IN THE MICHIGAN SUPREME COURT

In the Matter of ETHAN, EMILY, TARAH, AND TITUS BRATCHER, Minors

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DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

STACEY TREMAIN,

Respondent-Appellant.

Circuit Court No.: 09-044959-NA
Court of Appeals No.: 295727
Supreme Court No.:

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BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN IN SUPPORT OF RESPONDENT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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1. In *Stanley v Illinois*, 405 US 645; 92 S Ct 1208; 31 L Ed 2d 551 (1972), the United States Supreme Court held that a parent cannot be denied rights to her children without a hearing on her parental fitness. Michigan law affords parents the right to an adjudication trial, before a jury or a judge, before a court can assume jurisdiction over their children. In this case, the trial court stripped the mother of her right to direct the care, custody, and control of her children without affording her an adjudication trial as she had requested. Did the trial court violate the mother's procedural due process rights?

Respondent-Appellant Says:	Yes.
Petitioner-Appellee Says:	No.
NACC Says:	Yes.

STATEMENT OF INTEREST OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN

Amicus curiae National Association of Counsel for Children ("NACC") submits this brief in support of Stacey Tremain's application for leave to appeal to the Michigan Supreme Court. Founded in 1977, the NACC is a 501(c)(3) non-profit child advocacy and professional membership association dedicated to enhancing the well being of America's children. The NACC works to strengthen the delivery of legal services to children, enhance the quality of legal services affecting children, improve courts and agencies serving children, and advance the rights and interests of children. NACC programs which serve these goals include training and technical assistance, the national children's law resource center, the attorney specialty certification program, the model children's law office program, policy advocacy, and the *amicus curiae* program. Through the *amicus curiae* program, the NACC has filed numerous briefs involving the legal interests of children in state and federal appellate courts and the Supreme Court of the United States. The NACC uses a highly selective process to determine participation as *amicus curiae.* *Amicus* cases must pass staff and Board of Directors review using the following criteria: the request must promote and be consistent with the mission of the NACC; the case must have widespread impact in the field of children's law and not merely serve the interests of the particular litigants; the argument to be presented must be supported by existing law or good faith extension of the law; and there must generally be a reasonable prospect of prevailing. The NACC is a multidisciplinary organization with approximately 2,000 members representing all fifty states and the District of Columbia. NACC membership is comprised primarily of attorneys and judges, although the fields of medicine, social work, mental health, education, and law enforcement are also represented.

The NACC submits this *amicus curiae* brief on behalf of the interests of children in having the best and most appropriate outcomes in child protective proceedings, including

custody proceedings involving their parents. In this context, the NACC asks the Court to grant Ms. Tremain's application for leave to appeal the trial court's adjudication and dispositional orders in this matter and, ultimately, to remand the matter for an adjudication trial to determine whether Ms. Tremain is a fit or unfit parent.

I. INTRODUCTION

The United States Constitution recognizes a presumption that a child's parents are fit. As Justice O'Connor explained in *Troxel v Granville*, there is "a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions." 530 US 57, 68; 120 S Ct 2054; 147 L Ed 2d 49 (2000) (plurality) (internal quotation marks omitted). The Constitution further recognizes "a presumption that fit parents act in the best interests of their children." *Id.* These are fundamental principles undergirding our constitutional system.[1]

Trial courts in the State of Michigan violate these principles when they presume the *opposite* with regard to a parent who has done nothing wrong (the "non-offending parent"), though unfortunately shares parental rights with someone who has done something wrong (the "offending parent"). The trial courts do *not* presume that the non-offending parent is fit. The trial courts do *not* presume that the non-offending parent will act in the best interest of her child. Instead, the trial courts assume the role of a parent and take jurisdiction over the child without

[1] Justice O'Connor announced the judgment of the Court and wrote an opinion joined by then-Chief Justice Rehnquist and Justices Ginsburg and Breyer. *Troxel*, *supra* at 59. Justice Thomas wrote a concurring opinion where he explained that he "agree[d] with the plurality that this Court's recognition of a fundamental right of parents to direct the upbringing of their children resolves this case." *Id.* at 80 (Thomas, J, concurring in the judgment). He took issue with the plurality and the dissent in failing to "articulate[] the appropriate standard of review" and would "apply strict scrutiny to infringements of fundamental rights." *Id.* It seems clear, therefore, that Justice Thomas agreed with the plurality's discussion of prior Supreme Court precedent that established these fundamental presumptions about parents, children, and families.

any adjudication at all of the non-offending parent's fitness. In so doing, the trial courts violate the due process rights of the non-offending parent and act against the interests of the child.

Stacey Tremain is not an unfit mother—no court has ever held otherwise. Respondent-Appellant's Application for Leave to Appeal ("Tremain App") at 11-12. And, yet, despite this incontrovertible fact, the trial court stripped Ms. Tremain of legal custody of her children (and physical custody of her son) based on the guilty plea by her non-custodial ex-husband, who lives in Indiana, to neglect of the children. *Id.* at 11. In so doing, the trial court violated Ms. Tremain's constitutional right to due process.

II. BACKGROUND

The NACC adopts the Statement of Facts in Respondent-Appellant's Application. *Id.* at 9-12.

III. ANALYSIS

A. Parents and Their Minor Children Enjoy Due Process Rights

The rights of minor children and parents are protected by the Due Process Clause of the Fourteenth Amendment. *Santosky v Kramer*, 455 US 745, 752-54 & n7; 102 S Ct 1388; 71 L Ed 2d 599 (1982). "Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Mathews v Eldridge*, 424 US 319, 332; 96 S Ct 893; 47 L Ed 2d 18 (1976).

The specific contours that these due process protections take must be considered not in the abstract but, rather, with due regard for "the precise nature of the government function involved as well as the private interest that has been affected by governmental action." *Stanley v*

Illinois, 405 US 645, 650-51; 92 S Ct 1208; 31 L Ed 2d 551 (1972). Accordingly, a review of "first principles" with regard to a child's interest, a parent's interest, and the government's role in furthering those and society's interests, will be instructive.

First. **The Interests of the Child Have Paramount Importance.** A minor child is a vulnerable member of society and, as such, is deserving of special protection. *See id.* at 652. Courts have recognized this by noting that the best interest of a child has paramount importance to society. *Lassiter v Dep't of Social Servs*, 452 US 18, 28; 101 S Ct 2153; 68 L Ed 2d 640 (1981) (stating that "the State has an urgent interest in the welfare of the child"); *In re Irwin*, No 229012, 2001 WL 793883, at *5 (Mich App, July 13, 2001) (Ex A) ("I wholly agree the primary focus of a child protective proceeding is the health, safety, and well-being of children.").

Second. **The Interests of the Child Are Best Protected by a Fit Parent, Who Also Has Her Own Protected Interests in the Familial Relationship.** The interests of a child and the interests of a *fit* parent are perfectly aligned under the law. To suggest the opposite—that a child's interest diverges from his fit parent's interest—is a constitutional paradox. Both the Fifth Amendment and the Fourteenth Amendment recognize and provide "'heightened protection against governmental interference'" in "[t]he liberty . . . interest of parents in the care, custody, and control of their children." *Troxel*, *supra* at 65 (O'Connor, J, plurality) (quoting *Washington v Glucksberg*, 521 US 702, 720; 117 S Ct 2258; 138 L Ed 2d 772 (1997)). The U.S. Supreme Court has "recognized on numerous occasions that the relationship between parent and child is constitutionally protected." *Quilloin v Walcott*, 434 US 246, 255; 98 S Ct 549; 54 L Ed 2d 511 (1978). This liberty interest "is perhaps the oldest of the fundamental liberty interests recognized by this Court," *Troxel*, *supra* at 65 (O'Connor, J, plurality), and "is an interest far more precious than any property right," *Santosky*, *supra* at 745.

The Constitution protects not only the parent's right to be a parent, but also the right to custody of her child. "'It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.'" *Stanley*, *supra* at 651 (quoting *Prince v Massachusetts*, 321 US 158, 166; 64 S Ct 438; 88 L Ed 645 (1944)). A parent's "interest in retaining custody of [her] children is cognizable and substantial." *Id.* at 652.

And, importantly, not only does this fundamental liberty interest protect the rights of a parent, but, as the U.S. Supreme Court has recognized on several occasions, it promotes the best interests of the parent's child. *Troxel*, *supra* at 68 (O'Connor, J, plurality) ("[N]o court has found[] that [the parent] was an unfit parent. That aspect of the case is important, for there is a presumption that fit parents act in the best interests of their children."). The Supreme Court in *Parham v JR* recognized this link between a parent's custody and the best interests of her child:

> Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course; our constitutional system long ago rejected any notion that a child is "the mere creature of the State" and, on the contrary, asserted that parents generally "have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations." *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925). *See also Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923). . . . The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children. 1 W. Blackstone, Commentaries *447; 2 J. Kent, Commentaries on American Law *190.
>
> As with so many other legal presumptions, experience and reality may rebut what the law accepts as a starting point; the incidence of child neglect and abuse cases attests to this. That some parents "may at times be acting against the interests of their children" as was stated in *Bartley v. Kremens*, 402 F. Supp. 1039, 1047-1048 (ED Pa. 1975), *vacated and remanded*, 431 U. S. 119 (1977), creates a basis for caution, but is hardly a reason to discard wholesale those pages of human experience that teach that parents generally do act in the child's best interests. *See Rolfe & MacClintock* 348-349. The statist notion that governmental power should supersede parental authority in all cases because

> some parents abuse and neglect children is repugnant to American tradition. [442 US 584, 602-03; 99 S Ct 2493; 61 L Ed 2d 101 (1979).]

The private interest here, that of a mother's in the children she has adopted and raised, "undeniably warrants deference and, absent *a powerful countervailing interest*, protection." *Stanley*, *supra* at 651 (emphasis added); *cf. Santosky*, *supra* at 760 ("But until the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship.").

Third. **If No Fit Parent Is Available, Then the Government Must Protect the Child's Interests.** As explained above, there is no doubt that a child's interest is paramount. One of the fundamental objectives of any government—federal, state or local—is to ensure that a child's interests are protected. *Santosky*, *supra* at 766 (noting that one state interest in parental rights cases is "a *parens patriae* interest in preserving and promoting the welfare of the child"). The State of Michigan recognizes the importance of a child's welfare: "This chapter [dealing with juveniles] shall be liberally construed so that each juvenile coming with the court's jurisdiction receives the care, guidance, and control, preferably in his or her own home, conducive to the juvenile's welfare and the best interests of the state." MCL 712A.1(3). There is no question that if a fit parent is unavailable, then the government must step in and take custody of that child, at least temporarily until a better option is found.

Fourth. **However, If There Is a Fit Parent, Then the Government Cannot Assume Custody and Control of That Parent's Child.** Between the choice of (a) a fit parent, versus (b) a state agency or court acting in *parens patriae*, the Constitution conclusively favors the former. "[W]hile there is still reason to believe that positive, nurturing parent-child relationships exist, the *parens patriae* interest favors preservation, not severance, of natural familial bonds." *Santosky*, *supra* at 766-67 (citation and footnote omitted). "[S]o long as a parent adequately cares for . . . her children (*i.e.*, is fit), there will normally be no reason for the State to 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 [her] children." *Troxel*, *supra* at 68-69 (O'Connor, J, plurality).

The U.S. Supreme Court has explained that the interest of the government in the care of a child is actually quite low when there is a fit parent available. In *Stanley*, the Court characterized the government's interest in the care of a parent's child as "*de minimis* if [the parent] is shown to be a fit [parent]." *Supra* at 657-58. This minimal interest cannot justify a government inserting itself between a fit mother and her children by assuming custody of her children. This would permit a government's "*de minimis*" interest to override the "cardinal" interest of a parent, *id.* at 651, 657, an outcome no level of due process protection could countenance. As the *Stanley* Court put it, "[The] State registers no gain towards its declared goals when it separates children from the custody of fit parents." *Id.* at 652. Similarly, as Justice O'Connor explained, writing for the plurality in *Troxel*, "[T]he Due Process Clause does not permit a State to infringe on the fundamental right of parents to make childrearing decisions simply because a state judge believes a 'better' decision could be made." *Supra* at 72-73; *see also id.* at 67-68 (noting that the state statute at issue instructed the trial court to be guided by the "best interest of the child" when determining which non-parent relative should be granted visitation rights, but concluding that the trial court's view must not be permitted to supersede "the decision by a fit custodial parent").

Fifth. **The Familial Relationship of a Parent and Her Child Are Too Fundamental to Suppress on the Basis of Speed and Efficiency.** The final factor to consider in determining the contours of the process due to a person in a particular circumstance is the impact on the public purse. In general, "the Government's interest, and hence that of the public, in conserving scarce fiscal and administrative resources is a fact that must be weighed." *Mathews*, *supra* at

348. Yet, "speed and efficiency" cannot trump either a fit parent's interest in raising her children or her children's interest in being raised by a fit parent:

> [T]he Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones. [*Stanley*, *supra* at 656 (footnote omitted).]

B. From First Principles to Necessary Conclusion: A Parent's Right to Custody Cannot Be Infringed Without an Adjudication on Her Fitness

A review of these first principles of constitutional due process establishes the following: (1) The interests of the child have paramount importance. (2) These interests are best protected by a fit parent. Moreover, the parent has her own, independent interests in the custody of her child. (3) When a fit parent is not available, the government must step in and act in *parens patriae*. (4) But, if there is fit parent available, the government cannot assume custody and control over her child. (5) Speed and efficiency alone cannot justify the government assuming custody over a child without first ascertaining whether that child has a fit parent. From these principles, the only conclusion that can be drawn is this: The government cannot presume that a parent is unfit, but, rather, must provide a parent the right to adjudicate her fitness as a parent before taking custody of her child.

In the present matter, the trial court's objective of protecting children is unquestionably an important one. However, as in *Stanley*, "the legitimacy" of this "state end[]" is not at issue in this case. *Supra* at 652. Rather, this Court must "determine whether the *means* used to achieve th[is] end[] are constitutionally defensible." *Id.* (emphasis added). In so doing, the Court should ask the same question that the U.S. Supreme Court asked in *Stanley*: "What is the state interest

in separating children from [parents] without a hearing designed to determine whether the [parent] is unfit in a particular disputed case?" *Id.*

The mere posing of the question virtually answers it. Again, mirroring the U.S. Supreme Court's analysis in *Stanley*, it may well be that many parents who have children with offending parents are, themselves, unfit to be parents. *Id.* at 654. It may also well be that Ms. Tremain is one of those unfit parents and that legal custody of her children should have been placed in the trial court's hands and physical custody of her son should have been given to her ex-husband. But, certainly not all (or even most) non-offending parents in this situation are unfit, and there is no judicial finding that Ms. Tremain has done anything that was not in the best interests of her children. If Ms. Tremain is a fit parent (and there is no reason to believe she is not), then the trial court undermined its role in protecting the interests of minor children when it assumed custody over Ms. Tremain's children, and the Michigan Court of Appeals compounded the deprivation by upholding the trial court's procedures in an unpublished opinion on direct appeal. *In re Bratcher*, No 295727, 2010 WL 2977535 (Mich App, July 29, 2010). When a court ignores a fit parent's interests and wishes and, instead, engages in its own independent "best interests" analysis, that court acts not as an agent for the best interests of the child, but, rather, as an agent *against* the best interests of that child.

C. Various States Recognize the Necessity of Finding No Fit Parent Before It Can Take Custody

Various states recognize that they must first find that a parent is unfit before they can take custody over her child. Some states have embodied this right in a statute, while others have done

so through judicial decisions. Following is a survey of how several states have protected this fundamental right.[2]

1. Pennsylvania

The Commonwealth of Pennsylvania has effective due process rights for parents and children alike. The stated goals of the Pennsylvania Juvenile Act is set forth in relevant part: "(1) To preserve the unity of the family whenever possible or to provide another alternative permanent family when the unity of the family cannot be maintained. . . . . (3) To achieve the foregoing purposes in a family environment whenever possible, separating the child from parents only when necessary for his welfare, safety or health or in the interests of public safety." 42 Pa CSA 6301.

The Pennsylvania courts have effectuated these goals in their decisions. For example, in *In the Interest of Justin S*, the Superior Court of Pennsylvania ruled that a trial court cannot adjudge a child to be dependent on the state if there is a fit non-custodial parent who is ready, willing and able to provide for the child. 543 A2d 1192, 1199 (Pa Super Ct, 1988). The appellate court explained, "The fundamental purpose of proceedings under the Juvenile Act is to preserve the unity of the family. The care and protection of children are to be achieved in a family environment whenever possible." *Id*. (citation omitted). Similarly, in *In re ML*, the Pennsylvania Supreme Court succinctly explained,

> When a court adjudges a child dependent, that court then possesses the authority to place the child in the custody of a relative or a public or private agency. Where a non-custodial parent is available and willing to provide care to the child, such power in the hands of the court is an *unwarranted intrusion into*

[2] For a more extensive review of how various states handle the issue, see Sankaran, Parens Patriae *Run Amoke: The Child Welfare System's Disregard for the Constitutional Rights of Nonoffending Parents*, 82 Temp L Rev 55 (2009) (Ex B), and Greene, *The Crab Fisherman & His Children: A Constitutional Compass for the Non-Offending Parent in Child Protection Cases*, 24 Alaska L Rev 173 (2007) (Ex C).

> *the family*. Only where a child is truly lacking a parent, guardian or legal custodian who can provide adequate care should we allow our courts to exercise such authority.

757 A2d 849, 851 (Pa, 2000) (emphasis added).

2. Maryland

In *In re Russell G*, the Court of Special Appeals of Maryland held that "[a] child in the care and custody of a parent or parents is a CINA [child in need of assistance] only if *both* parents are unable or unwilling to give the child proper care and attention." 672 A2d 109, 114 (Md Ct Spec App, 1996). The court concluded that "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." As a result of *In re Russel G*, the Maryland legislature amended its juvenile code to provide in pertinent part:

> (e) If the allegations in the petition are sustained against only one parent of a child, and there is another parent available who is able and willing to care for the child, the court may not find that the child is a child in need of assistance, but, before dismissing the case, the court may award custody to the other parent.

Md Code 3-819; *In re Sophie S*, 891 A2d 1125, 1133 (Md Ct Spec App, 2006).

3. California

The State of California also recognizes the constitutional principle that the offenses of one parent are not necessarily indicative of the fitness of the non-offending parent. California courts have held that due process requires a finding of unfitness before parental rights can be infringed. For example, one California court explained, "A parent's right to care, custody and management of a child is a fundamental liberty interest protected by the federal constitution that will not be disturbed except in extreme cases where a parent acts in a manner incompatible with parenthood." *In re Marquis D*, 46 Cal Rptr 2d 198, 207 (Cal Ct App, 1999). The court

concluded that a decision determining custody was critical: "Should the court fail to place the child with the noncustodial parent, the stage is set for the court to ultimately terminate parental rights." *Id.* at 208. Likewise, as explained by the California court in *In re Gladys L*, "California's dependency system comports with [due process] because by the time parental rights are terminated at a section 366.26 hearing, the juvenile court must have made prior findings that the parent was unfit." 46 Cal Rptr 3d 434, 436 (Cal Ct App, 2006). The court held that "[d]ue process therefore prohibit[ed] the termination of [the father's] parental rights" because the state family agency had never alleged that the father was unfit. *Id*. While acknowledging the laudable goal of "rapidly concluding dependency proceedings," the court held that this goal did not trump the father's right to due process. *Id*.

4. New York

New York state courts have likewise recognized the fundamental due process rights enjoyed by parents in the custody of their children. For example, *In the Matter of Cheryl K*, the state family court reversed a custody decision made where a non-offending mother was not a party to the custody proceedings. 484 NYS2d 476 (NY Fam Ct, 1985). After a finding of sexual abuse was made against the father, the state's family agency placed the children in the state's custody for one year. The mother was not a party to the child abuse proceeding. The court held, "Accordingly, petitioner mother having not been adjudicated an unfit parent has a superior right to care and custody of her child as against third parties including the Commissioner of Social Services." *Id.* at 474. New York courts have also held that the state must hold proceedings against both parents before granting custody of a child to the state. *Alfredo S v Nassau County Dep't of Social Servs*, 568 NYS2d 123 (NY App Div, 1991). As the court explained in *Alfredo S*, "If the Department believed the petitioner to be an unfit father, it was obligated to make a

sufficient showing in this proceeding of extraordinary circumstances, or to commence a neglect proceeding against him." *Id.* at 127.

5. New Hampshire

New Hampshire provides a non-offending, non-custodial parent an opportunity, upon request, to obtain custody. In *In re Bill F*, a state court held that "parents who have not been charged with abuse or neglect must be afforded, upon request, a full hearing in the district court regarding their ability to obtain custody." 761 A2d 470, 475 (NH, 2000). "At that hearing, a parent must be provided the opportunity to present evidence pertaining to his or her ability to provide care for the child." *Id*.

D. Outlier States

The protection of a parent's due process right to custody is not uniformly protected across all fifty states, however. Following are a couple of outlier states.

1. Ohio

The State of Ohio currently permits trial courts to by-pass any adjudication on whether a non-offending parent is a fit parent and to take custody of a child based solely on the finding that one parent is unfit. In *In re CR*, the Ohio Supreme Court held that there is no separate duty of a trial court to find a non-custodial parent unfit before awarding legal custody to a non-parent. 843 NE2d 1188, 1192 (Ohio, 2006). Ohio courts have gone on to hold that when a trial court finds that one parent is unfit, this represents an "implicit[]" finding that the non-offending parent is also unfit. *In the Matter of MD*, No CA2006-09-223, 2007 WL 2584831, at *3 (Ohio Ct App, Sept 10, 2007) (Ex D).

This line of reasoning—teasing an implicit finding of unfitness of one parent based on the actual unfitness of another—clearly is wrong. As the U.S. Supreme Court recognized in *Stanley*, the liberty interests at issue are too fundamental to be decided by judicial short-cut: "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, . . . it needlessly risks running roughshod over the important interests of both parent and child." *Supra* at 656-57.

Moreover, the dissent in *In re C.R.* recognized that the majority failed to address the constitutional impediment to implicitly finding a parent unfit. Justice Pfeifer explained, "These constitutional rights [to due process] exist whether a child has been adjudicated neglected (as in the case before us) or whether the case involves a parentage action (as in *Hockstok*). Despite the plain and obvious language of *Hockstok*, the majority opinion doesn't even acknowledge that [the father] has constitutional custodial rights." *In re CR*, *supra* at 1195 (Pfeifer, J., dissenting).

2. Alaska

Alaska courts have recognized that their state's statutory scheme does not adequately address the circumstance of when a non-custodial, non-offending parent is fit and available to take custody of a neglected child. In *Peter A v Alaska*, the father argued that his constitutional rights were violated when his child was adjudicated as a ward of the state solely based on the actions of the child's mother. 146 P3d 991, 993 (Alaska, 2006). The state court acknowledged that there was a gap in Alaska statutory law regarding circumstances when there is a non-custodial parent who is willing and able to care for the child. *Id.* at 996 n30. The father argued that the statute required an "individual assessment" of each parent, while the state responded that the statute's use of the singular "parent" allowed for an adjudication based solely on one parent's actions. *Id.* The court recognized "that other states have adjudication statutes that are

considerably more precise regarding one or both of these issues." *Id*. However, because the state voluntary moved to dismiss the case at disposition and the appellate court vacated the adjudication, the appellate court did not address the constitutional issue. *Id.*

E. The Practice of Michigan Trial Courts Violates Due Process

The practice of Michigan trial courts is closer to those of the outlier states. *See, e.g., In re Shawley*, Nos 256408/256409, 2005 WL 564069, at *2-3 (Mich App, Mar 10, 2005) (Ex E). In the present matter, the trial court violated Ms. Tremain's right to due process when it stripped her of custody of her children without ever holding that she was an unfit mother. The trial court did so in two, independent ways. First, as explained above, Ms. Tremain had a protected fundamental liberty interest in the custody of her children, an interest that could not be lawfully infringed without a judicial finding that she was unfit as a parent. Second, Ms. Tremain had the right not to be subjected to the arbitrary deprivation of a procedural protection provided under the law. *MLB v SLJ*, 519 US 102, 126-27; 117 S Ct 555; 135 L Ed 3d 473 (1996). Michigan law, properly understood in accordance with the federal constitutional requirements set forth above, gives parents the right to a trial on allegations made against them in a child protective petition. MCL 712A.17; MCR 3.972.[3] As explained more fully in Respondent-Appellant's Application at 13-22, the trial court violated Ms. Tremain's right to due process when it took custody of her children away from her and assumed the role of *parens patriae* in her place.

[3] To the extent that Michigan statutes or court rules can be read to permit a trial court to take custody of a child based solely on the wrongdoing of one parent without determining whether the other, non-offending parent is fit, those statutes and rules violate the federal constitution. "The minimum requirements of procedural due process being a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action." *Santosky*, *supra* at 755 (internal quotation marks and brackets omitted).

F. The Appellate Court's Decision In *In re CR* Is Inapposite

As explained in Respondent-Appellant's Application, the facts of the present case are materially different than those in *In re CR*, 250 Mich App 185; 646 NW2d 506 (2001). *See* Tremain App at 16-18. The court's analysis in *In re CR* focused on whether "it was fundamentally unfair to use evidence concerning [the father] gathered from other hearings when he was not a respondent because he was unaware of these allegations." *Supra* at 208. The court noted that the father had advance notice of all of the hearings and had participated in several of them, and, therefore, "he was given the notice to which he claims he was entitled." *Id.* at 209. On this basis, the court found no due process violation. *Id.*

In contrast, in Ms. Tremain's case the central concern is not with the notice given, but, rather, the process denied—i.e., the lack of an adjudication hearing to determine her right to legal and physical custody of her children. The court in *In re CR* did state that Michigan court rules do not require the trial court to hold an adjudication hearing before stripping a non-offending parent of custody, *see id.* at 205, but it did not take the next step and find that this lack of a hearing itself does or does not comport with constitutional due process. The undersigned are not aware of any binding precedent from the Michigan Court of Appeals or Supreme Court addressing this specific issue. Thus, the constitutional issue is now squarely before the Court for a decisive determination.

Although no prior court appears to have addressed, in binding precedent, the constitutionality of Michigan trial court's practice with regard to non-offending parents, Judge Whitbeck did raise the issue in an unpublished concurring opinion. In *In re Irwin*, the non-custodial father was a prisoner at the time his parental rights were terminated. 2001 WL 793883, at *1. He raised several concerns with the termination process, all of which were rejected by the majority. *Id.* at *1-3. Judge Whitbeck concurred, but in so doing, he addressed what he called

"the one parent problem"—the situation where the state family agency lists only one parent as a respondent in a child protection action, thereby depriving the other parent of the right to an adjudication hearing. Judge Whitbeck forcefully addressed the issue of the due process rights of non-offending parents, as set forth below in pertinent part:

> From my perspective, the [state family agency] *should* list both parents as respondents in a protective proceeding if all the following conditions exist: (1) the [agency] knows both parents' identities, (2) the [agency] knows both parents' whereabouts, (3) there are grounds to list both parents as a respondent in a protective proceeding, and (4) the [agency] intends to initiate protective proceedings against at least one parent. If the [agency] does not make both parents respondents under these circumstances, which I refer to as the one parent problem, a number of difficult issues may affect the course of the proceedings and the nonparty parent's substantive legal rights.
>
> First, when the one parent problem exists, the [agency] usurps the right of the parent who is not listed as a respondent to demand a jury for the adjudication. I think it possible that if the [agency] worker and legal staff handling a case are particularly pressed for time because of a heavy caseload, they might see a jury trial for the adjudication as a waste of time. In such an instance, the [agency] worker and legal staff could make a calculated guess concerning which parent was less likely to demand a jury trial, proceed only against that parent, and then later add allegations to the petition concerning the other parent who had, for instance, voiced an intent to demand a jury, simply in order to preclude one parent from demanding a jury trial. While this tactic may not violate any specific statute or court rule governing child protective proceedings, it nevertheless lacks the fundamental fairness that is the hallmark of the American justice system. Though I have every reason to believe that most, if not all, [agency] workers who initiate child protective proceedings are efficient, compassionate, and fair advocates for children, I would hate to see child protective proceedings become yet another avenue for legal gamesmanship.
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> * * *
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> Some might contend that it is not necessary to emphasize the rights of both parents when the parent who is made a respondent from the start is able to demand the procedures, whether a jury trial for the adjudication or an interlocutory appeal of the family court's order taking jurisdiction. However, all too frequently parents are adversaries, not allies. They may be divorced, never married, or simply not concerned about each other. Further, they often have different attorneys with different legal strategies calculated to protect their individual interests regardless of the other parent's interests. In some instances the parent originally made a respondent in the proceeding dies or abandons his or her parental rights. Thus, it is impractical to believe that a nonparty father can

> rely on the respondent mother to demand the procedure that would benefit the father, or vice versa.
>
> Others might argue that this concern for *parental* rights in a *child* protective proceeding is unwarranted. I wholly agree the primary focus of a child protective proceeding is the health, safety, and well-being of children. Nevertheless, when a court terminates parental rights, it not only has a significant effect on the children's lives, it is also a drastic step that forever affects the parents' liberty interest in raising their children, an interest that the Constitution protects in no uncertain terms. While the juvenile code and the court rules may technically allow termination of parental rights without certain procedures, the right to due process may nevertheless impose additional safeguards to ensure the fundamental fairness of the proceedings.
>
> It is important to remember that even children benefit from proceedings that are fair to parents. Fairness inspires confidence in difficult decisions, like the decision to terminate parental rights. After all, while the cases appealed in which termination of parental rights is legally questionable are few and far between, courts do no good by depriving parents of the opportunity to demonstrate their fitness. Fairness also promotes finality. If a family court terminates parental rights following fair proceedings, it is far less likely that a child's life will once again be thrown into chaos by reversal on appeal for a due process violation or other error.
>
> Though I am satisfied with the fairness of the proceedings in this case, I remain convinced that courts must not be so distracted by well-intentioned and perfectly justified efforts to protect children that they ignore how they treat parents. [*Id.* at *3, 5 (footnotes omitted).]

Because of the unique circumstance of the case (including the fact that the father was incarcerated at the time that he later claimed he could provide support for his children) and because the father did not challenge the agency's failure to list him initially as a respondent, Judge Whitbeck did not "find error requiring reversal." *Id.* at *4.

The risks to due process identified by Judge Whitbeck in *In re Irwin* were actualized in this case. Ms. Tremain had custody of her children taken from her based on the guilty plea of her ex-husband, who lives outside the state, to child neglect. Tremain App at 11-12. The trial court denied her request for an adjudication trial where she could prove that she was a fit mother. *See id.* And, to this day, she still have not been granted the opportunity to prove in a court of law that she is, in fact, a fit mother.

G. Constitutional Deprivation Not Mooted by Subsequent Events

Finally, it may often be the case that by the time an appeal reaches the Michigan Court of Appeals or Michigan Supreme Court, the non-offending parent will get back physical custody of her child. However, this does not moot the constitutional deprivation. When dealing with the interests of a parent, the U.S. Supreme Court has rejected "the general proposition that a wrong may be done if it can be undone." *Stanley*, *supra* at 647. In particular, this is exactly the type of constitutional wrong that is "capable of repetition, yet evading review," thereby alleviating any mootness concerns. *Honig v Doe*, 484 US 305, 318; 108 S Ct 592; 98 L Ed 2d 686 (1988); *Socialist Workers Party v Sec'y of State*, 412 Mich 571, 582 n11; 317 NW2d 1 (1982). In addition, an appellate court can address an issue that, while appearing to be technically moot, involves collateral consequences that impact one of the parties. *Mead v Batchlor*, 435 Mich 480, 486-87; 460 NW2d 493 (1990). Here, Ms. Tremain has on-going requirements imposed on her by the trial court that she must satisfy, including complying with a court-ordered service plan and listing on Michigan's child abuse registry. *See, e.g., BB v. Dep't of Health & Rehabilitative Servs*, 542 So2d 1362, 1363 (Fla, 1989) (noting that inclusion on the state's child abuse registry "alongside the names of convicted child molesters and persons who have committed violent crimes against children, is a harsh and permanent sanction").

IV. CONCLUSION

As the U.S. Supreme Court explained in *Stanley*, the right "to raise one's children ha[s] been deemed essential, [a] basic civil right[] of man, and [a] right[] far more precious than property rights." *Supra* at 651 (internal citations, quotation marks, and ellipsis omitted). This latter point is especially poignant here. Had Ms. Tremain, through no fault of her own, been stripped of a piece of real estate by the state or had her property over-burdened by regulations,

she would have been entitled to a hearing and potentially just compensation. *Mathews*, *supra* at 333. It cannot be that her rights in property are deserving of more due process protection than her rights as a parent. "The right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society." *Id.* (internal quotation marks omitted).

Yet, Ms. Tremain, through no fault of her own, was stripped of custody of her children and over-burdened with time-consuming and unnecessary requirements, without receiving a trial on her fitness as a mother. Her right as a mother and her children's right to a mother are too important to have been jettisoned—without first determining whether she was a fit parent—by the trial court in favor of its own calculations of what was best for her children. In setting aside Ms. Tremain's interests without first deciding whether those interests *could be* set aside, the trial court violated her right to due process under the law.

For the foregoing reasons, *amicus curiae* NACC respectfully requests that the Court grant Ms. Tremain's application for leave to appeal the trial court's adjudication and dispositional orders in this matter and, ultimately, remand the matter for an adjudication trial to determine whether Ms. Tremain is a fit or unfit parent.

Respectfully Submitted,

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