts whether the "one parent doctrine" violates the substantive due process rights of unadjudicated parents. Here, the trial court – applying the doctrine – violated Mr. Laird's constitutional rights by depriving him of the right to direct the care, custody and control of his children despite never having found him to be an unfit parent after an adjudication trial. The court infringed upon Mr. Laird's parental rights based solely on a no contest plea entered into by the children's mother.

The right implicated in this case – that of parents to direct the care, custody, and control of their children – is an element of liberty protected by due process that is "well-established" under the law. *In re JK*, 468 Mich 202, 211; 661 NW2d 216 (2003); *Hunter v Hunter*, 484 Mich 247, 258; 771 NW2d 694 (2009). Decisions in both the United States Supreme Court and this Court "establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition." *Michael H v Gerald D*, 491 US 110, 123-124; 109 S Ct 2333; 105 L Ed 2d 91 (1989); *Reist v Bay County Circuit Judge*, 396 Mich 326, 342-343; 241 NW2d 55 (1976). This right to family integrity exists to protect reciprocal rights held by both parents and children. It is the interest of the parent in the "companionship, care, custody, and management of his or her children," *Stanley, supra* at 651, and of the children in not being dislocated from the "emotional attachments that derive from the

intimacy of daily association" with the parent. *Smith v Organization of Foster Families for Equality and Reform*, 431 US 816, 844; 97 S Ct 2094; 53 L Ed 2d 14 (1977).

The law's concept of the family rests on a presumption that the natural bonds of affection lead parents to act in the best interests of their children. *Parham v JR*, 442 US 584, 602; 99 S Ct 2493, 61 L Ed 2d 101 (1979). See also *Troxel v Granville*, 530 US 57, 69; 120 S Ct 2054; 147 L Ed 2d 49 (2000) (noting the "traditional presumption that a fit parent will act in the best interest of his or her child."). Any legal adjustment of these rights and obligations affects this fundamental human relationship, which courts have zealously guarded from unwarranted governmental intrusion. *In re Brock*, 442 Mich 101, 109; 499 NW2d 752 (1993); *Reist, supra* at 342.

B. The State Must Prove That A Parent Is Unfit Prior To Infringing Upon His Substantive Due Process Right To Direct The Care Of His Children.

In order to infringe upon the decision-making rights of a parent, substantive due process requires the State to prove that a parent is unfit to care for his child. *Stanley, supra* at 649. Absent proof of unfitness, the "state-required breakup of a natural family" cannot be founded "solely on a 'best interests' analysis." *In re JK, supra* at 210. As this Court noted in *In re Clausen*, 442 Mich 648; 502 NW2d 649 (1993), "the mutual rights of the parent and child come into conflict only when there is a showing of parental unfitness." *Id.* at 687. "[W]hen a parent is fit and a child's needs are met, there is no reason for the state to interfere in a child's life." *In re AP*, 283 Mich App 574, 591; 770 NW2d 403 (2009).

The Juvenile Code and applicable court rules establish a process that, if followed, permits the State to strip an unfit parent of decision-making authority over his children while comporting with the due process requirements in the Constitution. To deprive a parent of physical and legal custody of his children, the State must file a petition detailing allegations of abuse and neglect as defined under MCL 712A.2(b). MCL 712A.11; MCR 3.961. Then, the petition must be authorized by the court upon a showing of probable cause for the child protective proceeding to continue. MCL 712A.11; MCR 3.965. Since, as noted by the Court of Appeals in *In re AMB*, 248 Mich App 144, 183; 640 NW2d 262 (2001), the allegations in a petition do not always fully represent the situation, an adjudication trial must be held within 63 days before a judge or a jury to test those allegations, and to determine whether grounds exist for the court to assume jurisdiction over the child. MCL 712A.17(2); MCR 3.972(A). The rules of evidence apply at this hearing, and the State bears the burden of proving, by a preponderance of evidence, that abuse or neglect occurred. MCR 3.972. If the State fails to meet this burden, its case is dismissed and the child must be returned to her presumptively fit parent. And if the State prevails, a parent has a right to appeal that decision to the Court of Appeals. MCR 3.993(A). The procedures governing adjudication trials protect parents from the risk that their fundamental interest in raising their children will be wrongly taken away from them. *In re Brock, supra* at 111.

Consistent with due process requirements, the Juvenile Code also limits the court's dispositional authority in situations where jurisdiction is obtained solely through unfitness findings against one parent. Although MCL 712A.6 permits a trial

court to issue "orders affecting adults" once it obtains jurisdiction over a child, it limits the court to issuing only those orders which are "necessary" for the child's well-being and "incidental to the jurisdiction of the court over the juvenile." See *In re Macomber*, 436 Mich 386, 399; 461 NW2d 671 (1990) ("The word 'necessary' is sufficient to convey to probate courts that they should be conservative in the exercise of their power over adults."); *State Fire Marshall v Lee*, 101 Mich App 829, 834; 300 NW2d 748 (1980) (adopting Black's Law Dictionary definition of incidental to mean "[d]epending upon or appertaining to something else as primary; something necessary, appertaining to, or depending upon another which is termed the principal; something incidental to the main purpose."). Similarly, MCL 712A.18, which enumerates the specific orders a court may enter at a dispositional hearing, states that those orders can only be entered into "in view of the facts proven and ascertained." MCL 712A.18(1). No such facts exist with respect to unadjudicated parents.

Read together, these provisions create a constitutionally-coherent scheme which allows a trial court to obtain jurisdiction over a child based on findings against one parent but prohibits the court from using its dispositional powers to infringe upon an unadjudicated parent's substantive due process right to direct the care, custody and control of his child.

C. The "One Parent Doctrine" Permits Courts To Deprive Unadjudicated Parents Of Their Right To Direct The Care, Custody And Control Of Their Children Without Establishing Their Parental Unfitness.

In this case, the trial court – applying the "one parent doctrine" – failed to provide these constitutionally-mandated protections to Mr. Laird. The doctrine – which

was described by the Court of Appeals in *In re CR, supra* – permits trial courts to obtain jurisdiction over children based on a plea by one parent and deprive the other parent of his right to contest the allegations against him at a trial. It then allows the court to place a child in foster care and to shift the burden onto the unadjudicated parent to demonstrate his or her fitness through compliance with a court-ordered service plan. *Id.*

This is precisely what occurred in this case. Soon after the filing of the petition, Mr. Laird requested a jury trial. He repeated that request in subsequent hearings. 7a; 14a-15a; 22a-23a; 52a. On the day of the adjudication trial, the children's mother entered into a no contest plea to the allegations in the petition against her. 20a-22a; 31a. The court continued the adjudication trial as to Mr. Laird to another date, but the DHS decided to strike all the allegations against him. 46a; 48a-49a. As the court correctly observed, "[A]ny affirmative allegations of abuse or neglect against the father was [sic] stricken from the petition. So that father is not a respondent." 50a. Then, the court cancelled the jury trial that was scheduled to resolve the allegations against Mr. Laird. 46a.

Yet, after the allegations against Mr. Laird were stricken from the petition, the trial court did not return the children to his custody. Instead, the court assumed jurisdiction over the children based solely on the mother's no contest plea, placed them in foster care, presumed that Mr. Laird was an unfit parent, and shifted the burden onto him to establish his fitness. At the dispositional review hearing, the court ordered Mr. Laird to comply with a treatment plan, which included parenting classes, a substance

abuse assessment, individual counseling and a psychological evaluation, among other requirements. 53a. It restricted his contact with the children to supervised parenting time. 53a. It took all of these steps despite the fact that Mr. Laird had never been found to be unfit after an adjudication trial.

The application of the "one parent doctrine" in this case and many others across the state violates the Constitution because it creates a scheme where the burden is shifted to presumptively fit parents like Mr. Laird to prove their fitness.[6] This type of burden-shifting was rejected by the United States Supreme Court in *Stanley v Illinois.* At issue in *Stanley* was an Illinois law that automatically placed the children of unwed fathers in foster care upon the death of their mother. *Id.* at 646. The State argued that proof that an unmarried mother of a child was dead was enough to separate the children from their father. The State sought to shift the burden of proving parental fitness onto the father, whom it said could prove his ability to care for the child by filing

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[6] In addition to violating the constitutional rights of unadjudicated parents, the "one parent doctrine" has practical effects on the well being of children involved in child protective proceedings. The State shares an interest in children remaining in the care of fit parents. *Stanley, supra* at 652 ("[T]he State registers no gain towards its declared goals when it separates children from the custody of fit parents."). Yet, the "one parent doctrine" allows trial courts to separate children from presumptively fit parents without first actually determining whether the parent is unfit as defined in the Juvenile Code. The doctrine increases the likelihood that children will be erroneously taken from their parents and placed unnecessarily in foster care.

Additionally, the doctrine permits trial courts to impose service plans on unadjudicated parents without ever determining whether a parent is actually unfit to care for the child. Thus, parents are ordered to comply with a litany of costly services – including parenting classes, drug screens, and psychological evaluations – despite the absence of a factual predicate justifying the need for a particular service. A parent's future ability to regain custody of his child then hinges on complying with a service plan that has no connection to particularized judicial findings of that parent's unfitness.

for guardianship or adoption, proceedings in which he would be treated as a legal stranger to the child. *Id.* at 647.

The Supreme Court rejected the argument and held that the Constitution requires, as a matter of due process, that the father have a "hearing on his fitness as a parent before his children [are] taken from him." *Id.* at 649. The Court found that the State's interest in presuming the unfitness of all unmarried fathers and efficiently disposing of their rights did not outweigh the constitutional interests of the father. The Court stated:

> Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand. *Id.* at 656-657.

The Court made clear that infringing upon a parent's right to custody of his children is strictly forbidden under the Constitution absent a judicial determination of parental unfitness.

This constitutional burden cannot be satisfied by making unfitness findings against the other parent. In *Parham v JR, supra,* the Supreme Court noted that "[t]he statist notion that governmental power should supersede parental authority in *all* cases because *some* parents abuse and neglect children is repugnant to American tradition." *Id.* at 603. Other federal decisions have made similar findings. See, e.g., *Burke v County of Alameda,* 586 F3d 725, 733 (9th Cir 2009) (holding that where the noncustodial parent was not accused of wrongdoing and the State failed to investigate the possibility of

placing his daughter with him rather than the government, a reasonable jury could find his constitutional rights were violated); *Wallis v Spencer*, 202 F3d 1126, 1142 n. 14 (9th Cir 2000) ("The government may not, consistent with the Constitution, interpose itself between a fit parent and her children simply because of the conduct – real or imagined – of the other parent.").

But this is precisely what the "one parent doctrine" allows. It permits juvenile courts to infringe upon the constitutional rights of both parents based solely on findings against one parent. It then allows the court to place the burden on the unadjudicated parent to demonstrate his fitness by complying with a service plan while his children remain in foster care. It also authorizes a trial court to terminate the unadjudicated parent's rights based on his failure to comply with the service plan. The "one parent doctrine" conflicts with the constitutional precedent of this Court and the United States Supreme Court and must be overruled.

D. Findings Made By Trial Courts At Dispositional Hearings Do Not Satisfy The Constitutionally-Required Unfitness Finding.

Most recently, the Court of Appeals, in *In re Mays II*, unpublished decision per curiam of the Court of Appeals issued December 6, 2012 (Docket No. 309577), Attachment B, addressed the constitutionality of the "one parent doctrine." In its per curiam decision, the Court of Appeals correctly recognized that the Constitution requires courts to afford parents a hearing on their fitness prior to placing children in foster care. *Id.* at 3. The Court of Appeals, however, ruled that trial courts could satisfy this constitutional requirement, as it relates to unadjudicated parents, by making the

findings required by the statutes and court rules governing dispositional hearings. *Id.* at 5. After citing a long list of statutes and court rules, the Court of Appeals concluded that "[w]hen 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." *Id.* at 5.

The law, however, does not support the novel holding by the Court of Appeals that the dispositional statutes and court rules require courts to make findings regarding an unadjudicated parent's fitness. None of the provisions cited by the Court of Appeals require courts to make unfitness findings, afford an unadjudicated parent a right to a fitness trial, or incorporate the constitutional presumption that absent a finding of unfitness, the child must be placed in the care of the unadjudicated parent. In fact, the dispositional and post-dispositional statutes and court rules only guide the court's decision-making *after* a parent has been found to be unfit. See MCL 712A.6; MCL 712A.18 (both restricting courts to entering orders pertaining only to parents who have been adjudicated unfit)

At best, the provisions cited by the Court of Appeals only require the agency to report to the court about the "likely harm to the child if the child were to be separated from his or her parent" and require the court to "consider" that information before making a decision. MCL 712A.18f(1)(c); MCL 712A.19(6); MCR 3.975(F)(1)(f). But ultimately under these dispositional rules, the court can enter orders it deems are best for the child, regardless of the parent's fitness. MCR 3.973(F)(3) ("The court . . . may

enter such orders as it considers necessary in the interest of the child."). Those requirements are quite different than the unequivocal standard imposed by the Constitution – that a court cannot infringe upon the rights of a parent absent a finding of unfitness against that parent.

Not only do the provisions cited by the Court of Appeals fail to require courts to make unfitness findings against unadjudicated parents at dispositional hearings, even if they did, the two-tiered system for adjudicating a parent's unfitness created by the Court of Appeals raises significant due process concerns because of the fundamental unfairness it would create. *In re Rood, supra* at 92; *In re Adams Estate*, 257 Mich App 230, 233-234; 667 NW2d 904 (2003) ("The essence of due process is fundamental fairness."). In this two-tiered system, some parents would receive the benefits of an adjudication trial. For these parents, the State would have to file a petition in which the allegations of neglect or abuse would be detailed. MCR 3.961. These parents would have a right to discovery and the ability to request a trial before a jury. MCR 3.912; MCR 3.922. The case against them would have to be proven by a preponderance of evidence, and the rules of evidence would apply. MCR 3.972(C)(1). Additionally, the specific standard set forth in MCL 712A.2(b), which has been interpreted on numerous occasions by this Court and the Court of Appeals, would govern the unfitness determination. See, e.g., *People v Tennyson*, 487 Mich 730; 790 NW2d 354 (2010).

For unadjudicated parents, whose unfitness would be determined at dispositional hearings, none of these safeguards would exist. Nothing would require the State to detail the allegations of unfitness in writing. The unadjudicated parent

would not have the right to a trial before a jury, nor would he have the right to discovery.[7] No legal standard would govern the trial court's unfitness determination – since none is set forth in the dispositional statutes or court rules – nor is a standard of proof stated. Evidentiary standards would also be relaxed since the Michigan Rules of Evidence do not apply at dispositional hearings. MCR 3.973(E)(1); MCR 3.975(E). "All relevant and material evidence, including oral and written reports, may be received and may be relied upon to the extent of its probative value." MCR 3.973(E)(2). Additionally, the court would have the ability to "consider . . . any written or oral evidence concerning the child" from a lengthy list of people including the child's foster parent, child caring institution, or relative with whom the child is placed. MCR 3.973(E)(2); MCR 3.975(E). While some parents would receive an unfitness determination made after a trial full of procedural safeguards, others would have determinations made with no notice of the specific allegations of unfitness, no evidentiary rules and no defined legal standards. The Constitution does not permit this type of arbitrariness.

E. The Overwhelming Majority of States To Address The Rights Of Unadjudicated Parents Have Rejected The One Parent Doctrine.

Numerous states have considered and rejected the "one parent doctrine," recognizing that parental unfitness must be proven before the state can interfere with a parent's substantive due process right to have care and custody of his children.[8] Most

[7] Michigan Court Rule 3.922 only affords parents the right to discovery before trials. MCR 3.922(A).

[8] See, e.g., *Meryl R v Ariz Dep't of Econ Sec*, 992 P2d 616, 618; 196 Ariz 24 (1999) (finding

recently, for example, the Nevada Supreme Court thoroughly analyzed the "one-parent doctrine" in light of constitutional requirements and declared that "each parent is

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that the court correctly dismissed a dependency case because the child had a noncustodial father who was ready and willing to parent him); *In re DS*, 52 A3d 887 (DC Ct App 2012), aff'd on rehearing in *In re DS*, 60 A3d 1225 (DC Ct App 2013) (finding that an unadjudicated, willing, parent who had relationship with his children was entitled to custody absent a finding by clear and convincing evidence to the contrary); *In re Austin P*, 118 Cal App 4th 1124, 1128; 13 Cal Rptr 3d 616 (2004) (applying California statute that instructs courts to place children with unadjudicated parents absent a detriment finding); *People ex rel AH*, 271 P3d 1116, 1123 (Colo Ct App 2011) (ordering return of child to parent because the father had not been adjudicated); *People ex rel US*, 121 P3d 326, 328 (Colo Ct App 2005) ("Nothing in the statute grants a court the power to impose a treatment plan on a parent when the child has not been found to be dependant and neglected by that parent."); *JP v Dep't of Children and Families*, 855 So 2d 175 (Fla Dist Ct App 2003) (recognizing the requirement to transfer physical custody of the child to the unadjudicated parent); *In re MK*, 649 NE2d 74, 80-82; 271 Ill App 3d 820 (1995) (permitting the court to take jurisdiction over a child based on the conduct of one parent but finding that custody of the child should be awarded to the fit parent); *In re MML*, 900 P2d 813, 823; 258 Kan 254 (1995) (finding that a parent's fundamental right to custody cannot be disturbed by the State absent a showing of unfitness); *In re Sophie S*, 891 A2d 1125, 1133; 167 Md App 91 (2006) (noting that where one parent is "able and willing" to care for child, a court may not adjudge the child to be in need of assistance); *In re Russell G*, 672 A2d 109, 114; 108 Md App 366 (1996) ("A child who has at least one parent willing and able to provide the child with proper care and attention should not be taken from both parents and be made a ward of the court."); *In re ML*, 757 A2d 849, 851; 562 Pa 646 (2000) ("[A] child is not dependent if the child has a parent who is willing and able to provide proper care to the child."); *In the Interest of Amber G*, 250 Neb 973, 984; 554 NW2d 142 (1996) ("While it is true that the juvenile court has broad discretion to determine placement, that discretion is limited by the presumption in favor of the biological parent. Absent an affirmative finding of unfitness, the father is entitled to custody of his children."); *In re Bill F*, 761 A2d 470, 476; 145 NH 267 (2000) (finding that the court must give an unadjudicated parent a full hearing at which the State must prove unfitness prior to depriving him of custody); *New Mexico ex rel. Children Youth & Families Dep't v Benjamin O*, 160 P3d 601, 609-610; 141 NM 692 (2007) (reversing TPR because the trial court did not consider placing the child with the unadjudicated father); *In re JAG*, 617 SE2d 325, 332; 172 NC App 708 (2005) (finding that the trial court erred in denying fit parent physical custody); *In re NH*, 373 A2d 851, 856; 135 Vt 230 (1977) (permitting adjudication of the child based on findings against one parent but mandating that the child be placed with other parent absent evidence of unfitness).

entitled to a hearing before being deprived of the custody of his or her child." *In re Parental Rights as to AG*, 295 P3d 589, 593 (Nev 2013). In that case, the child was taken into foster care by the State based on her mother's conduct, which included drug use. *Id.* at 590. The father was prohibited from contacting the mother and child by a protective order that had been issued due to alleged domestic violence. *Id.* at 591. The father also tested positive for marijuana and methamphetamine. *Id.* The state agency subsequently filed a neglect petition against both parents, and the mother admitted to several allegations. *Id.* The father denied neglecting the child. *Id.* As in the instant case, the juvenile court took jurisdiction over the child based on the mother's plea and set a dispositional hearing as to the mother. *Id.* An evidentiary hearing was set as to the father. *Id.* The agency subsequently dismissed the petition regarding the father, yet it filed a service plan listing services with which it wanted the father to comply. *Id.* The father did not sign the service plan. *Id.*

At a dispositional hearing held around that time, the father requested that the child be placed with him, as Mr. Laird did here. *Id.* By that time, the protective order against the father had been modified to allow him contact with the child. *Id.* The trial court denied the father placement of the child, kept the child in foster care, and limited the father to supervised parenting time. *Id.* at 591-92. The trial court issued this decision despite the lack of any findings that the father was unfit. The father then filed a motion requesting dismissal of the child protection case and placement of the child with him or, alternatively, to begin the reunification process with unsupervised visits in his home. *Id.* at 592. The trial court denied the motion, maintained the child's

placement in foster care, and continued the father's supervised visits, because although the father had had one recent negative drug test, he had not submitted to drug testing for approximately five months prior to that screen. *Id.* Six months later, at a permanency planning hearing, the court approved a permanency plan of reunification with the father and a concurrent plan of termination of parental rights. *Id.* The court also ordered the father to complete services. *Id.* After another six months, a permanency planning hearing was held, and the father was found to have failed to comply with services because he had failed another drug test, failed to maintain contact with the agency, and had not attended any counseling or substance abuse treatment. *Id.* The permanency plan was changed to termination of parental rights and adoption. *Id.* A termination of parental rights petition was filed, but the district court denied the petition, noting that the father had been an unadjudicated parent throughout the case. *Id.* In other words, his parental unfitness had never been proven.

The agency appealed to the Nevada Supreme Court, arguing precisely the one-parent doctrine: once jurisdiction over a child is obtained based on the conduct of one parent, the juvenile court can place the child in foster care even if the other parent is available to take custody. *Id.* at 594. The agency also argued that the juvenile court has the statutory authority to order the unadjudicated parent to complete services in order to demonstrate his fitness, and that a failure to complete such services can lead to a termination of parental rights. *Id.* at 595.

The Nevada Supreme Court disagreed after engaging in a thorough analysis of the constitutional protections of parental rights rooted in substantive due process. *Id.* at

595-96. Although the court found that jurisdiction can be obtained based on the conduct of one parent, it held that an unadjudicated parent cannot be denied custody of the child and required to complete a case service plan. *Id.* The court noted that the juvenile court had been concerned about the father's inconsistent compliance with the case plan but rejected that concern, writing that it was "a case plan that [the father] should not have been required to complete in the first place." *Id.* at 596.

The Nevada Supreme Court thoughtfully sought to strike a balance between competing concerns about a child's health and safety and protections for the constitutional rights of parents, concluding that if the agency believes that a parent is not fit to have custody of his children, it should file a petition and prove the allegations. *Id.* at 596-97. The court wrote that requiring a petition and proof of neglect or abuse "protects the due process rights of the parent's relationship with his child, while also serving the government's interest in protecting the child's welfare if there is an adequate basis for concern." *Id.* at 597. The court noted that without findings of parental unfitness, "a parent is presumed to make decisions in the best interest of his or her child." *Id.* at 596 (citing *Troxel, supra* at 65). The burden cannot be shifted onto a parent to prove his fitness through service compliance absent the parent being adjudicated unfit in the first place. *Id.*

As noted by the Nevada Supreme Court and other courts across the country, the "one parent doctrine" violates the substantive due process rights of unadjudicated parents and should be overruled by this Court.

II. THE TRIAL COURT VIOLATED MR. LAIRD'S EQUAL PROTECTION RIGHTS BY ARBITRARILY DENYING HIM A STATE-BASED PROCEDURAL RIGHT AVAILABLE TO SIMILARLY- SITUATED PARENTS.

Standard of Review

Unpreserved issues are reviewed for plain error that affects substantial rights. *People v Carines, supra* at 774. The decision should be reversed if the Court finds that "the error seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Id.*

Argument

The trial court violated Mr. Laird's constitutional rights under the Equal Protection Clause when it ruled that it could place his children in foster care and order him to comply with a service plan without affording him the right to an adjudication trial to challenge the allegations of unfitness against him – a right many parents routinely receive. The constitutional guarantee of equal protection means that "all persons similarly circumstanced must be treated alike." *El Souri v Dep't of Soc Svs*, 429 Mich 203, 207; 414 NW2d 679 (1987) (internal quotes omitted); *In re AH*, 245 Mich App 77, 82; 627 NW2d 33 (2001). Thus, the State cannot arbitrarily deny one person a right that it has given to others in similar circumstances. When such a practice by the State impacts a fundamental liberty interest, the State must demonstrate that the "classification scheme has been precisely tailored to serve a compelling governmental interest." *Doe v Dep't of Soc Svs*, 439 Mich 650, 662; 487 NW2d 166 (1992); *In re AH, supra* at 83.

Distinctions that arbitrarily deprive some people, but not others, of a procedural right are especially offensive to the Equal Protection Clause. In a series of cases, the United States Supreme Court has applied this reasoning to invalidate the arbitrary assignment of procedural rights. For example, in *Rinaldi v Yeager*, 384 US 305, 310; 86 S Ct 1497; 16 L Ed 2d 577 (1966), the Court found that a statute that required repayment of certain appellate court costs only by some imprisoned appellants violated the Equal Protection Clause. The Court explained that procedural avenues "must be kept free of unreasoned distinctions that can only impede open and equal access to the courts." *Id.* Likewise, in *Lindsey v Normet*, 405 US 56; 92 S Ct 862; 31 L Ed 2d 36 (1972), the Court struck down a statute that imposed a "double bond" requirement on certain tenants who wished to appeal adverse housing decisions. *Id.* at 79. The same reasoning applied in *Stanley, supra*, where the Court concluded that denying unwed fathers the right to a hearing and proof of neglect "while granting it to other Illinois parents is inescapably contrary to the Equal Protection Clause." *Id.* at 658.

The United States Supreme Court extended this line of reasoning in *MLB v SLJ*, 519 US 102; 117 S Ct 555; 136 L Ed 2d 473 (1996). There, the Court, articulating both equal protection and due process concerns, held that Mississippi could not withhold a trial record from indigent parents appealing the termination of their parental rights. *Id.* at 121, 128. The Court noted that "the interest of parents in their relationship with their children is sufficiently fundamental to come within the finite class of liberty interests protected by the Fourteenth Amendment." *Id.* at 119. With such an important interest at stake, the Court found that a state distinction that imposed "different consequences

on two categories of persons" was inconsistent with the Equal Protection Clause. *Id* at 107, 127 (internal quotations omitted).

The "one parent doctrine" violates the equal protection rights of unadjudicated parents like Mr. Laird by arbitrarily denying them a state-based procedural right – the right to an adjudication trial – that other parents routinely receive. The doctrine arbitrarily assigns similarly situated parents markedly different procedural rights. In the first category of cases are those in which only one parent of a child is named as a respondent. These parents have an absolute right to an adjudication trial in which the allegations against them must be proven by the DHS before a court can place their children in foster care. The trial can be before a judge, jury, or referee, and the rules of evidence apply. If the parent prevails, the State has no authority to infringe upon the parent's right to direct the care of his or her child.

The "one parent doctrine," however, creates a second category of cases – those in which both parents are named as co-respondents – where the right to an adjudication trial is summarily eliminated for one parent. In these cases, the doctrine makes each parent's right to a trial reciprocally contingent on the findings against the other parent. If findings are made – after a trial or a plea – against one of the respondents, the other respondent automatically loses the opportunity to contest the allegations in the petition against him at a trial. Instead, his unfitness is presumed and the case simply moves on to the dispositional phase of the proceedings where the trial court is then able to infringe upon the rights of both parents. Again, in cases involving only one respondent, the right to an adjudication trial can never be taken away from the parent.

The Equal Protection Clause of the Fourteenth Amendment does not permit this type of arbitrariness. Just as the State may not arbitrarily deny a litigant access to the courts to vindicate a state-based legal right, or access to appellate review, the State may not make a parent's right to an adjudication trial contingent on whether that parent is a sole respondent or a co-respondent in a petition. Simply put, procedural rights – such as the right to an adjudication trial – "cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection clause." *Lindsey, supra* at 77.

CONCLUSION

Mr. Laird respectfully requests that this Court find that the "one parent doctrine" violates the substantive due process and equal protection rights of unadjudicated parents. This Court should hold that absent an adjudication finding of unfitness, a court cannot use its dispositional authority to infringe upon the rights of an unadjudicated parent. Accordingly, the trial court's order denying Mr. Laird's motion should be reversed.

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Dated: June 20, 2013

ATTACHMENT A

In re Sanders,
unpublished order per curiam of the Court of Appeals,
issued January 18, 2013 (Docket No. 313385)

Court of Appeals, State of Michigan

ORDER

In re Sanders Minors

Docket No. 313385

LC No. 11-002828-NA

David H. Sawyer
Presiding Judge

William B. Murphy, C.J.

Joel P. Hoekstra
Judges

The Court orders that the motion to waive the filing fees is GRANTED for this case only.

The motion for immediate consideration is GRANTED.

The motion for leave to file a reply to the answer is GRANTED and the reply brief received on December 17, 2012, is accepted for filing.

The Court further orders that the application for leave to appeal is DENIED for lack of merit in the grounds presented.

A true copy entered and certified by Larry S. Royster, Chief Clerk, on

JAN 18 2013
Date

Chief Clerk

ATTACHMENT B

In re Mays II,
unpublished decision per curiam of the Court of Appeals,
issued December 6, 2012 (Docket No. 309577)

STATE OF MICHIGAN

COURT OF APPEALS

UNPUBLISHED
December 6, 2012

In the Matter of MAYS, Minors.

No. 309577
Wayne Circuit Court
Family Division
LC No. 09-485821-NA

Before: MURRAY, P.J., and CAVANAGH and STEPHENS, JJ.

PER CURIAM.

In this child protective proceeding case, respondent W. Phillips appeals a circuit court order, following a permanency planning hearing, that continued the minor children's placement in foster care and denied respondent's motion for placement of the children with him and dismissal of the trial court's jurisdiction. The order was entered during proceedings on remand after our Supreme Court reversed an order terminating respondent's parental rights.[1] *In re Mays*, 490 Mich 993; 807 NW2d 307 (2012). We affirm.

The Department of Human Services (DHS) filed a petition for temporary custody of the children in March 2009. The petition alleged that the children were living with their mother, respondent U. Mays, who had left them home alone, and that respondent had stated that he was unable to care for the children at that time and that their best placement would be with their grandmother. The court acquired jurisdiction over the children in April 2009 when respondent Mays entered a plea of admission to the allegations in the petition. The trial court held a dispositional hearing in May 2009. It continued the children in alternative placement and directed the parents to participate in reunification services.

In December 2009, the DHS filed a supplemental petition to terminate each parent's parental rights. Following a hearing, the trial court terminated the parents' parental rights.

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[1] Although respondent initially filed a claim of appeal from the trial court's order, this Court, in response to a jurisdictional challenge in the children's brief on appeal, concluded that it lacked jurisdiction by right because the order was not a final order defined in MCR 3.993(A), but "that the claim of appeal is treated as an application for leave to appeal and leave to appeal is GRANTED." *In re Mays*, unpublished order of the Court of Appeals, entered July 25, 2012 (Docket No. 309577).

Although this Court affirmed that decision, *In re Mays*, unpublished opinion per curiam of the Court of Appeals, issued November 23, 2010 (Docket Nos. 297446, 297447), our Supreme Court subsequently reversed the order terminating respondent's parental rights, holding that "the trial court clearly erred in concluding that a statutory basis existed for termination of respondent's parental rights" and that the trial court erred in finding that termination was in the children's best interests when the factual record was inadequate to make a best interests determination. *In re Mays*, 490 Mich at 993-994.[2] Although the Supreme Court had previously directed the parties to address the constitutionality of the so-called "one parent" doctrine first adopted in *In re CR*, 250 Mich App 185; 646 NW2d 506 (2002), the Court ultimately declined to consider that issue because respondent had not raised it in his appeal to this Court. *In re Mays*, 490 Mich at 994.

Once the case returned to the trial court, respondent filed a motion for termination of the court's jurisdiction over the children or to return the children to his custody. He argued that the trial court had violated his due process rights when it utilized the one parent doctrine recognized in *In re CR* to take jurisdiction over the children because it deprived him of custody without a determination of unfitness. The trial court disagreed and denied the motion.

Respondent now argues on appeal that the trial court's continued exercise of jurisdiction over the children based solely on respondent Mays' plea, without an adjudication of unfitness with respect to him, violates his constitutional right to due process. After de novo review of this constitutional issue, we disagree. See *County Rd Ass'n of Mich v Governor*, 474 Mich 11, 14; 705 NW2d 680 (2005).

The concept of due process is flexible, and analysis of what process is due in a particular proceeding depends on the nature of the proceeding, the risks involved, and the private and governmental interests that might be affected. *In re Brock*, 442 Mich 101, 111; 499 NW2d 752 (1993). "The essence of due process is fundamental fairness." *In re Adams Estate*, 257 Mich App 230, 233-234; 667 NW2d 904 (2003) (internal quotation marks and citation omitted). Procedural due process requires that a party be provided notice of the nature of the proceedings and an opportunity to be heard by an impartial decision maker at a meaningful time and in a meaningful manner. *Reed v Reed*, 265 Mich App 131, 159; 693 NW2d 825 (2005). The opportunity to be heard requires a hearing at which a party may know and respond to the evidence. *Hanlon v Civil Serv Comm*, 253 Mich App 710, 723; 660 NW2d 74 (2002).

"[P]arents have a significant interest in the companionship, care, custody, and management of their children. This interest has been characterized as an element of 'liberty' to be protected by due process." *In re Brock*, 442 Mich at 109. A parent's interest in his children "warrants deference and, absent a powerful countervailing interest, protection." *Stanley v Illinois*, 405 US 645, 651; 92 S Ct 1208; 31 L Ed 2d 551 (1972). Conversely, the state has a legitimate interest in protecting children who are neglected or abused by their parents. *Id.* at 652; *In re VanDalen*, 293 Mich App 120, 132-133; 809 NW2d 412 (2011). But "so long as a parent adequately cares for his . . . children (*i.e.*, is fit), there will normally be no reason for the State to

[2] In a separate order, the Supreme Court also reversed the termination of respondent Mays' parental rights. *In re Mays*, 490 Mich 997; 807 NW2d 304 (2012).

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 v Granville*, 530 US 57, 68-69; 120 S Ct 2054; 147 L Ed 2d 49 (2000). A parent is constitutionally entitled to a hearing on his fitness before his children are removed from his custody. *Stanley*, 405 US at 658. "A due-process violation occurs when a state-required breakup of a natural family is founded solely on a 'best interests' analysis that is not supported by the requisite proof of parental unfitness." *In re JK*, 468 Mich 202, 210; 661 NW2d 216 (2003).

Child protective proceedings are initiated by the filing of a petition. MCR 3.961(A). A petition is a complaint alleging "that a parent, guardian, nonparent adult, or legal custodian has harmed or failed to properly care for a child[.]" MCR 3.903(A)(20). "[T]he parent, guardian, nonparent adult, or legal custodian who is alleged to have committed an offense against a child" is a respondent. MCR 3.903(C)(10). An offense against a child is "an act or omission by a parent, guardian, nonparent adult, or legal custodian asserted as grounds for bringing the child within the jurisdiction of the court" under MCL 712A.2(b). MCR 3.903(C)(7).

The procedures outlined by the Juvenile Code and the court rules protect a parent's due process rights. They permit the court to issue an order to take a child into custody when a judge or referee finds from the evidence "reasonable grounds to believe that 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)(1). Once the child is taken into custody, the parent must be notified and advised "of the date, time, and place of the preliminary hearing," which is to be held within 24 hours after the child has been taken into custody, and a petition is to be prepared and submitted to the court. MCR 3.921(B)(1); MCR 3.963(C); MCR 3.965(A)(1). If the child is in protective custody when the petition is filed, the procedures afforded at the preliminary hearing provide due process to the respondent-parents. They are informed of the charges against them and the court may either release the child to the respondent-parents or order alternative placement. MCR 3.965(B)(4) and (12)(b). Before ordering alternative placement, "the court shall receive evidence, unless waived, to establish that the criteria for placement . . . are present. The respondent shall be given an opportunity to cross-examine witnesses, subpoena witnesses, and to offer proof to counter the admitted evidence." MCR 3.965(C)(1). Thus, the respondent-parents are given notice of the proceedings and an opportunity to be heard before the child can remain in protective custody.

For the court to continue the child in alternative placement and "exercise its full jurisdiction authority," it must hold an adjudicatory hearing at which the factfinder determines whether the child comes within the provisions of § 2(b). *In re MU*, 264 Mich App 270, 278; 690 NW2d 495 (2004); *Ryan v Ryan*, 260 Mich App 315, 342; 677 NW2d 899 (2004). Generally, the determination whether the allegations in the petition are true, thus allowing the court to exercise jurisdiction, is made from the respondent's admissions to the allegations in the petition, from other evidence if the respondent pleads no contest, or from evidence introduced at a trial if the respondent contests jurisdiction. MCR 3.971; MCR 3.972; MCR 3.973(A); *In re PAP*, 247 Mich App 148, 152-153; 640 NW2d 880 (2001). "The procedural safeguards used in adjudicative hearings protect parents from the risk of erroneous deprivation of their liberty interest in the management of their children." *Id.* at 153. Once jurisdiction is obtained, the case proceeds to disposition "to determine what measures the court will take with respect to a child properly within its jurisdiction and, when applicable, against any adult . . . ." MCR 3.973(A).

There is no dispute that respondent was provided with the procedural safeguards prior to the adjudication. However, he was never adjudicated unfit; only respondent Mays was adjudicated as unfit. This Court upheld the validity of this practice in *In re CR*, in which it held that "[t]he family court's jurisdiction is tied to the children" and thus the petitioner is not required "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." *In re CR*, 250 Mich App at 205. This Court further observed that if the trial court acquires jurisdiction by a plea from one parent, the court can take measures "against any adult," MCR 3.973(A), and order the nonadjudicated parent to engage in services without alleging and proving that the nonadjudicated parent was abusive or neglectful as provided under § 2(b).[3] *Id.* at 202-203.

The essence of respondent's argument on appeal is that the one parent doctrine violates the nonadjudicated parent's due process rights by depriving him of custody of his children without a determination that he is an unfit custodian, as would be established at the adjudicatory hearing. Respondent's argument conflates the adjudicatory and dispositional phases of the proceedings. The adjudicatory phase determines whether a child requires the protection of the court because he or she comes within the parameters of § 2(b). If the child comes within the scope of § 2(b), the trial court acquires jurisdiction and "can act in its dispositional capacity." It is at the dispositional hearing that the court determines "what measures [it] will take with respect to a child properly within its jurisdiction[.]" MCR 3.973(A). It can issue a warning to the parents and dismiss the petition, MCL 712A.18(1)(a), place the child in the home of a parent or a relative under court supervision, MCL 712A.18(1)(b), or commit the child to the DHS for placement, MCL 712A.18(1)(d) and (e). Before the court determines what action to take, the DHS must prepare a case service plan, MCL 712A.18f(2), and the court must "consider the case service plan and any written or oral information concerning the child from the child's parent, guardian, custodian, foster parent, child caring institution, relative with whom the child is placed, lawyer-guardian ad litem, attorney, or guardian ad litem; and any other evidence offered, including the appropriateness of parenting time, which information or evidence bears on the disposition." MCL 712A.18f(4). See, also, MCR 3.973(E)(2) and (F)(2). If the DHS recommends against placing the child with a parent, it must "report in writing what efforts were made to prevent removal, or to rectify conditions that caused removal, of the child from the home," MCR 3.973(E)(2), and identify the likely harm to the child if separated from or returned to the parent. MCL 712A.18f(1)(c) and (d). The parent is entitled to notice of the dispositional hearing, MCR 3.921(B)(1)(d), and the parties are entitled to an opportunity "to examine and controvert" any reports offered to the court and to "cross-examine individuals making the reports when those individuals are reasonably available." MCR 3.973(E)(3).

If the child is removed from the home and remains in alternative placement, the court must hold periodic review hearings to assess the parents' progress with services and the extent to which the child would be harmed if he or she remains separated from, or is returned to, the parents. MCL 712A.19(3) and (6); MCR 3.975(A) and (C). The court must "determine the

[3] This is what is known as the so-called "one parent doctrine."

continuing necessity and appropriateness of the child's placement" and may continue that placement, change the child's placement, or return the child to the parents. MCL 712A.19(8); MCR 3.975(G). Before making a decision, the court must "consider any written or oral information concerning the child from the child's parent, guardian, legal custodian, foster parent, child caring institution, or relative with whom a child is placed, in addition to any other relevant and material evidence at the hearing." MCR 3.975(E). If the child remains out of the home and parental rights have not been terminated, the court must hold a permanency planning hearing within 12 months from the time the child was removed from the home and at regular intervals thereafter. MCL 712A.19a(1); MCR 3.976(B)(2) and (3). The purpose of the hearing is to assess the child's status "and the progress being made toward the child's return home[.]" MCL 712A.19a(3). At the conclusion of the hearing, the court "must order the child returned home unless it determines that the return would cause a substantial risk of harm to the life, the physical health, or the mental well-being of the child." MCR 3.976(E)(2). See, also, MCL 712A.19a(5). In making its determination, "[t]he court must consider any written or oral information concerning the child from the child's parent, guardian, legal custodian, foster parent, child caring institution, or relative with whom a child is placed, in addition to any other relevant and material evidence at the hearing." MCR 3.976(D)(2). Further, "[t]he parties must be afforded an opportunity to examine and controvert written reports received by the court and may be allowed to cross-examine individuals who made the reports when those individuals are reasonably available." *Id.* As with the initial dispositional hearing, each parent is entitled to notice of the dispositional review and permanency planning hearings and an opportunity to participate therein. MCR 3.920(B)(2)(c); MCR 3.975(B); MCR 3.976(C).

These provisions, taken together, satisfy the requirements of due process. 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 the child 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. Respondent does not contend that these procedures were not followed here.

Accordingly, the trial court did not violate respondent's due process rights by continuing to exercise jurisdiction over the children without subjecting respondent to an adjudication.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Cynthia Diane Stephens

STATE OF MICHIGAN

COURT OF APPEALS

UNPUBLISHED
December 6, 2012

In re MAYS, Minors.

No. 309577
Wayne Circuit Court
Family Division
LC No. 09-485821-NA

Before: MURRAY, P.J., and CAVANAGH and STEPHENS, JJ.

MURRAY, P.J., (*concurring*).

Respondent father and his amicus curiae argue that his constitutional right to due process of law was violated when the trial court refused to place the children with him in the absence of a finding of harm or danger to the children in doing so. With respect to the procedural due process aspect of respondent's argument,[1] I concur with the majority opinion that the statutory procedures in place under Michigan law adequately protect a parent from having children removed from their custody during the pendency of proceedings without adequate findings. However, for the reasons expressed briefly below, it is also evident that respondent's substantive due process right was not violated given the evidence of record at the time the motion was decided on March 8, 2012.

As recognized by the majority and respondent, there is no dispute that a parent has a liberty interest in raising his child that is protected by the due process clause of the United States Constitution. US Const, Am XIV, § 1; *Smith v Org of Foster Families for Equality & Reform*, 431 US 816, 842-844; 97 S Ct 2094; 53 L Ed 2d 14 (1977). Respondent's argument is that the trial court violated this constitutional right to due process of law (which he claims to be both procedural and substantive) by refusing to place the children with him during the pendency of the proceedings without first finding that he would be a danger to the children or otherwise

[1] The federal due process clause that applies to the States is contained in the Fourteenth Amendment to the United States Constitution, and provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law[.]" US Const, Am XIV, § 1. Although the constitutional language only references process, *People v Sierb*, 456 Mich 519, 522-523; 581 NW2d 219 (1998), the United States Supreme Court has held that there is both a procedural and substantive part to the Fourteenth Amendment, see *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 197; 761 NW2d 293 (2008).

committed abuse and neglect against the children. In making this argument respondent challenges this Court's decision in *In re CR*, 250 Mich App 185; 646 NW2d 506 (2002), where we held that once the circuit court acquires jurisdiction over the children it can order a parent to comply with certain orders and conditions, even if that parent was not a respondent in the proceedings, because jurisdiction over the children was established based on a plea by the other parent. *Id.* at 202-203. However, *In re CR* addresses an issue not presented by this case. As just noted, *In re CR* stands for the proposition that a non-respondent parent may be subject to court orders and conditions even when jurisdiction over the children is based exclusively on the other parent's conduct. The issue presented in this case is whether respondent may be deprived of the custody of his children during the pendency of these proceedings absent evidence of his particular unfitness. These are substantially different issues and therefore there is no basis in this case upon which to challenge the holding of *In re CR*.

Additionally, in light of the evidence presented to the trial court, it is readily apparent that the trial court's decision not to turn the children over to respondent did not violate his substantive due process right in the liberty interest he has as a parent as recognized by the United States Supreme Court. 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. At that hearing respondent testified that he most recently saw one child the previous month on her tenth birthday, and that he had seen both children "less than 10 times" in the year since his rights to the children were terminated. 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,[2] the liberty interest recognized by the due process clause as enunciated in *Stanley v Illinois*, 405 US 645; 92 S Ct 1208; 31 L Ed 2d 551 (1972), is simply not applicable here. Indeed, the *Stanley* Court repeatedly emphasized that the interest that it was recognizing was "that of a man in the children he had sired *and raised*," and that the father "was entitled to a hearing on his fitness as a parent *before his children were taken from him* . . . ." *Stanley*, 405 US at 649, 651. (Emphasis added.) See, also, *Stanley*, 405 US at 652 ("*Stanley's* [the father] interest in *retaining* custody of his children is cognizable and substantial.") and 405 US at 655 ("[N]othing in this record indicates that Stanley is or has been a neglectful father who has not cared for his children."). (Emphasis added.) Indeed, the Court in *Lehr v Robertson*, 463 US 248, 260; 103 S Ct 2985; 77 L Ed 2d 614 (1983), quoting *Caban v Mohammed*, 441 US 380, 397; 99 S Ct 1760; 60 L Ed 2d 297 (1979) (STEWART, J., *dissenting*), recognized that "'[*p*]*arental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring.*'" (Emphasis in the original.)

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[2] Though not as elaborate as they could be, one of the findings by the trial court in denying the motion was that although there is a presumption that a parent is fit, in the present case it did not apply because, since March 2009 when the case began and February 2012, the evidence revealed that respondent had either shown no interest in, or no ability to, parent the children.

Consequently, because there was a question about whether respondent had any contact or relationship with the two children at the time the trial court was asked to place the children with him, and because the children were not being "returned" or "taken from" respondent since he did not have custody of them, and because respondent had an opportunity to present evidence on this issue at the hearing held in February 2012, the liberty interest recognized in *Stanley* was neither applicable nor violated by the trial court's decision. See *In re CAW (On Remand)*, 259 Mich App 181, 185; 673 NW2d 470 (2003).

For these reasons, I concur in the decision to affirm the trial court's order.

/s/ Christopher M. Murray