

State of Michigan
Supreme Court

In the Matter of:
Aidan Jay Roustan.

Supreme Court No. 147522
Court of Appeals No. 312100
Trial Court No. 2012-24817-AY
Kent County Circuit Court
Hon. Kathleen A. Feeney

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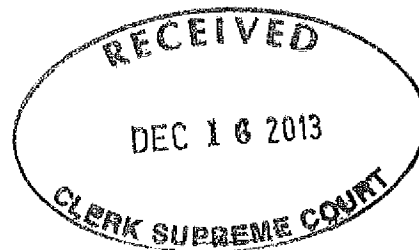
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Petitioners-Appellants' Brief on Appeal

Oral Argument Requested



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December 15, 2013

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Statement of Basis of Jurisdiction

This matter is properly before the Court on leave granted pursuant to an order entered on October 23, 2013.

Statement of Questions Presented

A. Whether the Court of Appeals properly interpreted the statutory phrase "the parent having legal custody of the child" in the stepparent adoption statute, MCL 710.51(6), as necessarily referring to the "the" sole parent with legal custody?

Appellants answer : No
Appellee answers: Yes
Court of Appeals answers: Yes
Trial Court: Did not address this question

B. Whether the phrase "legal custody" in MCL 710.51(6) is synonymous with the concept of joint custody in the Child Custody Act, MCL 722.26a(7)(b), whereby "the parents share decision-making authority as to the important decisions affecting the welfare of the child"?

Appellants answers : No
Appellee answers: Yes
Court of Appeals answers: Yes
Trial Court: Did not address this question

C. Whether there is a remedy available to the petitioners in this case that is consistent with the general purposes of the Adoption Code, MCL 710.21a, assuming the Court of Appeals did not err in interpreting the statute in question.

Appellants answers : No
Appellee answers: Yes
Court of Appeals: Did not address this question
Trial Court: Did not address this question

Statement of Facts

Overview: This appeal involves a stepparent adoption. The parental rights of the minor child's biological father, Pierre Roustan, were terminated pursuant to the provisions of MCL 710.51(6). The minor child involved is AJR who was born May 9, 2005, and is currently 8½ years old. Petitioner/stepfather, Steven Merrill, and the child's biological, legal, and custodial mother, Susan Merrill, were married on June 25, 2010.

Facts: Nearly all of the facts in this case are undisputed. The biological mother and father of AJR were married on October 11, 2003, and divorced on February 24, 2009, after nearly six years of marriage. The divorce judgment granted the parties joint legal custody of the minor child, with sole physical custody awarded to Ms. Merrill. Jmt of Div, ¶ XI.¹ Mr. Roustan was granted reasonable parenting time as more specifically set forth in the Judgment of Divorce. *Id*, ¶ XIII.²

The parties agreed that in approximately September of 2009, Mr. Roustan no longer exercised parenting time in accordance with the schedule contained in the Judgment of Divorce.³ The parties agreed that there were only two visits in 2010.⁴ Ms. Merrill testified that there were only six visits in the two years preceding the filing of the petition for stepparent adoption.⁵

¹ App 29a-30a.

² App 30a.

³ App 56a, 103a.

⁴ App 58a-59a, 105a.

⁵ App 78a.

Additionally, Mr. Roustan failed to substantially comply with the Court's orders requiring him to support his child, making only five payments, with only one payment appearing to be voluntary.⁶ At the time of the trial court's hearing, both parties agreed that Mr. Roustan was approximately \$9,000 behind in his child support payments.⁷

On May 9, 2012, Steven Merrill, joined by Susan Merrill, filed for stepparent adoption of AJR. Upon Mr. Roustan's objection to the petition, an evidentiary hearing was conducted on July 18 and 19, 2012. Testimony was taken regarding termination of Mr. Roustan's parental rights under MCL 710.51(6)(a) and (b). At no time during the hearing or in his written closing argument to the trial court did Mr. Roustan raise the issue that the stepparent adoption statute did not apply because he was a joint legal custodian.

Trial Court's Findings and Conclusions: The trial court issued its decision on August 9, 2012.⁸ After making detailed factual findings and stating its conclusions as to the provisions of MCL 710.51(6), the trial court terminated Mr. Roustan's parental rights to AJR, stating:

Despite his recent efforts, the evidence and testimony presented to this Court clearly and convincingly demonstrate that Mr. Roustan has both "failed to substantially comply" with this Court's orders requiring him to support his child and has "regularly and substantially failed or neglected to visit, contact, or communicate with Aidan for a period of two or more years

⁶ App 80a, 83a.

⁷ App 79a, 99a.

⁸ App 235a-244a.

before the petition for adoption was filed by Mr. and Mrs. Merrill on May 9, 2012 Lastly, this Court notes that after the August 2009 UCSO modification, Mr. Roustan failed to make any motions with the Friend of the Court to lower his child support obligation or to enforce or modify his parenting time until after the Merrills filed their adoption petition. Therefore . . . pursuant to MCL 710.51(6), Respondent Pierre Roustan's parental rights to his child [AJR] are hereby terminated, and the stepparent adoption may proceed.⁹

Court of Appeals: Mr. Roustan filed his Claim of Appeal from the trial court's August 9, 2012, termination of parental rights order on August 29, 2012. For the first time in his brief on appeal, Mr. Roustan argued that because the divorce judgment granted him a share of legal custody, the provisions of MCL 710.51(6) did not apply and a stepparent adoption could not be sought by the Merrills.

Looking only at the term "legal custody" as it is informally used in the divorce and custody context under the Child Custody Act rather than its historical context as used in the Adoption Code and other statutes, the Court of Appeals agreed with the Mr. Roustan's argument that MCL 710.51(6) could not be used to terminate the parental rights of a parent with joint legal custody even if that parent failed to support or communicate with his child for the requisite two-year period under MCL 710.51(6)(a) and (b).

The Court of Appeals reversed, holding that the trial court erred when it terminated respondent's rights under MCL 710.51(6) despite finding that the requirements of subsections (a) and (b) were satisfied. The sole basis of

⁹ App 244a.

the Court of Appeals decision was that the mother did not have sole legal custody.¹⁰ The Court of Appeals denied reconsideration in an order dated July 8, 2013.¹¹

The Merrills filed an application for leave to appeal with this Court on August 5, 2013. This Court granted leave to appeal in an order dated October 23, 2013.¹²

¹⁰ App 245a-248a.

¹¹ App 249a.

¹² App 250a.

Argument

A. The Court of Appeals improperly interpreted the statutory phrase “the parent having legal custody of the child” in the stepparent adoption statute, MCL 710.51(6), as necessarily referring to the “the” sole parent with legal custody.

Standard of Review: Issues of statutory interpretation are questions of law that this Court reviews *de novo*. *Spectrum Health Hospitals v Farm Bureau Mut Ins Co of Michigan*, 492 Mich 503, 515, 821 NW2d 117 (2012); *Douglas v Allstate Ins Co*, 492 Mich 241, 256, 821 NW2d 472 (2012).

Introduction: The Court of Appeals ruled that only the parent with sole legal custody could request the termination of the parental rights of the other parent in a stepparent adoption. Therefore, the parental rights of the father in this case could not be terminated under the stepparent adoption statute because shared joint legal custody with the mother. In making its decision, the Court of Appeals interpreted MCL 710.51(6), the portion of the stepparent adoption statute that allows “the” parent having legal custody of the child and his/her spouse to seek a stepparent adoption, to mean the “sole” parent having legal custody of the child. Therefore, stepparent adoption would never be possible where the other parent has joint legal custody even where that parent has not regularly supported or maintained contact with the child for the relevant two-year period.

The Court of Appeals focused much of its discussion on the meaning of the words “the” and “a” in the statute. It ignored the purpose and historical

context of the stepparent adoption statute. As a result, the Court of Appeals erred in its interpretation. Such a narrow view would defeat the intent of the Legislature.

Law and Argument: The statute in question, MCL 710.51(6), provides that if the parents of a child are divorced,...and if **the** parent having legal custody of the child subsequently marries, that the court may enter an order to terminate the parental rights of the other parent if the requirements of subsections (a) and (b) are met. The Court of Appeals stated at p 3 of its decision:

We conclude and hold that the statute's use in the preceding paragraph of the language, "if *the* parent having legal custody of the child," is to be read as requiring the party initiating termination proceedings to be *the only parent* having legal custody. The rights of a parent who maintains joint legal custody are not properly terminated under MCL 710.51(6).¹³

The primary goal of statutory interpretation is to ascertain the legislative intent that may reasonably be inferred from the statutory language. The first step in that determination is to review the language of the statute itself. Unless statutorily defined, every word or phrase of a statute should be accorded its plain and ordinary meaning, **taking into account the context in which the words are used**. Here, the term "legal custody" is not defined in the Adoption Code. Absent a statutory definition, a court may consult dictionary definitions to give words their common and ordinary meaning. When given their common and ordinary meaning, "[t]he

¹³ App ___ a.

words of a statute provide 'the most reliable evidence of its intent....!'" *Spectrum Health Hospitals v Farm Bureau Mut Ins Co of Michigan*, 492 Mich 503, 515, 821 NW2d 117 (2012).

This Court stated in *Pohutski v City of Allen Park*, 465 Mich 675, 641 NW2d 291 (2002): "When faced with questions of statutory interpretation, our obligation is to discern and give effect to the Legislature's intent as expressed in the words of the statute." Also, in *People v. Borchard-Ruhland*, 460 Mich. 278, 284-85, 597 N.W.2d 1, 5-6 (1999) it was held that: "The rules of statutory construction are well established. The fundamental task of statutory construction is to discover and give effect to the intent of the Legislature.

The task of discerning our Legislature's intent begins by examining the language of the statute itself. *Tryc v Michigan Veterans' Facility*, 451 Mich 129, 135, 545 NW2d 642 (1996). Where the language of the statute is unambiguous, the plain meaning reflects the Legislature's intent and the Court applies the statute as written. Judicial construction under such circumstances is not permitted. *Donajkowski v Alpena Power Co*, 460 Mich 243, 596 NW2d 574 (1999).

Only where the statutory language is ambiguous may a court properly go beyond the words of the statute to determine legislative intent. *Luttrell v. Dep't of Corrections*, 421 Mich 93, 365 NW2d 74 (1984). When construing a statute, the court must presume that every word has some meaning and

should avoid any construction that would render any part of the statute surplusage or nugatory. *Altman v Meridian Twp*, 439 Mich 623, 635, 487 NW2d 155 (1992). If possible, effect should be given to each provision. *Gebhardt v O'Rourke*, 444 Mich 535, 542, 510 NW2d 900 (1994).

In examining a statute, the ability to discern the legislative intent that may reasonably be inferred from the words expressed in the statute. *White v. Ann Arbor*, 406 Mich. 554, 562, 281 N.W.2d 283 (1979). Concomitantly, it is the Court's task to give the words used by the Legislature their common, ordinary meaning. MCL 8.3a; *Massey v Mandell*, 462 Mich 375, 380, 614 NW2d 70, 72 (2000).

The problem in this case, and what led the Court of Appeals astray, is that the common, ordinary meaning of the term "legal custody" is different today than when the stepparent adoption statute, MCL 710.51(6), was enacted. The Legislature could not have known that the term "legal custody" would develop an informal, yet widespread, meaning that departs from its meaning at the time the statute in question was enacted. The development of the informal usage of the term "legal custody" as a shorthand for shared decision-making on important issues affecting the child retroactively created an ambiguity in the statute. However, at the time the statute was passed, there was no ambiguity. This issue will be addressed more fully in *Argument B* of this brief.

Before reaching that issue, it is important to address the Court of

Appeals' misguided focus on the definite article "the" in the statute. Other statutes within the Adoption Code and also the Juvenile Code (which have the related purpose of securing permanent fit homes for children) use the definite article "the" and the indefinite article "a" interchangeably and do not demonstrate an intent by the Legislature for a different application or interpretation of the law.

For example at MCL 710.43(1)(a)(v), the statute makes reference to a parent in a stepparent adoption and requires as follows:

"Subject to this section and sections 44 and 51 of this chapter:

(1) consent to adoption of a child shall be executed:

(a) By each parent of a child to be adopted or the surviving parent, except under the following circumstances:

(v) **A** parent having legal custody of the child is married to the petitioner."

Pursuant to the direct placement provisions of the adoption code (MCL 710.23d), a temporary placement of a child for adoption purposes can be made by "a" parent or guardian with legal and physical custody of the child. Again, the intermittent use of "a" as opposed to "the".

Another inconsistency is found at MCL 710.51 in paragraphs (5) and (6). The Court of Appeals recognized the inconsistency in the Legislature's use of the words "a" and "the" when it stated on p 4 of its opinion:

Notably, the preceding section in the statute, MCL 710.51(5), uses the phrase "a parent" to refer to whom that particular

section applies. Contrastingly, MCL 710.51(6) refers to "the parent". We presume that the Legislature intended to use the more general phrase "a parent" to refer to either of the child's parents in MCL 710.51(5) and that the omission of such a general article in MCL 710.51(6) was intentional.¹⁴

The portion of the statute that the Court of Appeals is referring to is found at MCL 710.51(5) and (6) states as follows [emphasis added]:

(5) If **a** parent having legal custody of the child is married to the petitioner for adoption, the judge shall not enter an order terminating the rights of that parent.

(6) If the parents of a child are divorced, or if the parents are unmarried but the father has acknowledged paternity or is a putative father who meets the conditions in section 39(2) of this chapter, and if **the** parent having legal custody of the child subsequently marries and that parent's spouse petitions to adopt the child, the court upon notice and hearing may issue an order terminating the rights of the other parent if both of the following occur...

It was error for the Court of Appeals to presume the Legislature intentionally omitted the indefinite article "a". In light of the conflicting use of these terms, and in reading the statute as a whole, there is no indication that the Legislature preferred the more limiting definite article over the indefinite article when modifying the noun "parent". It is more plausible to infer that the Legislature's omission of the indefinite article was **not** intentional, particularly where the statute is read in light of its stated purpose.

The Court of Appeals used legislative silence to resolve the conflict and thereby imposed substituted its own policy preference for the Legislature's

¹⁴ App 248a.

intent. In order to remedy that error, this Court must find a way to address the problem of conflict between the words' uses and their meanings. In so doing, this Court must look to the intent of the statute as a whole, along with the legislative history, to determine if MCL 710.51(6) was meant to limit application of the statute to a parent with sole legal custody

Paragraphs (5) and (6) refer to the same person; the parent who is married to a stepparent and is seeking to terminate the other parent's rights in a stepparent adoption proceeding. Following the Court of Appeals' faulty logic, the Legislature intended the more general phrase in paragraph (5) to refer to **either** of the child's parents, but in paragraph (6) reversed course and did not intend for the more general phrase to apply. Such a conclusion when construing consecutive sections of statute with a unified and singular purpose is a legal absurdity.

It is not possible for "either" parent to be married to the petitioner in a stepparent adoption. Only one parent may be married to the petitioner. More importantly, there is no question that the parent referred to in both paragraphs (5) and (6) are the same person and therefore different rules should not apply.

This Court has set forth an "absurd result" rule in *Salas v Clements*, 399 Mich 103, 109, 247 NW2d 889 (1976), where it was held:

[W]e must keep in mind the fundamental rule of statutory construction that departure from the literal construction of a statute is justified when such construction would produce an absurd and unjust result and would be clearly inconsistent with

the purposes and policies of the act in question.

"Statutes must be construed to prevent absurd results." *People v. Tennyson*, 487 Mich 730, 741, 790 NW2d 354 (2010) [citations omitted]. In the present case the Court of Appeals construction of MCL 710.51(6) renders it nugatory. The interpretation by the Court of Appeals that "the" parent means the "sole" parent with legal custody produces an absurd result. The Court of Appeals wrongfully substituted its own policy decision for those already made by the legislature. See *DiBenedetto v West Shore Hosp*, 461 Mich 394, 405, 605 NW2d 300 (2000).

Further, it was error for the Court of Appeals to engage in an analysis based on dictionary definitions when doing so was not required or necessary to interpreting the statute. When a term is not defined in a statute, the dictionary definition of the term may be consulted or examined. *People v. Perkins*, 473 Mich. 626, 639, 703 N.W.2d 448 (2005). Reliance on dictionary definitions assists the goal of construing undefined terms in accordance with their ordinary and generally accepted meanings. *People v Morey*, 461 Mich. 325, 330–331, 603 NW2d 250 (1999). "However, recourse to dictionary definitions is unnecessary when the Legislature's intent can be determined from reading the statute itself." *People v Stone*, 463 Mich 558, 563, 621 NW2d 702 (2001). This is particularly true where, as here, the ordinary and generally accepted meaning has changed in the decades since the statute was enacted, as addressed in *Argument B*.

Despite the Legislature's failure to define a term, the intent may be determined by examining the language of the statutes themselves. *Id.* In the present case, there was no need to define the term "the" in reference to MCL 710.51(6), since the meaning of the phrase, when read in conjuncture with the stepparent adoption statute as a whole, and more precisely with the legislative history of the purpose of the statute, was not ambiguous. The statute intends that a parent who has legal custody of a child may seek to terminate the parental rights of the other parent where that parent has essentially abandoned their child. The intent of the statute is to focus on the conduct of the delinquent parent, not that parent's status as a shared decision-maker (a/k/a joint legal custodial), particularly where the facts show that joint decision-making was not taking place.

It is essential to review the objectives of MCL 710.51(6) as set forth in *In re Colon*, 144 Mich App 805, 810, 377 NW2d 321 (1985), where the objectives of the Legislature were revealed in the House Legislative Analysis of HB 5791 (September 19, 1980), stating:

Given the inherent unfairness to the stepparent, the parent having legal custody, and the child, of allowing a parent who does not support or communicate with his or her child to block the adoption of that child by a loving, caring stepparent, some feel that the law should be changed to permit the termination of parental rights under such circumstances, so as to enable the stepparent to adopt the child.

The purpose of the statute was never to limit the parent authorized to consent to the adoption to the "sole" parent with legal custody, but rather

the emphasis was clearly on the parent who had become non-participatory in their parental duties and responsibilities. That lack of participation, not the presence or absence of the parent's status as a joint decision-maker, permits termination of parental rights and adoption by the stepparent.

The Court of Appeals, in using a strained and overly narrow view of the words "the" and "a," defeats the intent of the stepparent adoption statute. That intent is to allow a stepparent who has been a parent in fact and who has provided for the child's stability, emotional, physical, and financial stability in place of the absent parent, to adopt his/her stepchild.

As stated in *Charter Twp of Pittsfield, supra*, the Court should apply a reasonable construction which best accomplishes the statute's purpose. The legislature's interchangeable use of the words "a" and "the" in the context of the same subject matter, i.e. termination of parental rights, further proves that the terms were not intended to be terms of limitation, and that the intent was not to limit termination of parental rights to only those parents who had the "sole legal custody" of a child.

Therefore the parent having legal custody of a child as referenced in MCL 710.51(6) does not mean the sole parent having custody. The Court of Appeals' decision should be reversed.

B. The phrase "legal custody" in MCL 710.51(6) is not synonymous with the concept of joint custody in the Child Custody Act, MCL 722.26a(7)(b), whereby "the parents share decision-making authority as to the important decisions affecting the welfare of the child".

Standard of Review: Issues of statutory interpretation are questions of law that this Court reviews *de novo*. *Spectrum Health Hospitals v Farm Bureau Mut Ins Co of Michigan*, 492 Mich 503, 515, 821 NW2d 117 (2012); *Douglas v Allstate Ins Co*, 492 Mich 241, 256, 821 NW2d 472 (2012).

Law and Argument: At issue in this appeal is the meaning of the term "legal custody" as used in MCL 710.51(6). In its decision, the Court of Appeals adopted Mr. Roustan's argument (raised for the first time on appeal) that because he had "joint legal custody" of the child, his parental rights could never be terminated under the stepparent adoption statute no matter what the facts showed about his failure to regularly support and contact his son. The Court of Appeals relied exclusively on the portion of the stepparent adoption statute allowing "the parent having legal custody of the child" to seek termination of the other parent's parental rights. Since Mr. Roustan had joint legal custody, the Court of Appeals held that he was excluded from having his parental rights terminated under the statute.

In making its decision, the Court of Appeals incorrectly construed the term "legal custody" as synonymous with shared decision making authority as defined in the Child Custody Act [MCL 722.26a(7)(b)] instead of a legal right to physical custody of the child as that term has historically meant in

the Adoption and Juvenile Codes. The intent of the stepparent adoption statute does not support the Court of Appeals interpretation of the term "legal custody." To the contrary, the decision serves to frustrate and defeat the intent of the statute.

MCL 710.51(6), states as follows:

(6) If the parents of a child are divorced, or if the parents are unmarried but the father has acknowledged paternity or is a putative father who meets the conditions in section 39(2) of this chapter, and if the parent **having legal custody of the child** subsequently marries and that parent's spouse petitions to adopt the child, the court upon notice and hearing may issue an order terminating the rights of the other parent if both of the following occur:

(a) The other parent, having the ability to support, or assist in supporting, the child, has failed or neglected to provide regular and substantial support for the child or if a support order has been entered, has failed to substantially comply with the order, for a period of 2 years or more before the filing of the petition.

(b) The other parent, having the ability to visit, contact, or communicate with the child, has regularly and substantially failed or neglected to do so for a period of 2 years or more before the filing of the petition. [Emphasis added.]

MCL 710.51(6) is part of the 1980 amendment to the Michigan Adoption Code. (See 1980 PA 509). The Court of Appeals in the case of *In re Colon*, 144 Mich App 805, 810, 377 NW2d 321 (1985) explained the purpose of the stepparent statute in light of the 1980 amendment, and found that the primary purpose of the statute was to "foster stepparent adoptions in families where the natural parent has regularly and

substantially failed to support or communicate and visit with the child." The

Colon panel further held:

The amendment was designed to redress the unfairness of prior law which required the parent's consent in all proposed adoptions. These objectives are revealed in the House Legislative Analysis of HB 5791 (September 19, 1980):

Under the Michigan Adoption code, if parents of a child are divorced and the parent having legal custody of the child subsequently remarries, that parent's new spouse may not adopt the child unless given the consent of the other living parent. This present problems in cases where the parent who does not have legal custody of the child cannot be located, or fails to support or communicate with the child even though the child's stepparent may be providing the material and emotional support which would be expected of the child's legal parent, that stepparent may not adopt the child or act in a legal capacity as the child's parent, such as to give consent to treatment in a medical emergency. Given the inherent unfairness to the stepparent, the parent having legal custody, and the child, of allowing a parent who does not support or communicate with his or her child to block the adoption of that child by a loving, caring stepparent, some feel that the law should be changed to permit the termination of parental rights under such circumstances, so as to enable the stepparent to adopt the child.

Colon, supra, at 144 Mich App 811-812.

The Court of Appeals in *Colon* compared the ability of a court to terminate parental rights in the Adoption Code to the dispositional phase of a Juvenile Code proceeding, stating:

The parental rights termination hearing under the Adoption Code is analogous to the dispositional phase of a Juvenile Code hearing. The findings of fact that the court must make under the Adoption Code, MCL § 710.51(6), are very similar to the grounds for termination under MCL § 712A.19a(b); MSA 27.3178(598.19a)(b) of the Juvenile Code which provides:

Where a child remains in foster care in the temporary custody of the court following the initial hearing provided by section 19, the court may make a final determination and order placing the child in the permanent custody of the court, if it finds any of the following:

(b) The child is left with intent of desertion and abandonment by his parent or guardian in the care of another person without provision for his support or without communication for a period of at least 6 months. The failure to provide support or to communicate for a period of at least 6 months shall be presumptive evidence of the parent's intent to abandon the child. If, in the opinion of the court, the evidence indicates that the parent or guardian has not made regular and substantial efforts to support or communicate with the child, the court may declare the child deserted and abandoned by his parent or guardian.

In both provisions, the court makes findings concerning the parent's support of and communication with the child for designated lengths of time.

Colon, supra, at 144 Mich App 816-17.

The focus of both the Juvenile Code and the Adoption Code is to provide a mechanism to terminate the rights of a parent who has abrogated his or her parental responsibilities and has "abandoned" the physical and emotional needs of the child. Termination of parental rights is a prerequisite to the court's authority to place the child in a stable and permanent home.

A similar objective is seen in the statute that allows for the name change of a minor child where the consent of both parents is no longer required. MCL 711.1 provides as follows:

(7) The name of a minor may be changed pursuant to subsection

(5) or (6) with the consent or signature of ***the custodial parent*** upon notice to the non-custodial parent as provided in supreme court rule and after a hearing in either of the following circumstances:

(a) If both of the following occur:

(i) The other parent, having the ability to support or assist in supporting the child, has failed or neglected to provide regular and substantial support for the child or, if a support order has been entered, has failed to substantially comply with the order, for 2 years or more before the filing of the petition.

(ii) The other parent, having the ability to visit, contact, or communicate with the child, has regularly and substantially failed or neglected to do so for 2 years or more before the filing of the petition.

MCL 711.1(7) [Emphasis added.]

This statute was modified in 1988 to amend the prior language requiring the consent of both parents to a minor child's name change, even in cases where one of the parents was absent. The modification to the name change law mirrors the intent of the stepparent adoption act, whereby an absent parent's rights are secondary to the rights of the parent with whom the child resides, so as to promote the stability and well-being of the child.

The name change statute uses the phrase "custodial and non-custodial parent" as opposed to the phrase "the parent having legal custody." However, it is clear that the intent is the same in both statutes; to allow the parent having the legal right to physical custody of the child to take action regarding the interests of the child without the requirement of the absent parent's consent; in one case a name change and the other a stepparent

adoption. The authority to seek relief is vested in the parent with whom the child lives. It is not given to a parent who lacks physical custody, but has been granted shared decision making authority. As a result, it is apparent that not only did the Court of Appeals fail to consider the broad intent of the statute, its interpretation of the term "legal custody" in the context of the Adoption Code was in error.

The term "legal custody" is not defined in the stepparent adoption statute. Indeed, it is not defined in *any* Michigan Law. The statute most often cited in reference to the term "legal custody" is the joint custody provision of the Child Custody Act. MCL 722.26a, effective January 14, 1981, states in part:

(7) As used in this section, "joint custody" 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.

The joint custody provisions of the Child Custody Act does not use the term "legal custody." Instead, the statute defines two types of joint custody. The first is where the child resides "alternately for specific periods with each of the parents." MCL 722.26a(7)(a). The second is where the "parents share decision-making authority as to the important decisions affecting the welfare of the child." MCL 722.26a(7)(b). Again, the term "legal custody" never

appears in the joint custody statute.

The Legislature has never defined either "legal custody" or "physical custody." These informal designations were not authorized or codified in statute or court rule. Instead, the terms have developed informally over the more than three decades since the joint custody statute was enacted. They are shorthand references used by lawyers and judges to describe the types of joint custody arrangements permitted under MCL 722.26a(7). The term "legal custody" commonly describes "shared decision making" as provided in MCL 722.26a(7)(b).

The term "legal custody" as used in the stepparent adoption statute and in the Legislative Analysis cited in *Colon*, could **not** have meant "legal custody" in the context of shared decision making found in MCL 722.26a(7)(b). The joint custody provisions of the Child Custody Act were effective January 14, 1981, and therefore not yet in effect at the time the stepparent adoption statute was enacted, which was effective September 12, 1980. The view that of legal custody means shared decision making is of more recent origin than the stepparent adoption statute. The Legislature, therefore, could not have intended the term to mean a status (shared decision making) that did not yet exist under Michigan law when the stepparent adoption statute took effect.

After the joint custody statute went into effect in 1981, there are several instances where the term "legal custody" is used in other statutes.

Yet, "legal custody" remains to this day undefined under Michigan law. For example, MCL 722.31, the so-called "100 mile rule", took effect January 9, 2001, and uses the term "sole legal custody". That term is not defined in the statute, and it is not clear if the statute meant to use the short hand definition of "legal custody" meaning shared decision making authority, or the historic meaning of legal custody, meaning the parent with the right to the physical custody of the child. The statute provides that a parent with "sole legal custody" may not move the child's residence more than 100 miles without complying with the law's relocation requirements. It raises an interesting question as to whether the interpretation of this statute correctly relates to shared decision making, or to the legal right to physical custody. However, that issue unrelated to the stepparent adoption statute. It is therefore not relevant to the construction of the term "legal custody" as it appears in MCL 710.51(6).

The term legal custody also appears in the third party custody standing provisions of MCL 722.23c and MCL 722.23e. Both of these statutes took effect on November 29, 1993, more than a decade after the stepparent adoption statute was written. Neither provision attempts to define legal custody.

The grandparenting time statute found at MCL 722.27b, effective January 3, 2005, also supports appellants' view that "legal custody" means a legal right to physical custody. The law grants standing to grandparents

where "legal custody of the child has been given to a person other than the child's parent..." MCL 722.27b(1)(e). If legal custody always meant shared decision making, the grandparenting time statute would make no sense. Shared decision making under MCL 722.26a(7)(b) applies only to parents. Under the Child Custody Act, which includes the grandparenting time statutes, only parents can have shared decision making, a/k/a joint legal custody. Yet the grandparenting time statute clearly contemplates that legal custody may be "given to a person other than the child's parent." The only possible conclusion is that legal custody means a legal right to physical custody of a child.

Similar use of the term legal custody appears elsewhere in the grandparenting time law at MCL 722.27b(4)(a) and (9). In each provision, the focus is on the child's physical placement outside the parent's home, not on a right to participate in decision making on behalf of the child.

The parenting time statute, MCL 722.27a, effective March 30, 1989, also contains the term "legal custody." It provides that a court may consider when determining parenting time, "[t]he 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." MCL 722.27a(6)(h). In this context, the focus is again on physical custody of the child, not a right to share in decision making on behalf of the child.

Because the Adoption Code does not define legal custody, the term

must be construed within its historical context and in a manner consistent with the way the term is used elsewhere in that statute and other Michigan statutes. In reviewing those statutes sequentially, it is clear that the term "legal custody" as used in MCL 710.51(6) means a **legal right to physical custody of a child**. It does not mean shared decision-making. Any other interpretation would defeat the intent of the stepparent adoption statute.

The term legal custody appears in the definitional section of the Elliot-Larsen Civil Rights Act, MCL 37.2103. In that statute, the term legal custody is used in the definition of "familial status" and states:

'Familial status' means 1 or more individuals under the age of 18 residing with a parent or other person having custody or in the process of securing legal custody of the individual or individuals, or residing with the designee of the parent or other person having or securing custody, with the written permission of the parent or other person.

This definition refers to a legal right to physical custody or possession of a child. No reference is made to shared decision making.

The same is true of the Mental Health Code. When addressing Substance Use Disorder Services found at MCL 330.1260, a "person *in loco parentis*" is defined as "an individual who is not the parent or guardian of a child or minor but who has legal custody of the child or minor and is providing support and care for the child or minor." MCL 330.1260(1)(c). A nearly identical definition appears in the Public Health Code at MCL 333.6122(c). These provisions refer to a legal right to physical custody of a child, not shared decision making.

The Personal Protection Order statute also uses the term "legal custody" in reference to minor children. It allows the court to enjoin a person from "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." MCL 600.2950(1)(d). Once more, legal custody as used in this statute clearly means a legal right to physical custody, not shared decision making.

It is important and instructive to view how the term "legal custody" is used elsewhere in the Adoption Code. In MCL 710.23b, the relevant portion of Section (1) states:

A child placing agency that acquires written authorization pursuant to subsection (3) from the parent or guardian having legal custody of a child may make a temporary placement of the child under section 23d of this chapter. A child placing agency may assist a parent or guardian to make a direct placement under section 23a of this chapter.

Use of the term legal custody in this portion of the Adoption Code could not mean shared decision-making. It refers to a parent who, by operation of law, has the right to physical possession of his or her child.

The next place the term "legal custody" appears in the adoption code is at MCL 710.23d(3)(b) and (4). Subsection (3)(b) governs the transfer of a child's "physical custody" to a parent or other person having "legal custody" - again referring to a parent or person who has a legal right to physical possession of a child. Section (4) of the same statute is similar in that its use of the term "legal custody" references the "transfer of physical

custody of a child.”

This pattern continues in the Adoption Code’s temporary placement provision found at MCL 710.23e. In Sections (2), (3), and (5) of that statute, the term “legal custody” refers to the return of a child’s physical possession to a parent, guardian, or agency. A similar provision, with the same meaning, is found in the pre-placement assessment section of the Adoption Code at MCL 710.23f.

Of even greater relevance is the use of the term “legal custody” in MCL 710.41 governing placement of a child in a home for purposes of adoption. That section precludes finalization of an adoption during a period when a motion for reconsideration or an appeal is pending from an order terminating parental rights. An exception is created in MCL 710.41(4) where “the petitioner for adoption is married to a parent having legal custody of the child.” In this context, because placement in the parent’s home is the issue, the term “legal custody” can only refer to the legal right to physical custody of the child.

In the Juvenile Code, the term “legal custody” appears once and, by its context, means a legal right to physical custody. MCL 712a.19a(15), allows the court to return “legal custody” of a child to the department of human services upon termination of a guardianship.

The term legal custody also appears in the custody provisions of the Surrogate Parenting Act, MCL 722.861. In that context, the term “legal

custody” refers to the court’s award of physical custody as defined in MCL 722.23, the best interest factors in the Child Custody Act.

This Court held in *Spectrum Health Hospitals v Farm Bureau Mut Ins Co of Michigan*, 492 Mich 503, 515, 821 NW2d 117 (2012), that the primary goal of statutory interpretation is to ascertain the legislative intent that may reasonably be inferred from the statutory language. The first step in that determination is to review the language of the statute itself. Unless statutorily defined, every word or phrase of a statute should be accorded its plain and ordinary meaning, taking into account the context in which the words are used. The Court may consult dictionary definitions to give words their common and ordinary meaning. When given their common and ordinary meaning, “[t]he words of a statute provide ‘the most reliable evidence of its intent....’”

Since the legislature does not define the term “legal custody,” it is permissible to look to the dictionary meaning of the words to obtain their “ordinary meaning.”

Merriam Webster Dictionary defines “legal” as follows:

- 1: of or relating to law
- 2
 - a : deriving authority from or founded on law : de jure
 - b : having a formal status derived from law often without a basis in actual fact : titular <a corporation is a legal but not a real person>
 - c : established by law; especially : statutory
- 3: conforming to or permitted by law or established rules
- 4: recognized or made effective by a court of law as distinguished from a court of equity

5 : of, relating to, or having the characteristics of the profession of law or of one of its members

6 created by the constructions of the law <a legal fiction>

Merriam Webster Dictionary defines "custody" as follows:

: immediate charge and control (as over a ward or a suspect) exercised by a person or an authority;

The ordinary meaning of the phrase "legal custody" supports appellants' position that, as used in the Adoption Code, the term does not mean shared decision-making authority. It means a legally authorized right to physical custody of the child.

In the instant case, the Legislature's failure to define the term "legal custody" as used in the stepparent adoption statute has inadvertently created an ambiguity as to its meaning. However, it is an ambiguity that arose only after the fact. At the time the stepparent adoption statute was enacted in 1980, legal custody meant only one thing - a legal right to physical custody.

If the subsequent rise of the informal use of "legal custody" to mean "shared decision making" muddies the waters, it may be necessary to look to the legislative intent, discussed above. The intent of the statute is to permit termination of a parent's right due to abrogation of his/her parental duties and responsibilities. To assume the Legislature meant to prevent termination of a parent's rights simply because that parent was granted the right to joint decision making, regardless of whether in fact they exercised that right, defies logic and is not consistent to the intent of the statute. The

construction of the statute that best accomplishes its purpose that "legal custody" means the legal right to physical custody, not joint decision making.

Interpreting legal custody in MCL 710.51(6) to mean anything other than a legal right to physical custody would be logically inconsistent with the rest of the statute. The substantive grounds found in MCL 710.51(6)(a) and (b) for termination of the non-petitioning parent's rights do not relate to decision making. They measure only whether the parent has complied with his/her obligation to pay support and to visit or communicate with the child. Both of these obligations are placed on a parent without physical custody.

Looking at it from the opposite perspective, a parent with legal custody may have neither a parenting time nor support obligation merely because he or she is a shared decision maker. It would make no sense for the Legislature to create a prerequisite for termination of parental rights in stepparent adoption cases that does not relate to whether the other parent has regularly and substantially complied with his/her court-imposed support and contact obligations.

This conclusion is also mandated by a review of each of the statutes cited and quoted above. Nothing in any of the statutes cited would lead to the conclusion that term "legal custody" as used in MCL 710.51(6) is shared decision making. The stepparent adoption statute preceded the joint custody statute found at MCL 722.26a(7)(b). At the time the stepparent

adoption statute was enacted in 1980, the term "legal custody" meant only **legal right to physical custody**, and that is what the Legislature intended it to mean in the statute.

The Court of Appeals incorrectly interpreted the phrase legal custody to mean shared decision making authority. The Court of Appeals should have found that since Susan Merrill has sole physical custody of AJR, she is the only parent with the type of legal custody referenced by the statute. a legal right to physical custody of AJR. Therefore, the stepparent adoption statute is applicable to respondent, Mr. Roustan. His parental rights may be terminated if, as found by the trial court, the grounds in MCL 710.51(6)(a) and (b) were proven by clear and convincing evidence.

C. Assuming the Court of Appeals did not err in interpreting the statute in question, there is no remedy available to the petitioners in this case that is consistent with the general purposes of the Adoption Code, MCL 710.21a.

Standard of Review: There is no applicable standard of review on this issue because this issue was not addressed or decided by either the trial court or the Court of Appeals. However, to the extent that this issue involves analysis of possible applicable statutes, application of the *de novo* standard of review used when addressing questions of law is appropriate. *Spectrum Health Hospitals v Farm Bureau Mut Ins Co of Michigan, supra*; *Douglas v Allstate Ins Co, supra*.

Law and Argument: In order for a child to be adopted, the child must be available for adoption. This requires either a voluntary release of parental rights or an involuntary termination of parental rights. Here, Mr. Roustan did not agree to voluntarily release his rights. Therefore, the child cannot be adopted by his stepfather unless Mr. Roustan's parental rights are involuntarily terminated.

A legal father's parental rights may be involuntarily terminated pursuant to: (a) stepparent adoption under to the Adoption Code pursuant to MCL 710.51(6); or (b) child protective proceedings under to the Juvenile Code, MCL 712A.1 *et seq.* A court obtains jurisdiction over a child under the Juvenile Code pursuant to MCL 712A.2(b). No child protective proceedings have been initiated in this matter, nor are there grounds for doing so since the child is being properly cared for by his mother and stepfather. Therefore the only statute under which Mr. Roustan's parental rights may be terminated is the stepparent adoption statute at issue in this appeal.

The general purposes of the Adoption Code are outlined in MCL 710.21a, which states as follows:

Sec. 21a. The general purposes of this chapter are:

(a) To provide that each adoptee in this state who needs adoption services receives those services.

(b) To provide procedures and services that will safeguard and promote the best interests of each adoptee in need of adoption and that will protect the rights of all parties concerned. If conflicts arise between the rights of the adoptee and the rights of another, the rights of the adoptee shall be paramount.

(c) To provide prompt legal proceedings to assure that the adoptee is free for adoptive placement at the earliest possible time.

(d) To achieve permanency and stability for adoptees as quickly as possible.

(e) To support the permanency of a finalized adoption by allowing all interested parties to participate in proceedings regarding the adoptee.

Paragraph (b) specifically provides that the purpose of the Adoption Code is to promote the best interest of the adoptee in need of adoption. The stepparent adoption provision in the Adoption Code states that a child, or adoptee, is eligible for adoption when the biological parent fails to regularly and substantially support or communicate with his or her child for a period of two years. This portion of the Adoption Code provides a mechanism for the termination of a biological parent's parental rights when that parent has been delinquent in their parental responsibilities so that the child may be adopted by a loving, caring stepparent.

The purpose of the stepparent statute is to prevent the parent who fails to support or communicate with the child from blocking the ability of the stepparent to adopt. As stated in the September 19, 1980, House Legislative Analysis of HB51 5791 quoted in *In re Colon, supra*, at 144 Mich App 810-811:

Under the Michigan Adoption Code, if parents of a child are divorced and the parent having legal custody of the child subsequently remarries, that parent's new spouse may not adopt the child unless given the consent of the other living parent. This presents problems in cases where the parent who does not have legal custody of the child cannot be located, or fails to support or

communicate with the child but has not allowed his or her parental rights to be terminated. In such instances, even though the child's stepparent may be providing the material and emotional support which would be expected of the child's legal parent, that stepparent may not adopt the child or act in a legal capacity as the child's parent, such as to give consent to treatment in a medical emergency. Given the inherent unfairness to the stepparent, the parent having legal custody, and the child, of allowing a parent who does not support or communicate with his or her child to block the adoption of that child by a loving, caring stepparent, some feel that the law should be changed to permit the termination of parental rights under such circumstances, so as to enable the stepparent to adopt the child.

MCL 710.21a(b) states that if a conflict arises between the rights of the adoptee and the rights of another, the rights of the adoptee shall be paramount. The Court of Appeals ruled that a parent who shares "joint legal custody" (more properly called "shared decision making") of a child may not have his or her parental rights involuntarily terminated, regardless of a parent's history of failing to regularly and substantially support and communicate with a child. Unless reversed by this Court, the decision prevents a child to be adopted by a stepparent no matter how egregious the biological parent's lack of involvement may be. This is inconsistent with the statutory mandate that the rights of the adoptee are "paramount."

MCL 710.21a(c) adds that the purpose of the Adoption Code is to provide prompt legal proceedings to assure that the adoptee is free for adoptive placement at the earliest possible time. The Court of Appeals held that despite the objective of the stepparent adoption statute to allow for a stepparent to adopt in certain circumstances, an adoptee will not be free for

adoptive placement so long as the biological father shares "joint legal custody." The Court of Appeals ruling frustrates this stated objective of the Adoption Code.

MCL 710.21a(d) states that an objective of the Adoption Code is to achieve permanency and stability for adoptees as quickly as possible. There is no question that a child's permanency and stability is threatened by the failure of parent to provide for a consistent parent-child relationship. A parent who only sporadically calls and visits sets the child up for continued emotional letdown and disappointment. The failure to provide regular and substantial financial support also threatens the stability and permanency of the child, all of which deprives the child of the legally permanent and stable relationship through adoption by the stepparent who has taken on the responsibility and role of parent.

The trial court found that the Mr. Roustan made only eleven support payments from June 11, 2010 to July 17, 2012. Of the eleven, six were made after he was notified about the Merrills' intent to seek a stepparent adoption. The trial court further found that there were four show cause hearings and two of the eleven child support payments occurred immediately after the February 2011 and May 2012 show cause hearings at which Mr. Roustan was forced to make a payment or face incarceration.¹⁵

¹⁵ App 238a-239a.

It is important that the largest payment, \$3,164 came from the involuntary withholding of Mr. Roustan's IRS tax refund.¹⁶ The trial court concluded that Mr. Roustan made only one voluntary payment of his support obligation, a \$25 payment made in May 2011, and that he had continued to maintain a large support arrearage.¹⁷ On this record, the trial court properly concluded that Mr. Roustan failed to substantially comply with the order for support for a period of two years or more before the filing of the petition.

The trial court also found that Mr. Roustan had only met with the child twice in 2010, four times in 2011, and once in 2012.¹⁸ Other than the visits, the trial court found that Mr. Roustan rarely contacted the child since the end of 2009, that he sent only seven e-mails to the child in the last two years. The trial court correctly characterized these messages as sporadic.¹⁹

There was a phone call in May of 2012 where Mr. Roustan said he would call the child for his birthday between 4:30 p.m. and 5:00 p.m. After waiting until 5:15 p.m. without received a call, the Merrills and the child left for for a birthday dinner. Mr. Roustan claimed that he called and left a message. Other than this call and the seven emails, the trial court found that there were no other attempts by Mr. Roustan contact or communicate with the child.²⁰

¹⁶ App 238a.

¹⁷ *Id.*

¹⁸ App 240a.

¹⁹ *Id.*

²⁰ *Id.*

The Court of Appeals' determination that Mr. Roustan's parental rights could not be terminated solely because he was granted shared decision-making in the divorce judgment, despite a demonstrated lack of regular and substantial support and contact with the child, deprives the Merrills and the child of any legal remedy. The lack of a remedy on these facts is contrary to the purpose of the Adoption Code.

As stated above, the objectives of the Adoption Code are to serve the best interest of the minor child; to allow the minor child to achieve permanency and stability; to allow for prompt legal proceedings to assure that the adoptee is free for adoptive placement at the earliest possible time; and to place the interest of the child as paramount when a conflict arises between the child and a third party (biological parent). None of these objectives can be accomplished if the ruling of the Court of Appeals is permitted to stand.

The Court of Appeals ruling divides the children that are eligible for a stepparent adoption into two categories without a rational basis for that distinction. Children who have been abandoned by a parent who was given the right to shared decision making, a right not inherently related to either support or contact, is denied equal the protection under law. A child similarly situated, but where his or her abandoning parent lacks shared decision making, is eligible to be adopted by a stepparent. This is analogous to the constitutionally impermissible distinctions made based on a child's

"legitimacy." *Gomez v Perez*, 409 US 535 (1973). The relationship between shared decision-making and the abandonment necessary to terminate parental rights and allow a stepparent adoption is even more tenuous than the relationship between "legitimacy" and a child's right to support from a parent.

The key focus in stepparent adoption cases on the bond that exists, or fails to exist, between a parent and child. When that bond is negligible or non-existent due to the parent's failure to honor his parental responsibilities, it should make no difference if the parent had joint legal custody (shared decision making) or sole legal custody. The Legislature has determined that a failure to regularly and substantially support and communicate with a child for a two-year period is sufficient to show the type of abandonment that justifies termination of parental rights and stepparent adoption. The differentiating factor of whether a parent has the right to participate in decision-making on important issues affecting the child does not address the more critical issue of a child's entitlement to support, love, and a relationship with both parents. The view taken by the Court of Appeals frustrates the purpose of the Adoption Code.

Conclusion/Relief Requested

The trial court heard this issue on July 17 and July 18, 2012, determining that petitioners Steven and Susan Merrill met their burden of proof by clear and convincing evidence and that respondent Pierre Roustan

failed to provide support or have any substantial contact with the minor child for a period of two years in compliance with the provisions of MCL 710.51(6)(a) and (b).

The Court of Appeals misinterpreted the term "legal custody" in a way that is inconsistent with how that term was understood and used when MCL 710.51(6) was enacted in its present form. Furthermore, the Court of Appeals erroneously interpreted the statutory language of MCL 710.51(6) in a way that renders other provisions of the Adoption Code nonsensical. Most significantly, the Court of Appeals interpretation of the statutory language in this case is contrary to the stated purpose and objectives of the Adoption Code in general, and the stepparent adoption provision in particular.

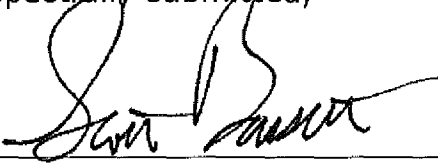
If the Court of Appeals decision is allowed to stand, neither the Merrills nor the child have a remedy under the Adoption Code or any other Michigan statute. The same can be said for the potentially hundreds of other children parents share joint legal custody yet one parent has failed to support or visit with the child for a period of two years or more.

The Court of Appeals ruling will wreak havoc on stepparent adoptions in Michigan. Most divorce judgments and non-marital custody orders grant parents shared decision making, also known as joint legal custody. In all of those cases, where the statutory grounds of two years without regular and substantial support and contact have been proven, the child will nonetheless be ineligible for stepparent adoption. Given the prevalence of joint legal

custody, the Court of Appeals faulty interpretation of the statute will effectively preclude stepparent adoptions in Michigan, thereby frustrating the Legislature's intent.

This Court should reverse the decision of the Court of Appeals. The trial court's findings were not against the great weight of the evidence, nor did they result from clear legal error. The trial court's order terminating the rights of Pierre Roustan should be affirmed.

Respectfully submitted,

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Dated: December 15, 2013