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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Dated: July 31, 2013

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ARGUMENT

The Appellee raises three arguments in its brief. First, it argues that the appeal is moot because Mr. Laird is currently incarcerated. Appellee's Br. at 3, 10. Second, it asserts that the trial court satisfied the constitutionally-required fitness hearing by holding a pre-trial motion hearing. Appellee's Br. at 4. That hearing only dealt with whether the children should be placed in their grandmother's home pending Mr. Laird's adjudication trial. Third, it minimizes the equal protection concerns created by the "one parent doctrine" by summarily concluding that the disparate treatment of similarly-situated litigants is permissible so long as all parties receive notice of the proceedings, an opportunity to be heard and due consideration. Appellee's Br. at 12. Each of these arguments is addressed below.

I. This Appeal Is Not Moot Because Incarcerated Parents Retain The Right To Direct The Care Of Their Children.

The crux of this appeal involves whether a trial court can apply the "one parent doctrine" to deprive an unadjudicated parent of his right to direct the care, custody and control of his children. That was the issue presented to the trial court by Mr. Laird's counsel and that continues to be the issue before this Court. See Father's Motion for Immediate Placement, 62a-63a ("The Constitution forbids the State from infringing upon a parent's right to direct the care, custody or control of children absent a finding of parental unfitness. Here, the petition filed by the DHS alleging Mr. Laird's unfitness was dismissed by the Court. As such, the law requires the immediate return of his children to his care.").

The Appellee argues that the appeal is moot because Mr. Laird is presently incarcerated. In making this argument, it assumes that a parent automatically loses his right to direct the care of his children when he becomes incarcerated. So, for incarcerated parents, an adjudication trial is legally irrelevant because they cannot personally care for their children.

But this Court and the Court of Appeals have rejected this argument. Instead, both have held that incarcerated parents can exercise their right to direct their children's care by arranging for relatives to care for their children. *In re Taurus F*, 415 Mich 512, 535; 330 NW2d 33 (1982), (equally divided decision)("[I]f a mother gives custody to a sister, that can be 'proper custody'."); *In re Maria S Weldon*, 397 Mich 225, 296; 244 NW2d 827 (1976)("Some parents, . . . because of illness, incarceration, employment or other reason, entrust the care of their children for extended periods of time to others. This they may do without interference by the state as long as the child is adequately cared for."), overruled in part on other grounds by *Bowie v Arder*, 441 Mich 23, 47; 490 NW2d 568 (1992); *In re Curry*, 113 Mich App 821, 823-826; 318 NW2d 567 (1982)(observing that incarcerated parents may achieve proper custody by placing a child with relatives); *In re Carlene Ward*, 104 Mich App 354, 360; 304 NW2d 844 (1981)(holding that a child "who was placed by her natural mother in the custody of a relative who properly cared for her, is not a minor 'otherwise without proper custody or guardianship' and thus she was not subject to the jurisdiction of the probate court.").

This Court relied upon this case law in *In re Mason*, 486 Mich 142; 782 NW2d 747 (2010), to find that an incarcerated parent "could fulfill his duty to provide proper care

and custody in the future by voluntarily granting legal custody to his relatives during his remaining term of incarceration." *Id.* at 163. And in *In re Hansen*, 486 Mich 1037; 783 NW2d 124 (2010), which was issued soon after the *Mason* decision, this Court vacated a trial court's termination of parental rights order where an incarcerated father had arranged for his daughter to live with his sister. *Id.* These cases establish that an incarcerated parent can exercise his constitutional right to direct the care of his children by arranging for a relative to care for them.

So contrary to the Appellee's assertion, this case is not moot. The trial court continues to infringe upon Mr. Laird's ability to direct the care of his children. For example, Mr. Laird has requested that the children be placed with his mother. But the trial court denied his request and instead substituted its judgment as to what it believed would be a better placement option for the children. 36a. Additionally, Mr. Laird's continuing ability to have any relationship with his children is subject to compliance with a court-ordered case service plan. Mr. Laird is asking this Court to hold that absent an adjudication finding of unfitness, the trial court has no authority to infringe upon his ability to direct the care of his children.

II. A Pre-Trial Motion Hearing Having Nothing To Do With Determining Mr. Laird's Parental Unfitness Under MCL 712A.2(b) Does Not Satisfy The Constitutional Requirement For A Fitness Hearing.

Next, the Appellee argues that the trial court satisfied the Constitution by holding a pre-trial motion hearing dealing with one issue: whether the children should be moved to their grandmother's home pending the resolution of the adjudication trial against Mr. Laird. 36a. The hearing had absolutely nothing to do with Mr. Laird's

fitness to parent. The trial court only started the hearing *after* scheduling the adjudication trial for Mr. Laird. 24a. At the conclusion of the motion hearing, the trial court specifically noted that the issue before it involved comparing the homes of two relatives to determine which was the better environment for the children. 36a. And after denying the motion, the trial court and the children's lawyer-guardian ad litem both acknowledged that the unfitness allegations against Mr. Laird had not been adjudicated. 38a; 39a. Then, the trial court scheduled a jury trial to resolve those allegations. 39a. But that trial never occurred.

In making this argument, the Appellee suggests that any hearing involving the placement of children is enough to satisfy constitutional mandates regardless of whether the hearing actually focuses on a parent's fitness. So long as the parent receives notice of the hearing and an opportunity to be heard, no constitutional problems exist.

But the law does not support this view. Instead, it requires that a parent be afforded "a hearing on his fitness as a parent before his children [are] taken from him." *Stanley v Illinois*, 405 US 645, 649; 92 S Ct 1208; 31 L Ed 2d 551 (1972) (emphasis added). And under the Michigan Juvenile Code, the only standard by which a court can adjudicate a parent's unfitness prior to assuming temporary custody of a child is set forth in MCL 712A.2(b).[1]

[1] Other jurisdictions have enacted specific statutes to adjudicate the rights of non-offending parents. See, e.g., Cal Wel & Inst Code § 361.2 ("If that parent requests custody, the court shall place the child with the parent unless it finds that placement with that parent would be detrimental to the safety, protection, or physical or emotional

Yet the trial court never made this finding against Mr. Laird through an adjudication trial. See Opinion and Order Denying Father's Motion for Immediate Placement, 88a ("The father correctly notes that the Court . . . has not adjudicated allegations of neglect or abuse against him."). Instead, it skipped this constitutionally-required step prior to infringing upon Mr. Laird's right to direct the care of his children. In doing so, it committed legal error and its order should be reversed.

III. The Two-Tiered System For Adjudicating A Parent's Unfitness Advanced By The Appellee Only Underscores The Equal Protection Issues Created By The One Parent Doctrine.

Finally, the Appellee, without citing any legal support, argues that so long as all parents receive notice, an opportunity to be heard, and "due consideration,"[2] the Equal Protection Clause is not violated.[3] Appellee's Br. at 12. But it fails to address the principal argument being made in this case that is central to any Equal Protection challenge – that the State may not treat similarly circumstanced people differently. *El Souri v Dep't of Soc Svs*, 429 Mich 203, 207; 414 NW2d 679 (1987).

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well-being of the child."); Fla Stat § 39.521(3)(b)(the court "shall place the child with that parent upon completion of a home study, unless the court finds that such placement would endanger the safety, well-being, or physical, mental, or emotional health of the child.); Mo Rev Stat § 211.037.1(3) (requiring the court to "promptly return to the care and custody of a nonoffending parent" the child under the court's jurisdiction if the standard has not been met). But Michigan has not enacted such provisions. In Michigan, the only standard to determine the temporary unfitness of a parent is set forth in MCL 712A.2(b).

[2] The Appellee does not define what it means by "due consideration."

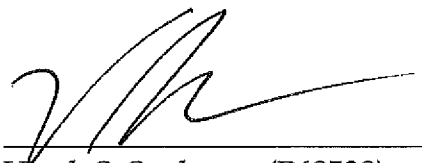
[3] The Appellee is correct that this argument was not preserved at the trial court. But this Court may review unpreserved issues under the "plain error" standard. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). This standard is satisfied when the error seriously affects "the fairness, integrity, or public reputation of judicial proceedings." *Id.*

Yet this is precisely what the two-tiered system advanced by the Appellee and created by the "one parent doctrine" does. One parent receives the full protections available under the Juvenile Code and the Juvenile Court Rules. She may request a trial before a jury and is entitled to discovery. MCR 3.911; MCR 3.922. She may call witnesses at the trial to prove her case. She may object to evidence being introduced that violates the rules of evidence and must be found to be unfit under MCL 712A.2(b) in order for a court to infringe upon her right to direct the care of her children. MCR 3.972. If the court makes such a finding, she may appeal the decision to the Court of Appeals. MCR 3.993(A). And if she wishes to enter into a plea, she must be carefully advised by the court of the significant procedural rights she is waiving. MCR 3.971.

But once one parent takes these steps and is determined to be unfit, the other parent receives none of these protections. He can be denied the right to an adjudication trial. He can be prevented from calling witnesses to contest the allegations made against him. He can be deprived of the ability to care for his children without ever having been found to be unfit under MCL 712A.2(b). And he can be stripped of the ability to resume caring for his children until he completes a court-ordered service plan. The trial court is empowered to presume he is unfit, order him to comply with a case service plan and condition his parental rights on his compliance with such a plan. Such disparate treatment violates the Equal Protection Clause and serves as an independent basis to reverse the trial court's decision in this case.

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 and Mr. Laird's right to direct the care of his children should be restored.



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