IN THE MICHIGAN SUPREME COURT

In the Matter of MAYS, Minors

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

WALI PHILLIPS,

Respondent-Appellant.

Lower Court No.: 09-485821-NA
Court of Appeals No.: 297447
Supreme Court No.: 142566

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NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN'S MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

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The National Association of Counsel for Children ("NACC"), through its attorneys, Honigman Miller Schwartz and Cohn LLP, moves for leave to submit an *amicus curiae* brief in the above-captioned case under MCR 7.306(D)(1). In support of its motion, NACC says:

I. THE PROPOSED *AMICUS*

A. 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. Founded in 1977, the NACC consists of nearly 2,000 professionals from all fifty states and the District of Columbia. Its Board and membership include attorneys who represent children before the family and juvenile courts of the nation, as well as judges and members from the fields of medicine, social work, mental health, education, and law enforcement.

B. The NACC works toward multiple goals, including, among others, improving courts and agencies serving children and advancing 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.

C. The NACC has contributed numerous *amicus curiae* briefs to federal and state 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, which evaluates cases based on the consistency with the mission of the NACC,

the widespread impact in the field of children's law, the argument's foundation in existing law or a good faith extension of the law, and the reasonable prospect of prevailing.

II. GROUNDS FOR *AMICUS* FILING

A. In requesting leave to participate in this matter, the NACC seeks to advance the interests of its members and the public in guaranteeing that all children and parents receive the statutory protections and due process that they are owed in proceedings involving their fundamental right to voice their views and make decisions regarding the care, custody, and control of children. The NACC believes that, in any child protective proceeding, including one affecting custodial and parental rights, the interests of children are best served by the court holding an adjudication trial to determine the fitness of parents. Moreover, the NACC believes that in those proceedings, the views of the children must be considered by the court in an age-appropriate manner.

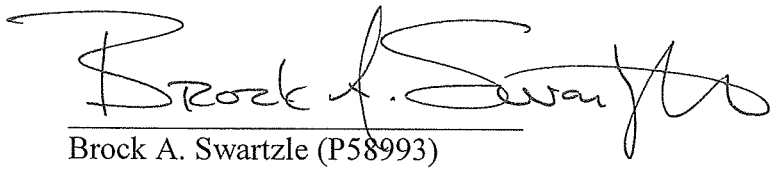
B. As explained in the proposed *amicus curiae* brief, attached as Exhibit 1 to this motion, the trial court's failure to consider the views of the Mays children violated their statutory and due process rights to have their views considered. Due process also required that before a court could act in *parens patriae* and take custody of a child, the court must hold an adjudication trial and conclude that the non-offending parent is not fit.

C. The NACC believes that its brief as an *amicus curiae* will afford the Court the benefit of arguments that address the issues presented in this case from a perspective different from that of the parties.

III. RELIEF

For the foregoing reasons, as well as those set forth in the attached brief, the NACC requests that this Court grant its motion to submit an *amicus curiae* brief in the above-referenced matter.

Respectfully Submitted,



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Dated: August 2, 2011

EXHIBIT 1

IN THE MICHIGAN SUPREME COURT

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BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN

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QUESTIONS PRESENTED FOR REVIEW

The National Association of Counsel for Children ("NACC") will address the following issues, as framed by the Michigan Supreme Court:

1. Whether the trial court clearly erred in finding that termination was in the children's best interests, MCL 712A.19b(5), without determining whether the children were of a sufficient age to give their views regarding termination?

   Amicus Curiae NACC answers: Yes.

2. Whether the so-called "one parent" doctrine, first adopted in *In re CR*, 250 Mich App 185 (2001), should be upheld?

   Amicus Curiae NACC answers: No.

Statement of Interest of *Amicus Curiae*
National Association of Counsel for Children

Amicus curiae National Association of Counsel for Children ("NACC") submits this brief to the Michigan Supreme Court in *In the matter of Mays* and *Department of Humans Services v Phillips*. 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. In this context,

the NACC requests the Court reverse the trial court's adjudication and dispositional orders in this matter and remand the matter for further proceedings.

I. INTRODUCTION

Kafka wrote in *The Trial* of the arrest and conviction of a person without notice of the charge. But, what of the cleaving of the tie between a child and parent without inquiry into the views of the child, or even into whether the child has a meaningful view? Or, what of a tribunal's assumption of the role of parent without first verifying that a parent is, in fact, somehow unfit?

II. BACKGROUND

The NACC adopts the Statements of Jurisdiction and Material Proceedings and Facts found in Respondent-Appellant's Application. *Id.* at 1, 4-11.

III. ANALYSIS

A. A Child's Views, If Ascertainable, Demand Consideration And Respect

1. The Importance Of Ascertaining A Child's Views

The NACC believes that each child should enjoy an age-appropriate opportunity to inform the court of that child's views concerning decisions that undoubtedly will affect him or her. Otherwise, the person most affected by custody, foster care, and parental termination proceedings—the child—will be the person most likely left without a voice.

The NACC has adopted, with important modifications, the American Bar Association's standards of practice as to legal representation of children in dependency court. Marvin Ventrell, *Legal Representation of Children in Dependency Court: Toward a Better Model – The ABA (NACC Revised) Standards of Practice*, NACC Children's Law Manual Series (1999) (Ex A). With regard to a minor's views on the parent-child relationship, the NACC believes that the following standards should be recognized:

> The child's attorney should elicit the child's preferences in a developmentally appropriate manner, advise the child, and provide guidance. The child's attorney should represent the child's expressed preferences and follow the child's direction throughout the course of litigation, except as specifically provided herein. Client directed representation does not include "robotic allegiance" to each directive of the client. . . . To the extent that a child cannot meaningfully participate in the formulation of the client's position (either because the child is preverbal, very young or for some other reason is incapable of judgment and meaningful communication), the attorney shall substitute his/her judgment for the child's and formulate and present a position which serves the child's interest. . . . It is possible for the child client to develop from a child incapable of meaningful participation in the litigation . . . to a child capable of such participation during the course of the attorney client relationship. [*Id.* at 184-87.]

The NACC recognizes that there is no "one-size-fits-all" rule with regard to how a child's views are put into the record. In determining whether a child should testify, several factors should be considered, including (a) "consideration of the child's need or desire to testify"; (b) "any repercussions of testifying"; (c) "the necessity of the child's direct testimony"; (d) "the availability of other evidence or hearsay exceptions which may substitute for direct testimony by the child"; and (e) "the child's developmental ability to provide direct testimony and withstand possible cross-examination." *Id.* at 194-95. "While testifying is undoubtedly traumatic for many children, it is therapeutic and empowering for others. . . . In the absence of compelling reasons, a child who has a strong desire to testify should be called to do so." *Id.* at 195.

With its Child and Family Services Improvement Act of 2006, Congress likewise recognized the importance of a child's views during proceedings affecting his or her life. The act requires that, in any permanency hearing involving a child, "the [state] court or administrative body conducting the hearing [must] consult[], in an age-appropriate manner, with the child regarding the proposed permanency or transition plan for the child." 42 USC § 675(5)(c). In the act's legislative history, it is noted that "each child deserves the opportunity to participate and be consulted in any court proceeding affecting his or her future, in an age-appropriate manner." Cong Rec, No H7384 (Sept 26, 2006). The NACC supports this position.

2. Michigan Requires That A Court Consider The Views Of A Child

In the normal course, before the child-parent relationship can be terminated, Michigan law requires that the trial court "obtain the child's views regarding the permanency plan in a manner that is appropriate to the child's age." MCL 712A.19a(3). That this inquiry will take place prior to a termination proceeding underscores, rather than undercuts, the importance of this statutory right of the child: The trial court must ascertain the views of the child near the beginning of the process, not at the end, so that those views can inform the entire process. In other words, a child's views are not to be treated by the trial court as largely an after-thought, relevant only to termination, but are, instead, to inform the entire process that decides how, when, where, and by whom the child will be cared. This understanding accords with the broad purpose of the permanency planning hearing, which is "to review the status of the child and the progress being made toward the child's return home or to show why the child should not be placed in the permanent custody of the court." *Id.*

This understanding also accords with other parts of Michigan law involving minors. MCL 712A.17(d)(1) requires that the L-GAL report the "child's wishes and preferences" to the court as part of the L-GAL's duty in determining the best interests of the child. (It does not appear from the record that the L-GAL did this here.) Moreover, it has long been recognized in the Child Custody Act that an analysis of the best interests of the child must include the child's views to the extent those views can be ascertained. MCL 722.23(i). The concept of best interests set forth in the Child Custody Act has "been the polar star for judicial guidance in cases involving children." *Matter of Schejbal*, 131 Mich App 833, 835; 346 NW2d 597 (1984). As explained by the court in *In re JS and SM*, 231 Mich App 92, 101-02; 585 NW2d 326 (1998),

overruled in part on other grounds by In re Trejo, 462 Mich 341, 356-57; 612 NW2d 407 (2000):

> [M]any, if perhaps not all, of the types of concerns about parental ability underlying the best interests factors of the Child Custody Act are highly relevant to a decision concerning whether parental rights should be terminated. . . . [I]t is entirely appropriate for a probate court to consider many of the concerns underlying those best interests factors in deciding whether to terminate parental rights.

3. The Trial Court Did Not Ascertain The Views Of The Mays Children

Although long a part of the Child Custody Act, the requirement to consider a child's views was just added to the Juvenile Code in 2008, possibly explaining the trial court's failure to take into account, at any point, the views of either Mays child. That the trial court did fail to consider those views is a position accepted by the mother, the father, and the children's L-GAL. (Respondent-Appellant's Brief at 29 (Dkt. 142566); Brief on Appeal, Appellant at 43 (Dkt. 142568); Minor Children's Brief at 47-48 (Dkt. 142566).) Although the State's Department of Humans Services ("DHS") asserts otherwise (Brief of Appellee Department of Human Services at 34-35 (Dkts. 142566/142568)), the pages in the record that it cites do not support its position, as pointed out in the father's reply brief, (Respondent-Appellant's Reply Brief at 7 (Dkt. 142568)).

4. The Trial Court's Omission Violated Due Process

The Mays children 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). In fact, the protections of due process and of MCL 712.19a(3) dovetail, as "[t]he touchstone of procedural due process is the fundamental requirement that an individual be given the opportunity to be heard in a meaningful manner," *O'Donnell v Brown*, 335 F Supp 2d 787, 809 (WD Mich, 2004), and this is precisely what the Michigan statute is intended to

provide a child—the right to be heard in a meaningful manner on decisions affecting that child's life.

The trial court's failure to determine the views of the Mays children, or, at least, whether the children had views that should be considered, clearly violated the state statute. Yet, notwithstanding this, the L-GAL has taken the position that there was no error here. In support, the L-GAL relies upon the California Court of Appeals' decision in *In re Amanda D*, 55 Cal App 4th 813; 64 Cal Rptr 2d 108 (1997). That decision is inapposite, however, because the record in that case showed unequivocally that the lower court *did* consider the child's views, just not in the form of direct testimony. *Id.* at 820. The *In re Amanda D* court went on to reiterate:

> What the [trial] court must strive to do is to explore the minor's feelings regarding his/her biological parents, foster parents, and prospective adoptive parents, if any, as well as his/her current living arrangements. . . . [A]n attempt should be made to obtain this information so that the court will have before it some evidence of the minor's feelings from which it can then infer his/her wishes regarding the issue confronting the court. [*Id.*]

In contrast to *In re Amanda D*, the record in this case contains nothing like that kind of specific information reflecting the children's views about their relationship with their mother or father.

As explained above, it is not the position of the NACC that a child must testify during a custody, permanency planning or termination hearing. Rather, the NACC believes that the trial court must, in some way, shape or form, be able to ascertain the views of the child (or ascertain that the child cannot express any view) before making a decision affecting fundamental aspects of that child's life. The trial court here failed in this respect.

5. The Child's Views Issue Should Not Be Waivable

Finally, the L-GAL argues that the children's-views issue was, at most, "an unpreserved error." (Minor Children's Brief at 48 (Dkt. 142566).) This issue should not, however, be one subject to appellate waiver.

"Michigan generally follows the 'raise or waive' rule of appellate review." *Walters v Nadell*, 481 Mich 377, 387-88; 751 NW2d 431, 437 (2008). The waiver rule is based on principles of judicial efficiency and adversarial process. *Id.* Yet, the Court has the "inherent power to review an issue not raised in the trial court to prevent a miscarriage of justice." *Id.* (footnote omitted).

The statutory provision mandating the trial court to "obtain the child's views . . . in a manner that is appropriate to the child's age" should be seen for what it is—a right of the child. As this Court's own Administrative Office has explained, "The main objective [of the requirement] is to give children an opportunity to express their opinions *in their own words*, which will convey to the children that their opinions are valuable to the court." SCAO Admin Mem 2009-02, at 2 (emphasis in original). Given this, the right should not be subject to appellate waiver, even by a child's L-GAL or parent.

The child is the lone party to the proceedings who is not in a position to tell the trial or appellate court that she does not agree with the position of the L-GAL, to press her own rights independent of the L-GAL, or otherwise to ensure that the L-GAL follows (or at least confers and reports) her wishes. As the L-GAL does not perform in a traditional attorney-client relationship but instead has a hybrid duty to the child and the court, MCL 712A.17d, the actions or inactions of the L-GAL should not act as a waiver on appeal. To refuse to reach the issue based on waiver would be to place greater weight on judicial efficiency and rigid formalism than to the fundamental due process rights of the child, who is both a subject and an object of the proceedings. The Mays children deserved in 2009 and 2010, and still deserve to this day to have their voices heard loud and clear before the trial court decides whether to terminate their relationships with their parents.

B. The One-Parent Doctrine Is Unconstitutional

This Court asked that the matter of the "one-parent" doctrine be addressed in the Mays' appeals. Order (Mich, Mar. 23, 2011). The NACC has opposed the "one-parent" doctrine, as first set forth in *In re CR*, 250 Mich App 185 (2001), in several amicus briefs filed in other appeals. See, eg, *In re Moore* (COA 298008); *In re Bratcher* (295727). The following analysis largely tracks the analyses set forth in those amicus briefs.[1]

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.[2]

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"),

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[1]The positions of the NACC, the Legal Services Association of Michigan, and the Michigan State Planning Body for the Delivery of Legal Services to the Poor are aligned on the one-parent problem. The undersigned, as counsel for NACC, has collaborated with counsel for the other two organizations in the past on the one-parent problem, and each have presented their respective organization's position in past briefs to this Court as well as the Michigan Court of Appeals. Accordingly, *amici* here present similar arguments in favor of overturning *In re CR*, though each have stressed different points to address specific concerns of the respective organization.

[2] 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,

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 his child. Instead, the trial courts assume the role of the child's parent and orders that the non-offending parent take substantive steps to prove his fitness without any prior adjudication that he was unfit to begin with. In so doing, the trial courts violate the due process rights of the non-offending parent and act against the interests of the child.

1. 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.

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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.

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 B) ("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 his 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 his 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 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 father's in his children, "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 within 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 . . . [his] 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 [his] 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 parent and his children by assuming custody of the 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 His Child Is 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 his children or his 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).]

2. From First Principles To Necessary Conclusion: A Parent's Rights In His Children Cannot Be Infringed Without An Adjudication On His 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 his own, independent interests in his 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, then the government cannot assume custody and control over his 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 adjudicate his fitness before imposing arduous requirements.

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).

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 Mr. Phillips is one of those unfit parents and that he should have had to comply with various requirements to show that he could, in time, be a fit parent. But, certainly not all (or even most) non-offending parents in this situation are unfit. The system should not be set up or interpreted, in effect, to presume unfitness by the non-offending parent.

3. Various States Recognize The Necessity Of Finding Unfitness Before It Can Proceed Against The Non-Offending Parent

The DHS incorrectly asserts that Michigan's one-parent doctrine is similar to those adopted in almost every other state in the Union. In fact, Michigan appears to be an extreme

outlier, joined only by Ohio. See *In re CR*, 843 NE2d 1188, 1192 (Ohio, 2006); *In the Matter of MD*, No CA2006-09-223, 2007 WL 2584831, at *3 (Ohio Ct App, Sept 10, 2007) (Ex C).

Many other states recognize that there must first be a finding that a parent is unfit before the court can take custody over a child and order that the parent satisfy various requirements. 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.[3]

a. 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,

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[3] 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 D).

> 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 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).

b. 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).

c. 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.*

d. 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.

e. 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.*

4. The Court Should Jettison The One-Parent Doctrine

Although no prior court appears to have addressed, in published precedent, the constitutionality of Michigan's one-parent doctrine, 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.

* * *

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* have been actualized in this case and many preceding ones. Parents have had custody of their children taken from them based on no-contest pleas of ex-spouses. Parents have had requirements imposed on them without any judicial finding that they were somehow unfit. The Court should take this opportunity to jettison the one-parent doctrine and put Michigan's family court system on more solid constitutional ground.

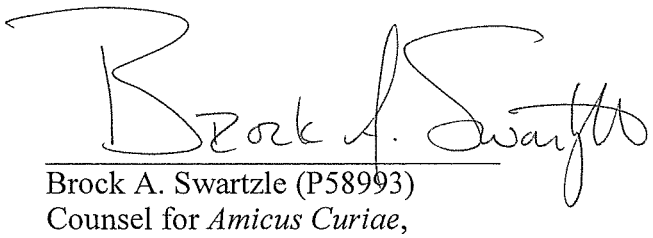
IV. CONCLUSION

This *amicus curiae* brief started out by drawing a comparison between Kafka's *The Trial* and Michigan's family law, admittedly an exercise in hyperbole. On a macro scale, Michigan's family law does not resemble the dystopian legal system in that novel. Yet, in two important ways here, the Mays children and Mr. Phillips experienced a bit of the process with which Josef K found himself. The Mays children were stripped of their right to be heard before their relationships with their parents were forever terminated. Similarly, Mr. Phillips and the Mays children were stripped of their rights to have Mr. Phillips adjudicated as unfit before being

treated as such. In the absence of these rights, the Mays children and Mr. Phillips were denied the fundamental statutory and constitutional rights to which they were entitled.

Accordingly, *amicus curiae* NACC respectfully requests that the Court remand the matter for further proceedings to determine, among other matters, the Mays' children's views on whether their relationships with their parents should have been terminated.

Respectfully submitted,



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Dated: August 2, 2011

EXHIBIT A

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LEGAL REPRESENTATION OF CHILDREN IN DEPENDENCY COURT: TOWARD A BETTER MODEL - THE ABA (NACC REVISED) STANDARDS OF PRACTICE

BY MARVIN VENTRELL, JD

LEGAL REPRESENTATION OF CHILDREN IN DEPENDENCY COURT: TOWARD A BETTER MODEL - THE ABA (NACC REVISED) STANDARDS OF PRACTICE

Marvin Ventrell

I. Introduction

The first duty of an attorney is independent, competent, zealous advocacy. Competent advocacy of a client's individual interests is the foundation of the attorney-client relationship. Advocacy of the client's interests, relative to the interests of other parties' or the court, is the purpose of the attorney in the system.

It seems this fundamental of representation is understood in all forms of the attorney-client relationship except for the representation of children. No jurisdiction, to my knowledge, relieves the attorney of this duty when the client is a child. Yet, attorneys frequently relieve themselves of this duty, often with the acquiescence of the court and opposing counsel. The result is the inadequate and unethical representation of the child client.

The causes of this phenomenon within the representation of children are many, but perhaps the foremost cause is the systemic confusion as to the basic *role* of the child's attorney. Without an understanding of the child's attorney's role in the system, and the resulting duties, the representation is bound to be inadequate.

The role confusion stems from the need to treat children differently than adults. Children are not simply small adults and it would be inappropriate to treat them as such. All of the components of representation of adults are not readily transferable to the representation of children. There must be exceptions made to the rules of lawyering where children are concerned.

In recognition of the special circumstance of the child client, however, we have too often, as children's lawyers, abandoned the general rule of lawyering for the exceptions. Rather than undertaking our duty as competent zealous advocates, making exceptions where necessary, we have tended to view the proposition of representing children as a complete exception to our basic duty as lawyers. The result has often been the child client's loss of the only true legal advocate the child has.

The remedy seems obvious - combine the elements of traditional lawyering with the child's need for something more. That combination has not been easy to find.

The following is a brief review of how the various models of child representation have addressed the issue, culminating in the recent NACC revisions to the 1996 *ABA Standards of Practice for Lawyers Who Represent Children in Dependency Cases.*

II. Representing Children: The Dilemma of Child Advocacy

Quality legal representation is essential to a high functioning dependency court process.[1] Quality legal representation of children in particular is essential in obtaining good outcomes for children. An adversarial court process dependent on competing individual advocacy for information, will not produce good outcomes for litigants who lack competent individual advocates. Dependency court decisions are only as good as the information upon which the decisions are based. In order to promote the welfare of children in dependency court (which is the goal of the child welfare system), children must be provided competent independent legal representation.

Children have been represented in the dependency court context a relatively short time. Representation of children in this context is largely the outgrowth of the 1974 passage of the Child Abuse Prevention Treatment Act (CAPTA) which continues to provide federal incentive for appointment of children's representatives. CAPTA has not, however, in its original or reauthorized versions, defined the role of the representative for the child. While the act specifies that a guardian *ad litem* (GAL) be appointed, it does not require that the GAL be an attorney. Neither does it clarify the role and duties of the attorney when appointed.

The result has been the creation of numerous, and oftentimes inconsistent and unclear models of representation. It can be argued that no two models of child representation among the 56 U.S. jurisdictions are alike. Further, within jurisdictions, there is considerable disagreement as to which model is used and what the role of the representative is within the model. This confusion has undoubtedly contributed to the poor quality of representation children frequently receive in our system.[2]

Of the numerous models of child legal representation, two models, with variation have dominated the representation of children: the attorney/GAL and the traditional attorney.[3] Of the two legal models, the traditional attorney model has been least favored as many have thought it placed too much autonomy with the child client who should not direct the representation.

The trend until very recently, therefore, has been to adopt the attorney/GAL model which charges an attorney with the representation of the child's "best interests." The model has, at the same time, been appropriately criticized for placing attorneys in the ethical dilemma of representing best interests, which may be contrary to the client's wishes, which attorney's are required to follow under most ethics codes. The model also calls for attorneys to engage in substituted judgment of the client's best interests, which they may be ill equipped to do. The model has also resulted in what has come to be known as "relaxed advocacy" where attorneys feel free to ignore their traditional duties (such as seeing their client or filing motions) because they are appointed as a GAL.

Many critics of the attorney/GAL model have advocated for the traditional attorney model only to be criticized for endangering children's welfare by allowing children to determine their fate. The

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[1] American Bar Association Center on Children and the Law, Court Improvement Progress Report (1998).

[2] *America's Children at Risk, A National Agenda for Legal Action*, A Report of the ABA Presidential Working Group on the Unmet Legal Needs of Children and Their Families (1993).

[3] To this point, the analysis does not include the "representation" of children by lay GALs or CASA volunteers. For purposes of this discussion, "legal" representation of children means attorney representation in its variations.

result of the competition between the two favored models has been the creation of the "dilemma of child advocacy." The dilemma paradigm asks whether children's attorneys should advocate the *expressed wishes* or the *best interests* of the child. The debate has polarized and paralyzed the profession and has not provided a solution. While it was not, at one time, an inappropriate question to ask, it has proved to be an inadequate context within which to resolve the representation problems within the dominant models.

III. Moving Toward a Better Model of Representation

Recently, however, a new model of child advocacy has begun to emerge.[4] The model, which can be called the "child's attorney" model, moves away from the substituted judgment, paternal attorney/GAL model and toward a more autonomous traditional attorney model which includes safeguards to protect autonomy which may harm a child. This "child's attorney" model, arose out of three events: The December, 1995 Fordham University School of Law Conference on Ethical Issues in the Legal Representation of Children which resulted in an 800 page special law review issue by the same name;[5] The adoption in February, 1996 of the *American Bar Association Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases;*[6] and the publication of *Representing Children in Child Protective Proceedings: Ethical and Practical Dimensions* by Yale Clinical Law Professor Jean Koh Peters In 1997.[7]

More recently, the National Association of Counsel for Children adopted its revised version of the *ABA Standards* in an attempt to achieve the delicate representation balance between zealous attorney advocacy and child protection.

A. Models of Child Advocacy

Nearly thirty years after the United States Supreme Court *Gault*[8] decision in which a child's right to legal counsel in delinquency proceedings was established; the role of the child's attorney in civil proceedings remains unclear[9]. The last three decades of children's law have seen the emergence of various models of child representation ranging from a *parens patriae*[10] model to a model of traditional zealous advocacy. Central to the various models of representation are the existence of the two principles, in varying degrees, of beneficence and autonomy[11]. Beneficence in the representation of children is that quality which results in the care and protection of the child; whereas autonomy is the quality of serving the child's legal rights by following her

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[4] The representation of children in the dependency court has also evolved from the 1970's paternal model to the current tendency toward an independent child's attorney. *See, e.g.*, Fraser, *Independent Representation for the Abused and Neglected Child: The Guardian Ad Litem*, 13 CAL. W. L. REV. 16 (1976); Haralambie, *Current Trends in Children's Legal Representation*, 2 CHILD MALTREATMENT 193 (1997); Ventrell, *Rights and Duties: An Overview of the Attorney-Child Client Relationship*, 26 LOY. U. CHI. L. J. 287 (1995).

[5] Fordham Law Review, Volume LXIV, Number 4, March 1996.

[6] The *ABA Standards* were adopted by the ABA February 5, 1996 and by the NACC (with reservation) on October 13, 1996. They are adapted and published with the permission of the ABA in the NACC *Deskbook & Directory*, 3rd Edition (1998).

[7] *Representing Children in Child Protective Proceedings: Ethical and Practical Dimensions*, by Jean Koh Peters, Copyright © 1997, LEXIS Law Publishing, Charlottesville, VA

[8] *In re Gault*, 387 U.S. 1 (1967).

[9] The *Gault* decision applies specifically to delinquency proceedings (proceedings in which a minor is charged with a violation of the law which would be criminal but for the child's minority). No similar decision establishing a child's right to counsel in civil proceedings exists.

[10] *Parens patriae* - literally, "parent of the country" refers to the role of the state as guardian or ultimate parent of the child.

[11] The identification of the themes beneficence and autonomy in this context was made by Donald C. Bross, JD/Ph.D., Education Director of the University of Colorado Health Sciences Department Kempe Children's Center.

expressed wishes. A robotic[12] allegiance to either beneficence or autonomy is harmful to the child client and that ideal legal representation of children has a balance of both principles.

An analysis of existing and emerging models of child representation which considers the degrees of beneficence and autonomy present may reveal the model or models of representation most appropriate for the child client. The following is an attempt to identify jurisprudential models and the role of the child's attorney in each.

1. Due Process / Delinquency. The due process / delinquency model is a reaction to the *Gault* decision which made the 14th Amendment applicable to juvenile delinquency proceedings. The model mirrors the adult criminal justice system and includes the right to notice of charges, the right to confrontation and cross-examination, the prohibition against self-incrimination and the right to counsel. The focus is adjudication - a finding of guilty or not guilty. The attorney functions in the role of traditional zealous advocate and protects the independent legal rights of the child-client. The attorney focuses on the child-client's expressed wishes. The system and counsel provide the child with full autonomy with little attention to beneficence. Post adjudication disposition may consider the child's rehabilitation or treatment, but the attorney is clearly bound in the traditional role.

2. Civil Child Law / Best Interests / Dependency. Civil child law proceedings encompass all abuse, neglect, dependency, custody and visitation proceedings. The initial considerations may involve findings of parental unfitness or other jurisdictional criteria, but once met, the system focus is the child's best interests. The system recognizes at that point that the child has her own interest in health and safety. Absent issues of abuse, neglect or dependency, many jurisdictions allow for but do not require or typically employ independent counsel for the child. In civil proceedings where a representative of the child is used, the representation takes one of the following forms.

a. Lay Guardian *ad Litem* (GAL). In this substituted judgment model, the GAL is a non-attorney who "stands" in the proceeding for the presumptively incompetent child. The focus is the protection of the child by an adult who presumes to know and then articulate the child's best interests. The focus is beneficence over autonomy. The child's interests are served if the GAL correctly assess the child's interests and the system sees fit to protect those interests absent legal advocacy.

b. Attorney for the Guardian *ad Litem.* In recognition that the lay GAL does not have the legal training or skills to advocate effectively for what she perceives to be the child's best interests, this substituted judgment model provides an attorney to do so. Beneficence is the focus. Should the GAL correctly assess the child's interests, the system is more likely to provide the child relief with the legal advocacy this model provides. The attorney represents the GAL, not the child.

c. Attorney and Guardian *ad Litem.* This models provides a client directed attorney to represent the child and a GAL to represent best interests. Ideally, the attorney and GAL both advocate the same outcome in which case a significant degree of autonomy and beneficence are found. This model is rare, however, and is often found where an attorney has been given a directive by the child which the attorney believes to be contrary to the child's interests and the attorney asks for a GAL. In this case, beneficence is the focus and the court is

[12] Attorney and author Ann M. Haralambie uses the term "robotic mouthpiece" to describe blind allegiance to a client's directive at the cost of counseling the client on her options.

sent the message that the child incorrectly assesses her interests. The situation is also found where a child has asked for an attorney because the GAL will not advocate her wishes. The same kind of mixed message is sent to the court.

d. Attorney / Guardian *ad Litem* (Law Guardian). This" hybrid"[13] model provides an attorney to represent a child, presumptively bound by the law and ethics of attorney and client (client direction), and instructs her to represent the child's best interests by substituted judgment. Approximately 60% of the U/S. jurisdictions use this model.[14] If best interests and expressed wishes coincide, the model can be an effective blend of beneficence and autonomy. It places an attorney in a substituted judgment role which is inconsistent with an attorney's primary ethical directive, and for which the attorney may not be trained. Additionally, the phenomenon of "relaxed representation" where an attorney presumes the requirements of zealous advocacy do not apply seems to appear when attorneys are appointed to this GAL function. The model emphasizes beneficence over autonomy.

e. Attorney. An attorney functions as a client directed advocate. Given the choice of representing the best interests or expressed wishes of the client, the attorney is bound to represent expressed wishes, which could be harmful to a child. This model does not prohibit the attorney from acting in her capacity as counselor for the client, and ethics codes include the counseling function. The focus of this model is autonomy over beneficence

B. Synthesis Of Models Of Representation: The ABA (NACC Revised) Standards of Practice

Achieving an appropriate blend of beneficence and autonomy in the representation of children is possible through a synthesis of the various models. Model "2" - Due Process / Delinquency remains the appropriate model of representation in the delinquency setting. Its components are constitutionally proscribed and to the extent courts recognize this attorney role and to the extent that attorneys perform competently,[15] it is functional. Admittedly, it places autonomy at a premium and works better with mature children, but without a significant overhaul of the juvenile justice system, it is the appropriate model.

In the civil representation of children, a review of the Civil ChildLaw / Best Interests model reveals that models "2 - d" - Attorney/GAL and "2 - e" - Attorney, come closest to blending necessary elements of beneficence and autonomy. The Attorney/GAL model, however, sacrifices necessary client autonomy in its subjective judgment substitution of the child's best interests. It also tends to result in "relaxed" advocacy. Conversely, the Attorney model frequently fails to provide for the child's interests and is subject to robotic allegiance to a child's autonomy. A synthesis of these models, however, may result in a better model of practice for the civil child attorney.

The synthesis is found in the "Child's Attorney" model of the *ABA Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases (NACC Revised Version)* which draws upon the work of the Fordham Conference and Professor Peters. In essence, the Child's Attorney model places the attorney in the traditional role of zealous advocate but provides for an

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[13] Ann M. Haralambie identifies and discusses the "hybrid' role in *The Child's Attorney, A Guide to Representing Children in Custody, Adoption and Protection Cases,* ABA 1993 @ p. 37.

[14] *Child Abuse and Neglect Cases: Representation as a Critical Component of Effective Practice.* NCJFCJ Permanency Planning for Children Project, Technical Assistance Bulletin, 1999, page 45.

[15] For a discussion of the quality of representation in delinquency proceedings, see *A Call for Justice: Access to Counsel and Quality of Representation in Delinquency Proceedings,* ABA Criminal Justice Section Juvenile Justice Center (1996).

infusion of beneficence through the application of an objective best interests evaluation in limited situations. The model requires that the attorney assume the traditional role of zealous advocate and not GAL to avoid any propensity toward relaxed advocacy. At the same time, it recognizes that some children are not capable of directing their litigation and a degree of substituted judgment is unavoidable.

The *ABA Standards (NACC Revised Version)*, attached as Appendix "A" to this article, provides the following model of representation:

> 1. **All children subject to court proceedings involving allegations of child abuse and neglect should have legal representation as long as the court jurisdiction continues.** These Abuse and Neglect Standards are meant to apply when a lawyer is appointed for a child in any legal action based on: (a) a petition filed for protection of the child; (b) a request to a court to change legal custody, visitation, or guardianship based on allegations of child abuse or neglect based on sufficient cause; or (c) an action to terminate parental rights. These Standards apply only to lawyers and take the position that although a lawyer *may* accept appointment in the dual capacity of a "lawyer/guardian ad litem," the lawyer's primary duty must still be focused on the protection of the legal rights of the child client. The lawyer/guardian ad litem should therefore perform all the functions of a "child's attorney," except as otherwise noted.
>
> 2. **The Child's Attorney.** The term "child's attorney" means a lawyer who provides legal services for a child and who owes the same duties of undivided loyalty, confidentiality, and competent representation to the child as is due an adult client.
>
> 3. **Basic Obligations**. The child's attorney should:
>
> - Obtain copies of all pleadings and relevant notices;
> - Participate in depositions, negotiations, discovery, pretrial conferences, and hearings;
> - Inform other parties and their representatives that he or she is representing the child and expects reasonable notification prior to case conferences, changes of placement, and other changes of circumstances affecting the child and the child's family;
> - Attempt to reduce case delays and ensure that the court recognizes the need to speedily promote permanency for the child;
> - Counsel the child concerning the subject matter of the litigation, the child's rights, the court system, the proceedings, the lawyer's role, and what to expect in the legal process;
> - Develop a theory and strategy of the case to implement at hearings, including factual and legal issues; and
> - Identify appropriate family and professional resources for the child.
>
> 4. **Client Preferences**. The child's attorney should elicit the child's preferences in a developmentally appropriate manner, advise the child, and provide guidance. The child's attorney should represent the child's expressed preferences and follow the child's direction throughout the course of litigation, except as specifically provided herein. Client directed representation does not include "robotic allegiance" to each directive of the client. Client directed representation involves the attorney's counseling function and requires good communication between attorney and client. The goal of the relationship is an outcome which serves the client, mutually arrived upon by attorney and client, following exploration of all available options.
>
> - While the default position for attorneys representing children under these standards is a client directed model, there will be occasions when the client directed model cannot serve the client and exceptions must be made. In such cases, the attorney may rely upon a substituted judgment process (similar to the role played by an attorney guardian ad litem), or call for the appointment of a guardian ad litem, depending upon the particular circumstances, as provided herein.

- To the extent that a child cannot meaningfully participate in the formulation of the client's position (either because the child is preverbal, very young or for some other reason is incapable of judgment and meaningful communication), the attorney shall substitute his/her judgment for the child's and formulate and present a position which serves the child's interests. Such formulation must be accomplished through the use of objective criteria, rather than solely the life experience or instinct of the attorney. The criteria[16] shall include but not be limited to:

    a. Determine the child's circumstances through a full and efficient investigation;
    b. Assess the child at the moment of the determination;
    c. Examine each option in light of the two child welfare paradigms; psychological parent and family network; and
    d. Utilize medical, mental health, educational, social work and other experts.

- It is possible for the child client to develop from a child incapable of meaningful participation in the litigation as set forth in section B-4 (2), to a child capable of such participation during the course of the attorney client relationship. In such cases, the attorney shall move from the substituted judgment exception of B-4 (2) to the default position of client directed representation described in section B-4 "Client Preferences."

- If the child's attorney determines that the child's expressed preference would be seriously injurious to the child (as opposed to merely being contrary to the lawyer's opinion of what would be in the child's interests), the lawyer shall, after unsuccessful use of the attorney's counseling role, request appointment of a separate guardian ad litem and continue to represent the child's expressed preference, unless the child's position is prohibited by law or without any factual foundation. The child's attorney shall not reveal the basis of the request for appointment of a guardian ad litem which would compromise the child's position.

The *ABA Standards* were adopted by the ABA in 1996. The following year, the NACC adopted the standards with reservation as to Standard B-4. Standard B-4 is the critical client direction language of the standards and many members of the NACC board believed the *ABA Standards* gave too much autonomy to the child client and was unrealistic where young children were concerned. The *ABA Standards (NACC Revised Version)*, is the NACC's attempt to achieve a better balance of beneficence and autonomy within standard B-4. The revision is only recently completed[17] and the ABA has not yet had the opportunity to review and comment on the NACC's efforts.

In essence, where the ABA remained consistent with the client directed attorney throughout, the NACC carved out a significant exception where the client cannot meaningfully participate in the formulation of his or her position. In such cases, the NACC's version calls for a GAL type substitution of judgment using objective criteria. Additionally, the NACC's version requires the attorney to request the appointment of a separate GAL, after unsuccessful attempts at counseling the child, when the child's wishes are considered to be potentially seriously injurious to the child.

C. Conclusion

The ABA Standards are a tremendous contribution to the practice of law for children. While imperfect in some applications, the standards represent a giant step toward achieving high quality

[16] These criteria are taken directly from Professors Peters article, "The Role and Content of Best Interests in Client-Directed Lawyering for Children in Child Protective Proceedings" 64 Fordham L. Rev. 1505 (1996).
[17] The NACC Board of Directors adopted the *ABA Standards (NACC revised Version)*, April 21, 1999. The NACC board further voted to engage in the creation of guardian ad litem standards in addition to these attorney standards.

legal representation for children. The ABA and the ABA Representing Children Standards of Practice Committee which drafted the standards are to be commended. While the NACC took issue with some provisions, even substantial provisions, we chose to attempt to revise rather than rewrite the standards. We did so primarily because the ABA had already established and supported the base proposition that lawyers for children should act like lawyers and that all children in dependency proceedings are entitled to the same high quality zealous advocacy as adults.

The NACC's version is sure to be criticized by those who oppose traditional lawyering for children, just as the ABA has been criticized. We will be in good company together. Admittedly, the revisions are also subject to criticism from the client directed purists for abandoning the client directed model in some cases. True, the revisions combine elements of both the attorney / GAL and attorney models, but that balance was the goal all along.

Insert chart

APPENDIX "A"

NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN

AMERICAN BAR ASSOCIATION

STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES

(NACC Revised Version)

Printed with permission from the American Bar Association Center on Children and the Law.

The *Abuse & Neglect Standards* were drafted by the American Bar Association Representing Children Standards of Practice Committee.

Adopted, The American Bar Association February 5, 1996.

Adopted, with Reservation as to Standard B-4, National Association of Counsel for Children, October 13th, 1996.

Amended, Section B-4 and B-5, National Association of Counsel for Children, April 21, 1999.

PREFACE

All children subject to court proceedings involving allegations of child abuse and neglect should have legal representation as long as the court jurisdiction continues. These Abuse and Neglect Standards are meant to apply when a lawyer is appointed for a child in any legal action based on: (a) a petition filed for protection of the child; (b) a request to a court to change legal custody, visitation, or guardianship based on allegations of child abuse or neglect based on sufficient cause; or (c) an action to terminate parental rights.

These Standards apply only to lawyers and take the position that although a lawyer *may* accept appointment in the dual capacity of a "lawyer/guardian ad litem," the lawyer's primary duty must still be focused on the protection of the legal rights of the child client. The lawyer/guardian ad litem should therefore perform all the functions of a "child's attorney," except as otherwise noted.

These Standards build upon the ABA-approved JUVENILE JUSTICE STANDARDS RELATING TO COUNSEL FOR PRIVATE PARTIES (1979) which include important directions for lawyers representing children in juvenile court matters generally, but do not contain sufficient guidance to aid lawyers representing children in abuse and neglect cases. These Abuse and Neglect Standards are also intended to help implement a series of ABA-approved policy resolutions (in Appendix) on the importance of legal representation and the improvement of lawyer practice in child protection cases.

In support of having lawyers play an active role in child abuse and neglect cases, in August 1995 the ABA endorsed a set of RESOURCE GUIDELINES: IMPROVING COURT PRACTICE IN CHILD ABUSE & NEGLECT CASES produced by the National Council of Juvenile and Family Court Judges. The RESOURCE GUIDELINES stress the importance of quality representation provided by competent and diligent lawyers by supporting: 1) the approach of vigorous representation of child clients; and 2) the actions that courts should take to help assure such representation.

These Standards contain two parts. Part I addresses the specific roles and responsibilities of a lawyer appointed to represent a child in an abuse and neglect case. Part II provides a set of standards for judicial administrators and trial judges to assure high quality legal representation.

PART I—STANDARDS FOR THE CHILD'S ATTORNEY

A. DEFINITIONS

A-1. The Child's Attorney. The term "child's attorney" means a lawyer who provides legal services for a child and who owes the same duties of undivided loyalty, confidentiality, and competent representation to the child as is due an adult client.

Commentary —

These Standards explicitly recognize that the child is a separate individual with potentially discrete and independent views. To ensure that the child's independent voice is heard, the child's attorney must advocate the child's articulated position. Consequently, the child's attorney owes traditional duties to the child as client consistent with ER 1.14(a) of the Model Rules of Professional Conduct. In all but the exceptional case, such as with a preverbal child, the child's attorney will maintain this traditional relationship with the child/client. As with any client, the child's attorney may counsel against the pursuit of a particular position sought by the child. The child's attorney should recognize that the child may be more susceptible to intimidation and manipulation than some adult clients. Therefore, the child's attorney should ensure that the decision the child ultimately makes reflects his or her actual position.

A-2. Lawyer Appointed as Guardian Ad Litem. A lawyer appointed as "guardian ad litem" for a child is an officer of the court appointed to protect the child's interests without being bound by the child's expressed preferences.

Commentary —

In some jurisdictions the lawyer may be appointed as guardian ad litem. These Standards, however, express a clear preference for the appointment as the "child's attorney." These Standards address the lawyer's obligations to the child as client.

A lawyer appointed as guardian ad litem is almost inevitably expected to perform legal functions on behalf of the child. Where the local law permits, the lawyer is expected to act in the dual role of guardian ad litem and lawyer of record. The chief distinguishing factor between the roles is the manner and method to be followed in determining the legal position to be advocated. While a guardian ad litem should take the child's point of view into account, the child's preferences are not binding, irrespective of the child's age and the ability or willingness of the child to express preferences. Moreover, in many states, a guardian ad litem may be required by statute or custom to perform specific tasks, such as submitting a report or testifying as a fact or expert witness. These tasks are not part of functioning as a "lawyer."

These Standards do not apply to nonlawyers when such persons are appointed as guardians ad litem or as "court appointed special advocates" (CASA). The nonlawyer guardian ad litem cannot and should not be expected to perform any legal functions on behalf of a child.

A-3. Developmentally Appropriate. "Developmentally appropriate" means that the child's attorney should ensure the child's ability to provide client-based directions by structuring all communications to account for the individual child's age, level of education, cultural context, and degree of language acquisition.

Commentary —

The lawyer has an obligation to explain clearly, precisely, and in terms the client can understand the meaning and consequences of action. See DAVID A. BINDER & SUSAN C. PRICE, LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH (1977). A child client may not understand the legal terminology and for a variety of reasons may choose a particular course of action without fully appreciating the implications. With a child the potential for not understanding may be even greater. Therefore, the child's attorney has additional obligations based on the child's age, level of education, and degree of language acquisition. There is also the possibility that because of a particular child's developmental limitations, the lawyer may not completely understand the child's responses. Therefore, the child's attorney must learn how to ask developmentally appropriate questions and how to interpret the child's responses. See ANNE GRAFFAM WALKER, HANDBOOK ON QUESTIONING CHILDREN: A LINGUISTIC PERSPECTIVE (ABA Center on Children and the Law 1994). The child's attorney may work with social workers or other professionals to assess a child's developmental abilities and to facilitate communication.

B. GENERAL AUTHORITY AND DUTIES

B-1. Basic Obligations. The child's attorney should:

(1) Obtain copies of all pleadings and relevant notices;

(2) Participate in depositions, negotiations, discovery, pretrial conferences, and hearings;

(3) Inform other parties and their representatives that he or she is representing the child and expects reasonable notification prior to case conferences, changes of placement, and other changes of circumstances affecting the child and the child's family;

(4) Attempt to reduce case delays and ensure that the court recognizes the need to speedily promote permanency for the child;

(5) Counsel the child concerning the subject matter of the litigation, the child's rights, the court system, the proceedings, the lawyer's role, and what to expect in the legal process;

(6) Develop a theory and strategy of the case to implement at hearings, including factual and legal issues; and

(7) Identify appropriate family and professional resources for the child.

Commentary —

The child's attorney should not be merely a fact-finder, but rather, should zealously advocate a position on behalf of the child. (The same is true for the guardian ad litem, although the position to be advocated may be different). In furtherance of that advocacy, the child's attorney must be adequately prepared prior to hearings. The lawyer's presence at and active participation in all hearings is absolutely critical. See, RESOURCE GUIDELINES, at 23.

Although the child's position may overlap with the position of one or both parents, third-party caretakers, or a state agency, the child's attorney should be prepared to participate fully in any proceedings and not merely defer to the other parties. Any identity of position should be based on the merits of the position, and not a mere endorsement of another party's position.

While subsection (4) recognizes that delays are usually harmful, there may be some circumstances when delay may be beneficial. Section (7) contemplates that the child's attorney will identify counseling, educational and health services, substance abuse programs for the child and other family members, housing and other forms of material assistance for which the child may qualify under law. The lawyer can also identify family members, friends, neighbors, or teachers with whom the child feels it is important to maintain contact; mentoring programs, such as Big Brother/Big Sister; recreational opportunities that develop social skills and self-esteem; educational support programs; and volunteer opportunities which can enhance a child's self-esteem.

B-2. Conflict Situations.

(1) If a lawyer appointed as guardian ad litem determines that there is a conflict caused by performing both roles of guardian ad litem and child's attorney, the lawyer should continue to perform as the child's attorney and withdraw as guardian ad litem. The lawyer should request appointment of a guardian ad litem without revealing the basis for the request.

(2) If a lawyer is appointed as a "child's attorney" for siblings, there may also be a conflict

which could require that the lawyer decline representation or withdraw from representing all of the children.

Commentary —

The primary conflict that arises between the two roles is when the child's expressed preferences differ from what the lawyer deems to be in the child's best interests. As a practical matter, when the lawyer has established a trusting relationship with the child, most conflicts can be avoided. While the lawyer should be careful not to apply undue pressure to a child, the lawyer's advice and guidance can often persuade the child to change an imprudent position or to identify alternative choices if the child's first choice is denied by the court.

The lawyer-client role involves a confidential relationship with privileged communications, while a guardian ad litem-client role may not be confidential. Compare Alaska Bar Assoc. Ethics Op. #854 (1985) (lawyer-client privilege does not apply when the lawyer is appointed to be child's guardian ad litem) with Bentley v. Bentley, 448 N.Y.S.2d 559 (App. Div. 1982) (communication between minor children and guardian ad litem in divorce custody case is entitled to lawyer-client privilege). Because the child has a right to confidentiality and advocacy of his or her position, the child's attorney can never abandon this role. Once a lawyer has a lawyer-client relationship with a minor, he or she cannot and should not assume any other role for the child, especially as guardian ad litem. When the roles cannot be reconciled, another person must assume the guardian ad litem role. See Arizona State Bar Committee on Rules of Professional Conduct, Opinion No. 86-13 (1986).

B-3. Client Under Disability. The child's attorney should determine whether the child is "under a disability" pursuant to the Model Rules of Professional Conduct or the Model Code of Professional Responsibility with respect to each issue in which the child is called upon to direct the representation.

Commentary —

These Standards do not accept the idea that children of certain ages are "impaired," "disabled," "incompetent," or lack capacity to determine their position in litigation. Further, these Standards reject the concept that any disability must be globally determined. Rather, disability is contextual, incremental, and may be intermittent. The child's ability to contribute to a determination of his or her position is functional, depending upon the particular position and the circumstances prevailing at the time the position must be determined. Therefore, a child may be able to determine some positions in the case but not others. Similarly, a child may be able to direct the lawyer with respect to a particular issue at one time but not at another. This Standard relies on empirical knowledge about competencies with respect to both adults and children. See, e.g., ALLEN E. BUCHANAN & DAN W. BROCK, DECIDING FOR OTHERS: THE ETHICS OF SURROGATE DECISION MAKING 217 (1989).

NOTE ON Section B-4	**Two versions of Standard B-4 are presented below. The first version is the "ABA Version" which is the version drafted and adopted by the ABA. The second version is the "NACC Version" adopted by the NACC as a recommended replacement to the "ABA Version." The NACC had originally adopted the ABA Standards with reservation as to**

Standard B-4 because of "concerns about the availability to the court of information about the interests of the child." The NACC Board of Directors subsequently adopted the "NACC Version." The NACC version is not approved or adopted by the ABA.

B-4. ABA Version

Client Preferences. The child's attorney should elicit the child's preferences in a developmentally appropriate manner, advise the child, and provide guidance. The child's attorney should represent the child's expressed preferences and follow the child's direction throughout the course of litigation.

Commentary —

The lawyer has a duty to explain to the child in a developmentally appropriate way such information as will assist the child in having maximum input in determination of the particular position at issue. The lawyer should inform the child of the relevant facts and applicable laws and the ramifications of taking various positions, which may include the impact of such decisions on other family members or on future legal proceedings. The lawyer may express an opinion concerning the likelihood of the court or other parties accepting particular positions. The lawyer may inform the child of an expert's recommendations germane to the issue.

As in any other lawyer/client relationship, the lawyer may express his or her assessment of the case, the best position for the child to take, and the reasons underlying such recommendation. A child, however, may agree with the lawyer for inappropriate reasons. A lawyer must remain aware of the power dynamics inherent in adult/child relationships. Therefore, the lawyer needs to understand what the child knows and what factors are influencing the child's decision. The lawyer should attempt to determine from the child's opinion and reasoning what factors have been most influential or have been confusing or glided over by the child when deciding the best time to express his or her assessment of the case.

Consistent with the rules of confidentiality and with sensitivity to the child's privacy, the lawyer should consult with the child's therapist and other experts and obtain appropriate records. For example, a child's therapist may help the child to understand why an expressed position is dangerous, foolish, or not in the child's best interests. The therapist might also assist the lawyer in understanding the child's perspective, priorities, and individual needs. Similarly, significant persons in the child's life may educate the lawyer about the child's needs, priorities, and previous experiences.

The lawyer for the child has dual fiduciary duties to the child which must be balanced. On one hand, the lawyer has a duty to ensure that the child client is given the information necessary to make an informed decision, including advice and guidance. On the other hand, the lawyer has a duty not to overbear the will of the child. While the lawyer may attempt to persuade the child to accept a particular position, the lawyer may not advocate a position contrary to the child's expressed position except as provided by these Abuse and Neglect Standards or the Code of Professional Responsibility.

While the child is entitled to determine the overall objectives to be pursued, the child's attorney, as any adult's lawyer, may make certain decisions with respect to the manner of achieving those objectives, particularly with respect to procedural matters. These Abuse and Neglect Standards do not require the lawyer to consult with the child on matters which would not require consultation with an adult client. Further, the Standards

do not require the child's attorney to discuss with the child issues for which it is not feasible to obtain the child's direction because of the child's developmental limitations, as with an infant or preverbal child.

(1) To the extent that a child cannot express a preference, the child's attorney shall make a good faith effort to determine the child's wishes and advocate accordingly or request appointment of a guardian ad litem.

Commentary —

There are circumstances in which a child is unable to express a position, as in the case of a preverbal child, or may not be capable of understanding the legal or factual issues involved. Under such circumstances, the child's attorney should continue to represent the child's legal interests and request appointment of a guardian ad litem. This limitation distinguishes the scope of independent decision-making of the child's attorney and a person acting as guardian ad litem.

(2) To the extent that a child does not or will not express a preference about particular issues, the child's attorney should determine and advocate the child's legal interests.

Commentary —

The child's failure to express a position is distinguishable from a directive that the lawyer not take a position with respect to certain issues. The child may have no opinion with respect to a particular issue, or may delegate the decision-making authority. For example, the child may not want to assume the responsibility of expressing a position because of loyalty conflicts or the desire not to hurt one of the other parties. The lawyer should clarify with the child whether the child wants the lawyer to take a position or remain silent with respect to that issue or wants the preference expressed only if the parent or other party is out of the courtroom. The lawyer is then bound by the child's directive. The position taken by the lawyer should not contradict or undermine other issues about which the child has expressed a preference.

(3) If the child's attorney determines that the child's expressed preference would be seriously injurious to the child (as opposed to merely being contrary to the lawyer's opinion of what would be in the child's interests), the lawyer may request appointment of a separate guardian ad litem and continue to represent the child's expressed preference, unless the child's position is prohibited by law or without any factual foundation. The child's attorney shall not reveal the basis of the request for appointment of a guardian ad litem which would compromise the child's position.

Commentary —

One of the most difficult ethical issues for lawyers representing children occurs when the child is able to express a position and does so, but the lawyer believes that the position chosen is wholly inappropriate or could result in serious injury to the child. This is particularly likely to happen with respect to an abused child whose home is unsafe, but who desires to remain or return home. A child may desire to live in a dangerous situation because it is all he or she knows, because of a feeling of blame or of responsibility to take care of the parents, or because of threats. The child may choose to deal with a known situation rather than risk the unknown world of a foster home or other out-of-home placement.

In most cases the ethical conflict involved in asserting a position which would seriously endanger the child, especially by disclosure of privileged information, can be resolved through the lawyer's counseling function. If the lawyer has taken the time to establish rapport with the child and gain that child's trust, it is likely that the lawyer will be able to persuade the child to abandon a dangerous position or at least identify an alternate course.

If the child cannot be persuaded, the lawyer has a duty to safeguard the child's interests by requesting appointment of a guardian ad litem, who will be charged with advocating the child's best interests without being bound by the child's direction. As a practical matter, this may not adequately protect the child if the danger to the child was revealed only in a confidential disclosure to the lawyer, because the guardian ad litem may never learn of the disclosed danger.

Confidentiality is abrogated for various professionals by mandatory child abuse reporting laws. Some states abrogate lawyer-client privilege by mandating reports. States which do not abrogate the privilege may permit reports notwithstanding professional privileges. The policy considerations underlying abrogation apply to lawyers where there is a substantial danger of serious injury or death. Under such circumstances, the lawyer must take the minimum steps which would be necessary to ensure the child's safety, respecting and following the child's direction to the greatest extent possible consistent with the child's safety and ethical rules.

The lawyer may never counsel a client or assist a client in conduct the lawyer knows is criminal or fraudulent. See ER 1.2(d), Model Rules of Professional Conduct, DR 7-102(A)(7), Model Code of Professional Responsibility. Further, existing ethical rules requires the lawyer to disclose confidential information to the extent necessary to prevent the client from committing a criminal act likely to result in death or substantial bodily harm, see ER 1.6(b), Model Rules of Professional Conduct, and permits the lawyer to reveal the intention of the client to commit a crime. See ER 1.6(c), Model Rules of Professional Conduct, DR 4-101(C)(3), Model Code of Professional Responsibility. While child abuse, including sexual abuse, are crimes, the child is presumably the victim, rather than the perpetrator of those crimes. Therefore, disclosure of confidences is designed to protect the client, rather than to protect a third party from the client. Where the child is in grave danger of serious injury or death, the child's safety must be the paramount concern.

The lawyer is not bound to pursue the client's objectives through means not permitted by law and ethical rules. See DR-7-101(A)(1), Model Code of Professional Responsibility. Further, lawyers may be subject personally to sanctions for taking positions that are not well grounded in fact and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.

B-4. NACC Version.

Client Preferences. The child's attorney should elicit the child's preferences in a developmentally appropriate manner, advise the child, and provide guidance. The child's attorney should represent the child's expressed preferences and follow the child's direction throughout the course of litigation. except as specifically provided herein. Client directed representation does not include "robotic allegiance" to each directive of the client. Client directed representation involves the attorney's counseling function and requires good communication between attorney and client. The goal of the relationship is an outcome which serves the client, mutually arrived upon by attorney and client, following exploration of all available options.

Commentary —

The lawyer has a duty to explain to the child in a developmentally appropriate way such information as will assist the child in having maximum input in determination of the particular position at issue. The lawyer should inform the child of the relevant facts and applicable laws and the ramifications of taking various positions, which may include the impact of such decisions on other family members or on future legal proceedings. The lawyer may express an opinion concerning the likelihood of the court or other parties accepting particular positions. The lawyer may inform the child of an expert's recommendations germane to the issue.

As in any other lawyer/client relationship, the lawyer may express his or her assessment of the case, the best position for the child to take, and the reasons underlying such recommendation. A child, however, may agree with the lawyer for inappropriate reasons. A lawyer must remain aware of the power dynamics inherent in adult/child relationships. Therefore, the lawyer needs to understand what the child knows and what factors are influencing the child's decision. The lawyer should attempt to determine from the child's opinion and reasoning what factors have been most influential or have been confusing or glided over by the child when deciding the best time to express his or her assessment of the case.

Consistent with the rules of confidentiality and with sensitivity to the child's privacy, the lawyer should consult with the child's therapist and other experts and obtain appropriate records. For example, a child's therapist may help the child to understand why an expressed position is dangerous, foolish, or not in the child's best interests. The therapist might also assist the lawyer in understanding the child's perspective, priorities, and individual needs. Similarly, significant persons in the child's life may educate the lawyer about the child's needs, priorities, and previous experiences.

The lawyer for the child has dual fiduciary duties to the child which must be balanced. On one hand, the lawyer has a duty to ensure that the child client is given the information necessary to make an informed decision, including advice and guidance. On the other hand, the lawyer has a duty not to overbear the will of the child. While the lawyer may attempt to persuade the child to accept a particular position, the lawyer may not advocate a position contrary to the child's expressed position except as provided by these Abuse and Neglect Standards or the Code of Professional Responsibility.

While the child is entitled to determine the overall objectives to be pursued, the child's attorney, as any adult's lawyer, may make certain decisions with respect to the manner of achieving those objectives, particularly with respect to procedural matters. These Abuse and Neglect Standards do not require the lawyer to consult with the child on matters which would not require consultation with an adult client. Further, the Standards do not require the child's attorney to discuss with the child issues for which it is not feasible to obtain the child's direction because of the child's developmental limitations, as with an infant or preverbal child.

(1) **While the default position for attorneys representing children under these standards is a client directed model, there will be occasions when the client directed model cannot serve the client and exceptions must be made. In such cases, the attorney may rely upon a substituted judgment process (similar to the role played by an attorney guardian ad litem), or call for the appointment of a guardian ad litem, depending upon the particular circumstances, as provided herein.** ~~**To the extent that a child cannot express a preference, the child's attorney shall make a good faith effort to determine the child's wishes and advocate accordingly or request appointment of a guardian ad litem.**~~

~~*Commentary*~~

~~There are circumstances in which a child is unable to express a position, as in the case of a preverbal child, or may not be capable of understanding the legal or factual issues involved. Under such circumstances, the child's attorney should continue to represent the child's legal interests and request appointment of a guardian ad litem. This limitation distinguishes the scope of independent decision making of the child's attorney and a person acting as guardian ad litem.~~

(2) To the extent that a child ~~does not or will not express a preference about particular issues, the child's attorney should determine and advocate the child's legal interests.~~ cannot meaningfully participate in the formulation of the client's position (either because the child is preverbal, very young or for some other reason is incapable of judgment and meaningful communication), the attorney shall substitute his/her judgment for the child's and formulate and present a position which serves the child's interests. Such formulation must be accomplished through the use of objective criteria, rather than solely the life experience or instinct of the attorney. The criteria shall include but not be limited to:

e. Determine the child's circumstances through a full and efficient investigation;

f. Assess the child at the moment of the determination;

g. Examine each option in light of the two child welfare paradigms; psychological parent and family network; and

h. Utilize medical, mental health, educational, social work and other experts.

Commentary —

The following resources are recommended reading regarding assessing children's best interests:

1. *The Best Interests of the Child, The Least Detrimental Alternative*, the landmark trilogy of Beyond the Best Interests of the Child, Before the Best Interests of the Child, and In the Best Interests of the Child, by Goldstein, Solnit, Goldstein and Freud, Copyright © 1996 The Free Press, New York, NY.
2. *Representing Children in Child Protective Proceedings: Ethical and Practical Dimensions*, by Jean K. Peters, Copyright © 1997, LEXIS Law Publishing, Charlottesville, VA.
3. *Advocating for the Child in Protection Proceedings: A Handbook for Lawyers and Court Appointed Special Advocates*, by Donald Duquette, Copyright © Jossey-Bass, Inc., San Francisco, CA.
4. *The Child's Attorney*, by Ann M. Haralambie, Copyright © 1993 American Bar Association, ABA Section of Family Law, Chicago, IL (Call 303/864-5320).
5. *Handling Child Custody, Abuse and Adoption Cases*, by Ann M. Haralambie, Second Edition Copyright © 1993 Shepard's McGraw-Hill, Colorado Springs, CO, now published by Clark, Boardman, Callaghan, Deerfield, IL.
6. Department of Justice, National Institute of Justice, *Research Preview*, Jeremy Travis, February 1996.

~~The child's failure to express a position is distinguishable from a directive that the lawyer not take a position with respect to certain issues. The child may have no opinion~~

~~with respect to a particular issue, or may delegate the decision-making authority. For example, the child may not want to assume the responsibility of expressing a position because of loyalty conflicts or the desire not to hurt one of the other parties. The lawyer should clarify with the child whether the child wants the lawyer to take a position or remain silent with respect to that issue or wants the preference expressed only if the parent or other party is out of the courtroom. The lawyer is then bound by the child's directive. The position taken by the lawyer should not contradict or undermine other issues about which the child has expressed a preference.~~

(3) It is possible for the child client to develop from a child incapable of meaningful participation in the litigation as set forth in section B-4 (2), to a child capable of such participation during the course of the attorney client relationship. In such cases, the attorney shall move from the substituted judgment exception of B-4 (2) to the default position of client directed representation described in section B-4 "Client Preferences."

(4) If the child's attorney determines that the child's expressed preference would be seriously injurious to the child (as opposed to merely being contrary to the lawyer's opinion of what would be in the child's interests), the lawyer ~~may~~ shall, after unsuccessful use of the attorney's counseling role, request appointment of a separate guardian ad litem and continue to represent the child's expressed preference, unless the child's position is prohibited by law or without any factual foundation. The child's attorney shall not reveal the basis of the request for appointment of a guardian ad litem which would compromise the child's position.

Commentary —

One of the most difficult ethical issues for lawyers representing children occurs when the child is able to express a position and does so, but the lawyer believes that the position chosen is wholly inappropriate or could result in serious injury to the child. This is particularly likely to happen with respect to an abused child whose home is unsafe, but who desires to remain or return home. A child may desire to live in a dangerous situation because it is all he or she knows, because of a feeling of blame or of responsibility to take care of the parents, or because of threats. The child may choose to deal with a known situation rather than risk the unknown world of a foster home or other out-of-home placement.

In most cases the ethical conflict involved in asserting a position which would seriously endanger the child, especially by disclosure of privileged information, can be resolved through the lawyer's counseling function. If the lawyer has taken the time to establish rapport with the child and gain that child's trust, it is likely that the lawyer will be able to persuade the child to abandon a dangerous position or at least identify an alternate course.

If the child cannot be persuaded, the lawyer has a duty to safeguard the child's interests by requesting appointment of a guardian ad litem, who will be charged with advocating the child's best interests without being bound by the child's direction. As a practical matter, this may not adequately protect the child if the danger to the child was revealed only in a confidential disclosure to the lawyer, because the guardian ad litem may never learn of the disclosed danger.

Confidentiality is abrogated for various professionals by mandatory child abuse reporting laws. Some states abrogate lawyer-client privilege by mandating reports. States which do not abrogate the privilege may permit reports notwithstanding

professional privileges. The policy considerations underlying abrogation apply to lawyers where there is a substantial danger of serious injury or death. Under such circumstances, the lawyer must take the minimum steps which would be necessary to ensure the child's safety, respecting and following the child's direction to the greatest extent possible consistent with the child's safety and ethical rules.

The lawyer may never counsel a client or assist a client in conduct the lawyer knows is criminal or fraudulent. See ER 1.2(d), Model Rules of Professional Conduct, DR 7-102(A)(7), Model Code of Professional Responsibility. Further, existing ethical rules requires the lawyer to disclose confidential information to the extent necessary to prevent the client from committing a criminal act likely to result in death or substantial bodily harm, see ER 1.6(b), Model Rules of Professional Conduct, and permits the lawyer to reveal the intention of the client to commit a crime. See ER 1.6(c), Model Rules of Professional Conduct, DR 4-101(C)(3), Model Code of Professional Responsibility. While child abuse, including sexual abuse, are crimes, the child is presumably the victim, rather than the perpetrator of those crimes. Therefore, disclosure of confidences is designed to protect the client, rather than to protect a third party from the client. Where the child is in grave danger of serious injury or death, the child's safety must be the paramount concern.

The lawyer is not bound to pursue the client's objectives through means not permitted by law and ethical rules. See DR-7-101(A)(1), Model Code of Professional Responsibility. Further, lawyers may be subject personally to sanctions for taking positions that are not well grounded in fact and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.

NOTE ON Section B-5:	**Section B-5 below describes the determination of the child's "legal interests" as used in Section B-4 (2) (ABA Version) which reads: "to the extent that a child does not or will not express a preference about particular issues, the child's attorney should determine and advocate the child's legal interests." Under the NACC version of B-4, however, the ABA's Section B-4 (2) has been deleted. Because the NACC version of B-4 does not use the term "legal interests," B-5 is irrelevant and has been deleted.**

~~**B-5. Child's Interests. The determination of the child's legal interests should be based on objective criteria as set forth in the law that are related to the purposes of the proceedings. The criteria should address the child's specific needs and preferences, the goal of expeditious resolution of the case so the child can remain or return home or be placed in a safe, nurturing, and permanent environment, and the use of the least restrictive or detrimental alternatives available.**~~

~~*Commentary*~~

~~A lawyer who is required to determine the child's interests is functioning in a nontraditional role by determining the position to be advocated independently of the client. The lawyer should base the position, however, on objective criteria concerning the child's needs and interests, and not merely on the lawyer's personal values, philosophies, and experiences. The child's various needs and interests may be in conflict and must be weighed against each other. Even nonverbal children can communicate their needs and interests through their behaviors and developmental levels. See generally JAMES GARBARINO & FRANCES M. STOTT, WHAT CHILDREN CAN TELL US: ELICITING,~~

~~INTERPRETING, AND EVALUATING CRITICAL INFORMATION FROM CHILDREN (1992). The lawyer may seek the advice and consultation of experts and other knowledgeable people in both determining and weighing such needs and interests.~~

~~A child's legal interests may include basic physical and emotional needs, such as safety, shelter, food, and clothing. Such needs should be assessed in light of the child's vulnerability, dependence upon others, available external resources, and the degree of risk. A child needs family affiliation and stability of placement. The child's developmental level, including his or her sense of time, is relevant to an assessment of need. For example, a very young child may be less able to tolerate separation from a primary caretaker than an older child, and if separation is necessary, more frequent visitation than is ordinarily provided may be necessary.~~

~~In general, a child prefers to live with known people, to continue normal activities, and to avoid moving. To that end, the child's attorney should determine whether relatives, friends, neighbors, or other people known to the child are appropriate and available as placement resources. The lawyer must determine the child's feelings about the proposed caretaker, however, because familiarity does not automatically confer positive regard. Further, the lawyer may need to balance competing stability interests, such as living with a relative in another town versus living in a foster home in the same neighborhood. The individual child's needs will influence this balancing task.~~

~~In general, a child needs decisions about the custodial environment to be made quickly. Therefore, if the child must be removed from the home, it is generally in the child's best interests to have rehabilitative or reunification services offered to the family quickly. On the other hand, if it appears that reunification will be unlikely, it is generally in the child's best interests to move quickly toward an alternative permanent plan. Delay and indecision are rarely in a child's best interests.~~

~~In addition to the general needs and interests of children, individual children have particular needs, and the lawyer must determine the child client's individual needs. There are few rules which apply across the board to all children under all circumstances.~~

C. ACTIONS TO BE TAKEN

C-1. Meet With Child. Establishing and maintaining a relationship with a child is the foundation of representation. Therefore, irrespective of the child's age, the child's attorney should visit with the child prior to court hearings and when apprised of emergencies or significant events impacting on the child.

Commentary —

Meeting with the child is important before court hearings and case reviews. In addition, changes in placement, school suspensions, in-patient hospitalizations, and other similar changes warrant meeting again with the child. Such in-person meetings allow the lawyer to explain to the child what is happening, what alternatives might be available, and what will happen next. This also allows the lawyer to assess the child's circumstances, often leading to a greater understanding of the case, which may lead to more creative solutions in the child's interest. A lawyer can learn a great deal from meeting with child clients, including a preverbal child. See, e.g., JAMES GARBARINO, ET AL, WHAT CHILDREN CAN TELL US: ELICITING, INTERPRETING, AND EVALUATING CRITICAL INFORMATION FROM CHILDREN (1992).

C-2. Investigate. To support the client's position, the child's attorney should conduct thorough, continuing, and independent investigations and discovery which may include, but should not be limited to:

(1) Reviewing the child's social services, psychiatric, psychological, drug and alcohol, medical, law enforcement, school, and other records relevant to the case;

Commentary —

Thorough, independent investigation of cases, at every stage of the proceedings, is a key aspect of providing competent representation to children. See, RESOURCE GUIDELINES, AT 23. The lawyer may need to use subpoenas or other discovery or motion procedures to obtain the relevant records, especially those records which pertain to the other parties. In some jurisdictions the statute or the order appointing the lawyer for the child includes provision for obtaining certain records.

(2) Reviewing the court files of the child and siblings, case-related records of the social service agency and other service providers;

Commentary —

Another key aspect of representing children is the review of all documents submitted to the court as well as relevant agency case files and law enforcement reports. See, RESOURCE GUIDELINES, at 23. Other relevant files that should be reviewed include those concerning child protective services, developmental disabilities, juvenile delinquency, mental health, and educational agencies. These records can provide a more complete context for the current problems of the child and family. Information in the files may suggest additional professionals and lay witnesses who should be contacted and may reveal alternate potential placements and services.

(3) Contacting lawyers for other parties and nonlawyer guardians ad litem or court-appointed special advocates (CASA) for background information;

Commentary —

The other parties' lawyers may have information not included in any of the available records. Further, they can provide information on their respective clients' perspectives. The CASA is typically charged with performing an independent factual investigation, getting to know the child, and speaking up to the court on the child's "best interests." Volunteer CASAs may have more time to perform their functions than the child's attorney and can often provide a great deal of information to assist the child's attorney. Where there appears to be role conflict or confusion over the involvement of both a child's attorney and CASA in the same case, there should be joint efforts to clarify and define mutual responsibilities. See, RESOURCE GUIDELINES, at 24.

(4) Contacting and meeting with the parents/legal guardians/caretakers of the child, with permission of their lawyer;

Commentary —

Such contact generally should include visiting the home, which will give the lawyer additional information about the child's custodial circumstances.

(5) Obtaining necessary authorizations for the release of information;

Commentary —

If the relevant statute or order appointing the lawyer for the child does not provide explicit authorization for the lawyer's obtaining necessary records, the lawyer should

attempt to obtain authorizations for release of information from the agency and from the parents, with their lawyer's consent. Even if it is not required, an older child should be asked to sign authorizations for release of his or her own records, because such a request demonstrates the lawyer's respect for the client's authority over information.

(6) Interviewing individuals involved with the child, including school personnel, child welfare case workers, foster parents and other caretakers, neighbors, relatives, school personnel, coaches, clergy, mental health professionals, physicians, law enforcement officers, and other potential witnesses;

Commentary —

In some jurisdictions the child's attorney is permitted free access to agency caseworkers. In others, contact with the caseworker must be arranged through the agency's lawyer.

(7) Reviewing relevant photographs, video or audio tapes and other evidence; and

Commentary —

It is essential that the lawyer review the evidence personally, rather than relying on other parties' or counsel's descriptions and characterizations of the evidence.

(8) Attending treatment, placement, administrative hearings, other proceedings involving legal issues, and school case conferences or staffings concerning the child as needed.

Commentary —

While some courts will not authorize compensation for the child's attorney to attend such collateral meetings, such attendance is often very important. The child's attorney can present the child's perspective at such meetings, as well as gather information necessary to proper representation. In some cases the child's attorney can be pivotal in achieving a negotiated settlement of all or some issues. The child's attorney may not need to attend collateral meetings if another person involved in the case, such as a social worker who works the lawyer, can get the information or present the child's perspective.

C-3. File Pleadings. The child's attorney should file petitions, motions, responses or objections as necessary to represent the child. Relief requested may include, but is not limited to:

(1) A mental or physical examination of a party or the child;

(2) A parenting, custody or visitation evaluation;

(3) An increase, decrease, or termination of contact or visitation;

(4) Restraining or enjoining a change of placement;

(5) Contempt for non-compliance with a court order;

(6) Termination of the parent-child relationship;

(7) Child support;

(8) A protective order concerning the child's privileged communications or tangible or intangible property;

(9) Request services for child or family; and

(10) Dismissal of petitions or motions.

Commentary —

Filing and arguing necessary motions is an essential part of the role of a child's attorney. See, RESOURCE GUIDELINES, at 23. Unless the lawyer is serving in a role which explicitly precludes the filing of pleadings, the lawyer should file any appropriate pleadings on behalf of the child, including responses to the pleadings of the other parties. The filing of such pleadings can ensure that appropriate issues are properly before the court and can expedite the court's consideration of issues important to the child's interests. In some jurisdictions, guardians ad litem are not permitted to file pleadings, in which case it should be clear to the lawyer that he or she is not the "child's attorney" as defined in these Standards.

C-4. Request Services. Consistent with the child's wishes, the child's attorney should seek appropriate services (by court order if necessary) to access entitlements, to protect the child's interests and to implement a service plan. These services may include, but not be limited to:

(1) Family preservation-related prevention or reunification services;

(2) Sibling and family visitation;

(3) Child support;

(4) Domestic violence prevention, intervention, and treatment;

(5) Medical and mental health care;

(6) Drug and alcohol treatment;

(7) Parenting education;

(8) Semi-independent and independent living services;

(9) Long-term foster care;

(10) Termination of parental rights action;

(11) Adoption services;

(12) Education;

(13) Recreational or social services; and

(14) Housing.

Commentary —

The lawyer should request appropriate services even if there is no hearing scheduled. Such requests may be made to the agency or treatment providers, or if such informal methods are unsuccessful, the lawyer should file a motion to bring the matter before the court. In some cases the child's attorney should file collateral actions, such as petitions for termination of parental rights, if such an action would advance the child's interest and is legally permitted and justified. Different resources are available in different localities.

C-5. Child With Special Needs. Consistent with the child's wishes, the child's attorney should assure that a child with special needs receives appropriate services to address the physical, mental, or developmental disabilities. These services may include, but should not be limited to:

(1) Special education and related services;

(2) Supplemental security income (SSI) to help support needed services;

(3) Therapeutic foster or group home care; and

(4) Residential/in-patient and out-patient psychiatric treatment.

Commentary —

There are many services available from extra-judicial, as well as judicial, sources for children with special needs. The child's attorney should be familiar with these other services and how to assure their availability for the client. See generally, THOMAS A. JACOBS, CHILDREN & THE LAW: RIGHTS & OBLIGATIONS (1995); LEGAL RIGHTS OF CHILDREN (2d ed. Donald T. Kramer, ed., 1994).

C-6. Negotiate Settlements. The child's attorney should participate in settlement negotiations to seek expeditious resolution of the case, keeping in mind the effect of continuances and delays on the child. The child's attorney should use suitable mediation resources.

Commentary —

Particularly in contentious cases, the child's attorney may effectively assist negotiations of the parties and their lawyers by focusing on the needs of the child. If a parent is legally represented, it is unethical for the child's attorney to negotiate with a parent directly without the consent of the parent's lawyer. Because the court is likely to resolve at least some parts of the dispute in question based on the best interests of the child, the child's attorney is in a pivotal position in negotiation.

Settlement frequently obtains at least short term relief for all parties involved and is often the best resolution of a case. The child's attorney, however, should not become merely a facilitator to the parties' reaching a negotiated settlement. As developmentally appropriate, the child's attorney should consult the child prior to any settlement becoming binding.

D. HEARINGS

D-1. Court Appearances. The child's attorney should attend all hearings and participate in all telephone or other conferences with the court unless a particular hearing involves issues completely unrelated to the child.

D-2. Client Explanation. The child's attorney should explain to the client, in a developmentally appropriate manner, what is expected to happen before, during and after each hearing.

D-3. Motions and Objections. The child's attorney should make appropriate motions, including motions *in limine* and evidentiary objections, to advance the child's position at trial or during other hearings. If necessary, the child's attorney should file briefs in support of evidentiary issues. Further, during all hearings, the child's attorney should preserve legal issues for appeal, as appropriate.

D-4. Presentation of Evidence. The child's attorney should present and cross examine witnesses, offer exhibits, and provide independent evidence as necessary.

Commentary —

The child's position may overlap with the positions of one or both parents, third-party caretakers, or a child protection agency. Nevertheless, the child's attorney should be prepared to participate fully in every hearing and not merely defer to the other parties. Any identity of position should be based on the merits of the position (consistent with Standard B-6), and not a mere endorsement of another party's position.

D-5. Child at Hearing. In most circumstances, the child should be present at significant court hearings, regardless of whether the child will testify.

Commentary —

A child has the right to meaningful participation in the case, which generally includes the child's presence at significant court hearings. Further, the child's presence underscores for the judge that the child is a real party in interest in the case. It may be necessary to obtain a court order or writ of habeas corpus ad testificandum to secure the child's attendance at the hearing.

A decision to exclude the child from the hearing should be made based on a particularized determination that the child does not want to attend, is too young to sit through the hearing, would be severely traumatized by such attendance, or for other good reason would be better served by nonattendance. There may be other extraordinary reasons for the child's non-attendance. The lawyer should consult the child, therapist, caretaker, or any other knowledgeable person in determining the effect on the child of being present at the hearing. In some jurisdictions the court requires an affirmative waiver of the child's presence if the child will not attend. Even a child who is too young to sit through the hearing may benefit from seeing the courtroom and meeting, or at least seeing, the judge who will be making the decisions. The lawyer should provide the court with any required notice that the child will be present. Concerns about the child being exposed to certain parts of the evidence may be addressed by the child's temporary exclusion from the court room during the taking of that evidence, rather than by excluding the child from the entire hearing.

The lawyer should ensure that the state/ custodian meets its obligation to transport the child to and from the hearing. Similarly, the lawyer should ensure the presence of someone to accompany the child any time the child is temporarily absent from the hearing.

D-6. Whether Child Should Testify. The child's attorney should decide whether to call the child as a witness. The decision should include consideration of the child's need or desire to testify, any repercussions of testifying, the necessity of the child's direct testimony, the

availability of other evidence or hearsay exceptions which may substitute for direct testimony by the child, and the child's developmental ability to provide direct testimony and withstand possible cross-examination. Ultimately, the child's attorney is bound by the child's direction concerning testifying.

Commentary —

There are no blanket rules regarding a child's testimony. While testifying is undoubtedly traumatic for many children, it is therapeutic and empowering for others. Therefore, the decision about the child's testifying should be made individually, based on the circumstances of the individual child and the individual case. The child's therapist, if any, should be consulted both with respect to the decision itself and assistance with preparation. In the absence of compelling reasons, a child who has a strong desire to testify should be called to do so. See ANN M. HARALAMBIE, THE CHILD'S LAWYER: A GUIDE TO REPRESENTING CHILDREN IN CUSTODY, ADOPTION, AND PROTECTION CASES ch. 4 (1993). If the child should not wish to testify or would be harmed by being forced to testify, the lawyer should seek a stipulation of the parties not to call the child as a witness or seek a protective order from the court. If the child is compelled to testify, the lawyer should seek to minimize the adverse consequences by seeking any appropriate accommodations permitted by local law, such as having the testimony taken informally, in chambers, without presence of the parents. See JOHN E.B. MYERS, 2 EVIDENCE IN CHILD ABUSE AND NEGLECT CASES ch. 8 (1992). The child should know whether the in-chambers testimony will be shared with others, such as parents who might be excluded from chambers, before agreeing to this forum. The lawyer should also prepare the child for the possibility that the judge may render a decision against the child's wishes which will not be the child's fault.

D-7. Child Witness. The child's attorney should prepare the child to testify. This should include familiarizing the child with the courtroom, court procedures, and what to expect during direct and cross-examination and ensuring that testifying will cause minimum harm to the child.

Commentary —

The lawyer's preparation of the child to testify should include attention to the child's developmental needs and abilities as well as to accommodations which should be made by the court and other lawyers. The lawyer should seek any necessary assistance from the court, including location of the testimony (in chambers, at a small table etc.), determination of who will be present, and restrictions on the manner and phrasing of questions posed to the child.

The accuracy of children's testimony is enhanced when they feel comfortable. See, generally, Karen Saywitz, Children in Court: Principles of Child Development for Judicial Application, in A JUDICIAL PRIMER ON CHILD SEXUAL ABUSE 15 (Josephine Bulkley & Claire Sandt, eds., 1994). Courts have permitted support persons to be present in the courtroom, sometimes even with the child sitting on the person's lap to testify. Because child abuse and neglect cases are often closed to the public, special permission may be necessary to enable such persons to be present during hearings. Further, where the rule sequestering witnesses has been invoked, the order of witnesses may need to be changed or an exemption granted where the support person also will be a witness. The child should be asked whether he or she would like someone to be present, and if so, whom the child prefers. Typical support persons include parents, relatives, therapists, Court Appointed Special Advocates (CASA), social workers, victim-witness advocates,

and members of the clergy. For some, presence of the child's attorney provides sufficient support.

D-8. Questioning the Child. The child's attorney should seek to ensure that questions to the child are phrased in a syntactically and linguistically appropriate manner.

Commentary —

The phrasing of questions should take into consideration the law and research regarding children's testimony, memory, and suggestibility. See generally, Karen Saywitz, supra D -7; CHILD VICTIMS, CHILD WITNESSES: UNDERSTANDING AND IMPROVING TESTIMONY (Gail S. Goodman & Bette L. Bottoms, eds. 1993); ANN HARALAMBIE, 2 HANDLING CHILD CUSTODY, ABUSE, AND ADOPTION CASES §§ 24.09_24.22 (2nd ed. 1993); MYERS, supra D-6, at Vol. 1, ch 2; Ellen Matthews & Karen Saywitz, Child Victim Witness Manual, 12/1 C.J.E.R.J. 40 (1992).

The information a child gives in interviews and during testimony is often misleading because the adults have not understood how to ask children developmentally appropriate questions and how to interpret their answers properly. See WALKER, SUPRA, A-3 Commentary. The child's attorney must become skilled at recognizing the child's developmental limitations. It may be appropriate to present expert testimony on the issue and even to have an expert present during a young child's testimony to point out any developmentally inappropriate phrasing.

D-9. Challenges to Child's Testimony/Statements. The child's competency to testify, or the reliability of the child's testimony or out-of-court statements, may be called into question. The child's attorney should be familiar with the current law and empirical knowledge about children's competency, memory, and suggestibility and, where appropriate, attempt to establish the competency and reliability of the child.

Commentary —

Many jurisdictions have abolished presumptive ages of competency. See HARALAMBIE, SUPRA D-8 AT §24.17. The jurisdictions which have rejected presumptive ages for testimonial competency have applied more flexible, case-by-case analyses. See Louis I. Parley, Representing Children in Custody Litigation, 11 J. AM. ACAD. MATRIM. LAW. 45, 48 (Winter 1993). Competency to testify involves the abilities to perceive and relate.

If necessary, the child's attorney should present expert testimony to establish competency or reliability or to rehabilitate any impeachment of the child on those bases. See generally, Karen Saywitz, supra D-8 at 15; CHILD VICTIMS, SUPRA D-8; Haralambie, supra D-8; J. MYERS, SUPRA D-8 ; Matthews & Saywitz, supra D-8.

D-10. Jury Selection. In those states in which a jury trial is possible, the child's attorney should participate in jury selection and drafting jury instructions.

D-11. Conclusion of Hearing. If appropriate, the child's attorney should make a closing argument, and provide proposed findings of fact and conclusions of law. The child's attorney should ensure that a written order is entered.

Commentary —

One of the values of having a trained child's attorney is such a lawyer can often present creative alternative solutions to the court. Further, the child's attorney is able to argue the child's interests from the child's perspective, keeping the case focused on the

child's needs and the effect of various dispositions on the child.

D-12. Expanded Scope of Representation. The child's attorney may request authority from the court to pursue issues on behalf of the child, administratively or judicially, even if those issues do not specifically arise from the court appointment. For example:

(1) Child support;

(2) Delinquency or status offender matters;

(3) SSI and other public benefits;

(4) Custody;

(5) Guardianship;

(6) Paternity;

(7) Personal injury;

(8) School/education issues, especially for a child with disabilities;

(9) Mental health proceedings;

(10) Termination of parental rights; and

(11) Adoption.

Commentary —

The child's interests may be served through proceedings not connected with the case in which the child's attorney is participating. In such cases the lawyer may be able to secure assistance for the child by filing or participating in other actions. See, e.g., In re Appeal in Pima County Juvenile Action No. S-113432, 872 P.2d 1240 (Ariz. Ct. App. 1994). With an older child or a child with involved parents, the child's attorney may not need court authority to pursue other services. For instance, federal law allows the parent to control special education. A Unified Child and Family Court Model would allow for consistency of representation between related court proceedings, such as mental health or juvenile justice.

D-13. Obligations after Disposition. The child's attorney should seek to ensure continued representation of the child at all further hearings, including at administrative or judicial actions that result in changes to the child's placement or services, so long as the court maintains its jurisdiction.

Commentary —

Representing a child should reflect the passage of time and the changing needs of the child. The bulk of the child's attorney's work often comes after the initial hearing, including ongoing permanency planning issues, six month reviews, case plan reviews, issues of termination, and so forth. The average length of stay in foster care is over five years in some jurisdictions. Often a child's case workers, therapists, other service providers or even placements change while the case is still pending. Different judges

may hear various phases of the case. The child's attorney may be the only source of continuity for the child. Such continuity not only provides the child with a stable point of contact, but also may represent the institutional memory of case facts and procedural history for the agency and court. The child's attorney should stay in touch with the child, third party caretakers, case workers, and service providers throughout the term of appointment to ensure that the child's needs are met and that the case moves quickly to an appropriate resolution.

Generally it is preferable for the lawyer to remain involved so long as the case is pending to enable the child's interest to be addressed from the child's perspective at all stages. Like the JUVENILE JUSTICE STANDARDS, these ABUSE AND NEGLECT STANDARDS require ongoing appointment and active representation as long as the court retains jurisdiction over the child. To the extent that these are separate proceedings in some jurisdictions, the child's attorney should seek reappointment. Where reappointment is not feasible, the child's attorney should provide records and information about the case and cooperate with the successor to ensure continuity of representation.

E. POST-HEARING

E-1. Review of Court's Order. The child's attorney should review all written orders to ensure that they conform with the court's verbal orders and statutorily required findings and notices.

E-2. Communicate Order to Child. The child's attorney should discuss the order and its consequences with the child.

Commentary —

The child is entitled to understand what the court has done and what that means to the child, at least with respect to those portions of the order that directly affect the child. Children may assume that orders are final and not subject to change. Therefore, the lawyer should explain whether the order may be modified at another hearing, or whether the actions of the parties may affect how the order is carried out. For example, an order may permit the agency to return the child to the parent if certain goals are accomplished.

E-3. Implementation. The child's attorney should monitor the implementation of the court's orders and communicate to the responsible agency and, if necessary, the court, any non-compliance.

Commentary —

The lawyer should ensure that services are provided and that the court's orders are implemented in a complete and timely fashion. In order to address problems with implementation, the lawyer should stay in touch with the child, case worker, third party caretakers, and service providers between review hearings. The lawyer should consider filing any necessary motions, including those for civil or criminal contempt, to compel implementation. See, RESOURCE GUIDELINES, at 23.

F. APPEAL

F-1. Decision to Appeal. The child's attorney should consider and discuss with the child, as developmentally appropriate, the possibility of an appeal. If after such consultation, the child wishes to appeal the order, and the appeal has merit, the lawyer should take all steps necessary to perfect the appeal and seek appropriate temporary orders or extraordinary

writs necessary to protect the interests of the child during the pendency of the appeal.

Commentary —

The lawyer should explain to the child not only the legal possibility of an appeal, but also the ramifications of filing an appeal, including the potential for delaying implementation of services or placement options. The lawyer should also explain whether the trial court's orders will be stayed pending appeal and what the agency and trial court may do pending a final decision.

F-2. Withdrawal. If the child's attorney determines that an appeal would be frivolous or that he or she lacks the necessary experience or expertise to handle the appeal, the lawyer should notify the court and seek to be discharged or replaced.

F-3. Participation in Appeal. The child's attorney should participate in an appeal filed by another party unless discharged.

Commentary —

The child's attorney should take a position in any appeal filed by the parent, agency, or other party. In some jurisdictions, the lawyer's appointment does not include representation on appeal. If the child's interests are affected by the issues raised in the appeal, the lawyer should seek an appointment on appeal or seek appointment of appellate counsel to represent the child's position in the appeal.

F-4. Conclusion of Appeal. When the decision is received, the child's attorney should explain the outcome of the case to the child.

Commentary —

As with other court decisions, the lawyer should explain in terms the child can understand the nature and consequences of the appellate decision. In addition, the lawyer should explain whether there are further appellate remedies and what more, if anything, will be done in the trial court following the decision.

F-5. Cessation of Representation. The child's attorney should discuss the end of the legal representation and determine what contacts, if any, the child's attorney and the child will continue to have.

Commentary —

When the representation ends, the child's lawyer should explain in a developmentally appropriate manner why the representation is ending and how the child can obtain assistance in the future should it become necessary. It is important for there to be closure between the child and the lawyer.

PART II—ENHANCING THE JUDICIAL ROLE IN CHILD REPRESENTATION

PREFACE

Enhancing the legal representation provided by court-appointed lawyers for children has long been a special concern of the American Bar Association [*see, e.g.,* JUVENILE JUSTICE

STANDARDS RELATING TO *COUNSEL FOR PRIVATE PARTIES* (1979); ABA Policy Resolutions on Representation of Children (Appendix). Yet, no matter how carefully a bar association, legislature, or court defines the duties of lawyers representing children, practice will only improve if judicial administrators and trial judges play a stronger role in the selection, training, oversight, and prompt payment of court-appointed lawyers in child abuse/neglect and child custody/visitation cases.

The importance of the court's role in helping assure competent representation of children is noted in the JUVENILE JUSTICE STANDARDS RELATING TO COURT ORGANIZATION AND ADMINISTRATION (1980) which state in the Commentary to 3.4D that effective representation of parties is "essential" and that the presiding judge of a court "might need to use his or her position to achieve" it. In its RESOURCE GUIDELINES: IMPROVING COURT PRACTICE IN CHILD ABUSE & NEGLECT CASES (1995), the National Council of Juvenile and Family Court Judges stated, "Juvenile and family courts should take active steps to ensure that the parties in child abuse and neglect cases have access to competent representation. . . ." In jurisdictions which engage nonlawyers to represent a child's interests, the court should ensure they have access to legal representation.

These Abuse and Neglect Standards, like the RESOURCE GUIDELINES, recognize that the courts have a great ability to influence positively the quality of counsel through setting judicial prerequisites for lawyer appointments including requirements for experience and training, imposing sanctions for violation of standards (such as terminating a lawyer's appointment to represent a specific child, denying further appointments, or even fines or referrals to the state bar committee for professional responsibility). The following Standards are intended to assist the judiciary in using its authority to accomplish the goal of quality representation for all children before the court in abuse/neglect related proceedings.

G. THE COURT'S ROLE IN STRUCTURING CHILD REPRESENTATION

G-1. Assuring Independence of the Child's Attorney. The child's attorney should be independent from the court, court services, the parties, and the state.

Commentary —

To help assure that the child's attorney is not compromised in his or her independent action, these Standards propose that the child's lawyer be independent from other participants in the litigation. "Independence" does not mean that a lawyer may not receive payment from a court, a government entity (e.g., program funding from social services or justice agencies), or even from a parent, relative, or other adult so long as the lawyer retains the full authority for independent action. For ethical conflict reasons, however, lawyers should never accept compensation as retained counsel for the child from a parent accused of abusing or neglecting the child. The child's attorney should not prejudge the case. The concept of independence includes being free from prejudice and other limitations to uncompromised representation.

JUVENILE JUSTICE STANDARD § 2.1(d) states that plans for providing counsel for children "must be designed to guarantee the professional independence of counsel and the integrity of the lawyer-client relationship." The Commentary strongly asserts there is "no justification for . . . judicial preference" to compromise a lawyer's relationship with the child client and notes the "willingness of some judges to direct lawyers' performance and thereby compromise their independence."

G-2. Establishing Uniform Representation Rules. The administrative office for the state trial, family, or juvenile court system should cause to be published and disseminated to all

relevant courts a set of uniform, written rules and procedures for court-appointed lawyers for minor children.

Commentary —

Although uniform rules of court to govern the processing of various types of child-related judicial proceedings have become common, it is still rare for those rules to address comprehensively the manner and scope of representation for children. Many lawyers representing children are unclear as to the court's expectations. Courts in different communities, or even judges within the same court, may have differing views regarding the manner of child representation. These Standards promote statewide uniformity by calling for written publication and distribution of state rules and procedures for the child's attorney.

G-3. Enhancing Lawyer Relationships with Other Court Connected Personnel. Courts that operate or utilize Court Appointed Special Advocate (CASA) and other nonlawyer guardians ad litem, and courts that administer nonjudicial foster care review bodies, should assure that these programs and the individuals performing those roles are trained to understand the role of the child's attorney. There needs to be effective coordination of their efforts with the activities of the child's attorney, and they need to involve the child's attorney in their work. The court should require that reports from agencies be prepared and presented to the parties in a timely fashion.

Commentary —

Many courts now regularly involve nonlawyer advocates for children in various capacities. Some courts also operate programs that, outside of the courtroom, review the status of children in foster care or other out-of-home placements. It is critical that these activities are appropriately linked to the work of the child's attorney, and that the court through training, policies, and protocols helps assure that those performing the nonlegal tasks (1) understand the importance and elements of the role of the child's attorney, and (2) work cooperatively with such lawyers. The court should keep abreast of all the different representatives involved with the child, the attorney, social worker for government or private agency, CASA volunteer, guardian ad litem, school intermediator, counselors, etc.

H. THE COURT'S ROLE IN APPOINTING THE CHILD'S ATTORNEY

H-1. Timing of Appointments. The child's attorney should be appointed immediately after the earliest of:

(1) The involuntary removal of the child for placement due to allegations of neglect, abuse or abandonment;

(2) The filing of a petition alleging child abuse and neglect, for review of foster care placement, or for termination of parental rights; or

(3) Allegations of child maltreatment, based upon sufficient cause, are made by a party in the context of proceedings that were not originally initiated by a petition alleging child maltreatment.

Commentary —

These ABUSE AND NEGLECT STANDARDS take the position that courts must assure the appointment of a lawyer for a child as soon as practical (ideally, on the day the court first has jurisdiction over the case, and hopefully, no later than the next business day). The three situations are described separately because:

(1) A court may authorize, or otherwise learn of, a child's removal from home prior to the time a formal petition is instituted. Lawyer representation of (and, ideally, contact with) the child prior to the initial court hearing following removal (which in some cases may be several days) is important to protect the child's interests;

(2) Once a petition has been filed by a government agency (or, where authorized, by a hospital or other agency with child protection responsibilities), for any reason related to a child's need for protection, the child should have prompt access to a lawyer; and

(3) There are cases (such as custody, visitation, and guardianship disputes and family-related abductions of children) where allegations, with sufficient cause, of serious physical abuse, sexual molestation, or severe neglect of a child are presented to the court not by a government agency (i.e., child protective services) but by a parent, guardian, or other relative. The need of a child for competent, independent representation by a lawyer is just as great in situation (3) as with cases in areas (1) and (2).

H-2. Entry of Compensation Orders. At the time the court appoints a child's attorney, it should enter a written order addressing compensation and expense costs for that lawyer, unless these are otherwise formally provided for by agreement or contract with the court, or through another government agency.

Commentary —

Compensation and expense reimbursement of individual lawyers should be addressed in a specific written court order is based on a need for all lawyers representing maltreated children to have a uniform understanding of how they will be paid. Commentary to Section 2.1(b) of the JUVENILE JUSTICE STANDARDS observes that it is common for court-appointed lawyers to be confused about the availability of reimbursement of expenses for case-related work.

H-3. Immediate Provision of Access. Unless otherwise provided for, the court should upon appointment of a child's attorney, enter an order authorizing that lawyer access between the child and the lawyer and to all privileged information regarding the child, without the necessity of a further release. The authorization should include, but not be limited to: social services, psychiatric, psychological treatment, drug and alcohol treatment, medical, evaluation, law enforcement, and school records.

Commentary —

Because many service providers do not understand or recognize the nature of the role of the lawyer for the child or that person's importance in the court proceeding, these Standards call for the routine use of a written court order that clarifies the lawyers right to contact with their child client and perusal of child-related records. Parents, other caretakers, or government social service agencies should not unreasonably interfere with a lawyer's ability to have face-to-face contact with the child client nor to obtain relevant information about the child's social services, education, mental health, etc. Such interference disrupts the lawyer's ability to control the representation and undermines his

or her independence as the child's legal representative.

H-4. Lawyer Eligibility for and Method of Appointment. Where the court makes individual appointment of counsel, unless impractical, before making the appointment, the court should determine that the lawyer has been trained in representation of children and skilled in litigation (or is working under the supervision of an lawyer who is skilled in litigation). Whenever possible, the trial judge should ensure that the child's attorney has had sufficient training in child advocacy and is familiar with these Standards. The trial judge should also ensure that (unless there is specific reason to appoint a specific lawyer because of their special qualifications related to the case, or where a lawyer's current caseload would prevent them from adequately handling the case) individual lawyers are appointed from the ranks of eligible members of the bar under a fair, systematic, and sequential appointment plan.

Commentary —

The JUVENILE JUSTICE STANDARDS § 2.2(c) provides that where counsel is assigned by the court, this lawyer should be drawn from "an adequate pool of competent attorneys." In general, such competency can only be gained through relevant continuing legal education and practice-related experience. Those Standards also promote the use of a rational court appointment process drawing from the ranks of qualified lawyers. The Abuse and Neglect Standards reject the concept of ad hoc appointments of counsel that are made without regard to prior training or practice.

H-5. Permitting Child to Retain a Lawyer. The court should permit the child to be represented by a retained private lawyer if it determines that this lawyer is the child's independent choice, and such counsel should be substituted for the appointed lawyer. A person with a legitimate interest in the child's welfare may retain private counsel for the child and/or pay for such representation, and that person should be permitted to serve as the child's attorney, subject to approval of the court. Such approval should not be given if the child opposes the lawyer's representation or if the court determines that there will be a conflict of interest. The court should make it clear that the person paying for the retained lawyer does not have the right to direct the representation of the child or to receive privileged information about the case from the lawyer.

Commentary —

Although such representation is rare, there are situations where a child, or someone acting on a child's behalf, seeks out legal representation and wishes that this lawyer, rather than one appointed by the court under the normal appointment process, be recognized as the sole legal representative of the child. Sometimes, judges have refused to accept the formal appearances filed by such retained lawyers. These Standards propose to permit, under carefully scrutinized conditions, the substitution of a court-appointed lawyer with the retained counsel for a child.

I. THE COURT'S ROLE IN LAWYER TRAINING

I-1. Judicial Involvement in Lawyer Training. Trial judges who are regularly involved in child-related matters should participate in training for the child's attorney conducted by the courts, the bar, or any other group.

Commentary —

JUVENILE JUSTICE STANDARDS § 2.1 indicates that it is the responsibility of the courts (among others) to ensure that competent counsel are available to represent children before the courts. That Standard further suggests that lawyers should "be encouraged" to qualify themselves for participation in child-related cases "through formal training." The Abuse and Neglect Standards go further by suggesting that judges should personally take part in educational programs, whether or not the court conducts them. The National Council of Juvenile and Family Court Judges has suggested that courts can play in important role in training lawyers in child abuse and neglect cases, and that judges and judicial officers can volunteer to provide training and publications for continuing legal education seminars. See, RESOURCE GUIDELINES, at 22.

I-2. Content of Lawyer Training. The appropriate state administrative office of the trial, family, or juvenile courts should provide educational programs, live or on tape, on the role of a child's attorney. At a minimum, the requisite training should include:

(1) Information about relevant federal and state laws and agency regulations;

(2) Information about relevant court decisions and court rules;

(3) Overview of the court process and key personnel in child-related litigation;

(4) Description of applicable guidelines and standards for representation;

(5) Focus on child development, needs, and abilities;

(6) Information on the multidisciplinary input required in child-related cases, including information on local experts who can provide consultation and testimony on the reasonableness and appropriateness of efforts made to safely maintain the child in his or her home;

(7) Information concerning family dynamics and dysfunction including substance abuse, and the use of kinship care;

(8) Information on accessible child welfare, family preservation, medical, educational, and mental health resources for child clients and their families, including placement, evaluation/diagnostic, and treatment services; the structure of agencies providing such services as well as provisions and constraints related to agency payment for services; and

(9) Provision of written material (e.g., representation manuals, checklists, sample forms), including listings of useful material available from other sources.

Commentary —

The ABUSE AND NEGLECT STANDARDS take the position that it is not enough that judges mandate the training of lawyers, or that judges participate in such training. Rather, they call upon the courts to play a key role in training by actually sponsoring (e.g., funding) training opportunities. The pivotal nature of the judiciary's role in educating lawyers means that courts may, on appropriate occasions, stop the hearing of cases on days when training is held so that both lawyers and judges may freely attend without docket conflicts. The required elements of training are based on a review of

well-regarded lawyer training offered throughout the country, RESOURCE GUIDELINES, and many existing manuals that help guide lawyers in representing children.

I-3. Continuing Training for Lawyers. The court system should also assure that there are periodic opportunities for lawyers who have taken the "basic" training to receive continuing and "new developments" training.

Commentary —

Many courts and judicial organizations recognize that rapid changes occur because of new federal and state legislation, appellate court decisions, systemic reforms, and responses to professional literature. Continuing education opportunities are critical to maintain a high level of performance. These Standards call for courts to afford these "advanced" or "periodic" training to lawyers who represent children in abuse and neglect related cases.

I-4. Provision of Mentorship Opportunities. Courts should provide individual court-appointed lawyers who are new to child representation the opportunity to practice under the guidance of a senior lawyer mentor.

Commentary —

In addition to training, particularly for lawyers who work as sole practitioners or in firms that do not specialize in child representation, courts can provide a useful mechanism to help educate new lawyers for children by pairing them with more experienced advocates. One specific thing courts can do is to provide lawyers new to representing children with the opportunity to be assisted by more experienced lawyers in their jurisdiction. Some courts actually require lawyers to "second chair" cases before taking an appointment to a child abuse or neglect case. See, RESOURCE GUIDELINES, at 22.

J. THE COURT'S ROLE IN LAWYER COMPENSATION

J-1. Assuring Adequate Compensation. A child's attorney should receive adequate and timely compensation throughout the term of appointment that reflects the complexity of the case and includes both in court and out-of-court preparation, participation in case reviews and postdispositional hearings, and involvement in appeals. To the extent that the court arranges for child representation through contract or agreement with a program in which lawyers represent children, the court should assure that the rate of payment for these legal services is commensurate with the fees paid to equivalently experienced individual court-appointed lawyers who have similar qualifications and responsibilities.

Commentary —

JUVENILE JUSTICE STANDARDS § 2.1(b) recognize that lawyers for children should be entitled to reasonable compensation for both time and services performed "according to prevailing professional standards," which takes into account the "skill required to perform...properly," and which considers the need for the lawyer to perform both counseling and resource identification/evaluation activities. The RESOURCE GUIDELINES, at 22, state that it is "necessary to provide reasonable compensation" for improved lawyer representation of children and that where necessary judges should "urge state legislatures and local governing bodies to provide sufficient funding" for quality legal representation. Because some courts currently compensate lawyers only for time spent in court at the adjudicative or initial disposition stage of cases, these Standards clarify that

compensation is to be provided for out-of-court preparation time, as well as for the lawyer's involvement in case reviews and appeals. "Out-of-court preparation" may include, for example, a lawyer's participation in social services or school case conferences relating to the client.

These Standards also call for the level of compensation where lawyers are working under contract with the court to provide child representation to be comparable with what experienced individual counsel would receive from the court. Although courts may, and are encouraged to, seek high quality child representation through enlistment of special children's law offices, law firms, and other programs, the motive should not be a significantly different (i.e., lower) level of financial compensation for the lawyers who provide the representation.

J-2. Supporting Associated Costs. The child's attorney should have access to (or be provided with reimbursement for experts, investigative services, paralegals, research costs, and other services, such as copying medical records, long distance phone calls, service of process, and transcripts of hearings as requested.

Commentary —

The ABUSE AND NEGLECT STANDARDS expand upon JUVENILE JUSTICE STANDARDS § 2.1(c) which recognizes that a child's attorney should have access to "investigatory, expert and other nonlegal services" as a fundamental part of providing competent representation.

J-3. Reviewing Payment Requests. The trial judge should review requests for compensation for reasonableness based upon the complexity of the case and the hours expended.

Commentary —

These Standards implicitly reject the practice of judges arbitrarily "cutting down" the size of lawyer requests for compensation and would limit a judge's ability to reduce the amount of a per/case payment request from a child's attorney unless the request is deemed unreasonable based upon two factors: case complexity and time spent.

J-4. Keeping Compensation Levels Uniform. Each state should set a uniform level of compensation for lawyers appointed by the courts to represent children. Any per/hour level of compensation should be the same for all representation of children in all types of child abuse and neglect-related proceedings.

Commentary —

These Standards implicitly reject the concept (and practice) of different courts within a state paying different levels of compensation for lawyers representing children. They call for a uniform approach, established on a statewide basis, towards the setting of payment guidelines.

K. THE COURT'S ROLE IN RECORD ACCESS BY LAWYERS

K-1. Authorizing Lawyer Access. The court should enter an order in child abuse and neglect cases authorizing the child's attorney access to all privileged information regarding the child, without the necessity for a further release.

Commentary —

This Standard requires uniform judicial assistance to remove a common barrier to

effective representation, i.e., administrative denial of access to significant records concerning the child. The language supports the universal issuance of broadly-worded court orders that grant a child's attorney full access to information (from individuals) or records (from agencies) concerning the child.

K-2. Providing Broad Scope Orders. The authorization order granting the child's attorney access to records should include social services, psychiatric, psychological treatment, drug and alcohol treatment, medical, evaluation, law enforcement, school, and other records relevant to the case.

Commentary —

This Standard further elaborates upon the universal application that the court's access order should be given, by listing examples of the most common agency records that should be covered by the court order.

L. THE COURT'S ROLE IN ASSURING REASONABLE LAWYER CASELOADS

L-1. Controlling Lawyer Caseloads. Trial court judges should control the size of court-appointed caseloads of individual lawyers representing children, the caseloads of government agency-funded lawyers for children, or court contracts/agreements with lawyers for such representation. Courts should take steps to assure that lawyers appointed to represent children, or lawyers otherwise providing such representation, do not have such a large open number of cases that they are unable to abide by Part I of these Standards.

Commentary —

THE ABUSE AND NEGLECT STANDARDS go further than JUVENILE JUSTICE STANDARD § 2.2(b) which recognize the "responsibility of every defender office to ensure that its personnel can offer prompt, full, and effective counseling and representation to each (child) client" and that it "should not accept more assignments than its staff can adequately discharge" by specifically calling upon the courts to help keep lawyer caseloads from getting out of control. The Commentary to § 2.2.(b) indicates that: Caseloads must not be exceeded where to do so would "compel lawyers to forego the extensive fact investigation required in both contested and uncontested cases, or to be less than scrupulously careful in preparation for trial, or to forego legal research necessary to develop a theory of representation." We would add: "...or to monitor the implementation of court orders and agency case plans in order to help assure permanency for the child."

L-2. Taking Supportive Caseload Actions. If judges or court administrators become aware that individual lawyers are close to, or exceeding, the levels suggested in these Standards, they should take one or more of the following steps:

(1) Expand, with the aid of the bar and children's advocacy groups, the size of the list from which appointments are made;

(2) Alert relevant government or private agency administrators that their lawyers have an excessive caseload problem;

(3) Recruit law firms or special child advocacy law programs to engage in child representation;

(4) Review any court contracts/agreements for child representation and amend them

accordingly, so that additional lawyers can be compensated for case representation time; and

(5) Alert state judicial, executive, and legislative branch leaders that excessive caseloads jeopardize the ability of lawyers to competently represent children pursuant to state-approved guidelines, and seek funds for increasing the number of lawyers available to represent children.

APPENDIX

Previous American Bar Association Policies Related to Legal Representation of Abused and Neglected Children

GUARDIANS AD LITEM
FEBRUARY 1992

BE IT RESOLVED, that the American Bar Association urges:

(1) Every state and territory to meet the full intent of the Federal Child Abuse Prevention and Treatment Act, whereby every child in the United States who is the subject of a civil child protection related judicial proceedings will be represented at all stages of these proceedings by a fully-trained, monitored, and evaluated guardian ad litem in addition to appointed legal counsel.

(2) That state, territory and local bar associations and law schools become involved in setting standards of practice for such guardians ad litem, clarify the ethical responsibilities of these individuals and establish minimum ethical performance requirements for their work, and provide comprehensive multidisciplinary training for all who serve as such guardians ad litem.

(3) That in every state and territory, where judges are given discretion to appoint a guardian ad litem in private child custody and visitation related proceedings, the bench and bar jointly develop guidelines to aid judges in determining when such an appointment is necessary to protect the best interests of the child.

COURT-APPOINTED SPECIAL ADVOCATES
AUGUST 1989

BE IT RESOLVED, that the American Bar Association endorses the concept of utilizing carefully selected, well trained lay volunteers, Court Appointed Special Advocates, in addition to providing attorney representation, in dependency proceedings to assist the court in determining what is in the best interests of abused and neglected children.

BE IT FURTHER RESOLVED, that the American Bar Association encourages its members to support the development of CASA programs in their communities.

COUNSEL FOR CHILDREN ENHANCEMENT
FEBRUARY 1987

BE IT RESOLVED, that the American Bar Association requests State and local bar associations to determine the extent to which statutory law and court rules in their States guarantee the right to counsel for children in juvenile court proceedings; and

BE IT FURTHER RESOLVED, that State and local bar associations are urged to actively participate and support amendments to the statutory law and court rules in their State to bring them in to compliance with the Institute of Judicial Administration/American Bar Association Standards Relating to Counsel for Private Parties; and

BE IT FURTHER RESOLVED, that State and local bar associations are requested to ascertain the extent to which, irrespective of the language in their State statutory laws and court rules, counsel is in fact provided for children in juvenile court proceedings and the extent to which the quality of representation is consistent with the standards and policies of the American Bar Association; and

BE IT FURTHER RESOLVED, that State and local bar associations are urged to actively support programs of training and education to ensure that lawyers practicing in juvenile court are aware

of the American Bar Association's standards relating to representation of children and provide advocacy which meets those standards.

BAR ASSOCIATION AND ATTORNEY ACTION
FEBRUARY 1984

BE IT RESOLVED, that the American Bar Association urges the members of the legal profession, as well as state and local bar associations, to respond to the needs of children by directing attention to issues affecting children including, but not limited to: ... (7) establishment of guardian ad litem programs.

BAR AND ATTORNEY INVOLVEMENT IN CHILD PROTECTION CASES
AUGUST 1981

BE IT RESOLVED, that the American Bar Association encourages individual attorneys and state and local bar organizations to work more actively to improve the handling of cases involving abused and neglected children as well as children in foster care. Specifically, attorneys should form appropriate committees and groups within the bar to ... work to assure quality legal representation for children....

JUVENILE JUSTICE STANDARDS
FEBRUARY 1979

BE IT RESOLVED, that the American Bar Association adopt (the volume of the) Standards for Juvenile Justice (entitled) Counsel for Private Parties...

APPENDIX "B"

Ten Fundamentals of Legal Representation of Children[18]

1. The child's attorney has a duty, as far as reasonably possible, to maintain a normal attorney-client relationship, including the obligation to zealously represent the child's interests within the bounds of the law.

- ABA Model Rules of Professional Conduct (Model Rules): Preamble; 1.14(a)
- ABA Model Code of Professional Responsibility (Model Code): EC 7-1; EC 7-12
- ABA Standards of Practice for Lawyers who Represent Children in Abuse and Neglect Cases (ABA Standards): Preface; A-1
- Local Rule: _____
- Notes: _____

2. The child's attorney has a duty to provide competent representation, which includes knowledge, skill, thoroughness and preparation. This includes knowledge of services available for the child.

- Model Rule: 1.1
- MC DR 6-101(A)(1)(2)
- ABA Standards B-1; C
- Local Rule: _____
- Notes: _____

3. The scope of representation by the child's attorney includes the duty, within reason, to abide by the client's decision concerning the objectives of representation.

- Model Rule: 1.2(a)
- Model Code: DR 7-101(A)(1); EC 7-7; EC 7-8
- ABA Standards: B-4
- Local Rule: _____
- Notes: _____

4. The child's attorney has a duty of diligent and prompt representation, and a duty to expedite litigation, especially where placement of a young child is at issue.

- Model Rule: 1.3; 3.2
- Model Code: DR 6-101(A)(3); EC 6-4
- ABA Standards: B-1(4); C-6
- Local Rule: _____

[18] 10 Fundamentals are suggested guidelines to assist the child's attorney regardless of the particular representation model. Attorneys must, however, always consult and follow the law and local rules of the jurisdiction.

- Notes:_____

5. The child's attorney has a duty of effective, thorough and developmentally appropriate communication with the client, including the duty to meet with the client.

- Model Rule: 1.4 (a), (b)
- Model Code: EC 7-8; 9-2
- ABA Standards: C-1; A-3; B-1(5); D-2; E-2; F-4
- Local Rule:_____
- Notes:_____

6. The child's attorney has a duty of full investigation of the case but shall not communicate about the subject of representation with a represented party without counsel's consent. Opposing counsel shall not communicate with a represented child without the child's attorney's consent.

- Model Rule: 4.2
- Model Code: DR 7-104 (A) (1)
- ABA Standards: C-2(4); C-6
- Local Rule:_____
- Notes:_____

7. Attorneys knowing that a child's attorney has committed a rules violation may have a duty to inform authorities.

- Model Rule: 8.3
- Model Code: DR 103(A)
- ABA Standards: No Provision
- Local Rule:_____
- Notes:_____

8. The child's attorney may not accept third party compensation without assurance that the payment will not effect the representation.

- Model Rule: 1.8(f)
- Model code: DR 5-107 (A), (B)
- ABA Standards: No Provision
- Local Rule:_____
- Notes:_____

- Exception: State payment OK

9. The child's attorney is prohibited from representation that would constitute a conflict of interest. The child's attorney must be sensitive to the age and maturity of the client where waiver is an issue.

- Model Rules: 1.7
- Model Code: DR 5-101 (A); 5-105(A), (C); 5-107 (B)
- ABA Standards: B-2(2)
- Local Rule:_____
- Notes:_____
_____
_____

10. The child's attorney is bound by attorney-client confidentiality and privilege.

- Model Rules: 1.6, 3.7
- Model Code: DR 4-101; 5-102
- ABA Standards: A-1; Comment B-2(2)
- Local Rule:_____
- Notes:_____
_____
_____

EXHIBIT B

Not Reported in N.W.2d, 2001 WL 793883 (Mich.App.)
(Cite as: 2001 WL 793883 (Mich.App.))

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.
In the Matter of Kattie IRWIN, Dawson Irwin and Shyanne Lynn Renee Schoolcraft, Minors.
FAMILY INDEPENDENCE AGENCY, Petitioner-Appellee,
v.
Ronald IRWIN, Respondent-Appellant,
and
Sharica SCHOOLCRAFT, Respondent.
No. 229012.

July 13, 2001.

Before: HOOD, P.J., and WHITBECK and METER, JJ.

PER CURIAM.

***1** Respondent-appellant ("respondent") appeals by right from the family court's order terminating his parental rights to three minor children under M.C.L. § 712A.19b(3)(g) ("[t]he parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age") and M.C.L. § 712A.19b(3)(h) ("[t]he parent is imprisoned for such a period that the child will be deprived of a normal home for a period exceeding 2 years, and the parent has not provided for the child's proper care and custody, and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age").[FN1] We affirm.

> FN1. At one point in his appellate brief, respondent appears to contend that the family court relied on an outdated version of M.C.L. § 712A.19a(e) and (f) in terminating his parental rights. The family court did not in fact cite these provisions, which were superseded by new language in 1988, in ruling on the termination proceedings.

Respondent first argues that the family court did not have subject-matter jurisdiction in this case and that the order terminating his parental rights must be reversed because although respondent was incarcerated, he was willing and able to care for the children by placing them with their paternal grandparents. We review jurisdictional questions de novo. *Jackson Community College v. Dep't of Treasury*, 241 Mich.App 673, 678; 621 NW2d 707 (2000).

We disagree that reversal based on a lack of jurisdiction is warranted here. Indeed, the family court properly acquired subject-matter jurisdiction over this case based on the neglectful conduct of the children's mother, and respondent did not argue below, nor does he argue on appeal, that the court erred in this finding. Accordingly, respondent's argument regarding the lack of subject-matter jurisdiction is without merit. See, e.g., *In re Gillespie*, 197 Mich.App 440, 442; 496 NW2d 309 (1992) (indicating that the "subject matter" in child protective proceedings is "the child"), and *In re Mayfield*, 198 Mich.App 226, 234-235; 497 NW2d 578 (1993) (indicating, in an appeal from an order terminating the parental rights of the father, that the family court acquired subject-matter jurisdiction over the child because of the mother's neglect). See also *In re Hatcher*, 443 Mich. 426, 444; 505 NW2d 834 (1993), and *In re Powers*, 208 Mich.App 582, 587-588; 528 NW2d 799 (1995) (indicating that the assumption of jurisdiction over a child cannot be collaterally attacked during an appeal from an order terminating parental rights).[FN2]

> FN2. To the extent that respondent cites *In re Ferris*, 151 Mich.App 736; 391 NW2d 468 (1986), for a holding contrary to *Hatcher* and *Powers*, we note that *Ferris* relied on *Fritts v. Krugh*, 354 Mich. 97; 92 NW2d 604 (1958), which was explicitly overruled by *Hatcher*, *supra* at 444.

Moreover, respondent is incorrect in arguing that the family court could not have properly assumed jurisdiction because of the existence of other relatives who could care for the children while respondent remained incarcerated. First, we note that the holding of *In the*

Matter of Taurus F. 415 Mich. 512, 535-537; 330 NW2d 33 (1982), on which respondent relies in arguing that placing a child with a suitable relative constitutes proper care and custody, was the product of an equally divided Supreme Court and therefore does not constitute binding precedent. See *People v. Armstrong*, 207 Mich.App 211, 215; 523 NW2d 878 (1994). In addition, the evidence is clear that respondent had not prevented the children from living in an unfit home at the time the court took jurisdiction. See *In re Systma*, 197 Mich.App 453, 456-457; 495 NW2d 804 (1992). No error occurred in this case with regard to jurisdiction.[FN3]

> FN3. Respondent's brief at times seems to confuse subject-matter jurisdiction with personal jurisdiction. To the extent respondent is contending that the family court failed to acquire personal jurisdiction over him, this contention is without merit. Indeed, respondent does not even argue that he was not notified of or did not attend the proceedings in this case. See, e.g., *In re Gillespie, supra* at 442-443 (discussing personal jurisdiction in child protective proceedings). Moreover, respondent failed to cite any authority pertaining to personal jurisdiction and has therefore waived the issue for appeal. See *Great Lakes Division of Nat'l Steel Corp v City of Ecorse*, 227 Mich.App 379, 422; 576 NW2d 667 (1998).

*2 Next, respondent contends that the trial court improperly terminated his parental rights because the paternal grandparents were willing to care for the children and respondent therefore could give the children a proper home. We review for clear error a family court's finding that a statutory basis for termination has been met. MCR 5.974(I); *In re Trejo Minors*, 462 Mich. 341, 356-357; 612 NW2d 407 (2000). Once a statutory basis has been proven by clear and convincing evidence, the court must terminate parental rights unless the court finds that termination is clearly not in the best interests of the child. *Trejo*, supra at 344, 355. A court's finding on the best interests prong is also reviewed by this Court for clear error. *Id.* at 356-357, 365.

We disagree that the family court erred by terminating respondent's parental rights despite the possibility of placing the children with the paternal grandparents. Indeed, a family court is not required to place a child in the care of relatives. *In re McIntyre*, 192 Mich.App 47, 52; 480 NW2d 293 (1991). In *In re JEM*, 233 Mich.App 438, 451; 592 NW2d 751 (1999), for example, the respondent argued that because her mother and grandmother could adequately care for the child, there was no basis on which to terminate her parental rights. The court disagreed, stating "[i]f it is in the best interests of the child, the ... court may properly terminate parental rights instead of placing the child with relatives." *Id.* at 453.

In *In re SD*, 236 Mich.App 240, 247; 599 NW2d 772 (1999), the respondent argued that there was insufficient evidence to terminate his parental rights under M.C.L. § 712A.19b(3)(h) because even though he was incarcerated, the children would be able to reside in a normal home with their mother in the meantime. This Court disagreed, stating that "[e]ven if respondent is paroled in less than four years," there was little likelihood that the children would end up with a normal home, given the respondent's sexual abuse of the children. *Id.* Here, even though respondent was imprisoned for the sexual abuse of a minor other than his own child, he nonetheless posed a risk to his own children, given his documented diagnoses of pedophilia, alcohol abuse, and anti-social personality disorder.[FN4] Accordingly, the reasoning of *SD* provides support for the trial court's decision in this case.

> FN4. While the court refused to terminate respondent's parental rights *solely* on his diagnoses and the corresponding possibility that the children would be harmed by respondent if returned to his care, the court, by adopting petitioner's closing statement with regard to the best interests prong of the analysis in this case, nonetheless acknowledged that respondent's diagnoses would likely make his home an unfit place for children (petitioner's statement emphasized respondent's diagnoses).

Moreover, we note once again that respondent did not prevent his children from being in an abusive situation while he was imprisoned. This fact also supported the trial court's decision to terminate respondent's parental rights. See, generally, *Systma, supra* at 457. For purposes of termination, it does not matter whether respondent's failure to prevent the abuse was intentional or unintentional. MCL 712A.19b(3)(h). We addition-

ally note that respondent acknowledged at the termination hearing that he was unlikely to gain custody of his children because of his background and his lack of personal contact with the children resulting from his prison term. Accordingly, respondent essentially contended that the children would remain with his parents indefinitely. This fact also provided support for the trial court's decision. See, generally, *In re Ernst*, 130 Mich.App 657, 663; 344 NW2d 39 (1983). Indeed, the court acknowledged that the children, especially given their ages, needed permanency in their lives. See *McIntyre, supra* at 52.

*3 Finally, we emphasize that respondent has been imprisoned since 1993 and is likely to remain imprisoned for several more years. One of the children was four-and-one-half years old at the time the incarceration commenced and was seven at the time of the termination hearing. The other two children had not even been conceived at the time of respondent's incarceration.[FN5] These facts demonstrate that there was essentially no bonding between respondent and the children.

FN5. Respondent, without objection, was treated as the father of these two children during the instant proceedings because he was married to their mother when they were born.

In light of the foregoing facts and case law, we simply cannot say that the family court *clearly erred* in determining that a statutory basis for termination existed [FN6] and that termination was in the best interests of the children.[FN7]

FN6. We note that only one statutory basis need be established to warrant termination. See *Trejo, supra* at 360.

FN7. Although his argument is not well-developed, respondent appears to make an additional contention in his appellate brief: that the children should have been placed with his parents at the commencement of the child protective proceedings in this case. We conclude that respondent waived this argument by failing to formally challenge the children's placement at an earlier stage in the proceedings. Moreover, any error in this regard would not affect our decision that the family court did not clearly err in terminating respondent's parental rights.

Affirmed.

WHITBECK, J. (concurring).WHITBECK, J.

I concur in the result the majority opinion reaches. Even though Ronald Irwin was not a respondent in the proceedings at the time the family court conducted the adjudication in this case, the family court acknowledged its obligation to ensure that the Family Independence Agency (FIA) presented legally admissible evidence to support termination.[FN1] The FIA did provide this legally admissible evidence, which established clear and convincing proof of grounds to terminate Irwin's parental rights under M.C.L. § 712A.19b(3).[FN2] Because termination was not clearly contrary to the children's best interests, the family court properly terminated his parental rights.[FN3] Like the majority, I see no merit to the other issues Irwin raises. I write separately to explain, briefly, one aspect of this case that I find somewhat troubling, though not sufficiently so to warrant reversing the family court's order.

FN1. MCR 5.974(E)(1).

FN2. See *id.*

FN3. MCR 5.974(E)(2).

I. The One Parent Problem

From my perspective, the FIA [FN4] *should* list both parents as respondents in a protective proceeding if all the following conditions exist: (1) the FIA knows both parents' identities, (2) the FIA knows both parents' whereabouts, (3) there are grounds to list both parents as a respondent in a protective proceeding, and (4) the FIA intends to initiate protective proceedings against at least one parent. If the FIA 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.

FN4. I focus on the FIA because it is a child protective agency and is involved in the vast majority of cases in which a family court

considers a petition to terminate parental rights.

First, when the one parent problem exists, the FIA usurps the right of the parent who is not listed as a respondent to demand a jury for the adjudication. [FN5] I think it possible that if the FIA 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 FIA 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. [FN6] 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, FIA 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.

FN5. See MCR 5.911.

FN6. See MCR 5.974(A)(3).

***4** Second, when the one parent problem exists, it affects the nonparty parent's ability to challenge the family court's jurisdiction over the children. Michigan law is well-settled in holding that the time to challenge a family court's order assuming jurisdiction over minor children in a protective proceeding is immediately after the family court takes jurisdiction, not after it terminates parental rights. [FN7] However, I think it possible, if not probable, that if the nonparty parent challenged the family court's jurisdiction properly, this Court would dismiss the appeal for lack of standing. After all, from the state of the pleadings in such a case, the appealing parent's parental rights are not at risk and, therefore, it is questionable whether that nonparty parent is aggrieved within the meaning of the court rules. [FN8]

FN7. See *In re Hatcher*, 443 Mich. 426, 444; 505 NW2d 834 (1993).

FN8. See *Dept' of Consumer & Industry Services v Shah*, 236 Mich.App 381, 385; 600 NW2d 406 (1999) (discussing MCR 7.203(A) and related case law).

Yet, the nonparty parent cannot wait until the FIA makes him or her a respondent by proceeding under MCR 5.974(E) in order to gain standing. The factfinding step in MCR 5.974(E)(1) may be considered roughly equivalent to an adjudication, strictly in the sense that it requires legally admissible evidence. Yet the court rules under this changed circumstance provision in MCR 5.974(E)(1) do not create a natural opportunity to file a direct appeal by providing for two phases of proceedings in the way an adjudication is separate from a disposition; once the factfinding step is complete and there is evidence supporting termination, the family court immediately moves to the best interests consideration. [FN9] Of course, having already terminated the parental rights of the parent originally excluded from the proceedings, an appeal to this Court challenging the family court's subject-matter jurisdiction will likely fail because it is a collateral attack. This leaves no practical opportunity for the parent originally excluded from the petition to challenge the family court's subject-matter jurisdiction.

FN9. It is not clear to me whether, to avoid the collateral attack rule, this Court would conclude that the parent had an obligation to ask the family court to stay the proceedings following the factfinding stage in MCR 5.974(E)(1) to file a direct appeal. See *Hatcher, supra* at 444 ("Our ruling today severs a party's ability to challenge a probate court decision years later in a collateral attack *where a direct appeal was available.*") (emphasis added).

II. Irwin's Circumstances

The record in this case indicates that, from the very early stages of the proceedings, the FIA was aware of several important facts or issues. The FIA knew that Irwin was the presumed father [FN10] of three of the children at issue in this case. The FIA was aware that he was imprisoned and where he was imprisoned. I infer from the FIA's expertise in child protective proceedings and familiarity with the statutory grounds for termination, the FIA knew soon after it located Irwin that there were significant obstacles to his abil-

ity to provide proper care and custody for his children because he was incarcerated and would remain incarcerated for some time. Because of Irwin's background and criminal history, as well as his extended absence from the children's lives, I find it highly probable that at some time in the early stages of this case the FIA determined that it would petition to terminate his parental rights. Irwin was even present at hearings and represented by counsel before he was made a party. Nevertheless, the FIA did not make Irwin a respondent in the proceedings before the adjudication. While I acknowledge that the FIA had no duty stemming from statute or court rule to do so, I question why the FIA would wait to make him a respondent. I do not, however, find error requiring reversal in this delay because Irwin does not challenge it.

FN10. See *Serafin v. Serafin*, 401 Mich. 629, 636; 258 NW2d 461 (1977) (children born during marriage are "guarded by the still viable and strong, though rebuttable, presumption of legitimacy").

III. Conclusion

***5** 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.[FN11] While the juvenile code [FN12] and the court rules [FN13] 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.

FN11. See, generally, *Stanley v. Illinois*, 405 U.S. 645, 651; 92 S Ct 1208; 31 L.Ed.2d 551 (1972).

FN12. MCL 712A.1 *et seq.*

FN13. MCR 5.901 *et seq.*

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.

Mich.App.,2001.
In re Irwin
Not Reported in N.W.2d, 2001 WL 793883 (Mich.App.)

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EXHIBIT C

Not Reported in N.E.2d, 2007 WL 2584831 (Ohio App. 12 Dist.), 2007 -Ohio- 4646
(Cite as: 2007 WL 2584831 (Ohio App. 12 Dist.))

Court of Appeals of Ohio,
Twelfth District, Butler County.
In the Matter of M.D.
No. CA2006-09-223.

Decided Sept. 10, 2007.

Appeal from Butler County Court of Common Pleas, Juvenile Division, Case No. JN2004-0072.
Robin N. Piper, Butler County Prosecuting Attorney, Gloria J. Sigman, Government Services Center, Hamilton, OH, for appellee, BCCSB.

Brian K. Harrison, Monroe, OH, guardian ad litem.

Dawn S. Garrett, Centerville, OH, for appellant, Terri W. fka Terri C.

Fred S. Miller, Hamilton, OH, for appellees, William & Irene D.

POWELL, J.

***1** {¶ 1} Appellant, Terri W., appeals the decision of the Butler County Court of Common Pleas, Juvenile Division, granting legal custody of her daughter, M.D., to the child's paternal grandparents, appellees, Irene and William D.[FN1] For the reasons set forth below, we affirm the trial court's judgment.

> FN1. For purposes of clarity in this opinion, we refer to M.D.'s grandparents, Irene and William D., as "appellees." Butler County Children Services Board and M.D.'s guardian ad litem, Brian Harrison, are also appellees herein.

{¶ 2} M.D. was born on May 30, 1996. Her mother, appellant, and father, Mark D., who is not a party to this appeal, were married at the time. When appellant and Mark D. later divorced in 2000, Mark D. was granted legal custody of M.D. Appellant was granted legal custody of her other daughter, K.D., at that time, along with visitation with M.D. on weekends and holidays.

{¶ 3} M.D. has resided off and on with appellees for the majority of her life, including time periods when appellant and Mark D. were married, and after Mark D. was granted legal custody of M.D. While Mark D. and M.D. were living with appellees, Mark D. was arrested on sexual abuse charges involving M.D. He was later convicted of multiple sexually-oriented offenses and sentenced to a term of life in prison.

{¶ 4} In January 2004, following Mark D.'s arrest, appellees were granted temporary custody of M.D. pursuant to an emergency order. On May 19, 2004, M.D. was adjudicated an abused and dependent child, and placed in the temporary custody of appellees. The Butler County Children Services Board (BCCSB) subsequently filed a motion for legal custody on behalf of appellees, and custody hearings were held from February 14, 2005 to March 7, 2006. At the conclusion of the hearings, the magistrate granted appellees legal custody of M.D., and granted appellant visitation. Appellant's objections to the magistrate's order were subsequently overruled on August 7, 2006.

{¶ 5} Appellant now appeals the trial court's decision granting legal custody of M.D. to appellees, advancing three assignments of error.

{¶ 6} Assignment of Error No. 1:

{¶ 7} "[R.C. 2151.353(A)(3)] IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED TO [APPELLANT'S] CASE. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION WHEN IT AWARDED CUSTODY TO A NON-PARENT RELATIVE WHEN THE MOTHER WAS NOT UNSUITABLE."

{¶ 8} In her first assignment of error, appellant challenges the constitutionality of R.C. 2151.353(A)(3) on its face and as applied to her in this case, asserting, generally, that the statute violates due process requirements. Appellant contends the statute infringes

on a natural parent's fundamental right to the custody of his or her child because it does not require a trial court to make a separate finding that the natural, noncustodial parent of a child previously adjudicated abused, neglected or dependent is unfit before the court may award legal custody of the child to a non-parent relative. We find this argument without merit.

{¶ 9} "An enactment of the General Assembly is presumed to be constitutional, and before a court may declare it unconstitutional it must appear beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible." *Woods v. Telb*, 89 Ohio St.3d 504, 510-511, 2000-Ohio-171, quoting *State ex rel. Dickman v. Defenbacher* (1955), 164 Ohio St. 142, paragraph one of the syllabus. "The party challenging the statute bears the burden of proving the unconstitutionality of the statute beyond a reasonable doubt." *Id.* at 511.

*2 {¶ 10} "A facial challenge to a statute is the most difficult to bring successfully because the challenger must establish that there exists no set of circumstances under which the statute would be valid." *Harrold v. Collier*, 107 Ohio St.3d 44, 2005-Ohio-5334, ¶ 37, citing *United States v. Salerno* (1987), 481 U.S. 739, 745, 107 S.Ct. 2095. "The fact that a statute might operate unconstitutionally under some plausible set of circumstances is insufficient to render it wholly invalid." *Id.* Further, in an "as applied" challenge to a statute, the challenging party bears the burden of presenting "clear and convincing evidence of a presently existing set of facts that makes the statutes unconstitutional and void when applied to those facts." *Id.*, citing *Belden v. Union Cent. Life Ins. Co.* (1944), 143 Ohio St. 329, paragraph six of the syllabus.

{¶ 11} Appellant challenges the constitutionality of R.C. 2151.353(A)(3), which provides as follows: "If a child is adjudicated an abused, neglected, or dependent child, the court may * * * [a]ward legal custody of the child to either parent or to any other person who, prior to the dispositional hearing, files a motion requesting legal custody of the child or is identified as a proposed legal custodian in a complaint or motion filed prior to the dispositional hearing by any party to the proceedings."

{¶ 12} While both the United States and Ohio Constitutions afford parents a fundamental right to the custody of their children, (See *In re James*, 113 Ohio St.3d 420, 2007-Ohio-2335, ¶ 16; *In re Hockstok*, 98 Ohio St.3d 238, 2002-Ohio-7208, ¶ 16), custody determinations made pursuant to R.C. 2151.353(A)(3) require a court to consider the best interest of the child. See *In re A. W.-G.*, Butler App. No. CA2003-04-099, 2004-Ohio-2298, ¶ 6. "The best interest of the child is the primary consideration" in such cases. *In re Allah*, Hamilton App. No. C-040239, 2005-Ohio-1182, ¶ 10.

{¶ 13} The Ohio Supreme Court recently examined R.C. 2151.353(A)(3) in the case of *In re C.R.*, 108 Ohio St.3d 369, 2006-Ohio-1191. Similar to appellant in this case, the natural, noncustodial parent in *C.R.* sought legal custody of his child, who had previously been adjudicated neglected based upon allegations concerning the custodial parent. Like appellant, the noncustodial parent seeking legal custody in *C.R.* argued that a court should be required to find each parent unsuitable before it may award legal custody of an abused, neglected or dependent child to a non parent relative. He further argued that his "fundamental right to raise his * * * child should not be taken away by implication and that it is unfair for a parent to be penalized for the neglect by the other parent." *Id.* at ¶ 11.[FN2]

FN2. In *C.R.*, the natural father of the child at issue sought legal custody following the juvenile court's adjudication of the child as neglected. The father learned of his paternity of the child after the children services board filed a complaint alleging the child was neglected based upon the child's mother having a substance abuse problem. The complaint named "John Doe" as the child's father, but after confirming his paternity of the child, the natural father began attending the court proceedings. The court later adjudicated the child neglected. After legal custody motions were filed by both the natural father and the child's aunt and uncle, the court held custody hearings and granted legal custody to the aunt and uncle. The natural father appealed, and the Eighth District Court of Appeals reversed on the basis the trial court was required to find the natural father unsuitable before awarding legal custody to a nonparent. The Eighth District thereafter certified a conflict between its decision and that of other districts to the Ohio Supreme Court.

{¶ 14} The court, however, rejected appellant's arguments and held that "when a juvenile court adjudicates a child to be abused, neglected, or dependent, it has no duty to make a separate finding at the dispositional hearing that a noncustodial parent is unsuitable before awarding legal custody of a child to a non-parent relative." *Id.* at ¶ 24. The court found that an adjudication of abuse, neglect or dependency "is a determination about the care and condition of a child and implicitly involves a determination of the unsuitability of the child's custodial and/or noncustodial parents." *Id.* at ¶ 23.

***3** {¶ 15} Significantly, in reaching this conclusion, the court emphasized the difference between legal and permanent custody, in that "legal custody does not divest parents of residual parental rights, privileges, and responsibilities." *Id.* at ¶ 21. As such, a disposition pursuant to R.C. 2151.353(A)(3) does not "permanently foreclose the right of either parent to regain custody, because it is not a termination of all residual parental rights, privileges, and responsibilities." *Id.* at ¶ 23. Either parent may therefore petition the court for a modification of custody. *Id.*[FN3]

> FN3. Notably, the Ohio Supreme Court recently ruled that R.C. 3109.04(E)(1)(a), concerning the modification of a prior decree allocating parental rights and responsibilities, is constitutional. *In re James*, 113 Ohio St.3d 420, 2007-Ohio-2335.

{¶ 16} Here, the record demonstrates that M.D. was adjudicated abused and dependent on May 19, 2004. Appellant received notice of and was represented by counsel at the adjudication hearing. During the hearing, the court determined M.D. to be abused and dependent based upon "stipulations and testimony on the record." Notably, appellant did not object to the court's adjudication of M.D. as abused and dependent, and that matter is not before this court.

{¶ 17} When BCCSB filed a motion for legal custody of M.D. on behalf of appellees, appellant responded with her own motion for legal custody of M.D. The court held custody hearings spanning a period of several days, during which an extensive amount of testimony and documentary evidence was presented. At the conclusion of the hearings, the court applied the best interest of the child standard, set forth in R.C. 3109.04(F), and found it was in M.D.'s best interest to grant appellees legal custody of the child and to allow appellant visitation.

{¶ 18} The court's prior adjudication of M.D. as abused and dependent permitted the court to grant legal custody of the child to a nonparent upon a finding it was in the child's best interest. See *In re C.R.* at ¶ 24. See, also, *In re A. W.-G.* at ¶ 6, 11. Under the authority of *C.R.*, the court was not required to find appellant unsuitable before making such disposition, as the court's previous adjudication of M.D. as abused and dependent implicitly involved a finding of appellant's unsuitability. See *In re C.R.* at ¶ 22-24.

{¶ 19} As emphasized by the court in *C.R.*, this procedure does not constitute a "termination of all residual parental rights, privileges, and responsibilities," and therefore, does not foreclose the ability of appellant to seek a change of custody in the future, in accordance with R.C. 2151.42. *Id.* at ¶ 23. Although appellant argues she *could be* denied the opportunity to raise M.D. indefinitely under this procedure, appellant has not filed a motion for a change of custody and any argument concerning that issue is therefore not ripe for review at this time.

{¶ 20} Based upon the foregoing, we find appellant has failed to demonstrate beyond a reasonable doubt that R.C. 2151.353(A)(3) is unconstitutional. Appellant has failed to demonstrate the statute violates due process requirements, as the statute applies where a child has previously been adjudicated abused, neglected or dependent. As indicated in *C.R.*, such an adjudication implicitly involves a determination of parental unsuitability. In addition, in applying R.C. 2151.353(A)(3), a court must make its custody determination in accordance with the best interest of the child. Because such determinations do not terminate all residual parental rights, privileges, and responsibilities, however, procedures remain in place for a natural parent to regain custody of his or her child. Accordingly, we overrule appellant's first assignment of error.

***4** {¶ 21} Assignment of Error No. 2:

{¶ 22} "THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION WHEN IT AWARDED CUSTODY TO [APPELLEES] WHICH WAS NOT IN THE CHILD'S BEST INTERESTS."

Not Reported in N.E.2d, 2007 WL 2584831 (Ohio App. 12 Dist.), 2007 -Ohio- 4646
(Cite as: 2007 WL 2584831 (Ohio App. 12 Dist.))

{¶ 23} Assignment of Error No. 3:

{¶ 24} "THE COURT'S CUSTODY ORDER IS NOT IN THE CHILD'S BEST INTERESTS AND IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶ 25} In her second and third assignments of error, appellant argues the trial court erred in awarding legal custody of M.D. to appellees upon a finding that such placement was in the child's best interest. We disagree.

{¶ 26} As stated, upon adjudicating a child as abused, neglected, or dependent, a juvenile court may award legal custody of a child to a parent or a nonparent upon a timely motion. R.C. 2151.353(A)(3). A court must make its custody decision in accordance with the best interest of the child. *In re A. C.*, Butler App. No. CA2006-12-105, 2007-Ohio-3350, ¶ 14; *In re A. W.-G.*, 2004-Ohio-2298 at ¶ 6. Unlike in a permanent custody proceeding where a juvenile court's standard of review is by clear and convincing evidence, a juvenile court's standard of review in legal custody proceedings is by a preponderance of the evidence. *Id.*; *In re Nice* (2001), 141 Ohio App.3d 445, 455; *In re A. W.-G.* A preponderance of the evidence is "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it." *In re A. W.-G.* at fn. 1.

{¶ 27} A juvenile court's custody decision will not be reversed absent an abuse of discretion. *In re A.C.* at ¶ 15. The discretion granted to a juvenile court in custody matters "should be accorded the utmost respect, given the nature of the proceeding and the impact the court's determination will have on the lives of the parties concerned. The knowledge a trial court gains through observing the witnesses and the parties in a custody proceeding cannot be conveyed to a reviewing court by a printed record." *In re A. W.G.*, quoting *Miller v. Miller* (1988), 37 Ohio St.3d 71, 74. Thus, an appellate court affords deference to a judge or magistrate's findings regarding witness credibility. *In re A.C.* at ¶ 15, citing *In re D.R.*, Butler App. Nos. CA2005-06-150, CA2005-06-151, 2006-Ohio-340, ¶ 12.

{¶ 28} In addition, "in determining whether a decision of a trial court is against the manifest weight of the evidence, an appellate court is guided by the presumption that the trial court's findings were correct." *In re Peterson* (Aug. 28, 2001), Franklin App. No. 01AP-381, at 3, citing *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80. "Where an award of custody is supported by a substantial amount of credible and competent evidence, such an award will not be reversed as being against the weight of the evidence by a reviewing court." *Davis v. Flickinger*, 77 Ohio St.3d 415, 418, 1997-Ohio-260, quoting *Bechtol v. Bechtol* (1990), 49 Ohio St.3d 21, syllabus.

*5 {¶ 29} Our review of the record indicates that the trial court considered the relevant factors in making its best interest determination, and that the evidence presented during the custody hearings supports the trial court's findings. The record indicates that M.D. has been in the temporary custody of appellees since January 2004. Before that time, M.D. had resided with appellees for a significant portion of her life, both when appellant and the child's father, Mark D., were married, and when Mark D. had custody of M.D. following the couple's divorce. Appellant has regular visitation with M.D., during which M.D. has contact with her sister, K.D.

{¶ 30} The evidence presented during the custody hearings demonstrates that M.D. is well-adjusted in appellees' home and is involved in various activities such as church, choir, and Big Brothers Big Sisters. The evidence also demonstrates that M.D. is attending school where she receives special attention due to learning disabilities and that she is currently doing well in school. Appellees have also hired a tutor for M.D. in the summer. Her performance in school has improved and M.D. is considered by school officials to be a good student. Appellees are active in M.D.'s schooling and regularly attend school-related conferences and functions. The trial court found that awarding appellant custody of M.D. would result in M.D. having to change schools, and that such change would not be in her best interests if it were to occur during the school year.

{¶ 31} In addition, the record indicates that appellees have been diligent and supportive in assuring that M.D. participates in regular therapy sessions with Melanie Grosser of Catholic Social Services. M.D. attends therapy sessions to help her cope with the abuse she suffered by her father and to help her establish personal boundaries that were compromised as a result of such abuse. Grosser testified that M.D. will need

on-going therapy for an indefinite period of time to cope with these issues. She also indicated that appellees are cooperative and attentive in attending sessions when necessary, in assuring M.D.'s attendance, and in following suggestions she makes for M.D.'s behavioral and psychological growth.

{¶ 32} Significantly, the evidence presented during the custody hearings indicates that appellees are also cooperative in facilitating and complying with visitation between appellant and M.D.

{¶ 33} With respect to appellant, the record indicates that she has experienced a significant period of residential instability within the past several years. She has been homeless at various times in the past and has lived at numerous residences. At present, appellant is cohabiting with Carl Lawson and her other daughter, K.D. While she reports that she and Lawson have a strong and stable relationship, the testimony presented during the custody hearings demonstrates that appellant has filed a domestic violence complaint against Lawson as recently as 2004.

*6 {¶ 34} The record indicates appellant has had numerous other live-in boyfriends in the past several years as well. In addition, there have been allegations of sexual abuse involving appellant's other daughter, K.D., while K.D. was living with appellant. Notably, Dr. Moore evaluated appellant prior to trial and concluded that placement of M.D. in her care would not be appropriate due to appellant's psychological problems and instability. He based his conclusion in part on appellant's own history of abuse by her father, removal from her mother and placement in foster care when she was a child, and mental health issues for which she has been treated with psychotropic medications.

{¶ 35} Grosser also testified during the custody hearings that M.D. felt conflicted in choosing with whom she wanted to live, though it was clear that she loves both her mother and grandparents very much. The trial court conducted an in camera interview with the child to determine whether she was capable of making such a choice, and if so, with whom she wanted to live. The court indicated following the interview that it was clear appellant had exerted significant influence over what M.D. reported to the court, and had provided her with information concerning the case in an effort to manipulate her loyalties.

{¶ 36} While appellant argues that granting legal custody of M.D. to appellees is not in the child's best interest because appellees are "in denial" about their son's guilt, reside in the same house where M.D.'s father abused her, and because appellee, Irene D., has a history of depression, our review of the record indicates the trial court thoroughly considered both the beneficial and detrimental aspects of placing M.D. with either party in making its best interest determination. The court found it was in M.D.'s best interest to be placed in a stable environment with parental figures who can provide and model appropriate behavior, and understand her psychological needs resulting from her abuse by her father. The trial court was permitted to make its determination based upon its observation of the witnesses and to resolve issues concerning witness credibility, sincerity and truthfulness accordingly. See *Davis*, 77 Ohio St.3d at 418-419.

{¶ 37} After thoroughly reviewing the record, we find that the evidence presented at the custody hearings supports the trial court's findings, and that the trial court did not abuse its discretion in granting legal custody of M.D. to appellees. Our review of the record indicates that competent, credible evidence supports the trial court's determination that granting legal custody of M.D. to appellees was in the child's best interest. Appellant's second and third assignments of error are therefore overruled.

{¶ 38} Judgment affirmed.

YOUNG, P.J. and BRESSLER, J., concur.
Ohio App. 12 Dist.,2007.
In re M.D.
Not Reported in N.E.2d, 2007 WL 2584831 (Ohio App. 12 Dist.), 2007 -Ohio- 4646

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EXHIBIT D

PARENS PATRIAE RUN AMUCK: THE CHILD WELFARE SYSTEM'S DISREGARD FOR THE CONSTITUTIONAL RIGHTS OF NONOFFENDING PARENTS

Vivek S. Sankaran[*]

Over the past hundred years, a consensus has emerged recognizing a parent's ability to raise his or her child as a fundamental, sacrosanct right protected by the Constitution. Federal courts have repeatedly rejected the parens patriae *summary mode of decision making that predominated juvenile courts at the turn of the twentieth century and have instead held that juvenile courts must afford basic due process to parents prior to depriving them of custodial rights to their children. This recognition has led to the strengthening of procedural protections for parents accused of child abuse or neglect in civil child protection proceedings.*

Yet, despite these advances, juvenile courts continue to disregard the constitutional rights of nonoffending parents, individuals against whom the state has made no allegations. Nearly every state permits juvenile courts to deprive nonoffending parents of rights to their children based solely on findings or admissions of child maltreatment by the other parent. Such actions not only raise many constitutional questions, but also jeopardize children's safety and well-being by increasing the likelihood that they will unnecessarily enter foster care and that their parents will disengage with the process. This Article proposes a policy solution that reflects the correct balance between safeguarding the constitutional rights of the nonoffending parent and preserving the flexibility of juvenile court judges to issue orders ensuring that the child's needs are met.

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* Special thanks to Martin Guggenheim, Don Duquette, and Amy Sankaran for reviewing drafts of this Article and providing insightful feedback. I would also like to thank Ashley Thompson for her thorough research on this issue.

I. INTRODUCTION

Over the past forty years, significant progress has been made in affording procedural protections to parents accused of child abuse or neglect in civil child protection proceedings. Before a court can take the authority to make decisions from a parent who allegedly maltreated her child,[1] she[2] is entitled to a trial to adjudicate the allegations against her,[3] and in most jurisdictions, is appointed an attorney to represent her if she is indigent.[4] Her attorney is given time to prepare for the hearing and can use traditional litigation tools including discovery and subpoena power to gather relevant information. If the state is seeking to terminate a parent's legal rights to the child, it must prove its case by clear and convincing evidence.[5] Many, if not all, of these changes were precipitated by landmark Supreme Court decisions recognizing that child protection cases impose a "'unique kind of deprivation'" on families that necessitate enhanced due process safeguards not typically available to litigants in civil cases.[6] Though

1. Throughout this Article, the terms "jurisdiction" and "dependency" will be used interchangeably to describe the act of the court transferring the custodial rights to the child from the parent to the state.

2. Since the majority of child welfare cases are brought against the child's mother, the offending parent will often be referred to as "she" and the nonoffending parent as "he." This is done for stylistic purposes only and in no way is meant to indicate any general belief about the proclivity of either gender to maltreat children.

3. Stanley v. Illinois, 405 U.S. 645, 649 (1972) ("[A]s a matter of due process of law, Stanley was entitled to a hearing on his fitness as a parent before his children were taken away from him . . . ."). These protections are set forth in state law. *E.g.*, D.C. CODE ANN. § 16-2316 (LexisNexis 2008); MICH. R. CT., STATE 3.972.

4. *See* Astra Outley, Representation for Children and Parents in Dependency Proceedings 7 (The Pew Commission on Children in Foster Care, Background Paper 2003), *available at* http://pewfostercare.org/research/docs/Representation.pdf (finding that thirty-nine states have statutes that provide for appointment of counsel for indigent parents in dependency cases). For examples of state statutes providing the right to counsel, see ALA. CODE § 12-15-63 (LexisNexis 2005 & Supp. 2008); COLO. REV. STAT. § 19-3-202 (2008); GA. CODE ANN. § 15-11-6 (2008).

5. *See* Santosky v. Kramer, 455 U.S. 745, 769–70 (1982) (holding that "clear and convincing" standard satisfies due process requirements in parental rights termination cases, though states can impose higher evidentiary burden).

6. M.L.B. v. S.L.J., 519 U.S. 102, 127–28 (1996) (quoting Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 27 (1981)). In *Santosky*, the Supreme Court observed that

> [e]ven when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.

far from perfect, much progress has been made during this time to protect the civil liberties of the alleged offending parent.[7]

Yet, despite these advances, child welfare systems continue to disregard the constitutional rights of nonoffending parents, individuals against whom the state has made no allegations and who thus have done nothing wrong other than to have a child in common with a parent who allegedly abused or neglected the child. These parents are presumed to be unfit based simply on their association with the other parent. Nearly every state permits juvenile courts to deprive nonoffending parents of custodial rights to their children based solely on findings or admissions of child maltreatment by the other parent.[8] Courts are empowered to do this even if the nonoffending parent is ready and willing to assume full responsibility for the child immediately. In a number of these states, courts even have the power to place the child in foster care, without any evidence indicating that the nonoffending parent is unfit, based solely on their subjective determination that such a placement would further the child's best interests.[9] In others, although the nonoffending parent is allowed to assume physical custody of the child, the legal authority to make decisions concerning the child rests in the hands of the juvenile court judge, who also has the power to compel the nonoffending parent to comply with services, such as attending a parenting class.[10] Only in a few states do nonoffending parents retain their full custodial rights until evidence of unfitness is introduced.[11] The justification for this near-universal approach is clear: "[D]ependency law is based on the protection of the children rather than the punishment of the parent. It follows that a finding

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455 U.S. at 753–54.

7. Though much progress had been made in the past hundred years, procedural protections for offending parents still remain inadequate. Far too many children are removed from their homes each year, attorneys appointed to represent parents in child protective cases are often overworked and poorly compensated, and judges frequently fail to act as neutral decision makers there to safeguard the constitutional rights of families. *See, e.g.*, Paul Chill, *Burden of Proof Begone: The Pernicious Effect of Emergency Removal in Child Protective Proceedings*, 41 FAM. CT. REV. 457, 457–59 (2003) (discussing statistics regarding high number of emergency child removal proceedings resulting in unnecessary removals, and difficulties faced by parents in trying to get their child back); Peggy Cooper Davis & Gautam Barua, *Custodial Choices for Children at Risk: Bias, Sequentiality, and the Law*, 2 U. CHI. L. SCH. ROUNDTABLE 139, 147–52 (1995) (addressing sources of bias in child custody proceedings); Kathleen A. Bailie, Note, *The Other "Neglected" Parties in Child Protective Proceedings: Parents in Poverty and the Role of the Lawyers Who Represent Them*, 66 FORDHAM L. REV. 2285, 2310–13 (1998) (describing lack of adequate counsel for parents and resulting effects on indigent parents); Editorial, *Giving Overmatched Parents a Chance*, N.Y. TIMES, June 17, 1996, at A14 (identifying difficulties facing counsel appointed to parents in neglect hearings).

8. *See* Angela Greene, *The Crab Fisherman and His Children: A Constitutional Compass for the Non-Offending Parent in Child Protection Cases*, 24 ALASKA L. REV. 173, 189 (2007) (noting that only three states—New York, Maryland, and Pennsylvania—have "found that a child cannot be deemed dependent or neglected if a fit parent is available to care for that child").

9. See *infra* Part II for a description of various state approaches to adjudicating the rights of nonoffending parents. For an outline of various approaches, see Greene, *supra* note 8, at 181–99.

10. *See, e.g.*, Greene, *supra* note 8, at 184–86 (describing Michigan's approach to custody proceedings).

11. *Id.* at 189–90.

against one parent is a finding against both in terms of the child being adjudged a dependent."[12]

Yet this reasoning, which consistently appears in cases across the country in which the rights of nonoffending parents have been raised, contravenes Supreme Court case law holding that parents with established relationships with their children have a right to direct the upbringing of their child protected by the Fourteenth Amendment,[13] a right which cannot be interfered with absent proof of parental unfitness.[14] This precedent, however, has not influenced the jurisprudence surrounding nonoffending parents. Juvenile courts throughout the country continue to disregard the rights of nonoffending parents and maintain systems in which judges routinely substitute their judgment of what a child needs for what the child's presumptively fit parent believes is best for the child.

Despite the importance of this issue, it has only received minimal attention from academics and policymakers. No one has proposed a comprehensive law and policy solution which balances the rights of the nonoffending parent, the child, and the parent found to be abusive or neglectful.[15] This Article describes

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12. *In re* Ryan W., No. A115424, 2007 WL 2588808, at *5 (Cal. Ct. App. Sept. 10, 2007); *see also* L.A. County Dep't of Children & Family Servs. v. John D. (*In re* James C.), 128 Cal. Rptr. 2d 270, 278–79 (Ct. App. 2002) (noting jurisdiction over child may be granted based on actions of one parent alone); *In re* Alysha S., 58 Cal. Rptr. 2d 393, 396–97 (Ct. App. 1996) (rejecting father's claim that jurisdictional finding against one parent was not valid against the other).

13. *See* Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (recognizing, for first time, an individual constitutional right to "establish a home and bring up children"); Troxel v. Granville, 530 U.S. 57, 65 (2000) (describing right as "perhaps the oldest of the fundamental liberty interests"); Parham v. J.R., 442 U.S. 584, 602 (1979) ("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."); Quilloin v. Walcott, 434 U.S. 246, 255 (1978) ("We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected."); Wisconsin v. Yoder, 406 U.S. 205, 232 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."); May v. Anderson, 345 U.S. 528, 534 (1953) ("[A] mother's right to custody of her children is a personal right entitled to at least as much protection as her right to alimony.").

14. Stanley v. Illinois, 405 U.S. 645, 649 (1972).

15. For example, in a recent article addressing this practice in Alaska, one author concluded that juvenile courts should have no authority to issue any orders regarding the child if a nonoffending parent seeks to care for his or her child, except to grant that parent long-term custody of the child immediately. Greene, *supra* note 8, at 199–201. But, as will be discussed more fully below, this solution would pose safety risks for the child, would deny the child the ability to receive much-needed services, and would deprive the offending parent of the opportunity to receive services to rectify the conditions that led to the maltreatment and perhaps regain custody of her child. Another scholar takes the opposite approach and proposes that the correct solution is to afford juvenile court judges vast discretion in determining the child's custody, even if a nonoffending parent is present and has not been judged to be unfit. Leslie Joan Harris, *Involving Nonresident Fathers in Dependency Cases: New Efforts, New Problems, New Solutions*, 9 J.L. & FAM. STUD. 281, 307 (2007). Professor Harris would permit the court to infringe upon the nonoffending parent's right to legal and physical custody if the judge feels that such action is in the "best interests of the child." *Id.* She writes, "A critical part of the solution to these problems is well-drafted statutes and rules that require judges to ensure children's safety and give them discretion to make dispositional orders that will serve the child's best interests." *Id.* This result, however, yields too much power to the court, which should not have the authority to

the historical origins of this practice and its conflict with current constitutional doctrine, and suggests a balanced policy response.

This Article will argue that the child welfare system's disregard for the rights of nonoffending parents, a vestige of antiquated procedures previously prevalent in child protective cases, violates the constitutional guarantees in the Fourteenth Amendment. The practice also affirmatively harms children by encouraging courts to make decisions based on unreliable information, by holding children in foster care unnecessarily, and by disempowering fit parents. Part II will briefly discuss the *parens patriae* mindset, prevalent during the time that specialized juvenile courts emerged, that laid the foundation for the current practice of disregarding the nonoffending parent's rights. This mindset, which transformed the state into the guardian of all children, permitted the summary transfer of custodial rights from parents to the state based on general assertions regarding the child's condition, as opposed to specific findings of each parent's unfitness. Part III will detail the Supreme Court's rejection of this approach and the Court's recognition of constitutionally protected parental rights. It will be argued that these rights extend to nonoffending parents and preclude states from restricting that parent's legal and physical custodial rights absent evidence of parental unfitness. Part IV will assert that, in contravention of these holdings, states have continued to deprive nonoffending parents of custodial rights to their children without any evidence of parental unfitness. Finally, Part V will argue that a system that preserves all custodial rights with the fit, nonoffending parent, while giving courts the flexibility to address the needs of the offending parent and the child, best serves the interests of children.

II. *PARENS PATRIAE* DECISION MAKING

The foundation for the current practice of depriving nonoffending parents of legal and physical custodial rights to their children was established at the turn of the twentieth century, when the *parens patriae* mindset emerged as the dominant rationale behind state intervention to protect children.[16] Prior to this time period, parental rights were afforded much deference, frequently to the detriment of children, and the legal authority for state intervention was extremely limited. Parents had near-absolute power over their children, and, often, child abuse and neglect were ignored by the state. As described by one scholar, "[t]he family's autonomy to do essentially as it saw fit with its children was untouched."[17]

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issue any orders that infringe upon the nonoffending parent's custodial rights. A more nuanced approach is needed to guide policymakers confronting this complex issue.

16. *Parens patriae*, Latin for "ultimate parent or parent of the country," refers to the power of the state to usurp the legal rights of the natural parent, and to serve as the parent of any child who is in need of protection. Marvin Ventrell, *The History of Child Welfare Law*, *in* CHILD WELFARE LAW AND PRACTICE: REPRESENTING CHILDREN, PARENTS, AND STATE AGENCIES IN ABUSE, NEGLECT, AND DEPENDENCY CASES 113, 126–27 (Marvin Ventrell & Donald N. Duquette eds., 2005).

17. *Id.* at 117.

That view, shielding families from government scrutiny, quickly changed as reformers embraced a more intrusive attitude towards protecting children from the corrupting influences of their parents and society. Driven by the doctrine of preventive penology, child advocates—primarily middle and upper class white women—believed that "society should identify the conditions of childhood which lead to crime," such as poverty and child abuse and neglect, and should enact legislation to commit children found in these conditions for their protection.[18] This goal necessitated a significant broadening of the state's authority to intervene in what were previously regarded as private family matters.

The enhanced scope of state authority was justified by a theory that the state was acting pursuant to its *parens patriae* powers, literally translated as "ultimate parent or parent of the country."[19] In this role, the state recast itself as the ultimate guardian of all children with the mandate to determine which children needed to be protected and how best to accomplish that goal.[20] The state's authority superseded the rights of any individual to the child, including his or her parents,[21] and all state intervention was characterized as taken to protect

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18. Mason P. Thomas, Jr., *Child Abuse and Neglect Part I: Historical Overview, Legal Matrix and Social Perspectives*, 50 N.C. L. REV. 293, 324, 326 (1972). Thomas writes that the new juvenile court movement did "little more than confirm and extend the nineteenth-century philosophy of preventive penology" that justified state intervention in the family using informal procedures. *Id.* at 323. States gave themselves "broadly defined jurisdiction over neglected children, with little thought . . . given to the rights of parents and children." *Id.*

19. Ventrell, *supra* note 16, at 126. The doctrine was based on English law that provided the crown with "supreme guardianship" over all children. HERBERT H. LOU, JUVENILE COURTS IN THE UNITED STATES 3 (Arno Press 1972) (1927). Lord Jekyll explained the doctrine in *Eyre v. Shaftsbury*, the leading English case decided in 1772:

> The care of all infants is lodged in the king as *parens patriae*, and by the king this care is delegated to his Court of Chancery. . . . Idiots and lunatics, who are incapable to take care of themselves, are provided for by the king as *parens patriae*; and there is some reason to extend this care to infants.

Id. (alteration in original) (quoting Eyre v. Shaftsbury, (1722) 24 Eng. Rep. 659, 664 (Ch.)). This reasoning appears in early appellate decisions involving juvenile court decisions. *See, e.g.*, Commonwealth v. Fisher, 62 A. 198, 200 (Pa. 1905) (describing Juvenile Court Act as "an exercise by the state of its supreme power over the welfare of its children . . . under which it can take a child from its father and let it go where it will . . . if the welfare of the child . . . can be thus best promoted"). Under this doctrine, the state not only had the right but the obligation to establish standards for the child's care. Mary Virginia Dobson, *The Juvenile Court and Parental Rights*, 4 FAM. L.Q. 393, 396 (1970).

20. *See* LOU, *supra* note 19, at 5 ("It has been generally maintained that the juvenile court is but an embodiment in the law and in a specific institution of an ancient doctrine and of modern methods in the exercise of the power of the state as the ultimate parent of the child.").

21. *See id.* at 9 ("The tendency of American courts has been to repudiate the notion that there can be such a thing as a proprietary right to or interest in the custody of an infant."); WILLIAM H. SHERIDAN, CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH, EDUC., & WELFARE, STANDARDS FOR JUVENILE AND FAMILY COURTS 3 (1966) (observing that "some early writers . . . tended to consider parental rights as merely a privilege or duty conferred upon the parent in the exercise of the police power of the State").

the child, not to punish the parent.[22] Armed with this new conception of the state's role, reformers pushed for the creation of specialized juvenile courts, the first of which appeared in Illinois in 1899.[23] Immediately thereafter, other states followed. By 1904, ten states had established such courts.[24] By 1920, all but three had.[25] The public broadly accepted the emergence of these courts, and a consensus emerged supporting the state's newfound role as the protector of all children.

In the newly created specialized courts, juvenile court judges became the state's designee to exercise its *parens patriae* authority, and procedures were implemented to expedite the transfer of custody from parents to the state. Broad, subjective legal standards were adopted, allowing the judge vast amounts of discretion to determine in which cases to intervene.[26] For example, one common statute permitted the court to assume custody of a child if the child was "without proper parental care or guardianship," while another ground rested on whether the child lived "in surroundings dangerous to morals, health, or general welfare."[27] Courts often relied upon very general findings to base their decisions on whether a child was neglected.[28] Not surprisingly, a study of the first juvenile court in Chicago found that "only 6.0% of the 10,631 petitions filed were dismissed, while in 88.5% of the cases a finding of neglect was made."[29] As aptly summarized by a prominent scholar during that era, "In the case of the juvenile court, except in general terms, there is very little substantive law. To do something constructive for the child is the goal of the entire procedure."[30]

Minimal procedural protections for parents complimented the broad legal standards for intervention.[31] Hearings were kept informal[32] and summary,[33] the

22. LOU, *supra* note 19, at 10 ("The most fundamental principle of the juvenile court—that juvenile-court acts are not criminal in their nature, because their purpose is not to punish but to save the child—has been almost universally affirmed by courts of last resort.").

23. Ventrell, *supra* note 16, at 132–33.

24. LOU, *supra* note 19, at 24.

25. *Id.*

26. *See id.* at 68 (noting that statutes give juvenile courts "broad jurisdiction and large discretionary powers"); ANTHONY M. PLATT, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY 135 (1969) (arguing that "such high standards of family propriety [were set] that almost any parent could be accused of not fulfilling his 'proper function'").

27. LOU, *supra* note 19, at 54.

28. *See* Comment, *The Custody Question and Child Neglect Rehearings*, 35 U. CHI. L. REV. 478, 479 (1968) ("[T]he courts often rely on 'general grounds' rather than any precise finding when they find children neglected.").

29. Note, *Child Neglect: Due Process for the Parent*, 70 COLUM. L. REV. 465, 466 (1970).

30. LOU, *supra* note 19, at 99.

31. Ventrell describes the *parens patriae* mindset as one in which courts were entitled to take custody of a child, regardless of the status of the child as a victim or offender, "without due process of law, because of the state's authority and obligation to save children from becoming criminal[s]." Ventrell, *supra* note 16, at 126. One early court rationalized, "To save a child from becoming a criminal . . . the Legislature surely may provide for the salvation of such a child . . . by bringing it into one of the courts of the state without any process at all." Commonwealth v. Fisher, 62 A. 198, 200 (Pa. 1905).

32. *See* BERNARD FLEXNER & REUBEN OPPENHEIMER, CHILDREN'S BUREAU, U.S. DEP'T OF

rules of evidence were relaxed,[34] and the appearance of lawyers was strongly discouraged.[35] Since all parties were purportedly working towards a common goal—the best interests of the child—the proponents of this system rationalized that adversarial procedures were not only unnecessary but were counterproductive.[36] Often, decisions on the future custody of a child were determined summarily at the first court hearing, without giving the parents an opportunity to prepare or to seek counsel.[37] In these juvenile courts, neither the law nor strict procedural formalities were permitted to prevent the judge from making a decision which he deemed best for an individual child.[38] "[T]hat the hearing has been legally conducted and no law violated is no excuse if the child is finally lost."[39]

LABOR, PUB. NO. 99, THE LEGAL ASPECT OF THE JUVENILE COURT 8–9 (1922) ("The procedure of the court must be as informal as possible. Its purpose is not to punish but to save."); SUSAN TIFFIN, IN WHOSE BEST INTEREST? CHILD WELFARE REFORM IN THE PROGRESSIVE ERA 223 (1982) (stating that staff in juvenile proceedings tried to make these proceedings as informal as possible). According to Tiffin, "[n]ormally the judge accepted the recommendation of the probation officer, since there was little time to devote to each case." TIFFIN, *supra*, at 224.

33. The concept of summary, prompt procedures was key to the efficient juvenile court. For example, "[t]he original Illinois [Juvenile Court] Act provided that 'the court shall proceed to hear and dispose of the case in a summary manner.'" MONRAD G. PAULSEN & CHARLES H. WHITEBREAD, JUVENILE LAW AND PROCEDURE 2 (1974) (quoting Ill. Laws 1899, 131-37 § 5).

34. *See* LOU, *supra* note 19, at 139 (suggesting that, especially in cases of dependency and neglect, juvenile courts should not refuse protection to child based on lack of "technical legal evidence").

35. *Id.* at 138 ("The better juvenile courts have been successful in discouraging the appearance of attorneys in most cases."); SHERIDAN, *supra* note 21, at 56 (observing that "in some courts counsel were not welcome – an attitude which was carried to the point of attempted exclusion"); Walter H. Beckham, *Helpful Practices in Juvenile Court Hearings*, FED. PROBATION, June 1949, at 10, 13 ("In most juvenile proceedings, lawyers are not required and the majority of cases are heard without them."). Even as late as 1970, only a few states had extended a statutory right to counsel in abuse and neglect cases. Note, *supra* note 29, at 475.

36. *See* Monrad G. Paulsen, *Juvenile Courts, Family Courts, and the Poor Man*, 54 CAL. L. REV. 694, 703 (1966) (writing that "[i]n juvenile court there were to be no adversaries, only friends of the child united in their desire to help him"). Many justified the procedural informality of this system by characterizing it as not criminal in nature, but there to further the interests of the child. Thus, constitutional rights were not implicated and strict processes did not need to be followed. *See* LOU, *supra* note 19, at 10 ("If they are not of a criminal nature, they are not unconstitutional because of their non-conformance to certain constitutional guarantees."); Wright S. Walling & Stacia Walling Driver, *100 Years of Juvenile Court in Minnesota – A Historical Overview and Perspective*, 32 WM. MITCHELL L. REV. 883, 893–94 (2006) ("The power of the juvenile court to operate in this informal fashion was almost universally sustained in state courts by characterizing the proceedings as civil rather than criminal – an exercise of parens patriae power.").

37. ALFRED J. KAHN, A COURT FOR CHILDREN: A STUDY OF THE NEW YORK CITY CHILDREN'S COURT 100–01 (1953). Kahn describes one case in which the "judge so convinced himself" that the father was a gambler that he "became so angry that he sent the man out of the courtroom and did all the planning with the wife." *Id.* at 112.

38. *See* LOU, *supra* note 19, at 129 ("In order to secure the utmost possible simplicity, it has been found necessary in the hearing of children's cases to disregard the technicalities of procedure which are not absolutely necessary and which tend to confuse a child's mind.").

39. *Id.* at 129–30 (quoting Charles W. Hoffman, *Saving the Child*, 45 SURV. 704, 704–05 (1921)).

With a broad mandate to intervene and relaxed procedures that ensured that he would not be encumbered with needless formalities, in each case, the juvenile court judge quickly assumed the role of the child's parent. Rather than focus on whether each of the child's parents was unfit or which of the two maltreated her, the judge simply sought to determine whether the general condition of the child warranted a need for the court to intervene.[40] So long as the *child* was maltreated in some way by someone, the court could apply its dispositional powers to order the remedy that it deemed was in the child's best interest. In other words, if one parent committed an offense against the child, the court could obtain custodial authority over the child regardless of the fitness of the other parent.[41] Again, since each parent's rights were deemed subservient to the court's *parens patriae* authority, the court's sole concern was the condition of the child, not the responsibility of the individual parent for the abuse or neglect.[42]

A number of published cases in this period demonstrate these principles in practice. Take, for example, the case of *Bleier v. Crouse*,[43] an Ohio case decided in 1920 in which three children were committed to a children's home despite the trial court's failure to provide notice of the proceedings to the children's father.[44] On appeal, the county court of appeals affirmed the trial court's decision finding that the father misconstrued the nature of juvenile court proceedings.[45] The court found that "[t]here [was] no authority to support the contention that notice to the parent [was] a condition prerequisite to jurisdiction of the juvenile court over the child."[46] The court held that "[a]n examination of the juvenile law as a whole leads us to the conclusion that the jurisdiction of the court attaches to the child without regard to the citation of the parent."[47] Although the court acknowledged the father's right to challenge the placement of the children at a later time, "[i]n the interest of the child and in the interest of society the court can commit its custody to strangers, or to an institution for its moral training and education"[48] without notifying the child's parents. Any rights held by each parent to the child were subordinate to the court's *parens patriae* authority.[49]

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40. *See id.* at 54 (explaining that dependency and neglect are broadly defined to cover any child needing state's protection).

41. *See id.* at 8 ("Whether the rights of the parents are superior to those of the state or whether the state occupies the position of primary parent, it has been well conceded that the welfare of the child is the paramount consideration, and, in the matter of custody, this principle governs court decisions.").

42. *Id.* at 8–9.

43. 13 Ohio App. 69 (Ct. App. 1920).

44. *Bleier*, 13 Ohio App. at 70, 74.

45. *Id.* at 76–77.

46. *Id.* at 74–75.

47. *Id.* at 75.

48. *Id.*

49. *Bleier*, 13 Ohio App. at 74–75.

Similarly, in *Allen v. Williams*,[50] the Supreme Court of Idaho upheld a trial court's decision to remove a child from her mother's custody despite failing to serve a petition on her, give her any notice, or provide her with an opportunity to be heard.[51] The Idaho Supreme Court dismissed the mother's argument that procedural due process required that her constitutional rights be determined prior to the juvenile court assuming temporary custody over her child.[52] Instead, the court reasoned:

> Our statute was enacted as a matter of protection to the child and for the welfare of the state. The Legislature, in enacting this law, no doubt saw the wisdom of prompt commitment of a child, who is upon the high road to becoming a moral degenerate and perhaps a future charge upon and a disgrace to the state. To drag such a case through a lengthy and formal criminal or civil proceeding, without prompt detention and commitment of the child, would in many cases thwart the object of the law.[53]

These two cases typify the approach embodied by the original juvenile courts.[54] In this system, the state's paternalism trumped all other interests. The state, acting upon the assumption that its powers superseded all authority conferred by birth on natural parents, granted itself the immediate right to determine the child's best interests without deference to the parent's wishes. Appeals by parents based on the core concepts underlying due process—notice and a meaningful opportunity to be heard—were largely rejected, which signified that the parent's role in the decision-making process was, at best, marginal.[55] Assertions of a parental right to custody based on fitness were ignored and instead yielded to the state's subjective determination of what was best for "its" child. The summary transfer of decision-making authority from parents to juvenile court judges in order to "save" children represented the core of the *parens patriae* approach to child welfare.

III. EMERGENCE OF CONSTITUTIONALLY PROTECTED PARENTAL RIGHTS

At nearly the same time as the emergence of specialized juvenile courts, the United States Supreme Court began recognizing a substantive due process right

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50. 171 P. 493 (Idaho 1918).

51. *See Allen*, 171 P. at 493 (setting forth mother's allegations).

52. *Id.* at 494.

53. *Id.*

54. Other cases during this period reflected the fundamental belief that the transfer of child custody from a parent to the court could occur in a summary manner without much regard to due process. *See, e.g.*, Farnham v. Pierce, 6 N.E. 830, 831–32 (Mass. 1886) (stating that "proceeding is intended to be summary" and that no notice needs to be given and no complaint is required prior to committing child); State *ex rel.* Jones v. West, 201 S.W. 743, 744 (Tenn. 1918) ("The State, thus acting upon the assumption that its parentage supersedes all authority conferred by birth on the natural parents, takes upon itself the power and right to dispose of the custody of children, as it shall judge best for their welfare.").

55. *See, e.g.*, *Farnham*, 6 N.E. at 832 (explaining that notice and trial are unnecessary in child commitment proceedings); *Jones*, 201 S.W. at 744 (recognizing that state has ultimate power to serve child's best interests).

to parent protected by the Fourteenth Amendment. The recognition and expansion of this right, which encompasses decisions by both custodial and noncustodial parents, ultimately led to enhanced procedural protections for offending parents in child welfare cases. This section will briefly outline the development of this right and how it led to the rejection of the *parens patriae* model of decision making. In the next section, it will be argued that the treatment of nonoffending parents is a lingering remnant of the *parens patriae* mindset.

A. Recognition of Substantive Due Process Right to Parent

The Court first recognized the existence of a substantive due process right to direct the upbringing of one's child in *Meyer v. Nebraska*,[56] a case appealing the conviction of a schoolteacher who taught German to young children.[57] The Court, in ruling that the conviction should be overturned, had the opportunity to consider what rights were encompassed by the word "liberty" in the Fourteenth Amendment, which it determined, "[w]ithout doubt," to include the right of the individual to "establish a home and bring up children."[58] Two years later, the Court, in *Pierce v. Society of Sisters*,[59] again found a substantive due process right for parents "to direct the upbringing and education of children under their control."[60] The Court famously declared that "[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[61] In *Prince v. Massachusetts*,[62] the Court reaffirmed the vitality of this parental right in the context of a Jehovah's Witness appealing a conviction for violating state child labor laws.[63] Though the Court affirmed the conviction, it elevated the stature of the parental right, describing it as a "sacred private interest[], basic in a democracy."[64] In the years after *Meyer*, *Pierce*, and *Prince*, the parental right has been used to insulate an array of parental decisions from state intervention in areas such as directing a child's religious upbringing,[65] choosing with whom the child should associate,[66] and making medical decisions

56. 262 U.S. 390 (1923).

57. *Meyer*, 262 U.S. at 396–97.

58. *Id.* at 399.

59. 268 U.S. 510 (1925).

60. *Pierce*, 268 U.S. at 534–35.

61. *Id.* at 535.

62. 321 U.S. 158 (1944).

63. *Prince*, 321 U.S. at 159, 165.

64. *Id.* at 165.

65. Wisconsin v. Yoder, 406 U.S. 205, 207, 234–36 (1972) (finding that First and Fourteenth Amendments prohibited state from making Amish children attend school until age sixteen when doing so violated parents' decisions about children's religious upbringing).

66. *See, e.g.*, Troxel v. Granville, 530 U.S. 57, 60–63, 67 (2000) (holding unconstitutional state statute that permitted judge to allow grandparent visitation against parent's consent solely on determination that visits were in child's best interests).

on behalf of the child.[67] The conception of the state as the primary protector, guardian, and decision maker for the child, as theorized in Plato's *Republic*, has been soundly rejected.[68]

B. *Constitutional Rights of Noncustodial Parents*

The changing dynamic of the family structure, primarily the increasing prevalence of children being raised by unmarried and separated parents, forced the Court to confront the question of who—or what type of parent—is entitled to protection under the Fourteenth Amendment. Prior to the 1970s, unwed fathers held no legal rights to their children and states commonly usurped parental decision making upon the death of the child's mother if she was unmarried.[69] The unwed father had no presumptive legal right to make decisions and care for the child.[70] All of this changed in the landmark case of *Stanley v. Illinois*.[71]

In *Stanley*, the Court evaluated an Illinois law under which the state automatically placed children of unwed fathers in foster care upon their mother's death.[72] The record revealed that Mr. Stanley had intermittently cared for his children throughout their lives, and upon their mother's death had located friends to care for the children.[73] The State, emphasizing its *parens patriae* authority, argued that it assumed full responsibility for the child immediately upon the death of the unmarried mother since unwed fathers were presumed to be unsuitable parents.[74] It sought to shift the burden of proving parental fitness onto the noncustodial father, whom it said could establish his ability to care for the child by filing for guardianship or adoption, options any legal stranger to the child could pursue.[75]

The Court rejected the state's argument and held that the Constitution requires, as a matter of due process, that the father have a "hearing on his fitness

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67. *See, e.g.*, Parham v. J.R., 442 U.S. 584, 620–21 (1979) (finding formal due process procedures were not constitutionally required when parents were seeking to commit their children to mental health institutions).

68. In *Meyer v. Nebraska*, the Court described Plato's conception of the Ideal Commonwealth: "That the wives of our guardians are to be common, and their children are to be common, and no parent is to know his own child, nor any child his parent." 262 U.S. 390, 401–02 (1925). The Court soundly rejected that idea. It stated, "Although such measures have been deliberately approved by men of great genius their ideas touching the relation between individual and State were wholly different from those upon which our institutions rest." *Id.* at 402; *see also* Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925) ("The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children.").

69. Stanley v. Illinois, 405 U.S. 645, 646–47 (1972) (nothing that under state law children became wards of state upon death of unwed mother regardless of father's fitness as parent).

70. *See id.* at 647 (noting that state law presumed unwed fathers to be unfit).

71. 405 U.S. 645 (1972).

72. *Stanley*, 405 U.S. at 646.

73. *Id.*; Brief for the Petitioner at *4, *Stanley*, 405 U.S. 645 (No. 70-5014).

74. *Stanley*, 405 U.S. at 647–50.

75. *Id.* at 648–49.

as a parent before his children were taken from him."[76] The State's interest in efficiency did not permit it to presume all unmarried fathers to be unfit:

> Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand.[77]

In other words, the Court made clear that depriving both custodial and noncustodial parents of rights to their child without a judicial determination of their unfitness violated the Constitution.[78]

Decisions after *Stanley* elaborated on the level of involvement noncustodial parents had to establish in their child's life in order to grasp the bundle of rights the Constitution afforded to parents. A common principle emerged from these cases. "When an unwed father demonstrates a full commitment to the responsibilities of parenthood by 'com[ing] forward to participate in the rearing of his child,' his interest in personal contact with his child acquires substantial protection under the due process clause."[79] Thus, in *Lehr v. Robertson*,[80] the Court upheld a New York statute that did not require that a father be notified of his child's impending adoption because the father had failed to take meaningful steps towards establishing a parental relationship with his child.[81] The Court reasoned:

> The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a state to listen to his opinion of where the child's best interests lie.[82]

Similarly, in *Quilloin v. Walcott*,[83] the Court held that a biological parent, who had minimal contact with the child, could not disrupt a child's adoption into a family with whom the child had already been living.[84] In both decisions, the Court prevented parents who had not made efforts to establish a relationship with their child from using the Constitution as a sword to disrupt the child's permanent placement.

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76. *Id.* at 649.

77. *Id.* at 656–57.

78. *See id.* at 651 (noting parent's rights to raise children should only be limited by strong countervailing forces).

79. Lehr v. Robertson, 463 U.S. 248, 261 (1983) (citation omitted).

80. 463 U.S. 248 (1983).

81. *Lehr*, 463 U.S. at 264, 266–68.

82. *Id.* at 262.

83. 434 U.S. 246 (1978).

84. *Quilloin*, 434 U.S. at 255.

Where, however, the parent established such a relationship, the Court has prevented states from infringing upon that intact parent-child bond without providing adequate process. In *Caban v. Mohammed*,[85] the Court struck down a New York statute that denied a father the right to object to an adoption that the biological mother had already consented to.[86] Although the decision was based on equal protection grounds, the Court's holding centered on the fact that the father was as involved in the children's upbringing as their mother.[87] Although the Court has never prescribed the specific actions a noncustodial parent must take to grasp his constitutionally protected interest in his child, the Court's rulings clarify that the physical and legal custodial rights of parents who have established relationships with their children are constitutionally protected from state interference absent proof of unfitness.

C. *Enhanced Procedural Protections in Child Welfare Cases*

The Supreme Court's recognition of constitutionally protected parental rights has fueled enhanced procedural protections in child abuse and neglect cases. In *Santosky v. Kramer*,[88] the Court determined that the state had to prove parental unfitness by clear and convincing evidence prior to terminating parental rights.[89] In *Lassiter v. Department of Social Services*,[90] the Court held that in some termination proceedings the Constitution mandated the appointment of counsel for parents.[91] In *M.L.B. v. S.L.J.*,[92] the Court concluded that due process required courts to furnish indigent litigants trial court transcripts, free of cost, when appealing termination of parental rights decisions.[93] On numerous occasions, the Court has described the deprivation in child protective cases as a "unique kind of deprivation,"[94] implicated by even a temporary dislocation of a child from his or her parent's custody. This deprivation warrants heightened procedural protections not typically applicable in civil proceedings.

State legislatures have responded by affording parents accused of child abuse or neglect an increased panoply of statutory protections to safeguard their fundamental rights. Nearly every state appoints attorneys to represent the alleged offender at the outset of a civil child protective case.[95] The parent is given an opportunity to contest the emergency removal of the child, if it occurs,

85. 441 U.S. 380 (1979).

86. *Caban*, 441 U.S. at 382.

87. *Id.* at 389 (noting that "an unwed father may have a relationship with his children fully comparable to that of the mother").

88. 455 U.S. 745 (1982).

89. *Santosky*, 455 U.S. at 748.

90. 452 U.S. 18 (1981).

91. *Lassiter*, 452 U.S. at 31–32 (leaving decision "whether due process calls for the appointment of counsel for indigent parents in termination proceedings to be answered in the first instance by the trial court").

92. 519 U.S. 102 (1996).

93. *M.L.B.*, 519 U.S. at 127–28.

94. *E.g.*, *id.* (quoting *Lassiter*, 452 U.S. at 27).

95. See *supra* note 4 and accompanying text for a discussion of this point.

and has the chance to prepare for a full-blown evidentiary hearing, typically several months after the filing of the petition, to contest the allegations made against her.[96] In most jurisdictions, discovery rights are afforded, strict evidentiary rules apply, and appellate rights exist to remedy incorrect decisions.[97] If the state fails to meet its burden, the case is dismissed. Though many flaws continue to permeate the child protective system, the court system has been revolutionized over the past thirty years to safeguard the rights of the alleged offender, a transformation spurred by the seminal cases noted above, recognizing and reaffirming the sanctity of a parent's right to raise his or her child.

The decisions by the Supreme Court, along with the increased procedural protections in state statutes, evinced the rejection of the *parens patriae* mode of decision making in child protective cases. The prompt, summary transfer of children from their parents into state custody was repudiated and instead replaced by a process consistent with basic notions of due process—notice, an opportunity to be heard, and a presumption of fitness that must be rebutted by the state at a judicial hearing. Any doubt regarding the rejection of the *parens patriae* model was resolved in *In re Gault*,[98] a juvenile delinquency case in which the Court held that children accused of crimes were entitled to receive many of the protections afforded to adult criminal defendants, such as the receipt of notice, appointment of counsel, and the ability to cross-examine and confront witnesses.[99] In doing so, the Court issued a strong pronouncement against the informality so prevalent in juvenile court proceedings justified under the *parens patriae* rhetoric. The Court described the Latin phrase as "a great help to those who sought to rationalize the exclusion of juveniles from the constitutional scheme"[100] but found that "its meaning is murky and its historic credentials are of dubious relevance."[101] The conclusion reached by the Court was clear: "'[T]he admonition to function in a 'parental' relationship is not an invitation to procedural arbitrariness.'"[102]

One studying this line of cases and assessing the resulting changes made in state child protective laws would likely conclude that the transformation of juvenile courts has been completed and that a new structure emphasizing procedural fairness governs decision making. In many ways, particularly with respect to the treatment of parents accused of maltreatment, this may be true. Yet, in one important respect—the treatment of nonoffending parents—the

96. *See, e.g.*, MICH. R. CT., STATE 3.965(C) (permitting parent to contest foster care placement of child); MICH. R. CT., STATE 3.972 (providing parent with right to trial within sixty-three days of child's removal from home).

97. *See, e.g.*, MICH. R. CT., STATE 3.922(A) (providing parents with discovery rights); MICH. R. CT., STATE 3.972(C)(1) (applying rules of evidence to neglect trial); MICH. R. CT., STATE 3.993 (outlining appellate rights for parents).

98. 387 U.S. 1 (1967).

99. *In re Gault*, 387 U.S. at 41, 57.

100. *Id.* at 16.

101. *Id.*

102. *Id.* at 30 (quoting Kent v. United States, 383 U.S. 541, 555 (1966)).

antiquated mindset of a previous era lingers. In most jurisdictions, the state still maintains the right to summarily usurp custodial authority from a parent against whom no allegations of unfitness are made, based solely on the conduct of the other parent. The remainder of this Article discusses the various manifestations of this practice and how it harms children, and, in the final Part, proposes a policy solution that balances the constitutional rights of the nonoffending parent with the interests of the child and the other parent.

IV. THE TREATMENT OF NONOFFENDING PARENTS

The overwhelming majority of states currently maintain child welfare systems that disregard the constitutional rights of nonoffending parents. Although the manifestations of the deprivation vary, the justification for the different approaches has been consistent: the state's lingering *parens patriae* authority warrants it to take an active role in a child's life where there is evidence that one parent has maltreated the child even when the other has done nothing wrong.[103] Appellate decisions scrutinizing these systems have given scant attention to the constitutional rights of the nonoffending parent and have generally endorsed the state's ability to encroach on the nonoffending parent's rights based on its determination that such actions are in the child's best interest. Those few states that have rejected this encroachment have instead adopted an extreme approach that prevents juvenile courts from intervening in any way with respect to either parent or the child where the child has only been maltreated by one parent. In my estimation, the correct balance would permit the court, upon a finding that a child has been harmed by one parent, to assume limited jurisdiction over the case to remedy the effects of the maltreatment by the offending parent, while forbidding it to restrict the custodial rights of the nonoffending parent, except in limited circumstances. The strengths of this balanced approach will be discussed in Part IV.B.

A. No Parental Presumption

States have intruded upon the constitutional rights of nonoffending parents in several ways. A number of states, such as Michigan and Ohio, have adopted policies which permit courts to strip nonoffending parents of all custodial rights to their children immediately upon a finding that the other parent has abused or neglected the child.[104] In these jurisdictions, immediately upon a finding against

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103. See *infra* Part IV.A for a discussion of cases relying on the best interests of the child to justify actions against nonoffending parents.

104. Numerous cases in Ohio have removed the custody rights of the nonoffending parent. *See, e.g.*, *In re* C.R., 843 N.E.2d 1188, 1192 (Ohio 2006) (concluding that court is not required to separately consider suitability of noncustodial parent before giving custody to nonparent); *In re* Russel, No. 06-CA-12, 2006 Ohio App. LEXIS 6565, at *5–6 (Ohio Ct. App. Nov. 27, 2006) (same); *In re* Osberry, No. 1-03-26, 2003 Ohio App. LEXIS 4922, at *8 (Ohio Ct. App. Oct. 14, 2003) (same). Michigan cases have been resolved in a manner similar to cases in Ohio. *See, e.g.*, *In re* Camp, No. 265301, 2006 Mich. App. LEXIS 1620, at *1–2 (Mich. Ct. App. May 9, 2006) (explaining that there is no requirement to hold separate hearing before entering order involving placement of child with nonparent); *In re* Church,

one parent, the trial court obtains temporary custody of the child and can issue any order it deems to be in the child's best interest. Even without a finding of unfitness against the nonoffending parent, the court can place the child in foster care,[105] compel the nonoffending parent to comply with services,[106] and order that that parent's rights be terminated based on the failure to comply with those services.[107] These systems treat nonoffending parents as legal strangers to the child, and the burden is placed on them to prove to the court that it is in the child's best interest to be placed with them. In these jurisdictions, Supreme Court precedent has had little impact on shaping the jurisprudence involving nonoffending parents.

Take, for example, the Michigan case of *In re Church*,[108] which involved three children over whom the court assumed jurisdiction based solely on a plea entered by the children's father.[109] The father admitted that he had neglected the children by not financially supporting them and by failing to protect them from their mother's emotional and mental instability.[110] Although the initial petition contained allegations against the mother, the prosecutor withdrew the allegations immediately after the father's plea was accepted. The trial court did not afford the mother a jury trial on the allegations against her, as she had requested.[111] Then, at the dispositional hearing, the court ordered that the three children be placed outside of the mother's custody, compelled the mother to comply with services, and determined that it would decide, at a later date, whether it was in the children's best interests to be returned to her custody.[112] At no point did the trial court find that the mother was unfit.

The Michigan Court of Appeals affirmed the trial court's actions.[113] It stated that upon a finding against one parent, Michigan law permitted the trial court to dispense with holding an adjudicative hearing to substantiate the allegations against the mother and could enter any orders involving her, including those mandating compliance with services that it deemed were in the children's interests.[114] It also concluded that Michigan statutes provided vast

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No. 263541, 2006 Mich. App. LEXIS 1098, at *4–6 (Mich. Ct. App. Apr. 11, 2006) (same); *In re* Stramaglia, No. 256133, 2005 Mich. App. LEXIS 1339, at *5–6 (Mich. Ct. App. May 26, 2005) (same).

105. *See, e.g.*, *In re C.R.*, 843 N.E.2d at 1192 ("When a juvenile court adjudicates a child to be abused, neglected or dependent, it has no duty to make a separate finding at the dispositional hearing that a non-custodial parent is unsuitable before awarding legal custody to a nonparent.").

106. *See, e.g.*, *In re* B.C., No. 23044, 2006 Ohio App. LEXIS 3197, at *8–9 (Ohio Ct. App. June 28, 2006) (finding that supervision of placement with birth fathers was appropriate even without proof of parental unfitness).

107. See, for example, *infra* notes 108–16 and accompanying text for a discussion of *In re Church*, in which the court required the mother to comply with services before it decided whether to terminate her parental rights regarding her three children.

108. No. 263541, 2006 Mich. App. LEXIS 1098 (Mich. Ct. App. Apr. 11, 2006).

109. *In re Church*, 2006 Mich. App. LEXIS 1098, at *2.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at *1–2.

114. *In re Church*, 2006 Mich. App. LEXIS 1098, at *4–5.

discretion for courts to enter orders "placing the children outside of the custodial parent's care whose neglect did not factor into the assumption of jurisdiction over the children"[115] as long as the court was acting "to ensure the children's well-being."[116] Countless numbers of cases in Michigan have similarly treated nonoffending parents as legal strangers to the child.[117]

The Illinois case of *In re Y.A.*[118] applied similar reasoning. In that case, the trial court obtained jurisdiction over the child after the child's mother admitted that she had created a harmful living environment.[119] No findings of maltreatment were issued against the father, and instead, the trial court explicitly found the father to be a fit parent.[120] Yet, the court still named the Department of Children and Family Services as the guardian of the child, which then determined that placement in foster care was warranted.[121] The Court of Appeals, which affirmed the trial court's decision, justified the decision by observing that, "[a]lthough it is true that the [father] was fit, the purpose of the dispositional hearing was for the trial court to determine whether it was in the best interests of the child to be made a ward of the court,"[122] and thus it could place the child in foster care even after determining that a parent was fit. In other words, even without a finding of unfitness, the parent's constitutional right to custody could be displaced by the court's subjective determination of what was best for the child.

A third case, *In re M.D.*,[123] demonstrates the prevalence of this approach. A child entered foster care after her father was arrested.[124] The trial court subsequently found that the child came under its purview based on the father's conduct, but made no findings against the child's mother.[125] Despite the mother's request for immediate custody, the court placed the child with her paternal

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115. *Id.* at *7.

116. *Id.* at *8.

117. See *supra* note 104 for a sampling of these cases. Decisions in Michigan stripping nonoffending parents of their custodial rights have relied upon the holding of *In re C.R.*, in which the Michigan Court of Appeals held that "[o]nce the family court acquires jurisdiction over the children," the court rule "authorizes the family court to hold a dispositional hearing 'to determine measures to be taken . . . against any adult'" and "then allows the family court 'to order compliance with all or part of the case service plan and may enter such orders as it considers necessary in the interest of the child.'" 646 N.W.2d 506, 515 (Mich. Ct. App. 2002) (emphasis omitted) (alteration in original) (quoting MICH. R. CT., STATE 5.973(A)).

118. 890 N.E.2d 710 (Ill. App. Ct. 2008).

119. *In re Y.A.*, 890 N.E.2d at 711–12.

120. *Id.* at 713.

121. *Id.*

122. *Id.* at 714.

123. No. CA2006-09-223, 2007 Ohio App. LEXIS 4181 (Ohio Ct. App. Sept. 10, 2007). Although the court recognized that both the United States and Ohio Constitutions afford a parent a fundamental right to the custody of his children, the court held that "'[t]he best interest of the child is the primary consideration' in such cases." *In re M.D.*, 2007 Ohio App. LEXIS 4181, at *6 (quoting *In re* Allah, No. C-040239, 2005 Ohio App. LEXIS 1163, at *10 (Ohio Ct. App. Mar. 18, 2005)).

124. *Id.* at *3.

125. *Id.*

grandparents, determining that it was best for the child to live with them.[126] On appeal, the Ohio Court of Appeals upheld the court's actions. The court ruled that a juvenile court "'has no duty to make a separate finding at the dispositional hearing that a noncustodial parent is unsuitable before awarding legal custody of a child to a non-parent relative.'"[127] Instead, an adjudication of abuse or neglect "'is a determination about the care and condition of a child and implicitly involves a determination of the unsuitability of the child's custodial and/or noncustodial parents.'"[128] Thus, based on one parent's conduct, the presumption that the other parent is fit is implicitly extinguished and the burden shifts to that parent to prove his or her adequacy.

These three cases typify the common practice of completely disregarding the nonoffending parent's rights in juvenile courts. Treated as a stranger to the child, the nonoffending parent has no legal rights to the child and instead must convince the state of his or her suitability, a tough burden of persuasion especially in a setting in which parents are routinely viewed with suspicion. These cases only give passing reference to the nonoffending parent's substantive due process right to raise his child and rarely address the Supreme Court's *Stanley v. Illinois*[129] decision, which seemingly requires juvenile courts to make findings of unfitness prior to interfering with a parent's custodial rights.[130] Despite serious constitutional infirmities, these approaches have survived numerous challenges on appeal.

B. Limited Parental Presumption

A number of other jurisdictions have adopted a more nuanced approach while continuing to deprive nonoffending parents of their full custodial rights. In these courts, judges recognize the parental presumption but only apply the presumption with regards to the physical custody of the child. Absent a finding of unfitness, nonoffending parents are granted physical custody of their children, but the court still retains legal custody, that is, the authority to make decisions regarding the child, and can order the nonoffending parent to comply with services.[131] Though safeguarding the physical custody rights of nonoffending parents, these systems intrude on their legal custody.

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126. *Id.* at *1.

127. *Id.* at *8 (quoting *In re* C.R., 843 N.E.2d 1188, 1192 (Ohio 2006)).

128. *In re M.D.*, 2007 Ohio App. LEXIS 4181, at *8 (quoting *In re C.R.*, 843 N.E.2d at 1192).

129. 405 U.S. 645 (1972).

130. *See Stanley*, 405 U.S. at 658 (holding that failure to provide unwed father a hearing on parental fitness qualifications prior to state's assumption of child custody, while affording a hearing to other parents, denies unwed father equal protection of law).

131. *See, e.g.*, *In re* S.G., 581 A.2d 771, 781 (D.C. 1990) (observing that "child's best interest is presumptively served by being with a parent, provided that the parent is not abusive or otherwise unfit"); *In re* M.K., 649 N.E.2d 74, 80–82 (Ill. App. Ct. 1995) (permitting court to take jurisdiction over child based on conduct of one parent but finding that physical custody of child should be awarded to fit parent); State v. Terry G. (*In re* Amber G.), 554 N.W.2d 142, 149 (Neb. 1996) (permitting trial court to order nonoffending parent to comply with services after finding of neglect but holding that "court may not properly deprive a biological or adoptive parent of the custody of the minor child unless it is

Decisions in Florida and California best illustrate this approach.[132] In *J.P. v. Department of Children and Families*,[133] the trial court found that a child was dependent due to the actions of the mother but determined that evidence of the father's unfitness was insufficient.[134] The court recognized that Florida law imposed a requirement to transfer physical custody of the child to the nonoffending parent upon the completion of the home study, but proceeded to condition that placement on the father submitting to a psychological evaluation and complying with any recommendations made by the evaluator.[135] The father appealed, arguing that since he was found to be a nonoffending parent, the court lacked the authority to order him to participate in services.[136]

The Florida Court of Appeals disagreed. The court interpreted the juvenile code to permit any parent, regardless of his or her responsibility for the child's abuse or neglect, to participate in treatment and services as the court determined was necessary.[137] Specifically, even after the restoration of physical custody to the nonoffending parent, the Florida statute in question permitted the court to order "that services be provided solely to the parent who is assuming physical custody in order to allow that parent to retain later custody without court jurisdiction, or that services be provided to both parents."[138] Few limits exist to constrain the juvenile court's ability to intrude on the nonoffending parent's decision-making authority. Despite the lack of an unfitness finding, the law presumes that the court is in a better position than the nonoffending parent to make decisions regarding the child's.[139]

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affirmatively shown that such parent is unfit"); *In re* Bill F., 761 A.2d 470, 476 (N.H. 2000) (finding that court must give nonoffending parent full hearing at which state must prove unfitness prior to deprivation of physical custody, but noting that "[n]othing in this opinion should be read to prevent the State from . . . providing social services for the benefit of a child"); New Mexico *ex rel.* Children, Youth & Families Dep't. v. Benjamin O., 160 P.3d 601, 609–10 (N.M. Ct. App. 2007) (noting that reversal of findings against father did not deprive trial court of ability to order him to comply with court-ordered services but required presumption that custody with father was in child's best interest); *In re* Christina I., 640 N.Y.S.2d 310, 310 (N.Y. App. Div. 1996) (finding that although trial court dismissed allegations against mother, it still had jurisdiction to enter orders pertaining to her); *In re* J.A.G., 617 S.E.2d 325, 332 (N.C. Ct. App. 2005) (finding that trial court erred in denying fit parent physical custody but still retained authority to proceed with case); *In re* N.H., 373 A.2d 851, 856 (Vt. 1977) (permitting court to adjudicate child as neglected based on findings against one parent but mandating that child be placed with other parent absent evidence of unfitness); State v. Gregory (*In re* Gregory R.S.), 643 N.W.2d 890, 901 (Wis. Ct. App. 2002) (stating that "children can be adjudicated to be in need of protection or services even when only one parent has neglected the children").

132. Cases from other jurisdictions are also instructive. *See, e.g.*, Meryl R. v. Ariz. Dep't of Econ. Sec., 992 P.2d 616, 618 (Ariz. Ct. App. 1999) (finding that juvenile court correctly dismissed dependency case because child had noncustodial father who was ready and willing to parent him); *In re* Welfare of T.L.L., 453 N.W.2d 355, 357 (Minn. Ct. App. 1990) (holding that child is not dependent if nonoffending, custodial parent is adequately meeting child's needs).

133. 855 So. 2d 175 (Fla. Dist. Ct. App. 2003).

134. *J.P.*, 855 So. 2d at 175.

135. *Id.* at 176.

136. *Id.*

137. *Id.*

138. FLA. STAT. ANN. § 39.521(3)(b)(2) (West 2008 & Supp. 2009).

139. *See* B.C. v. Dep't of Children and Families, 864 So. 2d 486, 490 (Fla. Dist. Ct. App. 2004)

California courts approach child welfare cases in the same way. California law mandates that courts must place a child with the nonoffending parent "unless it finds that placement with that parent would be detrimental to the safety, protection, or physical or emotional well-being of the child."[140] Even after the transfer of physical custody, the court may subject that parent to the "supervision of the juvenile court" and may order that the parent comply with services it deems necessary.[141] For example, in *Mendocino County Department of Social Services v. Shawn P. (In re Jeffrey P.)*,[142] the trial court ordered the child to be placed with his nonoffending father after the mother's unsuitability was proven, but then ordered the father to attend parenting classes and to accept the services of a parent aide.[143]

The Court of Appeals affirmed the lower court's decision to compel the nonoffending father to comply with services.[144] It explained that the trial court decided to give the father physical custody of the child while giving the state agency legal custody, a decision that was "within the juvenile court's discretion."[145] In reaching this conclusion, it emphasized that a child protection case was brought "on behalf of the child, not to punish the parents" and any imposition placed on the parent only occurred to further the child's interests.[146] Thus, interfering with a fit parent's legal custody was permissible so long as the interference furthered the court's determination of the child's best interest.

Even in these jurisdictions where courts appear cognizant that parents possess a constitutional right to custody of their child, courts have created an artificial distinction between physical and legal custody, one that has never been recognized by the Supreme Court. These courts interpret the Constitution to only protect the physical custodial rights of fit parents, while permitting the state to intrude upon that parent's legal rights to make decisions for the child. Never has the Supreme Court recognized this distinction, and in fact, the decisions discussed in Part III reflect the Court's strong protection of both physical and legal custodial rights of fit parents. For example, in *Stanley*, the Court prevented the state from removing children from the physical custody of their father absent proof of unfitness.[147] In *Troxel v. Granville*,[148] the Court barred courts from second-guessing the decisions made by a presumptively fit parent regarding with whom her child should associate.[149] But despite these and other holdings, in many states, once one parent is found to be unfit, the nonoffending parent is

(finding that, despite having superior right to custody of child, nonoffending parent could be ordered to comply with case plan).

140. CAL. WELF. & INST. CODE § 361.2(a) (West 2008).

141. *Id.* § 361.2(b)(3).

142. 267 Cal. Rptr. 764 (Ct. App. 1990).

143. *In re Jeffrey P.*, 267 Cal. Rptr. at 766.

144. *Id.* at 766, 768–69.

145. *Id.* at 768.

146. *Id.*

147. Stanley v. Illinois, 405 U.S. 645, 658 (1972).

148. 530 U.S. 57 (2000).

149. *Troxel*, 530 U.S. at 78–79.

viewed with suspicion and his ability to make sound decisions for the child is afforded no deference. Guilt by association pervades the process. "[A] finding against one parent is a finding against both in terms of the child being adjudged a dependent."[150]

C. *No State Involvement*

Two states, Maryland and Pennsylvania, have recognized that nonoffending parents have constitutionally protected rights and have adopted an approach completely at odds with those described above.[151] There, if a nonoffending parent exists, the court may not assume jurisdiction over the child for any purpose, even to offer services to the offending parent or the child.[152] The juvenile court must dismiss the case and the only limited action it may take is to grant custody to the nonoffending parent before dismissal.[153] Once the transfer of custody is made, all court involvement or oversight must be terminated.[154]

Two cases illustrate this approach. In *In re M.L.*,[155] a trial court found that a child was dependent because her mother was making repeated, false accusations that the child was being sexually abused by her father, subjecting the child to intrusive medical examinations.[156] While assuming jurisdiction of the child, the court found the father to be a fit parent and immediately placed the child in his care under the court's supervision.[157] The father appealed, arguing that the court had no basis to maintain any oversight over the case since he was a fit parent.[158]

The Pennsylvania Supreme Court agreed with the father and reversed the trial court's decision to exercise jurisdiction over the child because the child had a fit, nonoffending parent.[159] The court determined that "a child, whose non-custodial parent is ready, willing and able to provide adequate care to the child, cannot be found dependent."[160] If the noncustodial parent is immediately available to care for the child, then the court must grant that parent custody and dismiss the case.[161] The court concluded that any retention of power by the trial court to make decisions regarding the child would be "an unwarranted intrusion

150. L.A. County Dep't of Children & Family Servs. v. John D. (*In re* James C.), 128 Cal. Rptr. 2d 270, 278 (Ct. App. 2002) (quoting *In re* Nicholas B., 106 Cal. Rptr. 2d 465, 472 (Ct. App. 2001)).

151. *E.g.*, *In re* Sophie S., 891 A.2d 1125, 1133 (Md. Ct. Spec. App. 2006); *In re* S.J.-L., 828 A.2d 352, 356 (Pa. Super. Ct. 2003).

152. *See In re Sophie S.*, 891 A.2d at 1133 (noting court previously held that where one parent is "able and willing" to care for child, court may not adjudge child to be in need of assistance).

153. *Id.*

154. *Id.*

155. 757 A.2d 849 (Pa. 2000).

156. *In re M.L.*, 757 A.2d at 850.

157. *Id.*

158. *Id.*

159. *Id.* at 851.

160. *Id.* at 849.

161. *In re M.L.*, 757 A.2d at 851.

into the family," which is only appropriate "where a child is truly lacking a parent."[162]

Maryland's Court of Special Appeals, in *In re Russell G.*,[163] reached a similar conclusion. There, court intervention was requested to protect the child from his alcoholic mother; the child was committed to the Department of Social Services for placement in the care and custody of his father.[164] After the court determined that the allegations against the mother were true, the court declared that the child was dependent and placed him in the physical custody of his father, but subjected that placement to the supervision of the Department of Social Services, a decision which both parents appealed.[165]

The Court of Special Appeals agreed that the court intervention was inappropriate due to the willingness of the nonoffending parent to assume immediate custody of the child.[166] "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."[167] Thus, the court determined that a finding that a child was dependent was erroneous since a nonoffending parent was willing to care for the child.[168] Subsequent to the court's decision, the Maryland State Legislature amended its statute to permit the juvenile court, before dismissing the child protective case, to award the nonoffending parent custody after finding evidence that the child was harmed by the other parent.[169] In Maryland and Pennsylvania, other than making this custody determination, juvenile courts are prohibited from taking any actions regarding the child where a nonoffending parent asserts his right to custody over the child.[170]

V. SHORTCOMINGS OF CURRENT APPROACHES

The three approaches described above fail to offer the correct balance between safeguarding the constitutional rights of the nonoffending parent while providing courts with the much-needed flexibility to address the needs of the child and the other parent. The jurisdictions which permit trial courts to deprive nonoffending parents of legal and/or physical custodial rights to their children

162. *Id.*

163. 672 A.2d 109 (Md. Ct. Spec. App. 1996).

164. *In re Russell G.*, 672 A.2d at 111.

165. *Id.*

166. *Id.* at 115.

167. *Id.* at 114.

168. *Id.* at 116.

169. *See* MD. CODE ANN., CTS. & JUD. PROC. § 3-819(e) (LexisNexis 2006 & Supp.2008) ("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.").

170. *See In re* Sophie S., 891 A.2d 1125, 1133 (Md. Ct. Spec. App. 2006) (stating that court could not make adjudication as to whether child was in need of assistance where nonoffending parent was able and willing to care for child); *In re* M.L., 757 A.2d 849, 851 (Pa. 2000) (holding that court lacks authority to remove child where noncustodial parent is available and willing to care for child).

run afoul of constitutional guarantees that prevent the state from encroaching on these rights without a finding of parental unfitness.[171] These systems are ripe for constitutional challenges.

In addition to their constitutional flaws, the policy of interference with the custodial rights of fit parents is likely to produce bad outcomes for several reasons. First, the stress that foster care systems across the country face is well known, and all efforts to safely reduce the numbers of children in care will only promote their best interests.[172] Yet, in states like Michigan and Ohio, children are unnecessarily placed in overburdened foster care systems despite the willingness and availability of fit parents to care for their children immediately. In these states, courts are permitted to ignore the nonoffending parent and place children in foster care even if that parent is fit. Restoring constitutional rights to nonoffending parents will force courts to seriously consider those parents as placement options unless clear evidence of unfitness exists, thereby reducing the number of children completely dependent on the state. As aptly described by the Washington State Court of Appeals, "A parent cannot be denied his right to parent his child on the off-chance that he may have a problem unknown to the State."[173] This is precisely the approach endorsed by these states.

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171. See *supra* Part III for a discussion of the constitutional requirement that the state prove parental unfitness prior to depriving a parent of legal and physical custody of a child.

172. The foster care system should be seen as a place of last resort for children. Over half a million children remain in the system, and each year more children enter foster care than exit it. CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., THE AFCARS REPORT: PRELIMINARY FY 2006 ESTIMATES AS OF JANUARY 2008, at 1, 3–4 (2008), *available at* http://www.acf.hhs.gov/programs/cb/stats_research/afcars/tar/report14.pdf. Social workers and attorneys handling these cases are overwhelmed. *See* THE ANNIE E. CASEY FOUND., THE UNSOLVED CHALLENGE OF SYSTEM REFORM: THE CONDITION OF THE FRONTLINE HUMAN SERVICES WORKFORCE 9 tbl.1 (2003) (observing that annual turnover rate in child welfare workforce is twenty percent for public agencies and forty percent for private agencies); Editorial, *A Legal Hand for Foster Children*, S.F. CHRON., Sept. 28, 2005, at B8 ("[W]ith many of these lawyers burdened with overwhelming student loans, poorly compensated posts and outrageous caseloads, many are being forced out of these roles that foster children so desperately need."). Child abuse investigations are not completed in a timely fashion, social workers and attorneys do not visit children in their placements, and court hearings do not take place in accordance with federal guidelines. *See* Ben Kerman, *What is . . . the Child and Family Services Review?*, VOICE, Fall 2003, at 35, 35–36, *available at* http://www.caseyfamilyservices.org/pdfs/casey_whatis.pdf (explaining that majority of states reviewed were not in "substantial conformity" with number of outcomes factors, including protecting children from abuse and neglect and providing them with stable living conditions). On numerous occasions, child welfare agencies have lost track of children in their custody or have failed to monitor a child's placement, resulting in serious harm to the child. *E.g.*, *Michigan Agency Loses 302 Children*, ASSOCIATED PRESS, Aug. 30, 2002. Not surprisingly, children in foster care experience a wide range of problems, including mental health issues, poor academic performance, and involvement with the juvenile delinquency system. *See, e.g.*, CHILDREN'S DEFENSE FUND, SUMMARY: IMPROVING EDUCATION FOR HOMELESS AND FOSTER CHILDREN WITH DISABILITIES IN THE INDIVIDUALS WITH DISABILITIES EDUCATION IMPROVEMENT ACT OF 2004 (IDEA 2004) (P.L. 108-446), at 1 (2005), http://www.childrensdefense.org/child-research-data-publications/data/summary-improving-education-homeless-foster-children-disabilities-idea.pdf (observing that children in care are twice as likely to drop out of school and almost forty percent of children who age out of care will never receive a high school diploma).

173. State v. Gallardo-Cruz (*In re* S.G.), 166 P.3d 802, 806 (Wash. Ct. App. 2007).

Second, scarce public funds are wasted by ordering nonoffending parents to comply with services which may or may not be necessary.[174] In most states, nonoffending parents are presumed to be unfit upon a finding against the other parent and are often put through a standard regimen of court-ordered services, typically including parenting classes and psychological evaluations, to test their fitness.[175] Since evidentiary hearings detailing that parent's deficiencies are not legally required, these services are mandated without any evidence of the problem they are trying to solve or the connection between the problem and the underlying abuse or neglect of the child.[176] A system which requires the state to introduce reliable evidence of parental unfitness prior to intruding upon a parent's custodial rights would ensure that the state's response is narrowly tailored to the specific problems facing that parent.

Third, the approach hurts children by disempowering their parents and increasing the likelihood that their parents will disengage from the process. Research reveals that parents who are provided with procedural protections and are given "their day in court" are much more likely to stay involved in the process and comply with court mandates. Repeated studies by social psychologists provide compelling evidence that a key determinant in retaining the support of those involved in court systems is the utilization of fair procedures to make decisions.[177] Trust in the motives of authorities and judgments about the

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174. Each year, states disburse more $10 billion in federal and state funds to pay for housing and support services for children in foster care. Rob Geen et al., *Medicaid Spending on Foster Children*, *in* 2 CHILD WELFARE RESEARCH PROGRAM 1 (The Urban Inst., 2005); *see also* CYNTHIA ANDREWS SCARCELLA ET AL., THE URBAN INST., THE COST OF PROTECTING VULNERABLE CHILDREN V: UNDERSTANDING STATE VARIATION IN CHILD WELFARE FINANCING 6 (2006), *available at* http://www.urban.org/UploadedPDF/311314_vulnerable_children.pdf (reporting that, in 2004, states spent over $23 billion on child welfare programs). States spend an additional $1.8 billion on administering the child welfare system. *Id.* at 11 tbl.2. The costs of placements vary from state to state and by type of placement. For example, it costs New York City roughly twenty-eight dollars a day to keep a child in foster care. Leslie Kaufman, *Bill to Save Foster Care Costs Is Stalled in the Legislature*, N.Y. TIMES, July 21, 2004, at B2. A North Carolina study revealed the following daily costs for children's foster care placements: $12.01 (family foster care), $66.30 (specialized foster care), $129.93 (large group home), $132.86 (small group home), and $148.17 (emergency and other placements). Richard P. Barth et al., *A Comparison of the Governmental Costs of Long-Term Foster Care and Adoption*, 80 SOC. SERV. REV. 127, 136 tbl.1 (2006). After a child is placed with a nonoffending parent, many of these costs would disappear.

175. *See, e.g.*, B.C. v. Dep't of Children & Families, 864 So. 2d 486, 490 (Fla. Dist. Ct. App. 2004) (finding that court could order nonoffending parent to comply with case plan).

176. The Washington State Court of Appeals emphasized this point in reversing a termination of parental rights decision in *In re* S.G., 166 P.3d 802, 803 (Wash. Ct. App. 2007). In that case, the state required the father to participate in services to address deficiencies without first proving the existence of those deficiencies. *Id.* at 805–06. The court held that "the more basic problem is that it is impossible to evaluate the sufficiency or efficacy of services as to [the father] when, at this point, the State failed to show he required any. Without a problem, there can be no solution." *Id.* at 806.

177. *See* E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 71 (1988) (stating that individuals' perception of fairness strongly informs their satisfaction and general affect towards encounters with procedural justice); TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS 51, 93 (2002) (discussing procedural justice models and stating that cooperative overtures by authorities and courts

fairness of procedures are strong influences on acceptance and satisfaction of court mandates.[178]

In assessing what is "fair," litigants look to a number of factors. Most importantly, procedures that permit individuals to present arguments and to exert control over the process are deemed just whereas those that silence litigants only exacerbate feelings of mistrust.[179] Central to these findings is a person's need to have his story told, regardless of whether the telling will ultimately impact the outcome of the case.[180] Fairness is also enhanced by adequate representation and confidence that the decision maker is neutral and unbiased.[181] Courts that reaffirm one's self-respect and treat a person politely while respecting one's rights earn the trust of those before it, regardless of the substance of the orders they issue.[182]

Yet, the crux of the approaches adopted in these jurisdictions does exactly the opposite. Nonoffending parents are stripped of presumptions that their children shall be placed in their legal and physical custody and are explicitly denied the right to an evidentiary hearing at which the state must prove parental unfitness. Instead, their unfitness is presumed, services the court believes are necessary are ordered, and the parent has no choice but to simply submit to the court's orders or walk away.[183] These approaches are devoid of any procedural justice, which only exacerbates the likelihood that the parent will become frustrated with the process and perhaps disengage in some way. This disillusion can be avoided by restoring procedural rights to nonoffending parents and requiring constitutionally mandated burdens of proof on the state. Parental engagement will only enhance the quality of child protective proceedings.

Finally, allowing the court to interfere with the custodial rights of both parents based on findings against one raises the possibility of manipulation. A parent, in the context of an acrimonious divorce or custody battle, could make allegations that lead to the filing of a petition. Once the petition is filed, that

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lead to reciprocal cooperative behavior by individuals); TOM R. TYLER, WHY PEOPLE OBEY THE LAW 115, 129, 137 (1990) (stating that perceived fairness by individuals of justice system is influenced by factors such as efforts to grant greater process control and consideration of their views). *See generally* Tom R. Tyler, *What Is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, 22 LAW & SOC'Y REV. 103 (1988) (analyzing interactions between citizens and legal authorities from procedural justice perspective to determine factors influencing procedural fairness).

178. *See* TYLER & HUO, *supra* note 177, at 90 (noting that courts can increase compliance by enacting procedures that are "fair and appropriate").

179. *Cf.* Kees van den Bos et al., *When Do We Need Procedural Fairness? The Role of Trust in Authority*, 75 J. OF PERSONALITY & SOC. PSYCHOL. 1449, 1455 (1998) (discussing study of individuals' reactions to authority in which individuals given opportunities to voice their opinions reported higher satisfaction levels than those who were not); Gary B. Melton & E. Allan Lind, *Procedural Justice in Family Court: Does the Adversary Model Make Sense?*, *in* LEGAL REFORMS AFFECTING CHILD & YOUTH SERVICES 65, 66 (Gary B. Melton ed., 1982) (discussing push for less adversarial procedures in child custody cases to avoid institutionalizing and exacerbating tensions among family members).

180. TYLER, *supra* note 177, at 116, 127.

181. *Id.* at 137; van den Bos et al., *supra* note 179, at 1452; Tyler, *supra* note 177, at 105, 107.

182. TYLER, *supra* note 177, at 138; Tyler, *supra* note 177, at 129.

183. See *supra* Parts IV.A–B for a discussion of this point.

parent could then admit to findings in the petition, which, in these states, would then allow the court to enter broad orders that encroach upon the physical and/or legal custody rights of both parents. Similarly, the child welfare agency could pursue allegations against one parent for the sole purpose of obtaining authority over the other parent, against whom allegations may be more difficult to prove.[184] As noted by the Colorado Court of Appeals, "To allow an adjudication under such circumstances would permit dependency and neglect proceedings to be used for manipulative purposes . . . to the possible detriment of the best interests of the child."[185] These are but some of the reasons why ignoring the parental presumption of fitness, as it relates to nonoffending parents, will generate poor outcomes for children.

On the other hand, the approach implemented in Maryland and Pennsylvania, while zealously protecting the constitutional rights of nonoffending parents, deprives juvenile courts of the flexibility to craft orders to further the interests of the offending parent and the child.[186] In these states, the juvenile court cannot maintain any oversight over the family; if a nonoffending parent is able to care for the child, the case must be dismissed.[187] The only remedy available to the court is to grant the nonoffending parent custody of the child prior to dismissal.[188] This type of approach raises several concerns.

First, in many states, specialized services for children are only available to children with open dependency cases.[189] This unfortunate reality exists, in part, due to state budgetary constraints and policy choices and federal child welfare statutes that provide states with funds to offer services to children involved in the foster care system.[190] Thus, often, children not affiliated with the system are deprived of needed services.[191]

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184. *See In re* Irwin, No. 229012, 2001 Mich. App. LEXIS 2088, at *12 (Mich. Ct. App. July 13, 2001) (Whitbeck, J., concurring) (observing that child welfare agency "could make a calculated guess concerning which parent was less likely to demand a jury trial [and] proceed only against that parent, . . . simply in order to preclude one parent from demanding a jury trial").

185. People *ex rel.* U.S., 121 P.3d 326, 328 (Colo. App. 2005).

186. See *supra* Part IV.C for a discussion of the hands-off approach of Maryland and Pennsylvania courts.

187. *See, e.g., In re* Sophie S., 891 A.2d 1125, 1133 (Md. Ct. Spec. App. 2006) (holding juvenile court will not adjudicate assistance petition when one parent is "able and willing to provide care"); *In re* S.J.-L., 828 A.2d 352, 356 (Pa. Super. Ct. 2003) (affirming termination of abused child's dependency status proceedings where noncustodial parent was "ready, willing, and able" to care for child).

188. *In re Sophie S.*, 891 A.2d at 1133 (citing MD. CODE ANN., CTS. & JUD. PROC. § 3-819(e)); *In re S.J.-L.*, 828 A.2d at 355.

189. Statement by Lex Frieden, Chairperson, Nat'l Council on Disability, Statement to the U.S. Senate Committee on Governmental Affairs: Castaway Children: Must Parents Relinquish Custody in Order to Secure Mental Health Services for Their Children? (June 10, 2003).

190. *Id.*

191. *See id.* (observing that "[i]nadequate funding of mental health services and supports for children and their families is the major reason families turn to the child welfare system for help"). In his statement, Frieden cites to several studies supporting his statement, including one by the Commonwealth Institute for Child and Family Studies which found that, in sixty-two percent of states, the child welfare agency used a custody transfer to gain access to state funding for services for children

Take, for example, a child who was sexually abused by her father and placed immediately with her nonoffending mother. The mother wishes to enroll the child in sex abuse counseling, which if privately retained would be quite costly, but would be paid for by the state if an open dependency case existed. The mother wishes for the case to remain open until the child receives all necessary services, yet the approach adopted by Maryland and Pennsylvania does not permit such a result; the willingness of the nonoffending parent to care for the child mandates the dismissal of the case. The dearth of services outside the child welfare system would likely result in the child's needs going unmet.

Second, this approach deprives offending parents of their statutory right to receive an opportunity to reunify with their children and instead forces judges to make premature decisions contrary to the child's interests. Federal law requires states to make "reasonable efforts" to reunify the family if a child has been removed from the home.[192] In Maryland and Pennsylvania, however, no opportunity for reunification is given.[193] After a child is placed with a nonoffending parent, the court only has two options. It may simply dismiss the case immediately, or it may grant the nonoffending parent custody of the child and then dismiss the case. No other choices exist.

Closing the case without granting the nonoffending parent permanent custody of the child may jeopardize the safety of the child and the nonoffending parent. Once the judge dismisses the case, all of the orders entered in the child protective case would lose their force and nothing would exist to protect the new family unit from the abusive parent.[194] The nonoffending parent would have no legal authority to prevent the other parent from having access to the child, yet in serious cases of child maltreatment, limiting access may be essential. The nonoffending parent's recourse would be to file a separate custody action to obtain such an order, but the time it may take to do so would be prohibitive.[195]

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with serious emotional and behavioral problems. *Id.* at n.16. Thirty-eight percent of the responding child welfare agencies used custody transfers to obtain funding for children's treatment. *Id.*

192. 42 U.S.C. § 671(a)(15)(B) (2006). State courts have interpreted this requirement to impose an obligation on states to reunify children with the parent from whose care they were removed. *See, e.g.*, State v. Daniel M. (*In re* Ethan M.), 723 N.W.2d 363, 370–71 (Neb. Ct. App. 2006) (finding state had to make efforts to reunify child with custodial parent). *But see* L.A. County Dep't of Children & Family Servs. v. Patricia O. (*In re* Patricia T.), 109 Cal. Rptr. 2d 904, 908–09 (Ct. App. 2001) (affirming trial court's decision denying offending parent reunification services when child was placed with nonoffending parent); R.W. v. Dep't of Children & Families, 909 So. 2d 402, 403 (Fla. Dist. Ct. App. 2005) (holding that substantial compliance with services did not mandate reunification with offending parent when child was placed with nonoffending parent); *In re* T.S., 74 P.3d 1009, 1018 (Kan. 2003) (finding that reasonable efforts requirement could be satisfied by reunifying child with noncustodial parent).

193. *In re Sophie S.*, 891 A.2d at 1133 (citing MD. CODE ANN., CTS. & JUD. PROC. § 3-819(e)); *In re S.J.-L.*, 828 A.2d at 356.

194. *See In re* N.H., 373 A.2d 851, 855 (Vt. 1977) ("In lieu of such a finding and the concomitant lack of jurisdiction, there is a strong possibility that the child will be returned to the same situation from which it has been taken.").

195. This problem would be exacerbated by the fact that many family courts remain fragmented and, often, numerous judges hear cases involving the same litigants. *See* Judith D. Moran, *Fragmented Courts and Child Protection Cases: A Modest Proposal for Reform*, 40 FAM. CT. REV. 488, 488 (2002)

In the interim, the child and the nonoffending parent would be subject to a state of impermanence during which the abusive parent would continue to have equal rights to access the child.

Maryland and Pennsylvania have responded to this safety risk by giving courts the authority to grant the nonoffending parent permanent custody of the child prior to closing the child protective case.[196] But this too raises concerns because a child's interests may not be served by granting the nonoffending parent immediate custody prior to giving the other parent an opportunity to reunify with her child after participating in services.[197] Consider the example of the child who has been living with her mother for the past ten years, while visiting her father every other weekend. The child enters the foster care system after her mom lapsed into depression and hit her with a belt while intoxicated. The evidence reveals that this only happened once, and the mother is eager to participate in services. The child also wants to return to her mother's care but is placed temporarily with her nonoffending father, who played no role in the abuse.

Again, in Maryland or Pennsylvania, the juvenile court would have to close the case either immediately upon placing the child with her father or after granting the father long-term custody of the child.[198] But neither of these options seems appropriate. Closing the case immediately may place the child in danger for the reasons described above. Without receiving services, the mother may not be in a position to safely care for the child, but no legal orders would prevent her from having unlimited contact with her daughter or immediately resuming her care for the child.

(noting that family law matters span multiple categories and jurisdictions, sometimes proceeding in both criminal and civil arenas). Moran writes, "The ills created and perpetuated by this patchwork court system addressing family matters wreak havoc on the fabric of family life," and often, "[f]amilies lose precious time getting help because the system fails to facilitate connections to necessary services." *Id.* at 489. Some jurisdictions have responded by creating unified family courts permitting judges to hear all matters involving the same family. *See, e.g.*, D.C. CODE ANN. § 11-1104(a) (LexisNexis 2008) ("To the greatest extent practicable, feasible, and lawful, if an individual who is a party to an action or proceeding assigned to the Family Court has an immediate family or household member who is a party to another action or proceeding assigned to the Family Court, the individual's action or proceeding shall be assigned to the same judge or magistrate judge to whom the immediate family member's action or proceeding is assigned."); MICH. COMP. LAWS ANN. § 600.1023 (West Supp. 2008) ("When 2 or more matters within the jurisdiction of the family division of circuit court involving members of the same family are pending in the same judicial circuit, those matters, whenever practicable, shall be assigned to the judge to whom the first such case was assigned."). But, fragmented systems still characterize many jurisdictions across the country. Moran, *supra*, at 488.

196. *See* MD. CODE ANN., CTS. & JUD. PROC. § 3-819(e) (LexisNexis 2006 & Supp. 2008) (permitting court to award permanent custody to nonoffending parent after petition is sustained as to other parent); *In re* M.L., 757 A.2d 849, 851 n.3 (Pa. 2000) (allowing trial courts to use their equitable powers to award nonoffending parent custody).

197. *See Harris*, *supra* note 15, at 306 (commenting that "the former custodial parent is not dead, and she and the child continue to have claims to a relationship with each other and statutory rights to state assistance to protect that relationship").

198. See *supra* Part IV.C for a discussion of how Maryland and Pennsylvania courts relinquish jurisdiction after the child is no longer dependent on the court.

Granting the father long-term custody may not be warranted either. The mother, who has been the child's custodial parent for the past ten years and still maintains residual rights to the child, is eager to regain custody of her child, is willing to comply with services, and has a child who wants to return to her care. She acknowledges that she made a mistake and desperately seeks to reunify with the child, and placement with her, after she receives services, may be the best outcome. Further, the child's father may not want to assume the role of the permanent custodial parent. Forcing the court to issue a long-term custody order based on one incident would deprive the mother of access to services to better herself and would impose a high burden on her in the future to modify the order.[199] Instead, a much better approach, described below, would be to place the child temporarily with the nonoffending parent, provide services to the offending parent, and permit the court to make a long-term custody decision after the mother has had the opportunity to participate in the services. This option is not available in most jurisdictions.

As described above, the current approaches either fail to protect the rights of the nonoffending parent or deprive courts of the much-needed flexibility to meet the needs of the child and the offending parent. The adoption of a new policy is required which balances all of these interests while surviving constitutional scrutiny. The final Part describes such an approach.

VI. SOLUTION

My proposed solution consists of two guiding principles. First, a juvenile court must be afforded the flexibility to assume jurisdiction over a child based on findings of maltreatment against one parent. This authority is essential to ensuring that the court has the ability to issue orders to remedy the abuse or neglect by the offending parent. Second, in order to respect the constitutional rights of the nonoffending parent, the court's power should be limited. While the case is ongoing, absent proof of parental unfitness, the court must grant custodial rights to the nonoffending parent to the satisfaction of that parent. The only authority the court could exert over the nonoffending parent would be to compel him to cooperate with reunification efforts, since the offending parent maintains residual rights to the child.[200]

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199. A parent seeking to modify a custody order must prove that there has been a substantial and material change of circumstance and that the modification is in the child's best interests, a high burden as described by state courts. *See, e.g.*, San Marco v. San Marco, 961 So. 2d 967, 970 (Fla. Dist. Ct. App. 2007) (holding modifications must be in best interests of child and requiring materially altered conditions of substantial degree for approval of modification (citing Wade v. Hirschman, 903 So. 2d 928, 932–33 (Fla. 2005))); Levin v. Levin, 836 P.2d 529, 532 (Idaho 1992) ("The party seeking modification clearly has the burden of justifying a change in custody, . . . and although the threshold question is whether a permanent and substantial change in the circumstances has occurred, the paramount concern is the best interest of the child."); Baxendale v. Raich, 878 N.E.2d 1252, 1255 (Ind. 2008) ("Modifications are permitted only if the modification is in the best interests of the child and there has been 'a substantial change'.").

200. The Supreme Court has recognized that parents do not lose their constitutionally protected interest in their children because they have lost temporary custody of them. Santosky v. Kramer, 455

This solution would be straightforward to implement in practice. Upon finding that one parent abused or neglected the child, the court could obtain jurisdiction over the child and could use that power to issue orders to remediate the underlying abuse or neglect by the offending parent. This authority could be used to regulate the offending parent's contact with the child, compel her compliance with a case service plan, or even terminate her parental rights in extreme circumstances. Additionally, the court could also order the child welfare agency to provide services to the child and the nonoffending parent necessary to address the maltreatment.

Despite having broad authority over the offending parent, the court's jurisdiction over the nonoffending parent would be limited. As the case proceeded, absent an unfitness finding, the court would have to grant the nonoffending parent custodial rights to that parent's satisfaction. Any attempt to interfere with those rights, unrelated to reunification efforts, would require the filing of a petition against the nonoffending parent, which would then trigger all the procedural protections available under state law. Only after making a specific finding of unfitness against that parent could the court obtain authority over him. Such a finding would trigger the court's ability to remove the child from that parent's custody,[201] order the parent to participate in services, or override his determination of what is best for the child.

As noted above, one exception would apply. Since child protective cases implicate the constitutional rights of both parents, the court would have the authority, even without an unfitness finding, to issue orders to ensure that the nonoffending parent did not undermine the offending parent's ability to reunify with her child. For example, the court could mandate that the nonoffending parent make the child available for visitations with the other parent, institute family therapy, and order that the child be returned to the temporary custody of the offending parent. If the nonoffending parent refused to cooperate with reunification efforts, the court could use its contempt powers to enforce orders.

Under this approach, preserving the custodial rights of the nonoffending parent would not interfere with the opportunity of the other parent to reunify with her child. After giving the offending parent the chance to participate in services, the court would be well-positioned to make an informed decision about which parent should be the long-term custodian of the child. This approach, permitting the court to address the needs of the child and giving the offending parent the opportunity to reunify with her child, while prohibiting the court from intruding upon the rights of the nonoffending parent, strikes the appropriate balance between flexibility, safety, and adherence to the due process rights of all parents.[202]

U.S. 745, 753 (1982) ("Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life.").

201. The court, however, would not need to find the nonoffending parent unfit prior to returning the child to the custody of the offending parent. Custody transfers from one parent to another can occur after the court makes a finding that the transfer is in the best interests of the child. Kauten v. Kauten, 261 A.2d 759, 760 (Md. 1970).

202. Few courts have adopted this type of approach. One example is seen in *People ex rel. U.S.*,

Critics of my approach may argue that giving nonoffending parents unfettered discretion with regards to children who have been found to be abused or neglected would jeopardize their well-being. They may assert that the state's interest in these children is heightened due to the maltreatment, and that state social workers are the experts in determining what the child needs. Under this view, social workers, and not the child's parents, should have the broad authority to make decisions for the child.[203]

This argument, however, is unpersuasive. It is important to remember that nonoffending parents, by definition, are those against whom no allegations of unfitness are made. No reason exists to doubt their decision-making abilities and thus the state has no justification to intrude. If such grounds exist, a petition alleging misconduct can be filed, an evidentiary hearing can be convened, and findings can be made against that parent which would then empower the court to issue orders related to that parent. While this process unfolds, the court could also issue emergency orders to protect the child, as it could with regards to any offending parent. But, without specific evidence of unfitness, the state has no interest in interfering with the nonoffending parent's custodial rights to the child.[204]

Additionally, given the states' poor track record in meeting the basic needs of children in foster care[205]—a record that includes federal court oversight of numerous state child welfare systems due to rampant violations of the

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where the county Department of Human Services filed a petition alleging that the child's environment was harmful to his welfare. 121 P.3d 326, 326 (Colo. Ct. App. 2005). The father admitted portions of the petition, but the mother requested a trial before a jury, which found in favor of the mother. *Id.* The trial court entered a dispositional order in which it found that it had jurisdiction over the father, but not the mother, and required the father to participate in a treatment plan. *Id.* at 327. The guardian ad litem requested that the mother be required as well to comply with services but the court refused, concluding that it had no jurisdiction to do so. *Id.* The guardian ad litem appealed. *Id.*

The Colorado Court of Appeals sided with the trial court and ruled that findings made against one parent cannot form the basis for requiring the other parent to comply with the treatment plan. *People ex. rel. U.S.*, 121 P.3d at 328. The father's admissions gave the court limited jurisdiction as to him but not as to the mother. Thus, the trial court's decision to force the father to participate in services was appropriate as was its finding that it could not issue any orders affecting the mother's custodial rights. *Id.* ("Nothing in the statute grants a court the power to impose a treatment plan on a parent when the child has not been found to be dependent and neglected by that parent.").

203. One additional factor to consider is the high rate of turnover among caseworkers involved in the child welfare system. "Ninety percent of state child welfare agencies report difficulty in recruiting and retaining workers." Sandra Stukes Chipungu & Tricia B. Bent-Goodley, *Meeting the Challenges of Contemporary Foster Care*, 14 FUTURE OF CHILDREN 75, 83 (2004). The annual turnover rate in the child welfare workforce is twenty percent for public agencies and forty percent for private agencies. THE ANNIE E. CASEY FOUNDATION, *supra* note 172, at 9 tbl.1. Thus, often, caseworkers do not get to know children on their caseloads well.

204. *See* Stanley v. Illinois, 405 U.S. 645, 652–53 (1972) (observing that "the State registers no gain towards its declared goals when it separates children from the custody of fit parents" and, in fact, it "spites its own articulated goals when it needlessly separates [a child] from his family").

205. See *supra* note 181 for a description of some of the problems children face in foster care. For a comprehensive discussion of these issues, see generally GLORIA HOCHMAN ET AL., THE PEW COMM'N ON CHILDREN IN FOSTER CARE, FOSTER CARE: VOICES FROM THE INSIDE, *available at* http://pewfostercare.org/research/voices/voices-complete.pdf.

constitutional rights of foster children[206]—the argument that the state is the expert on addressing the needs of at-risk children is tenuous. Indeed, as the Supreme Court has observed, "[H]istorically [the law] has recognized that natural bonds of affection lead parents to act in the best interests of their children."[207] No reason exists to deviate from this fundamental principle.

VII. CONCLUSION

Over the past hundred years, a consensus has developed recognizing a parent's ability to raise his or her child as a fundamental, sacrosanct right protected by the Constitution. Federal courts have repeatedly rejected the *parens patriae* mode of decision making and have instead held that the Constitution requires the state to introduce proof of parental unfitness prior to the temporary or permanent deprivation of that right from a parent. Yet, juvenile courts have persisted to strip nonoffending parents of those rights without any procedural protections, a striking remnant of the *parens patriae* mindset. Such actions not only raise many constitutional questions, but also jeopardize the child's safety and well-being by increasing the likelihood that he will unnecessarily enter foster care and that his parents will disengage with the process.

Current approaches to rectify the problem fail to reflect the correct balance between safeguarding the constitutional rights of the nonoffending parent and preserving the flexibility of juvenile court judges to issue orders regarding the offending parent and ensuring that appropriate services are available to the child. This balance can be achieved by implementing a policy which permits the court, upon a finding of abuse or neglect by one parent, to obtain limited jurisdiction in the case to enter orders addressing that parent and to order the child welfare agency to offer services to the child and the nonoffending parent. But, without a finding of unfitness against the other parent, the court would be prohibited from entering any orders that infringe upon the nonoffending parent's custodial rights to the child, except to the extent necessary to further reunification efforts. This compromise would ensure that fit parents remain the prime decision makers in their child's life.

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206. Children's Rights Inc., a nonprofit legal organization based in New York City, has litigated numerous class action cases which have resulted in federal court oversight over state child welfare systems. *See* Children's Rights, Legal Cases, http://www.childrensrights.org/reform-campaigns/legal-cases/ (last visited Nov. 6, 2009) (listing ongoing and completed cases handled by Children's Rights Inc.). This list only represents a partial summary of successful systemic actions brought against dysfunctional child welfare systems. *See, e.g.*, CHILD WELFARE LEAGUE OF AM. & ABA CTR. ON CHILDREN AND THE LAW, CHILD WELFARE CONSENT DECREES: ANALYSIS OF THIRTY-FIVE COURT ACTIONS FROM 1995 TO 2005, at 2 (2005), *available at* http://www.cwla.org/advocacy/consentdecrees.pdf (finding that twenty-one states were either currently under court-approved consent decree or court order, or had pending litigation brought against their child welfare agencies).

207. Parham v. J.R., 442 U.S. 584, 603 (1979).

IN THE MICHIGAN SUPREME COURT

In the Matter of MAYS, Minors

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

WALI PHILLIPS,

Respondent-Appellant.

Lower Court No.: 09-485821-NA
Court of Appeals No.: 297447
Supreme Court No.: 142566

CERTIFICATE OF SERVICE

Carolyn R. Lindeman, states that she is an employee of Honigman Miller Schwartz and Cohn, LLP, and that on August 2, 2011, she served two copies of the *National Association of Counsel for Children's Motion for Leave to File Amicus Curiae Brief, Brief of Amicus Curiae National Association of Counsel for Children* and this *Certificate of Service,* via first-class U.S. Mail, upon:

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