

**STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT**

IN THE MATTER OF
Aidan Jay Roustan,
Minor Child

Circuit Court No. 12-024817-AY
Court of Appeals No. 312100
Supreme Court No. 147522

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**MOTION TO FILE AMICUS CURIAE BRIEF -
STATE BAR OF MICHIGAN FAMILY LAW SECTION**

**AMICUS CURIAE BRIEF OF THE STATE BAR OF MICHIGAN
FAMILY LAW SECTION**

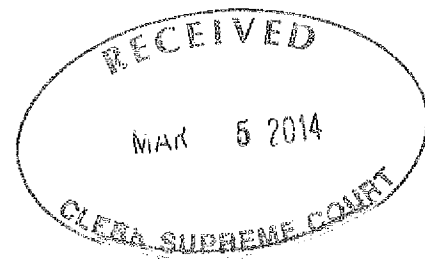


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STATEMENT OF QUESTIONS INVOLVED

- I. Was the Court of Appeals correct in holding that the use of the definite article “the” as opposed to the indefinite article “a” means one parent with legal custody? While the term “legal custody” in MCL 710.51(6) is not necessarily limited to the definition in the Child Custody Act, MCL 722.26a(7)(b), should the decision of the Court of Appeals in this case be affirmed?

Amicus answers Yes to the above questions.

STATEMENT OF INTEREST OF AMICUS CURIAE

The Family Law Council (“The Council”) is the governing body of the Family Law Section of the State Bar of Michigan. The Section is comprised of over 2,400 lawyers in Michigan practicing in the area of family law, and it is the section membership which elects 21 representative members to the Family Law Council. The Council provides services to its membership in the form of educational seminars, monthly Family Law Journals (an academic and practical publication reporting new cases and analyzing decisions and trends in family law), advocating and commenting on proposed legislation relating to family law topics, and filing Amicus Curiae briefs in selected cases in the Michigan Courts.

The Council, because of its active and exclusive involvement in the field of family law, and as part of the State Bar of Michigan, has an interest in the development of sound legal principles in the area of family law.

The instant case involves the statutory interpretation of the step-parent adoption statute, MCL 710.51(6), including the term “legal custody.” The decision from this Court will clarify the scope of the step-parent adoption statute and may have far-reaching effects on other domestic relations statutes involving the term “legal custody.”

STATEMENT OF FACTS

Amicus curiae is not providing a separate statement of facts and relies on the Statements of the parties.

ARGUMENT

- I. The Court of Appeals was correct in holding that the use of the definite article “the” as opposed to the indefinite article “a” means one parent with legal custody. And, while the term “legal custody” in MCL 710.51(6) is not necessarily limited to the definition in the Child Custody Act, MCL 722.26a(7)(b), the decision of the Court of Appeals in this case should be affirmed.

Argument:

The Court of Appeals was correct in holding that the use of the definite article “the” as opposed to the indefinite article “a” means one parent with legal custody.

It is a general principle of statutory interpretation that the Legislature intends the plain meaning of the language used in a statute. The use of the definite article “the” identifies a single individual, and the use of the indefinite article “a” identifies one of many. *See Robinson v City of Detroit*, 462 Mich 439, 461-462, 613 NW2d 307 (2000). This interpretation results in a sensible application of the statute. Stepparent adoption seems inapposite in cases where the parents are sharing custody.

While the term “legal custody” in MCL 710.51(6) is not necessarily limited to the definition in the Child Custody Act, MCL 722.26a(7)(b), the decision of the Court of Appeals in this case should be affirmed. Any variation in the definitions of legal custody is not dispositive in this case, where a court order awards *both* parties custody rights.

Courts have long recognized that child custody is comprised of a variety of components. *See Troxel v Granville*, 530 US 57, 65, 120 S.Ct. 2054 (2000) (the United States Supreme Court reaffirming “the interest of parents in the *care, custody, and control* of their children ... perhaps the oldest of the fundamental liberty interests recognized by this Court”). *Troxel* involved a challenge to Washington’s third person visitation statute, and addressed parental rights to determine children’s associations.

Appellant argues that the term “legal custody” should be narrowly construed as the legal

right to *physical* custody only - but provides no authority for this proposition. *Wiand v Wiand*, 178 Mich. App. 137, 443 N.W.2d 464 (1989)(a statement of position without supporting citations is insufficient to bring an issue before this Court).

Legal custody may be defined in various ways, but not in the way Appellant claims.

For example, under the Child Custody Act, in custody disputes between parents, the parents shall be advised of joint custody, and, "[a]t the request of either parent, the court shall consider an award of joint custody, and shall state on the record the reasons for granting or denying a request. See MCL 722.26a(1).

"[J]oint custody" as defined under MCL 722.26a(7) "means an order of the court in which 1 or both of the following is specified:"

- (a) That the child shall reside alternately for specific periods with each of the parents.
- (b) That the parents shall share decision-making authority as to the important decisions affecting the welfare of the child.

Each sub-provision describes a different aspect of custody. Although not labeled in the statute - as long recognized in case law - subsection (a) addresses "physical" custody and subsection (b) concerns "legal" custody or parental decision-making. See *Grange Insurance v Lawrence*, 494 Mich 247, 771 NW2d 694 (2009)(this Court stating legal custody under the Child Custody Act refers to parental decision-making authority as defined in section 26a(7)(b)).

But a review of the use of the term "legal custody" in various Michigan statutes shows that it also appears to be used in a much *broader* sense – not limited to the decision-making authority discussed in MCL 722.26a(7)(b) - and certainly not limited to the narrow definition argued by Appellant. In these statutes, the term "legal custody" appears to refer to "lawful" custody, i.e.

custody rights granted in accordance with a court order, judgment or by statutory authority. The term "legal custody" appears in statutes, including statutes concerning care of records, MCL §18.1285; the definition of familial status in the Elliot Larsen Act, MCL § 37.2103; the definition of "Person in loco parentis" in the Mental Health Code, MCL §330.1260; the designation of the person responsible for providing a certificate of lost records, MCL §559.240; various statutes within the probate code, MCL §700.2519 & .5204(2)(c)(ii); the Child Custody Act, MCL 722.26c(1)(ii), (e)(1), 27(1)(e) & (6)(h), and the personal protection order statute, MCL §600.2950. The statutes frequently make no mention of physical custody and speak only of legal custody.

Specifically, MCL 600.2950 (1)(d) - the statute authorizing personal protection orders - enjoins an individual from:

(d) Removing minor children from the individual having legal custody of the children, except as otherwise authorized by a custody or parenting time order issued by a court of competent jurisdiction.

If legal custody means only decision making under MCL 722.26a(7)(b), then the court has no power to protect a woman unless she has sole decision making authority.

The specific term "legal custody" also appears in other sections of the Child Custody Act, where it appear to refer to custody by court order, rather than custody limited to shared decision making authority. For example, MCL 722.26c allows a non-parent to request custody if certain conditions are met:

b) All of the following:

- (i) The child's biological parents have never been married to one another.
- (ii) The child's parent who has custody of the child dies or is missing and the other parent has not been granted legal custody under court order. [emphasis mine]
- (iii) The third person is related to the child within the fifth degree by marriage, blood, or adoption.

The statute is not excluding parents with physical custody and only including parents with decision-making authority. It is referring to parents who have custody by court order or other authority.¹

And, the parenting time statute, MCL 722.27a, in discussing wrongful detention as a factor to consider in setting parenting time uses the term “legal” custody:

(6) The court may consider the following factors when determining the frequency, duration, and type of parenting time to be granted:

(h) The threatened or actual detention of the child with the intent to retain or conceal the child from the other parent or from a third person who has *legal custody*. A custodial parent's temporary residence with the child in a domestic violence shelter shall not be construed as evidence of the custodial parent's intent to retain or conceal the child from the other parent.

It does not make sense in this context to use a narrower definition of legal custody as to non-parents; in this provision legal custody appears to indicate a lawful right to custody under court order or other authority.

There are other examples, but the varying definitions of legal custody are not dispositive

¹ MCL 722.26e sets out the persons entitled to notice of a non-parents action for custody:

722.26e Custody action by third person; notice; powers of court.

(1) A third person filing an action under section 6c shall send notice of the action to each party who has *legal custody* of the child and to each parent whose parental rights have not been terminated. (Emphasis added).

Notice is always required for a parent, unless their parental rights are terminated. Parties who are not parents are third persons, who are entitled to notice if they have “legal custody” of a child. This refers to custody by court order, as opposed to a third party who merely has the child living with them, for example. Third parties are not awarded shared decision-making authority and interpreting the statute to apply only in those instances would make no sense.

here. The term “legal custody” appears to be used in a broad sense in many statutes - meaning a “lawful” grant or entitlement to custody (a recognition of a parent’s rights in either an order or under some other authority). This use is broader than defining legal custody as decision-making power under MCL 722.26a(7)(b). And, it is broader than Appellant’s narrow suggestion that legal custody is a legal right to “physical” custody. A legal or “lawful” custody encompasses all aspects of custody; these rights could include, but are not limited to the right of decision-making, the right of care or possession, and the right of a parent to parenting time or spending time with a child. All of these are subsets of custody.

In this case, the parties were awarded joint legal custody in the Judgment of Divorce. The Child Custody Act applies and the “joint *legal* custody” in the context of the Judgment is interpreted consistently with MCL 722.26a(7)(b)(as decision-making authority). *Grange, supra*. Clearly, both parties in this case are awarded “legal” custody under the Judgment.

And, Appellee also has legal custody using the broader definition as “lawful” custody pursuant to statute or court order based on the divorce judgment (as well as based on the fact that he is the natural biological father). Under either definition, the step-parent adoption statute is not applicable.

If the Court of Appeals is affirmed, Appellee has other options.

If this Court affirms the Court of Appeals, Appellant is not without recourse. She may always seek to modify the custody order in the trial court. See MCL 722.27(1)(c). If she is granted sole custody, then she will be “**the** parent having legal custody” for the purposes of MCL 710.51(6). She also has the option of seeking parental termination under the Juvenile Code if appropriate.

CONCLUSION

If a petitioner is successful under the step-parent adoption statute, there is a permanent and severe remedy - parental rights are severed.² The Court of Appeals decision should be affirmed where it is based on a sound statutory interpretation which makes sense in terms of Michigan families.

² Amicus agrees with Appellant's footnote number 13 discussing the general constitutional context in this case.

RELIEF

Amicus respectfully requests that this Court consider this brief and affirm the Court of Appeals decision in this case.

Respectfully submitted,

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