IN THE MICHIGAN SUPREME COURT
Appeal from the Michigan Court of Appeals

In re Guardianship of Versalle, Minors

MSC No. 1624434-5
COA No. 351758; 351757

Muskegon County Probate
LC Nos. 19-2586-GM; 19-2589-GM

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AMICUS CURIAE FAMILY LAW SECTION
APPENDIX I: Index and Summary of Key US Supreme Court Precedent

***A. Stanley v. Illinois*, 405 US 645, 658 (1972).**

Summary: Father prevails. Illinois statute —that declared children of unwed fathers to be wards of the state upon death of mother without a hearing as to parental fitness— declared unconstitutional. Father entitled to hearing on fitness before children could be taken from him.

"[A]ll Illinois parents are constitutionally entitled to a hearing on their fitness before their children are removed from their custody. It follows that denying such a hearing to Stanley and those like him while granting it to other Illinois parents is inescapably contrary to the Equal Protection Clause."

***B. Santosky v Kramer*, 455 US 745, 753–54 (1982).**

Summary: Parents prevail. New York statute —requiring only a preponderance of the evidence standard for termination of parental rights— declared unconstitutional. The clear and convincing evidentiary standard is, at a minimum, required when fundamental liberty interests are at stake.

"The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. ... 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."

C. Troxel v Granville, 530 US 57, 72-73 (2000).

Summary: Parents prevail. A Washington statute —which broadly gave grandparents visitation without regard to parents wishes— was deemed unconstitutional. (1) Parents have a fundamental and constitutionally protected right to raise their children and make decisions for them; (2) that right is protected by the Due Process Clause of the Fourteenth Amendment; (3) State must defer to, and give special weight to, decisions of fit parents.

"Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a "better" decision could be made."

Respectfully submitted,
AUSTIN+KOFFRON

Dated: November 5, 2021

By: */s/Saraphoena B. Koffron*
Saraphoena B. Koffron, P67571
on behalf of the Family Law Section
of the State Bar of Michigan

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92 S.Ct. 1208
Supreme Court of the United States

Peter STANLEY, Sr., Petitioner,

v.

State of ILLINOIS.

No. 70—5014.
|
Argued Oct. 19, 1971.
|
Decided April 3, 1972.

Synopsis

Dependency proceeding was brought by State of Illinois upon the death of the natural mother of the children. The determination of the Circuit Court of Cook County, John P. McGury, J., that the children were dependent was affirmed by the Supreme Court of Illinois, 45 Ill.2d 132, 256 N.E.2d 814. The children's natural father brought certiorari. The Supreme Court, Mr. Justice White, held that under the Due Process Clause of the Fourteenth Amendment, unwed father was entitled to hearing on his fitness as parent before his children could be taken from him in dependency proceeding instituted by the State of Illinois after the death of the children's natural mother.

Reversed and remanded.

Mr. Justice Douglas joined in Parts I and II of the opinion.

Mr. Chief Justice Burger dissented and filed opinion in which Mr. Justice Blackmun joined.

Mr. Justice Powell and Mr. Justice Rehnquist took no part in consideration or decision.

West Headnotes (13)

[1] **Constitutional Law** Family law; marriage

Fact that unwed father could, under Illinois law, apply for adoption or for custody and control of his children did not bar his attack on dependency proceeding under Illinois statutory scheme whereby children of unmarried father, upon death of the mother, are declared dependents without any hearing on parental fitness and without proof of neglect. S.H.A.Ill. ch. 37, §§ 702–1, 702–4, 702–5, 705–8; U.S.C.A.Const. Amend. 14.

500 Cases that cite this headnote

[2] **Infants** Resignation, removal, and successorship

Under Illinois law, "legal custody" is not "parenthood" or "adoption" and a person appointed guardian in action for custody and control is subject to removal any time without such cause as must be shown in neglect proceeding against parent. S.H.A.Ill. ch. 37, § 705–8.

122 Cases that cite this headnote

[3] **Constitutional Law** Presumptions, inferences, and burden of proof

Presumption under Illinois law that unmarried fathers are unsuitable and neglectful parents is violative of due process; parental unfitness must be established on basis of individualized proof. S.H.A.Ill. ch. 37, §§ 702–1, 702–4, 702–5, 705–8; U.S.C.A.Const. Amend. 14.

210 Cases that cite this headnote

[4] **Constitutional Law** Notice and Hearing

Due process of law does not require hearing in every conceivable case of government impairment of private interest. U.S.C.A.Const. Amend. 14.

83 Cases that cite this headnote

[5] **Child Custody** Persons entitled in general

Private interest of unwed father in the children he has sired and raised warrants deference and, absent powerful countervailing interest, protection and the interest of a parent in the companionship, care, custody, and management

of his children comes to the Supreme Court with momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements. U.S.C.A.Const. Amend. 14.

1857 Cases that cite this headnote

[6] **Child Custody** Persons entitled in general

Unwed father's interest in retaining custody of his children after the death of the natural mother of the children was cognizable and substantial. S.H.A.Ill. ch. 37, §§ 702–1, 702–4, 702–5, 705–8; U.S.C.A.Const. Amend. 14.

156 Cases that cite this headnote

[7] **Child Custody** Interest or role of government

Protection by state of moral, emotional, mental and physical welfare of the minor and the best interests of the community and to strengthening of the minor's family ties whenever possible, removing him from the custody of his parents only when his welfare or safety or protection of the public cannot be adequately safeguarded without removal, are legitimate interests well within the power of the state to implement. S.H.A.Ill. ch. 37, § 701–2.

243 Cases that cite this headnote

[8] **Action** Course of procedure in general

The establishment of prompt efficacious procedures to achieve legitimate state ends is proper state interest worthy of cognizance in constitutional adjudication. U.S.C.A.Const. Amend. 14.

19 Cases that cite this headnote

[9] **Constitutional Law** Factors considered; flexibility and balancing

The Constitution recognizes higher values than speed and efficiency; the Bill of Rights in general, and the due process clause in particular, were designed to protect the fragile values of vulnerable citizenry from the overbearing concern for efficiency and efficacy which may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones. U.S.C.A.Const. Amend. 14.

128 Cases that cite this headnote

[10] **Constitutional Law** Protection of Children; Child Abuse, Neglect, and Dependency

Infants Necessity; right to hearing

Due process clause of Fourteenth Amendment required that unwed father be granted hearing by the State of Illinois on his fitness as parent before his children could be taken from him in dependency proceeding after death of the children's natural mother. S.H.A.Ill. ch. 37, §§ 702–1, 702–4, 702–5, 705–8; U.S.C.A.Const. Amend. 14.

693 Cases that cite this headnote

[11] **Child Custody** Hearing

All Illinois parents, both married and unmarried, male or female, are constitutionally entitled to hearing on their fitness before their children are removed from their custody. S.H.A.Ill. ch. 37, §§ 702–1, 702–4, 702–5, 705–8; U.S.C.A.Const. Amend. 14.

76 Cases that cite this headnote

[12] **Constitutional Law** Trial

Denial to unmarried father of hearing on fitness as parent which was accorded, under Illinois law, to all other parents when custody of their children was challenged by state constituted denial of equal protection of the laws. S.H.A.Ill. ch. 37, §§ 702–1, 702–4, 702–5, 705–8; U.S.C.A.Const. Amend. 14.

119 Cases that cite this headnote

[13] **Federal Courts** Review of state courts

The Supreme Court could predicate finding of constitutional invalidity under equal protection clause of Fourteenth Amendment on observation

that state has accorded bedrock procedural rights to some, but not to all similarly situated, when that constitutional premise was raised below and the result was reached by method of analysis readily available to the state court; federal courts are barred from reversing state conviction on grounds of contravention of equal clause when that clause had not been referred to for consideration by state authorities. U.S.C.A.Const. Amend. 14.

72 Cases that cite this headnote

**1209 *645 Syllabus*

Petitioner, an unwed father whose children, on the mother's death, were declared state wards and placed in guardianship, attacked the Illinois statutory scheme as violative of equal protection. Under that scheme the children of unmarried fathers, upon the death of the mother, are declared dependents without any hearing on parental fitness and without proof of neglect, though such hearing and proof are required before the State assumes custody of children of married or divorced parents and unmarried mothers. The Illinois Supreme Court, holding that petitioner could properly be separated from his children upon mere proof that he and the dead mother had not been married and that petitioner's fitness as a father was irrelevant, rejected petitioner's claim. Held:

1. Under the Due Process Clause of the Fourteenth Amendment petitioner was entitled to a hearing on his fitness **1210 as a parent before his children were taken from him. Pp. 1210—1216.

(a) The fact that petitioner can apply for adoption or for custody and control of his children does not bar his attack on the dependency proceeding. Pp. 1210—1212.

(b) The State cannot, consistently with due process requirements, merely presume that unmarried fathers in general and petitioner in particular are unsuitable and neglectful parents. Parental unfitness must be established on the basis of individualized proof. See Bell v. Burson, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90. Pp. 1211—1216.

2. The denial to unwed fathers of the hearing on fitness accorded to all other parents whose custody of their children is challenged by the State constitutes a denial of equal protection of the laws. P. 1216.

45 Ill.2d 132, 256 N.E.2d 814, reversed and remanded.

Attorneys and Law Firms

*646 Patrick T. Murphy, Chicago, Ill., for petitioner.

Morton E. Friedman, Chicago, Ill., for respondent.

Opinion

Mr. Justice WHITE delivered the opinion of the Court.

Joan Stanley lived with Peter Stanley intermittently for 18 years, during which time they had three children.[1] When Joan Stanley died, Peter Stanley lost not only her but also his children. Under Illinois law, the children of unwed fathers become wards of the State upon the death of the mother. Accordingly, upon Joan Stanley's death, in a dependency proceeding instituted by the State of Illinois, Stanley's children[2] were declared wards of the State and placed with court-appointed guardians. Stanley appealed, claiming that he had never been shown to be an unfit parent and that since married fathers and unwed mothers could not be deprived of their children without such a showing, he had been deprived of the equal protection of the laws guaranteed him by the Fourteenth Amendment. The Illinois Supreme Court accepted the fact that Stanley's own unfitness had not been established but rejected the equal protection claim, holding that Stanley could properly be separated from his children upon proof of the single fact that he and the dead mother *647 had not been married. Stanley's actual fitness as a father was irrelevant. In re Stanley, 45 Ill.2d 132, 256 N.E.2d 814 (1970).

Stanley presses his equal protection claim here. The State continues to respond that unwed fathers are presumed unfit to raise their children and that it is unnecessary to hold individualized hearings to determine whether particular fathers are in fact unfit parents before they are separated from their children. We granted certiorari, 400 U.S. 1020, 91 S.Ct. 584, 27 L.Ed.2d 631 (1971), to determine whether this method of procedure by presumption could be allowed to stand in light of the fact that Illinois allows married fathers —whether divorced, widowed, or separated—and mothers—even if unwed—the benefit of the presumption that they are fit to raise their children.

I

[1] At the outset we reject any suggestion that we need not consider the propriety of the dependency proceeding that separated the Stanleys because Stanley might be able to regain custody of his children as a guardian or through adoption proceedings. The suggestion is that if Stanley has been treated differently from other parents, the difference is immaterial and not legally cognizable for the purposes of the Fourteenth Amendment. This Court has not, however, embraced the general proposition that a wrong may be done if it **1211 can be undone. Cf. Sniadach v. Family Finance Corp. of Bay View, 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969). Surely, in the case before us, if there is delay between the doing and the undoing petitioner suffers from the deprivation of his children, and the children suffer from uncertainty and dislocation.

It is clear, moreover, that Stanley does not have the means at hand promptly to erase the adverse consequences of the proceeding in the course of which his children were declared wards of the State. It is first *648 urged that Stanley could act to adopt his children. But under Illinois law, Stanley is treated not as a parent but as a stranger to his children, and the dependency proceeding has gone forward on the presumption that he is unfit to exercise parental rights. Insofar as we are informed, Illinois law affords him no priority in adoption proceedings. It would be his burden to establish not only that he would be a suitable parent but also that he would be the most suitable of all who might want custody of the children. Neither can we ignore that in the proceedings from which this action developed, the 'probation officer,' see App. 17, the assistant state's attorney, see id., at 29—30, and the judge charged with the case, see id., at 16—18, 23, made it apparent that Stanley, unmarried and impecunious as he is, could not now expect to profit from adoption proceedings.[3] The Illinois Supreme Court apparently recognized some or all of these considerations, because it did not suggest that Stanley's case was undercut by his failure to petition for adoption.

[2] Before us, the State focuses on Stanley's failure to petition for 'custody and control'—the second route by which, it is urged, he might regain authority for his children. Passing the obvious issue whether it would be futile or burdensome for an unmarried father—without funds and already once presumed unfit—to petition for custody, this suggestion overlooks the fact that legal custody is not parenthood or adoption. A person appointed guardian in an action for custody and control is subject to removal at any time without such *649 cause as must be shown in a neglect proceeding against a parent. Ill.Rev.Stat., c. 37, s 705—8. He may not take the children out of the jurisdiction without the court's approval. He may be required to report to the court as to his disposition of the children's affairs. Ill.Rev.Stat., c. 37, s 705—8. Obviously then, even if Stanley were a mere step away from 'custody and control,' to give an unwed father only 'custody and control' would still be to leave him seriously prejudiced by reason of his status.

[3] We must therefore examine the question that Illinois would have us avoid: Is a presumption that distinguishes and burdens all unwed fathers constitutionally repugnant? We conclude that, as a matter of due process of law, Stanley was entitled to a hearing on his fitness as a parent before his children were taken from him and that, by denying him a hearing and extending it to all other parents whose custody of their children is challenged, the State denied Stanley the equal protection of the laws guaranteed by the Fourteenth Amendment.

II

Illinois has two principal methods of removing nondelinquent children from the homes of their parents. In a dependency proceeding it may demonstrate **1212 that the children are wards of the State because they have no surviving parent or guardian. Ill.Rev.Stat., c. 37, ss 702—1, 702—5. In a neglect proceeding it may show that children should be wards of the State because the present parent(s) or guardian does not provide suitable care. Ill.Rev.Stat., c. 37, ss 702—1, 702—4.

The State's right—indeed, duty—to protect minor children through a judicial determination of their interests in a neglect proceeding is not challenged here. Rather, we are faced with a dependency statute that empowers state officials to circumvent neglect proceedings *650 on the theory that an unwed father is not a 'parent' whose existing relationship with his children must be considered.[4] 'Parents,' says the State, 'means the father and mother of a legitimate child, or the survivor of them, or the natural mother of an illegitimate child, and includes any adoptive parent,' Ill.Rev.Stat., c. 37, s 701—14, but the term does not include unwed fathers.

Under Illinois law, therefore, while the children of all parents can be taken from them in neglect proceedings, that is only after notice, hearing, and proof of such unfitness as a parent

as amounts to neglect, an unwed father is uniquely subject to the more simplistic dependency proceeding. By use of this proceeding, the State, on showing that the father was not married to the mother, need not prove unfitness in fact, because it is presumed at law. Thus, the unwed father's claim of parental qualification is avoided as 'irrelevant.'

[4] In considering this procedure under the Due Process Clause, we recognize, as we have in other cases, that due process of law does not require a hearing 'in every conceivable case of government impairment of private interest.' Cafeteria and Restaurant Workers Union etc. v. McElroy, 367 U.S. 886, 894, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230 (1961). That case explained that '(t)he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation' and firmly established that 'what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental ***651** action.' Id., at 895, 81 S.Ct., at 1748; Goldberg v. Kelly, 397 U.S. 254, 263, 90 S.Ct. 1011, 1018, 25 L.Ed.2d 287 (1970).

[5] The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection. It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children 'come(s) to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.' Kovacs v. Cooper, 336 U.S. 77, 95, 69 S.Ct. 448, 458, 93 L.Ed. 513 (1949) (Frankfurter, J., concurring).

The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed 'essential,' Meyer v. Nebraska, 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042 (1923), 'basic civil rights of man,' Skinner v. Oklahoma, 316 U.S. 535, 541, 62 S.Ct. 1110, 1113, 86 L.Ed. 1655 (1942), and '(r)ights far more precious . . . than property rights,' May v. Anderson, 345 U.S. 528, 533, 73 S.Ct. 840, 843, 97 L.Ed. 1221 (1953). '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 ****1213** state can neither supply nor hinder.' Prince v. Massachusetts, 321 U.S. 158, 166, 64 S.Ct. 438, 442, 88 L.Ed. 645 (1944). The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, Meyer v. Nebraska, supra, 262 U.S. at 399, 43 S.Ct. at 626, the Equal Protection Clause of the Fourteenth Amendment, Skinner v. Oklahoma, supra, 316 U.S., at 541, 62 S.Ct., at 1113, and the Ninth Amendment, Griswold v. Connecticut, 381 U.S. 479, 496, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) (Goldberg, J., concurring).

Nor has the law refused to recognize those family relationships unlegitimized by a marriage ceremony. The Court has declared unconstitutional a state statute denying natural, but illegitimate, children a wrongful-death action for the death of their mother, emphasizing that ***652** such children cannot be denied the right of other children because familial bonds in such cases were often as warm, enduring, and important as those arising within a more formally organized family unit. Levy v. Louisiana, 391 U.S. 68, 71—72, 88 S.Ct. 1509, 1511, 20 L.Ed.2d 436 (1968). 'To say that the test of equal protection should be the 'legal' rather than the biological relationship is to avoid the issue. For the Equal Protection Clause necessarily limits the authority of a State to draw such 'legal' lines as it chooses.' Glona v. American Guarantee & Liability Ins. Co., 391 U.S. 73, 75—76, 88 S.Ct. 1515, 1516, 20 L.Ed.2d 441 (1968).

[6] These authorities make it clear that, at the least, Stanley's interest in retaining custody of his children is cognizable and substantial.

[7] For its part, the State has made its interest quite plain: Illinois has declared that the aim of the Juvenile Court Act is to protect 'the moral, emotional, mental, and physical welfare of the minor and the best interests of the community' and to 'strengthen the minor's family ties whenever possible, removing him from the custody of his parents only when his welfare or safety or the protection of the public cannot be adequately safeguarded without removal . . .' Ill.Rev.Stat., c. 37, s 701—2. These are legitimate interests, well within the power of the State to implement. We do not question the assertion that neglectful parents may be separated from their children.

But we are here not asked to evaluate the legitimacy of the state ends, rather, to determine whether the means used to achieve these ends are constitutionally defensible. What is the state interest in separating children from fathers without a hearing designed to determine whether the father is unfit in a particular disputed case? We observe that the State registers no gain towards its declared goals when it separates children from the custody of fit parents. Indeed, if Stanley is a ***653**

fit father, the State spites its own articulated goals when it needlessly separates him from his family.

In Bell v. Burson, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971), we found a scheme repugnant to the Due Process Clause because it deprived a driver of his license without reference to the very factor (there fault in driving, here fitness as a parent) that the State itself deemed fundamental to its statutory scheme. Illinois would avoid the self-contradiction that rendered the Georgia license suspension system invalid by arguing that Stanley and all other unmarried fathers can reasonably be presumed to be unqualified to raise their children.[5]

**1214 *654 It may be, as the State insists, that most unmarried fathers are unsuitable and neglectful parents.[6] It may also be that Stanley is such a parent and that his children should be placed in other hands. But all unmarried fathers are not in this category; some are wholly suited to have custody of their children.[7] This much the State *655 readily concedes, and nothing in this record indicates that Stanley is or has been a neglectful father who has not cared for his children. Given the opportunity to make his case, Stanley may have been seen to be deserving of custody of his offspring. Had this been so, the State's statutory policy would have been furthered by leaving custody in him.

Carrington v. Rash, 380 U.S. 89, 85 S.Ct. 775, 13 L.Ed.2d 675 (1965), dealt with a similar situation. There we recognized that Texas had a powerful **1215 interest in restricting its electorate to bona fide residents. It was not disputed that most servicemen stationed in Texas had no intention of remaining in the State; most therefore could be deprived of a vote in state affairs. But we refused to tolerate a blanket exclusion depriving all servicemen of the vote, when some servicemen clearly were bona fide residents and when 'more precise tests,' id., at 95, 85 S.Ct., at 779, were available to distinguish members of this latter group. 'By forbidding a soldier ever to controvert the presumption of nonresidence,' id., at 96, 85 S.Ct., at 780, the State, we said, unjustifiably effected a substantial deprivation. It viewed people one-dimensionally (as servicemen) when a finer perception could readily have been achieved by assessing a serviceman's claim to residency on an individualized basis.

'We recognize that special problems may be involved in determining whether servicemen have actually acquired a new domicile in a State for franchise purposes. We emphasize that Texas is free to take reasonable and adequate steps, as have other States, to see that all applicants for the vote actually fulfill the requirements of bona fide residence. But (the challenged) provision goes beyond such rules. *656 '(T)he presumption here created is . . . definitely conclusive—incapable of being overcome by proof of the most positive character.' Id., at 96, 85 S.Ct., at 780.

'All servicemen not residents of Texas before induction,' we concluded, 'come within the provision's sweep. Not one of them can ever vote in Texas, no matter' what their individual qualifications. Ibid. We found such a situation repugnant to the Equal Protection Clause.

[8] [9] Despite Bell and Carrington, it may be argued that unmarried fathers are so seldom fit that Illinois need not undergo the administrative inconvenience of inquiry in any case, including Stanley's. The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency.[8] 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.

[10] Procedure by presumption is always cheaper and easier *657 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.[9]

**1216 Bell v. Burson held that the State could not, while purporting to be concerned with fault in suspending a driver's license, deprive a citizen of his license without a hearing that would assess fault. Absent fault, the State's declared interest was so attenuated that administrative convenience was insufficient to excuse a hearing where evidence of fault could be considered. That drivers involved in accidents, as a statistical matter, might be very likely to have been wholly or partially at fault did not foreclose hearing and proof in specific cases before licenses were suspended.

We think the Due Process Clause mandates a similar result here. The State's interest in caring for Stanley's children is de minimis if Stanley is shown to be a fit *658 father. It

insists on presuming rather than proving Stanley's unfitness solely because it is more convenient to presume than to prove. Under the Due Process Clause that advantage is insufficient to justify refusing a father a hearing when the issue at stake is the dismemberment of his family.

III

[11] **[12]** **[13]** The State of Illinois assumes custody of the children of married parents, divorced parents, and unmarried mothers only after a hearing and proof of neglect. The children of unmarried fathers, however, are declared dependent children without a hearing on parental fitness and without proof of neglect. Stanley's claim in the state courts and here is that failure to afford him a hearing on his parental qualifications while extending it to other parents denied him equal protection of the laws. We have concluded that all Illinois parents are constitutionally entitled to a hearing on their fitness before their children are removed from their custody. It follows that denying such a hearing to Stanley and those like him while granting it to other Illinois parents is inescapably contrary to the Equal Protection Clause.[10]

***659** The judgment of the Supreme Court of Illinois is reversed and the case is remanded to that court for proceedings ****1217** not inconsistent with this opinion. It is so ordered.

Reversed and remanded.

Mr. Justice POWELL and Mr. Justice REHNQUIST took no part in the consideration or decision of this case.

Mr. Justice DOUGLAS joins in Parts I and II of this opinion.

Mr. Chief Justice BURGER, with whom Mr. Justice BLACKMUN concurs, dissenting.

The only constitutional issue raised and decided in the courts of Illinois in this case was whether the Illinois statute that omits unwed fathers from the definition of 'parents' violates the Equal Protection Clause. We granted certiorari to consider whether the Illinois Supreme Court properly resolved that equal protection issue when it unanimously upheld the statute against petitioner Stanley's attack.

No due process issue was raised in the state courts; and no due process issue was decided by any state court. As Mr. Justice Douglas said for this Court in State Farm Mutual Automobile Ins. Co. v. Duel, 324 U.S. 154, 160, 65 S.Ct. 573, 577, 89 L.Ed. 812 (1945), 'Since the (state) Supreme Court did not pass on the question, we may not do so.' We had occasion more recently to deal with this aspect of the jurisdictional limits placed upon this Court by 28 U.S.C. s 1257 when we decided Hill v. California, 401 U.S. 797, 91 S.Ct. 1106, 28 L.Ed.2d 484 (1971). Having rejected the claim that Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969), should be retroactively applied to invalidate petitioner Hill's conviction on the ground that a search incident to arrest was overly extensive in scope, the Court noted Hill's additional contention that his personal diary, which was one of the items ***660** of evidence seized in that search, should have been excluded on Fifth Amendment grounds as well. Mr. Justice White, in his opinion for the Court, concluded that we lacked jurisdiction to consider the Fifth Amendment contention:

'Counsel for (the petitioner) conceded at oral argument that the Fifth Amendment issue was not raised at trial. Nor was the issue raised, briefed or argued in the California appellate courts. (Footnote omitted.) The petition for certiorari likewise ignored it. In this posture of the case, the question, although briefed and argued here, is not properly before us.' 401 U.S., at 805, 91 S.Ct., at 1111.

In the case now before us, it simply does not suffice to say, as the Court in a footnote does say, that 'we dispose of the case on the constitutional premise raised below, reaching the result by a method of analysis readily available to the state court.' Ante, at 1216 n. 10. The Court's method of analysis seems to ignore the strictures of Justices Douglas and White, but the analysis is clear: the Court holds sua sponte that the Due Process Clause requires that Stanley, the unwed biological father, be accorded a hearing as to his fitness as a parent before his children are declared wards of the state court; the Court then reasons that since Illinois recognizes such rights to due process in married fathers, it is required by the Equal Protection Clause to give such protection to unmarried fathers. This 'method of analysis' is, of course, no more or less than the use of the Equal Protection Clause as a shorthand condensation of the entire Constitution: a State may not deny any constitutional right to some of its citizens without violating the Equal Protection Clause through its failure to deny such rights to all of its citizens. The limits on this Court's jurisdiction are not properly expandable by the use of such semantic devices as that.

***661** Not only does the Court today use dubious reasoning in dealing with limitations upon its jurisdiction, it proceeds as well to strike down the Illinois statute here involved by 'answering' arguments that are nowhere to be found in the record or in the State's brief—or indeed in the oral argument. I have been unable, for example, to discover ****1218** where or when the State has advanced any argument that 'it is unnecessary to hold individualized hearings to determine whether particular fathers are in fact unfit parents before they are separated from their children.' Ante, at 1210. Nor can I discover where the State has 'argu(ed) that Stanley and all other unmarried fathers can reasonably be presumed to be unqualified to raise their children.' Ante, at 1213. Or where anyone has even remotely suggested the 'argu(ment) that unmarried fathers are so seldom fit that Illinois need not undergo the administrative inconvenience of inquiry in any case, including Stanley's.' Ante, at 1215. On the other hand, the arguments actually advanced by the State are largely ignored by the Court.[1]

***662** All of those persons in Illinois who may have followed the progress of this case will, I expect, experience no little surprise at the Court's opinion handed down today. Stanley will undoubtedly be surprised to find that he has prevailed on an issue never advanced by him. The judges who dealt with this case in the state courts will be surprised to find their decisions overturned on a ground that never considered. And the legislators and other officials of the State of Illinois, as well as those attorneys of the State who are familiar with the statutory provisions here at issue, will be surprised to learn for the first time that the Illinois Juvenile Court Act establishes a presumption that unwed fathers are unfit. I must confess my own inability to find any such presumption in the Illinois Act. Furthermore, from the record of the proceedings in the Juvenile Court of Cook County in this case, I can only conclude that the judge of that court was unaware of any such presumption, for he clearly indicated that Stanley's asserted fatherhood of the children would stand him in good stead, rather than prejudice him, in any adoption or guardianship proceeding. In short, far from any intimations ***663** of hostility toward unwed fathers, that court gave Stanley 'merit points' for his acknowledgment of paternity and his past assumption of at least marginal responsibility for the children.[2]

****1219** In regard to the only issue that I consider properly before the Court, I agree with the State's argument that the Equal Protection Clause is not violated when Illinois gives full recognition only to those father-child relationships that arise in the context of family units bound together by legal obligations arising from marriage or from adoption proceedings. Quite apart from the religious or quasi-religious connotations that marriage has—and has historically enjoyed—for a large proportion of this Nation's citizens, it is in law an essentially contractual relationship, the parties to which have legally enforceable rights and duties, with respect both to each other and to any children born to them. Stanley and the mother of these children never entered such a relationship. The record is silent as to whether they ever privately exchanged such promises as would have bound them in marriage under the common law. See Cartwright v. McGown, 121 Ill. 388, 398, 12 N.E. 737, 739 (1887). In ***664** any event, Illinois has not recognized common-law marriages since 1905. Ill.Rev.Stat., c. 89, s 4. Stanley did not seek the burdens when he could have freely assumed them.

Where there is a valid contract of marriage, the law of Illinois presumes that the husband is the father of any child born to the wife during the marriage; as the father, he has legally enforceable rights and duties with respect to that child. When a child is born to an unmarried woman, Illinois recognizes the readily identifiable mother, but makes no presumption as to the identity of the biological father. It does, however, provide two ways, one voluntary and one involuntary, in which that father may be identified. First, he may marry the mother and acknowledge the child as his own; this has the legal effect of legitimating the child and gaining for the father full recognition as a parent. Ill.Rev.Stat., c. 3, s 12, subd. 8. Second, a man may be found to be the biological father of the child pursuant to a paternity suit initiated by the mother; in this case, the child remains illegitimate, but the adjudicated father is made liable for the support of the child until the latter attains age 18 or is legally adopted by another. Ill.Rev.Stat., c. 106 3/4, s 52.

Stanley argued before the Supreme Court of Illinois that the definition of 'parents,' set out in Ill.Rev.Stat., c. 37, s 701—14, as including 'the father and mother of a legitimate child, or the survivor of them, or the natural mother of an illegitimate child, (or) . . . any adoptive parent,'[3] violates the Equal ****1220** Protection Clause in that it ***665** treats unwed mothers and unwed fathers differently. Stanley then enlarged upon his equal protection argument when he brought the case here; he argued before this Court that Illinois is not permitted by the Equal Protection Clause to distinguish between unwed fathers and any of the other biological parents included in the statutory definition of legal 'parents.'

The Illinois Supreme Court correctly held that the State may constitutionally distinguish between unwed fathers and unwed mothers. Here, Illinois' different treatment of the two is part of that State's statutory scheme for protecting the welfare of illegitimate children. In almost all cases, the unwed mother is readily identifiable, generally from hospital records, and alternatively by physicians or others attending the child's birth. Unwed fathers, as a class, are not traditionally quite so easy to identify and locate. Many of them either deny all responsibility or exhibit no interest in the child or its welfare; and, of course, many unwed fathers are simply not aware of their parenthood.

Furthermore, I believe that a State is fully justified in concluding, on the basis of common human experience, that the biological role of the mother in carrying and nursing an infant creates stronger bonds between her and the child than the bonds resulting from the male's often casual encounter. This view is reinforced by the observable fact that most unwed mothers exhibit a concern for their offspring either permanently or at least until ***666** they are safely placed for adoption, while unwed fathers rarely burden either the mother or the child with their attentions or loyalties. Centuries of human experience buttress this view of the realities of human conditions and suggest that unwed mothers of illegitimate children are generally more dependable protectors of their children than are unwed fathers. While these, like most generalizations, are not without exceptions, they nevertheless provide a sufficient basis to sustain a statutory classification whose objective is not to penalize unwed parents but to further the welfare of illegitimate children in fulfillment of the State's obligations as parens patriae.[4]

Stanley depicts himself as a somewhat unusual unwed father, namely, as one who has always acknowledged and never doubted his fatherhood of these children. He alleges that he loved, cared for, and supported these children from the time of their birth until the death of their mother. He contends that he consequently must be treated the same as a married father of legitimate children. Even assuming the truth of Stanley's allegations, I am unable to construe the Equal Protection Clause as requiring Illinois to tailor its statutory definition of 'parents' so meticulously as to include such unusual unwed fathers, while at the same time excluding those unwed, and generally unidentified, biological fathers who in no way share Stanley's professed desires.

***667** Indeed, the nature of Stanley's own desires is less than absolutely clear from the record in this case. Shortly after the death of the mother, Stanley turned these two children over to the care of a Mr. and Mrs. Ness; he took no action to gain recognition of himself as a father, through adoption, or as a legal custodian, ****1221** through a guardianship proceeding. Eventually it came to the attention of the State that there was no living adult who had any legally enforceable obligation for the care and support of the children; it was only then that the dependency proceeding here under review took place and that Stanley made himself known to the juvenile court in connection with these two children.[5] Even then, however, Stanley did not ask to be charged with the legal responsibility for the children. He asked only that such legal responsibility be given to no one else. He seemed, in particular, to be concerned with the loss of the welfare payments he would suffer as a result of the designation of others as guardians of the children.

Not only, then, do I see no ground for holding that Illinois' statutory definition of 'parents' on its face violates the Equal Protection Clause; I see no ground for holding that any constitutional right of Stanley has been denied in the application of that statutory definition in the case at bar.

As Mr. Justice Frankfurter once observed, 'Invalidating legislation is serious business. . . .' Morey v. Doud, 354 U.S. 457, 474, 77 S.Ct. 1344, 1354, 1 L.Ed.2d 1485 (1957) (dissenting opinion). The ***668** Court today pursues that serious business by expanding its legitimate jurisdiction beyond what I read in 28 U.S.C. s 1257 as the permissible limits contemplated by Congress. In doing so, it invalidates a provision of critical importance to Illinois' carefully drawn statutory system governing family relationships and the welfare of the minor children of the State. And in so invalidating that provision, it ascribes to that statutory system a presumption that is simply not there and embarks on a novel concept of the natural law for unwed fathers that could well have strange boundaries as yet undiscernible.

All Citations

405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 Uncontradicted testimony of Peter Stanley, App. 22.

2 Only two children are involved in this litigation.

3 The Illinois Supreme Court's opinion is not at all contrary to this conclusion. That court said: '(T)he trial court's comments clearly indicate the court's willingness to consider a future request by the father for custody and guardianship.' 45 Ill.2d 132, 135, 256 N.E.2d 814, 816. (Italics added.) See also the comment of Stanley's counsel on oral argument: 'If Peter Stanley could have adopted his children, we would not be here today.' Tr. of Oral Arg. 7.

4 Even while refusing to label him a 'legal parent,' the State does not deny that Stanley has a special interest in the outcome of these proceedings. It is undisputed that he is the father of these children, that he lived with the two children whose custody is challenged all their lives, and that he has supported them.

5 Illinois says in its brief, at 21—23,

'(T)he only relevant consideration in determining the propriety of governmental intervention in the raising of children is whether the best interests of the child are served by such intervention.

'In effect, Illinois has imposed a statutory presumption that the best interests of a particular group of children necessitates some governmental supervision in certain clearly defined situations. The group of children who are illegitimate are distinguishable from legitimate children not so much by their status at birth as by the factual differences in their upbringing. While a legitimate child usually is raised by both parents with the attendant familial relationships and a firm concept of home and identity, the illegitimate child normally knows only one parent—the mother. . . .

'. . . The petitioner has premised his argument upon particular factual circumstances—a lengthy relationship with the mother . . . a familial relationship with the two children, and a general assumption that this relationship approximates that in which the natural parents are married to each other.

'. . . Even if this characterization were accurate (the record is insufficient to support it) it would not affect the validity of the statutory definition of parent. . . . The petitioner does not deny that the children are illegitimate. The record reflects their natural mother's death. Given these two factors, grounds exist for the State's intervention to ensure adequate care and protection for these children. This is true whether or not this particular petitioner assimilates all or none of the normal characteristics common to the classification of fathers who are not married to the mothers of their children.'

See also Illinois' Brief 23 ('The comparison of married and putative fathers involves exclusively factual differences. The most significant of these are the presence or absence of the father from the home on a day-to-day basis and the responsibility imposed upon the relationship'), id., at 24 (to the same effect), id., at 31 (quoted below in n. 6), id., at 24—26 (physiological and other studies are cited in support of the proposition that men are not naturally inclined to childrearing), and Tr. of Oral Arg. 31 ('We submit that both based on history or (sic) culture the very real differences . . . between the married father and the unmarried father, in terms of their interests in children and their legal responsibility for their children, that the statute here fulfills the compelling governmental objective of protecting children . . .').

6 The State speaks of 'the general disinterest of putative fathers in their illegitimate children' (Brief 8) and opines that '(i)n most instances the natural father is a stranger to his children.' Brief 31.

7 See In re T., 8 Mich.App. 122, 154 N.W.2d 27 (1967). There a panel of the Michigan Court of Appeals in unanimously affirming a circuit court's determination that the father of an illegitimate son was best suited to raise the boy, said:

'The appellants' presentation in this case proceeds on the assumption that placing Mark for adoption is inherently preferable to rearing by his father, that uprooting him from the family which he knew from birth until he was a year and a half old, secretly institutionalizing him and later transferring him to strangers is so incontrovertibly better that no court has the power even to consider the matter. Hardly anyone would even suggest such a proposition if we were talking about a child born in wedlock.

'We are not aware of any sociological data justifying the assumption that an illegitimate child reared by his natural father is less likely to receive a proper upbringing than one reared by his natural father who was at one time married to his mother, or that the stigma of illegitimacy is so pervasive it requires adoption by strangers and permanent termination of a subsisting relationship with the child's father.' Id., at 146, 154 N.W.2d, at 39.

8 Cf. Reed v. Reed, 404 U.S. 71, 76, 92 S.Ct. 251, 254, 30 L.Ed.2d 225 (1971). 'Clearly the objective of reducing the workload on probate courts by eliminating one class of contests is not without some legitimacy. . . . (But to) give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment.' Carrington v. Rash, 380 U.S. 89, 96, 85 S.Ct. 775, 780 (1965), teaches the same lesson.

'. . . States may not casually deprive a class of individuals of the vote because of some remote administrative benefit to the State. Oyama v. (State of) California, 332 U.S. 633, 68 S.Ct. 269, 92 L.Ed. 249. By forbidding a soldier ever to controvert the presumption of nonresidence, the Texas Constitution imposes an invidious discrimination in violation of the Fourteenth Amendment.'

9 We note in passing that the incremental cost of offering unwed fathers an opportunity for individualized hearings on fitness appears to be minimal. If unwed fathers, in the main, do not care about the disposition of their children, they will not appear to demand hearings. If they do care, under the scheme here held invalid, Illinois would admittedly at some later time have to afford them a properly focused hearing in a custody or adoption proceeding.

Extending opportunity for hearing to unwed fathers who desire and claim competence to care for their children creates no constitutional or procedural obstacle to foreclosing those unwed fathers who are not so inclined. The Illinois law governing procedure in juvenile cases. Ill.Rev.Stat., c. 37, s 704—1 et seq., provides for personal service, notice by certified mail, or for notice by publication when personal or certified mail service cannot be had or when notice is directed to unknown respondents under the style of 'All whom it may Concern.' Unwed fathers who do not promptly respond cannot complain if their children are declared wards of the State. Those who do respond retain the burden of proving their fatherhood.

10 Predicating a finding of constitutional invalidity under the Equal Protection Clause of the Fourteenth Amendment on the observation that a State has accorded bedrock procedural rights to some, but not to all similarly situated, is not contradictory to our holding in Picard v. Connor, 404 U.S. 270, 92 S.Ct. 509, 30 L.Ed.2d 438 (1971). In that case a due process, rather than an equal protection, claim was raised in the state courts. The federal courts were, in our opinion, barred from reversing the state conviction on grounds of contravention of the Equal Protection Clause when that clause had not been referred to for consideration by the state authorities. Here, in contrast, we dispose of the case on the constitutional premise raised below, reaching the result by a method of analysis readily available to the state court.

For the same reason the strictures of Cardinale v. Louisiana, 394 U.S. 437, 89 S.Ct. 1161, 22 L.Ed.2d 398 (1969), and Hill v. California, 401 U.S. 797, 91 S.Ct. 1106, 28 L.Ed.2d 484 (1971), have been fully observed.

1 In reaching out to find a due process issue in this case, the Court seems to have misapprehended the entire thrust of the State's argument. When explaining at oral argument why Illinois does not recognize the unwed father, counsel for the State presented two basic justifications for the statutory definition of 'parents' here at issue. See Tr. of Oral Arg. 25—26. First, counsel noted that in the case of a married couple to whom a legitimate child is born, the two biological parents have already 'signified their willingness to work together' in caring for the child by entering into the marriage contract; it is manifestly reasonable, therefore, that both of them be recognized as legal parents with rights and responsibilities in connection with the child. There has been no legally cognizable signification of such willingness on the part of unwed parents, however, and 'the male and female . . . may or may not be willing to work together towards the common end of child rearing.' To provide legal recognition to both of them as 'parents' would often be 'to create two conflicting parties competing for legal control of the child.'

The second basic justification urged upon us by counsel for the State was that, in order to provide for the child's welfare, 'it is necessary to impose upon at least one of the parties legal responsibility for the welfare of (the child), and since necessarily the female is present at the birth of the child and identifiable as the mother.' the State has elected the unwed mother, rather than the unwed father, as the biological parent with that legal responsibility.

It was suggested to counsel during an ensuing colloquy with the bench that identification seemed to present no insuperable problem in Stanley's case and that, although Stanley had expressed an interest in participating in the rearing of the children, 'Illinois won't let him.' Counsel replied that, on the contrary, 'Illinois encourages him to do so if he will accept the legal responsibility for those children by a formal proceeding comparable to the marriage ceremony, in which he is evidencing through a judicial proceeding his desire to accept legal responsibility for the children.' Stanley, however, 'did not ask for custody. He did not ask for legal responsibility. He only objected to someone (else) having legal control over the children.' Tr. of Oral Arg. 38, 39—40.

2 The position that Stanley took at the dependency proceeding was not without ambiguity. Shortly after the mother's death, he placed the children in the care of Mr. and Mrs. Ness, who took the children into their home. The record is silent as to whether the Ness household was an approved foster home. Through Stanley's act, then, the Nesses were already the actual custodians of the children. At the dependency proceeding, he resisted only the court's designation of the Nesses as the legal custodians; he did not challenge their suitability for that role, nor did he seek for himself either that role or any other role that would have imposed legal responsibility upon him. Had he prevailed, of course, the status quo would have obtained: the Nesses would have continued to play the role of actual custodians until either they or Stanley acted to alter the informal arrangement, and there would still have been no living adult with any legally enforceable obligation for the care and support of the infant children.

3 The Court seems at times to ignore this statutory definition of 'parents,' even though it is precisely that definition itself whose constitutionality has been brought into issue by Stanley. In preparation for finding a purported similarity between this case and Bell v. Burson, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971), the Court quotes the legislatively declared aims of the Juvenile Court Act to 'strengthen the minor's family ties whenever possible, removing him from the custody of his parents only when his welfare or safety or the protection of the public cannot be adequately safeguarded without removal.' (Emphasis added.) The Court then goes on to find a 'self-contradiction' between that stated aim and the Act's nonrecognition of unwed fathers. Ante, at 1213. There is, of course, no such contradiction. The word 'parent' in the statement of legislative purpose obviously has the meaning given to it by the definitional provision of the Act.

4 When the marriage between the parents of a legitimate child is dissolved by divorce or separation, the State, of course, normally awards custody of the child to one parent or the other. This is considered necessary for the child's welfare, since the parents are no longer legally bound together. The unmarried parents of an illegitimate child are likewise not legally bound together. Thus, even if Illinois did recognize the parenthood of both the mother and father of an illegitimate child, it would, for consistency with its practice in divorce proceedings, be called upon to award custody to one or the other of them, at least once it had by some means ascertained the identity of the father.

5 As the majority notes, ante, at 1210, Joan Stanley gave birth to three children during the 18 years Peter Stanley was living 'intermittently' with her. At oral argument, we were told by Stanley's counsel that the oldest of these three children had previously been declared a ward of the court pursuant to a neglect proceeding that was 'proven against' Stanley at a time, apparently, when the juvenile court officials were under the erroneous impression that Peter and Joan Stanley had been married. Tr. of Oral Arg. 19.

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102 S.Ct. 1388
Supreme Court of the United States

John SANTOSKY II and
Annie Santosky, Petitioners
v.
Bernhardt S. KRAMER,
Commissioner, Ulster County
Department of Social Services, et al.

No. 80–5889.
|
Argued Nov. 10, 1981.
|
Decided March 24, 1982.

Synopsis

Parents appealed from judgment of the Family Court, Ulster County, Elwyn, J., which adjudged their children to be permanently neglected. The New York Supreme Court, Appellate Division, affirmed, 75 A.D.2d 910, 427 N.Y.S.2d 319. The New York Court of Appeals dismissed the parents' appeal. Certiorari was granted. The Supreme Court, Justice Blackmun, held that before a state may sever completely and irrevocably the rights of parents in their natural child, due process requires that the state support its allegations by at least clear and convincing evidence, and, therefore, the "fair preponderance of the evidence" standard prescribed by the New York Family Court Act for the termination of parental rights denied the parents due process.

Judgment vacated and remanded.

Justice Rehnquist, filed a dissenting opinion in which Chief Justice Burger, Justice White and Justice O'Connor, joined.

West Headnotes (15)

[1] **Child Custody** Right of biological parent as to third persons in general

Child Custody Previous abandonment or relinquishment by custodian

Fundamental liberty interest of natural parents in care, custody and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to State. U.S.C.A.Const.Amends. 5, 14.

2664 Cases that cite this headnote

[2] **Infants** Proceedings

Even when blood relationships are strained, parents retain vital interest in preventing irretrievable destruction of their family life; if anything, persons faced with forced dissolution of their parental rights have more critical need for procedural protections than do those resisting state intervention into ongoing family affairs. U.S.C.A.Const.Amends. 5, 14.

497 Cases that cite this headnote

[3] **Infants** Proceedings

When state moves to destroy weakened familial bonds, it must provide parents with fundamentally fair procedures. U.S.C.A.Const.Amends. 5, 14.

442 Cases that cite this headnote

[4] **Constitutional Law** Removal or termination of parental rights

Nature of process due in parental rights termination proceedings turns on balancing of private interests affected by proceedings; risk of error created by state's chosen procedure; and countervailing governmental interest supporting use of challenged procedure. U.S.C.A.Const.Amends. 5, 14.

482 Cases that cite this headnote

[5] **Constitutional Law** Degree or standard of proof

In any given proceeding, minimum standard of proof tolerated by due process requirement reflects not only weight of private and public interests affected, but also societal judgment

about how risk of error should be distributed between litigants. U.S.C.A.Const.Amends. 5, 14.

128 Cases that cite this headnote

[6] **Federal Courts** Weight and sufficiency

Minimum standard of proof mandated by due process is question of federal law which Supreme Court may resolve. U.S.C.A.Const.Amends. 5, 14.

48 Cases that cite this headnote

[7] **Constitutional Law** Review

Retrospective case-by-case review cannot preserve fundamental fairness when class of proceedings is governed by constitutionally defective evidentiary standard. U.S.C.A.Const.Amends. 5, 14.

35 Cases that cite this headnote

[8] **Constitutional Law** Factors considered; flexibility and balancing

Constitutional Law Duration and timing of deprivation; pre- or post-deprivation remedies

Whether loss threatened by particular type of proceeding is sufficiently grave to warrant more than average certainty on part of fact finder turns on both nature of private interest threatened and permanency of threatened loss. U.S.C.A.Const.Amends. 5, 14.

20 Cases that cite this headnote

[9] **Infants** Deprivation, neglect, or abuse

In parental rights termination proceeding, private interest affected weighs heavily against use of preponderance of the evidence standard at state-initiated permanent neglect proceeding. U.S.C.A.Const.Amends. 5, 14.

472 Cases that cite this headnote

[10] **Constitutional Law** Removal or termination of parental rights

Until state proves parental unfitness under New York law, child and his parents share vital interest in preventing erroneous termination of the natural relationship, and, therefore, preponderance of the evidence standard provided under New York law does not satisfy due process clause. N.Y.McKinney's Social Service Law § 384–b, subds. 4(d), 7(a); N.Y.McKinney's Family Court Act § 622; U.S.C.A.Const.Amends. 5, 14.

321 Cases that cite this headnote

[11] **Constitutional Law** Removal or termination of parental rights

Preponderance of the evidence standard provided for in New York statutes governing termination of parental rights upon finding that child is "permanently neglected" does not properly allocate risk of error between parent and child, since, for child, likely consequence of erroneous failure to terminate is preservation of uneasy status quo, but for natural parents, consequence of erroneous termination is unnecessary destruction of natural family, and, therefore, due process mandates standard of proof greater than fair preponderance of the evidence. N.Y.McKinney's Social Service Law § 384–b, subds. 4(d), 7(a); N.Y.McKinney's Family Court Act § 622; U.S.C.A.Const.Amends. 5, 14.

653 Cases that cite this headnote

[12] **Infants** Dependency, permanency, and rights termination in general

Standard of proof more strict than fair preponderance of the evidence is consistent with two state interests at stake in parental rights termination proceedings, parens patriae interest in preserving and promoting child's welfare and fiscal and administrative interest in reducing costs and burden of such proceedings. N.Y.McKinney's Social Service Law § 384–b, subds. 1(a)(i, ii, iv), 3(g), 4(e); N.Y.McKinney's Family Court Act § 622; U.S.C.A.Const.Amends. 5, 14.

841 Cases that cite this headnote

[13] **Constitutional Law** Removal or termination of parental rights

Before state may sever completely and irrevocably rights of parents in their natural child, due process requires that state support its allegations by at least clear and convincing evidence. N.Y.McKinney's Social Service Law § 384–b, subds. 4(d), 7(a); N.Y.McKinney's Family Court Act § 622; U.S.C.A.Const.Amends. 5, 14.

948 Cases that cite this headnote

[14] **Constitutional Law** Removal or termination of parental rights

Clear and convincing evidence standard adequately conveys to fact finder level of subjective certainty about his factual conclusions necessary to satisfy due process in proceedings in which state seeks to completely and irrevocably sever rights of parents in their natural child. N.Y.McKinney's Social Service Law § 384–b, subds. 4(d), 7(a); N.Y.McKinney's Family Court Act § 622; U.S.C.A.Const.Amends. 5, 14.

1154 Cases that cite this headnote

[15] **Federal Courts** Presumptions, inferences, and burden of proof

Determination of precise burden of proof equal to or greater than clear and convincing evidence standard, for purpose of proceedings in which parental rights are terminated, is matter of state law properly left to the state legislatures and state courts. N.Y.McKinney's Social Service Law § 384–b, subds. 4(d), 7(a); N.Y.McKinney's Family Court Act § 622; U.S.C.A.Const.Amends. 5, 14.

679 Cases that cite this headnote

****1390** *Syllabus*[*]

***745** Under New York law, the State may terminate, over parental objection, the rights of parents in their natural child upon a finding that the child is "permanently neglected." The New York Family Court Act (§ 622) requires that only a "fair preponderance of the evidence" support that finding. Neglect proceedings were brought in Family Court to terminate petitioners' rights as natural parents in their three children. Rejecting petitioners' challenge to the constitutionality of § 622's "fair preponderance of the evidence" standard, the Family Court weighed the evidence under that standard and found permanent neglect. After a subsequent dispositional hearing, the Family Court ruled that the best interests of the children required permanent termination of petitioners' custody. The Appellate Division of the New York Supreme Court affirmed, and the New York Court of Appeals dismissed petitioners' appeal to that court.

Held:

1. Process is constitutionally due a natural parent at a state-initiated parental rights termination proceeding. Pp. 1393–1396.

(a) The fundamental liberty interest of natural parents in the care, custody, and management of their child is protected by the Fourteenth Amendment, and does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. A parental rights termination proceeding interferes with that fundamental liberty interest. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures. Pp. 1393–1394.

(b) The nature of the process due in parental rights termination proceedings turns on a balancing of three factors: the private interests affected by the proceedings; the risk of error created by the State's chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure. *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18. In any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the public and ***746** private ****1391** interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants. The minimum standard is a question of federal law which this Court may resolve. Retrospective

case-by-case review cannot preserve fundamental fairness when a class of proceedings is governed by a constitutionally defective evidentiary standard. Pp. 1394–1396.

2. The "fair preponderance of the evidence" standard prescribed by § 622 violates the Due Process Clause of the Fourteenth Amendment. Pp. 1396–1402.

(a) The balance of private interests affected weighs heavily against use of such a standard in parental rights termination proceedings, since the private interest affected is commanding and the threatened loss is permanent. Once affirmed on appeal, a New York decision terminating parental rights is *final* and irrevocable. Pp. 1397–1398.

(b) A preponderance standard does not fairly allocate the risk of an erroneous factfinding between the State and the natural parents. In parental rights termination proceedings, which bear many of the indicia of a criminal trial, numerous factors combine to magnify the risk of erroneous factfinding. Coupled with the preponderance standard, these factors create a significant prospect of erroneous termination of parental rights. A standard of proof that allocates the risk of error nearly equally between an erroneous failure to terminate, which leaves the child in an uneasy status quo, and an erroneous termination, which unnecessarily destroys the natural family, does not reflect properly the relative severity of these two outcomes. Pp. 1398–1401.

(c) A standard of proof more strict than preponderance of the evidence is consistent with the two state interests at stake in parental rights termination proceedings—a *parens patriae* interest in preserving and promoting the child's welfare and a fiscal and administrative interest in reducing the cost and burden of such proceedings. Pp. 1401–1402.

3. Before a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegations by at least clear and convincing evidence. A "clear and convincing evidence" standard adequately conveys to the factfinder the level of subjective certainty about his factual conclusions necessary to satisfy due process. Determination of the precise burden equal to or greater than that standard is a matter of state law properly left to state legislatures and state courts. Pp. 1402–1403.

75 App.Div.2d 910, 427 N.Y.S.2d 319, vacated and remanded.

Attorneys and Law Firms

***747** Martin Guggenheim, New York City, for petitioners.

Stephen Scavuzzo, Washington, D. C., for respondents, pro hac vice, by special leave of Court.

Opinion

Justice BLACKMUN delivered the opinion of the Court.

Under New York law, the State may terminate, over parental objection, the rights of parents in their natural child upon a finding that the child is "permanently neglected." N.Y.Soc.Serv.Law §§ 384–b.4.(d), 384–b.7. (a) (McKinney Supp.1981–1982) (Soc.Serv.Law). The New York Family Court Act § 622 (McKinney 1975 and Supp.1981–1982) (Fam.Ct.Act) requires that only a "fair preponderance of the evidence" support that finding. Thus, in New York, the factual certainty required to extinguish the parent-child relationship is no greater than that necessary to award money damages in an ordinary civil action.

Today we hold that the Due Process Clause of the Fourteenth Amendment demands more than this. Before a State may sever completely and irrevocably the rights of parents in ***748** their natural child, due process requires that the State support its ****1392** allegations by at least clear and convincing evidence.

I

A

New York authorizes its officials to remove a child temporarily from his or her home if the child appears "neglected," within the meaning of Art. 10 of the Family Court Act. See §§ 1012(f), 1021–1029. Once removed, a child under the age of 18 customarily is placed "in the care of an authorized agency," Soc.Serv.Law § 384–b.7.(a), usually a state institution or a foster home. At that point, "the state's first obligation is to help the family with services to ... reunite it...." § 384–b.1.(a)(iii). But if convinced that "positive, nurturing parent-child relationships no longer exist," § 384–b.1.(b), the State may initiate "permanent neglect" proceedings to free the child for adoption.

The State bifurcates its permanent neglect proceeding into "fact-finding" and "dispositional" hearings. Fam.Ct.Act §§ 622, 623. At the factfinding stage, the State must prove that the child has been "permanently neglected," as defined by Fam.Ct.Act §§ 614.1.(a)–(d) and Soc.Serv.Law § 384–b.7. (a). See Fam.Ct.Act § 622. The Family Court judge then determines at a subsequent dispositional hearing what placement would serve the child's best interests. §§ 623, 631.

At the factfinding hearing, the State must establish, among other things, that for more than a year after the child entered state custody, the agency "made diligent efforts to encourage and strengthen the parental relationship." Fam.Ct.Act §§ 614.1.(c), 611. The State must further prove that during that same period, the child's natural parents failed "substantially and continuously or repeatedly to maintain contact with or plan for the future of the child although physically and financially able to do so." § 614.1(d). Should the State support its allegations by "a fair preponderance of the evidence," § 622, the child may be declared permanently neglected. ***749** § 611. That declaration empowers the Family Court judge to terminate permanently the natural parents' rights in the child. §§ 631(c), 634. Termination denies the natural parents physical custody, as well as the rights ever to visit, communicate with, or regain custody of the child.[1]

New York's permanent neglect statute provides natural parents with certain procedural protections.[2] But New York permits its officials to establish "permanent neglect" with less proof than most States require. Thirty-five States, the District of Columbia, and the Virgin Islands currently specify a higher standard of proof, in parental rights termination proceedings, than a "fair preponderance of the evidence."[3] ****1393** The only analogous federal statute of which we are aware ***750** permits termination of parental rights solely upon "evidence beyond a reasonable doubt." Indian Child Welfare Act of 1978, Pub.L. 95–608, § 102(f), 92 Stat. 3072, 25 U.S.C. § 1912(f) (1976 ed., Supp.IV). The question here is whether ***751** New York's "fair preponderance of the evidence" standard is constitutionally sufficient.

B

Petitioners John Santosky II and Annie Santosky are the natural parents of Tina and John III. In November 1973, after incidents reflecting parental neglect, respondent Kramer, Commissioner of the Ulster County Department of Social Services, initiated a neglect proceeding under Fam.Ct.Act § 1022 and removed Tina from her natural home. About 10 months later, he removed John III and placed him with foster parents. On the day John was taken, Annie Santosky gave birth to a third child, Jed. When Jed was only three days old, respondent transferred him to a foster home on the ground that immediate removal was necessary to avoid imminent danger to his life or health.

In October 1978, respondent petitioned the Ulster County Family Court to terminate petitioners' parental rights in the three children.[4] Petitioners challenged the constitutionality of the "fair preponderance of the evidence" standard specified in Fam.Ct.Act § 622. The Family Court Judge rejected this constitutional challenge, App. 29–30, and weighed the evidence under the statutory standard. While acknowledging that the Santoskys had maintained contact with their children, the judge found those visits "at best superficial and devoid of any ****1394** real emotional content." *Id.*, at 21. After ***752** deciding that the agency had made " 'diligent efforts' to encourage and strengthen the parental relationship," *id.*, at 30, he concluded that the Santoskys were incapable, even with public assistance, of planning for the future of their children. *Id.*, at 33–37. The judge later held a dispositional hearing and ruled that the best interests of the three children required permanent termination of the Santoskys' custody.[5] *Id.*, at 39.

Petitioners appealed, again contesting the constitutionality of § 622's standard of proof.[6] The New York Supreme Court, Appellate Division, affirmed, holding application of the preponderance-of-the-evidence standard "proper and constitutional." *In re John AA*, 75 App.Div.2d 910, 427 N.Y.S.2d 319, 320 (1980). That standard, the court reasoned, "recognizes and seeks to balance rights possessed by the child ... with those of the natural parents...." *Ibid.*

The New York Court of Appeals then dismissed petitioners' appeal to that court "upon the ground that no substantial constitutional question is directly involved." App. 55. We granted certiorari to consider petitioners' constitutional claim. 450 U.S. 993, 101 S.Ct. 1694, 68 L.Ed.2d 192 (1981).

II

Last Term in *Lassiter v. Department of Social Services*, 452 U.S. 18, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981), this Court, by a 5–4 vote, held that the ***753** Fourteenth Amendment's Due

Process Clause does not require the appointment of counsel for indigent parents in every parental status termination proceeding. The case casts light, however, on the two central questions here—whether process is constitutionally due a natural parent at a State's parental rights termination proceeding, and, if so, what process is due.

In *Lassiter*, it was "not disputed that state intervention to terminate the relationship between [a parent] and [the] child must be accomplished by procedures meeting the requisites of the Due Process Clause." *Id.*, at 37, 101 S.Ct., at 2165 (first dissenting opinion); see *id.*, at 24–32, 101 S.Ct., at 2158–2162 (opinion of the Court); *id.*, at 59–60, 101 S.Ct., at 2176 (STEVENS, J., dissenting). See also *Little v. Streater*, 452 U.S. 1, 13, 101 S.Ct. 2202, 2209, 68 L.Ed.2d 627 (1981). The absence of dispute reflected this Court's historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment. *Quilloin v. Walcott*, 434 U.S. 246, 255, 98 S.Ct. 549, 554, 54 L.Ed.2d 511 (1978); *Smith v. Organization of Foster Families*, 431 U.S. 816, 845, 97 S.Ct. 2094, 2110, 53 L.Ed.2d 14 (1977); *Moore v. East Cleveland*, 431 U.S. 494, 499, 97 S.Ct. 1932, 1935, 52 L.Ed.2d 531 (1977) (plurality opinion); *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 639–640, 94 S.Ct. 791, 796, 39 L.Ed.2d 52 (1974); *Stanley v. Illinois*, 405 U.S. 645, 651–652, 92 S.Ct. 1208, 1212–1213, 31 L.Ed.2d 551 (1972); *Prince v. Massachusetts*, 321 U.S. 158, 166, 64 S.Ct. 438, 442, 88 L.Ed. 645 (1944); *Pierce v. Society of Sisters*, 268 U.S. 510, 534–535, 45 S.Ct. 571, 573–574, 69 L.Ed. 1070 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042 (1923).

[1] **[2]** **[3]** The fundamental liberty interest of natural parents in the care, custody, and ****1395** management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even 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 ***754** destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.[7]

[4] In *Lassiter*, the Court and three dissenters agreed that the nature of the process due in parental rights termination proceedings turns on a balancing of the "three distinct factors" specified in *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976): the private interests affected by the proceeding; the risk of error created by the State's chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure. See 452 U.S., at 27–31, 101 S.Ct., at 2159–2162; *id.*, at 37–48, 101 S.Ct., at 2164–2171 (first dissenting opinion). But see *id.*, at 59–60, 101 S.Ct., at 2176 (STEVENS, J., dissenting). While the respective *Lassiter* opinions disputed whether those factors should be weighed against a presumption disfavoring appointed counsel for one not threatened with loss of physical liberty, compare 452 U.S., at 31–32, 101 S.Ct., at 2161–2162, with *id.*, at 41, and n. 8, 101 S.Ct., at 2167, and n. 8 (first dissenting opinion), that concern is irrelevant here. Unlike the Court's right-to-counsel rulings, its decisions concerning constitutional burdens of proof have not turned on any presumption favoring any particular standard. To the contrary, the Court has engaged in a straight-forward consideration of the factors identified in *Eldridge* to determine whether a particular standard of proof in a particular proceeding satisfies due process.

[5] In *Addington v. Texas*, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979), the Court, by a unanimous vote of the participating Justices, declared: "The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to ***755** 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.' " *Id.*, at 423, 99 S.Ct. at 1808, quoting *In re Winship*, 397 U.S. 358, 370, 90 S.Ct. 1068, 1075, 25 L.Ed.2d 368 (1970) (Harlan, J., concurring). *Addington* teaches that, in any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants.

Thus, while private parties may be interested intensely in a civil dispute over money damages, application of a "fair preponderance of the evidence" standard indicates both society's "minimal concern with the outcome," and a conclusion that the litigants should "share the risk of error in roughly equal fashion." 441 U.S., at 423, 99 S.Ct., at 1808. When the State brings a criminal action to deny a defendant liberty or life, however, "the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as ****1396** nearly

as possible the likelihood of an erroneous judgment." *Ibid.* The stringency of the "beyond a reasonable doubt" standard bespeaks the "weight and gravity" of the private interest affected, *id.*, at 427, 99 S.Ct., at 1810, society's interest in avoiding erroneous convictions, and a judgment that those interests together require that "society impos[e] almost the entire risk of error upon itself." *Id.*, at 424, 99 S.Ct., at 1808. See also *In re Winship*, 397 U.S., at 372, 90 S.Ct., at 1076 (Harlan, J., concurring).

[6] The "minimum requirements [of procedural due process] being a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action." *Vitek v. Jones*, 445 U.S. 480, 491, 100 S.Ct. 1254, 1262, 63 L.Ed.2d 552 (1980). See also *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432, 102 S.Ct. 1148, 1155–1156, 71 L.Ed.2d 265 (1982). Moreover, the degree of proof required in a particular type of proceeding "is the kind of question which has ***756** traditionally been left to the judiciary to resolve." *Woodby v. INS*, 385 U.S. 276, 284, 87 S.Ct. 483, 487, 17 L.Ed.2d 362 (1966).[8] "In cases involving individual rights, whether criminal or civil, '[t]he standard of proof [at a minimum] reflects the value society places on individual liberty.' " *Addington v. Texas*, 441 U.S., at 425, 99 S.Ct., at 1809, quoting *Tippett v. Maryland*, 436 F.2d 1153, 1166 (CA4 1971) (opinion concurring in part and dissenting in part), cert. dism'd *sub nom. Murel v. Baltimore City Criminal Court*, 407 U.S. 355, 92 S.Ct. 2091, 32 L.Ed.2d 791 (1972).

This Court has mandated an intermediate standard of proof —"clear and convincing evidence"—when the individual interests at stake in a state proceeding are both "particularly important" and "more substantial than mere loss of money." *Addington v. Texas*, 441 U.S., at 424, 99 S.Ct., at 1808. Notwithstanding "the state's 'civil labels and good intentions,' " *id.*, at 427, 99 S.Ct. at 1810, quoting *In re Winship*, 397 U.S., at 365–366, 90 S.Ct., at 1073–1074, the Court has deemed this level of certainty necessary to preserve fundamental fairness in a variety of government-initiated proceedings that threaten the individual involved with "a significant deprivation of liberty" or "stigma." 441 U.S., at 425, 426, 99 S.Ct., at 1808, 1809. See, *e. g., Addington v. Texas, supra* (civil commitment); *Woodby v. INS*, 385 U.S., at 285, 87 S.Ct., at 487 (deportation); *Chaunt v. United States*, 364 U.S. 350, 353, 81 S.Ct. 147, 149, 5 L.Ed.2d 120 (1960) (denaturalization); ***757** *Schneiderman v. United States*, 320 U.S. 118, 125, 159, 63 S.Ct. 1333, 1336, 1353, 87 L.Ed. 1796 (1943) (denaturalization).

[7] In *Lassiter*, to be sure, the Court held that fundamental fairness may be maintained in parental rights termination proceedings even when some procedures are mandated only on a case-by-case basis, rather than through rules of general application. 452 U.S., at 31–32, 101 S.Ct., at 2161–2162 (natural parent's right to court-appointed counsel should be determined by the trial court, subject to appellate review). But this Court never has approved case-by-case determination of the proper *standard of proof* for a given proceeding. Standards of proof, like other "procedural due process ****1397** rules[,] are shaped by the risk of error inherent in the truth-finding process as applied to the*generality of cases*, not the rare exceptions." *Mathews v. Eldridge*, 424 U.S., at 344, 96 S.Ct., at 907 (emphasis added). Since the litigants and the factfinder must know at the outset of a given proceeding how the risk of error will be allocated, the standard of proof necessarily must be calibrated in advance. Retrospective case-by-case review cannot preserve fundamental fairness when a class of proceedings is governed by a constitutionally defective evidentiary standard.[9]

***758** III

In parental rights termination proceedings, the private interest affected is commanding; the risk of error from using a preponderance standard is substantial; and the countervailing governmental interest favoring that standard is comparatively slight. Evaluation of the three *Eldridge* factors compels the conclusion that use of a "fair preponderance of the evidence" standard in such proceedings is inconsistent with due process.

A

[8] "The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss.' " *Goldberg v. Kelly*, 397 U.S. 254, 262–263, 90 S.Ct. 1011, 1017–18, 25 L.Ed.2d 287 (1970), quoting *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 168, 71 S.Ct. 624, 646, 95 L.Ed. 817 (1951) (Frankfurter, J., concurring). Whether the loss threatened by a particular type of proceeding is sufficiently grave to warrant more than average certainty on the part of the factfinder turns on both the nature of the private interest threatened and the permanency of the threatened loss.

[9] *Lassiter* declared it "plain beyond the need for multiple citation" that a natural parent's "desire for and right to 'the companionship, care, custody, and management of his or her children' " is an interest far more precious than any property ***759** right. 452 U.S., at 27, 101 S.Ct., at 2160, quoting *Stanley v. Illinois*, 405 U.S., at 651, 92 S.Ct., at 1212. When the State initiates a parental rights termination proceeding, it seeks not merely to infringe that fundamental liberty interest, but to end it. "If the State prevails, it will have worked a unique kind of deprivation.... A parent's interest in the accuracy and justice of the decision to terminate his or her parental status is, therefore, a commanding one." 452 U.S., at 27, 101 S.Ct., at 2160.

****1398** In government-initiated proceedings to determine juvenile delinquency, *In re Winship, supra* ; civil commitment, *Addington v. Texas, supra*; deportation,*Woodby v. INS, supra* ; and denaturalization, *Chaunt v. United States, supra*, and *Schneiderman v. United States, supra*, this Court has identified losses of individual liberty sufficiently serious to warrant imposition of an elevated burden of proof. Yet juvenile delinquency adjudications, civil commitment, deportation, and denaturalization, at least to a degree, are all *reversible* official actions. Once affirmed on appeal, a New York decision terminating parental rights is *final* and irrevocable. See n. 1, *supra*. Few forms of state action are both so severe and so irreversible.

Thus, the first *Eldridge* factor—the private interest affected—weighs heavily against use of the preponderance standard at a state-initiated permanent neglect proceeding. We do not deny that the child and his foster parents are also deeply interested in the outcome of that contest. But at the factfinding stage of the New York proceeding, the focus emphatically is not on them.

[10] The factfinding does not purport—and is not intended—to balance the child's interest in a normal family home against the parents' interest in raising the child. Nor does it purport to determine whether the natural parents or the foster parents would provide the better home. Rather, the factfinding hearing pits the State directly against the parents. The State alleges that the natural parents are at fault. Fam.Ct.Act § 614.1.(d). The questions disputed and decided are ***760** what the State did—"made diligent efforts," § 614.1.(c)—and what the natural parents did not do—"maintain contact with or plan for the future of the child." § 614.1.(d). The State marshals an array of public resources to prove its case and disprove the parents' case. Victory by the State not only makes termination of parental rights possible; it entails a judicial determination that the parents are unfit to raise their own children.[10]

At the factfinding, the State cannot presume that a child and his parents are adversaries. After the State has established parental unfitness at that initial proceeding, the court may assume at the *dispositional* stage that the interests of the child and the natural parents do diverge. See Fam.Ct.Act § 631 (judge shall make his order "solely on the basis of the best interests of the child," and thus has no obligation to consider the natural parents' rights in selecting dispositional alternatives). But until the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship.[11] Thus, ***761** at the factfinding, the interests of the child and his natural parents coincide to favor use of error-reducing procedures.

****1399** However substantial the foster parents' interests may be, cf. *Smith v. Organization of Foster Families*, 431 U.S., at 845–847, 97 S.Ct., at 2110–2111, they are not implicated directly in the factfinding stage of a state-initiated permanent neglect proceeding against the natural parents. If authorized, the foster parents may pit their interests directly against those of the natural parents by initiating their own permanent neglect proceeding. Fam.Ct.Act § 1055(d); Soc.Serv.Law §§ 384–6.3(b), 392.7.(c). Alternatively, the foster parents can make their case for custody at the dispositional stage of a state-initiated proceeding, where the judge already has decided the issue of permanent neglect and is focusing on the placement that would serve the child's best interests. Fam.Ct.Act §§ 623, 631. For the foster parents, the State's failure to prove permanent neglect may prolong the delay and uncertainty until their foster child is freed for adoption. But for the natural parents, a finding of permanent neglect can cut off forever their rights in their child. Given this disparity of consequence, we have no difficulty finding that the balance of private interests strongly favors heightened procedural protections.

B

[11] Under *Mathews v. Eldridge*, we next must consider both the risk of erroneous deprivation of private interests resulting from use of a "fair preponderance" standard and the likelihood that a higher evidentiary standard would reduce that risk. See 424 U.S., at 335, 96 S.Ct., at 903. Since the

factfinding phase of a permanent neglect proceeding is an adversary contest between the State and the natural parents, the relevant question is whether a preponderance standard fairly allocates the risk of an erroneous factfinding between these two parties.

***762** In New York, the factfinding stage of a state-initiated permanent neglect proceeding bears many of the indicia of a criminal trial. Cf. *Lassiter v. Department of Social Services*, 452 U.S., at 42–44, 101 S.Ct., at 2167–2169 (first dissenting opinion); *Meltzer v. C. Buck LeCraw & Co.*, 402 U.S. 954, 959, 91 S.Ct. 1624, 1626, 29 L.Ed.2d 124 (1971) (Black, J., dissenting from denial of certiorari). See also dissenting opinion, *post*, at 1406–1408 (describing procedures employed at factfinding proceeding). The Commissioner of Social Services charges the parents with permanent neglect. They are served by summons. Fam.Ct.Act §§ 614, 616, 617. The factfinding hearing is conducted pursuant to formal rules of evidence. § 624. The State, the parents, and the child are all represented by counsel. §§ 249, 262. The State seeks to establish a series of historical facts about the intensity of its agency's efforts to reunite the family, the infrequency and insubstantiality of the parents' contacts with their child, and the parents' inability or unwillingness to formulate a plan for the child's future. The attorneys submit documentary evidence, and call witnesses who are subject to cross-examination. Based on all the evidence, the judge then determines whether the State has proved the statutory elements of permanent neglect by a fair preponderance of the evidence. § 622.

At such a proceeding, numerous factors combine to magnify the risk of erroneous factfinding. Permanent neglect proceedings employ imprecise substantive standards that leave determinations unusually open to the subjective values of the judge. See *Smith v. Organization of Foster Families*, 431 U.S., at 835, n. 36, 97 S.Ct., at 2105, n. 36. In appraising the nature and quality of a complex series of encounters among the agency, the parents, and the child, the court possesses unusual discretion to underweigh probative facts that might favor the parent.[12] ***763** Because parents ****1400** subject to termination proceedings are often poor, uneducated, or members of minority groups, *id.*, at 833–835, such proceedings are often vulnerable to judgments based on cultural or class bias.

The State's ability to assemble its case almost inevitably dwarfs the parents' ability to mount a defense. No predetermined limits restrict the sums an agency may spend in prosecuting a given termination proceeding. The State's attorney usually will be expert on the issues contested and the procedures employed at the factfinding hearing, and enjoys full access to all public records concerning the family. The State may call on experts in family relations, psychology, and medicine to bolster its case. Furthermore, the primary witnesses at the hearing will be the agency's own professional caseworkers whom the State has empowered both to investigate the family situation and to testify against the parents. Indeed, because the child is already in agency custody, the State even has the power to shape the historical events that form the basis for termination.[13]

***764** The disparity between the adversaries' litigation resources is matched by a striking asymmetry in their litigation options. Unlike criminal defendants, natural parents have no "double jeopardy" defense against repeated state termination efforts. If the State initially fails to win termination, as New York did here, see n. 4, *supra*, it always can try once again to cut off the parents' rights after gathering more or better evidence. Yet even when the parents have attained the level of fitness required by the State, they have no similar means by which they can forestall future termination efforts.

Coupled with a "fair preponderance of the evidence" standard, these factors create a significant prospect of erroneous termination. A standard of proof that by its very terms demands consideration of the quantity, rather than the quality, of the evidence may misdirect the factfinder in the marginal case. See *In re Winship*, 397 U.S., at 371, n. 3, 90 S.Ct., at 1076, n. 3 (Harlan, J., concurring). Given the weight of the private interests at stake, the social cost of even occasional error is sizable.

Raising the standard of proof would have both practical and symbolic consequences. Cf. *Addington v. Texas*, 441 U.S., at 426, 99 S.Ct., at 1809. The Court has long considered the heightened standard of proof used in criminal prosecutions to be "a prime instrument for reducing the risk of convictions resting on factual error." *In re Winship*, 397 U.S., at 363, 90 S.Ct., at 1072. An elevated standard of proof in a parental rights termination proceeding would alleviate "the possible risk that a factfinder might decide to [deprive] an individual based solely on a few isolated instances of unusual conduct [or] ... idiosyncratic behavior." *Addington v. Texas*, 441 U.S., at 427, 99 S.Ct., at 1810. "Increasing the burden of proof is one way to ****1401** impress the factfinder with the importance ***765** of the decision and thereby perhaps to

reduce the chances that inappropriate" terminations will be ordered. *Ibid.*

The Appellate Division approved New York's preponderance standard on the ground that it properly "balanced rights possessed by the child ... with those of the natural parents...." 75 App.Div.2d, at 910, 427 N.Y.S.2d, at 320. By so saying, the court suggested that a preponderance standard properly allocates the risk of error *between* the parents and the child.[14] That view is fundamentally mistaken.

The court's theory assumes that termination of the natural parents' rights invariably will benefit the child.[15] Yet we have noted above that the parents and the child share an interest in avoiding erroneous termination. Even accepting the court's assumption, we cannot agree with its conclusion that a preponderance standard fairly distributes the risk of error between parent and child. Use of that standard reflects the judgment that society is nearly neutral between erroneous termination of parental rights and erroneous failure to terminate those rights. Cf. *In re Winship*, 397 U.S., at 371, 90 S.Ct., at 1076 (Harlan, J., concurring). For the child, the likely consequence of an erroneous failure to terminate is preservation of ***766** an uneasy status quo.[16] For the natural parents, however, the consequence of an erroneous termination is the unnecessary destruction of their natural family. A standard that allocates the risk of error nearly equally between those two outcomes does not reflect properly their relative severity.

C

[12] Two state interests are at stake in parental rights termination proceedings—a *parens patriae* interest in preserving and promoting the welfare of the child and a fiscal and administrative interest in reducing the cost and burden of such proceedings. A standard of proof more strict than preponderance of the evidence is consistent with both interests.

"Since the State has an urgent interest in the welfare of the child, it shares the parent's interest in an accurate and just decision" at the *factfinding* proceeding. *Lassiter v. Department of Social Services*, 452 U.S., at 27, 101 S.Ct., at 2160. As *parens patriae*, the State's goal is to provide the child with a permanent home. See Soc.Serv.Law § 384–b.1.(a)(i) (statement of legislative findings and intent). Yet while ****1402** there is still reason to believe that positive, nurturing parent-child relationships exist, the *parens patriae* interest favors preservation, not ***767** severance, of natural familial bonds.[17] § 384–b.1.(a)(ii). "[T]he State registers no gain towards its declared goals when it separates children from the custody of fit parents." *Stanley v. Illinois*, 405 U.S., at 652, 92 S.Ct., at 1213.

The State's interest in finding the child an alternative permanent home arises only "when it is *clear* that the natural parent cannot or will not provide a normal family home for the child." Soc.Serv.Law § 384–b.1. (a)(iv) (emphasis added). At the factfinding, that goal is served by procedures that promote an accurate determination of whether the natural parents can and will provide a normal home.

Unlike a constitutional requirement of hearings, see, *e.g., Mathews v. Eldridge*, 424 U.S., at 347, 96 S.Ct., at 908, or court-appointed counsel, a stricter standard of proof would reduce factual error without imposing substantial fiscal burdens upon the State. As we have observed, 35 States already have adopted a higher standard by statute or court decision without apparent effect on the speed, form, or cost of their factfinding proceedings. See n. 3, *supra.*

Nor would an elevated standard of proof create any real administrative burdens for the State's factfinders. New York Family Court judges already are familiar with a higher evidentiary standard in other parental rights termination proceedings not involving permanent neglect. See Soc.Serv.Law §§ 384–b.3.(g), 384–b.4.(c), and 384–b.4.(e) (requiring "clear and convincing proof" before parental rights may be terminated for reasons of mental illness and mental retardation or severe and repeated child abuse). New York also demands at least clear and convincing evidence in proceedings of far less moment than parental rights termination proceedings. See, *e.g.*, N.Y. Veh. & Traf. Law § 227.1 (McKinney Supp.1981) (requiring the State to prove traffic ***768** infractions by "clear and convincing evidence") and *In re Rosenthal v. Hartnett*, 36 N.Y.2d 269, 367 N.Y.S.2d 247, 326 N.E.2d 811 (1975); see also *Ross v. Food Specialties, Inc.*, 6 N.Y.2d 336, 341, 189 N.Y.S.2d 857, 859, 160 N.E.2d 618, 620 (1959) (requiring "clear, positive and convincing evidence" for contract reformation). We cannot believe that it would burden the State unduly to require that its factfinders have the same factual certainty when terminating the parent-child relationship as they must have to suspend a driver's license.

IV

[13] The logical conclusion of this balancing process is that the "fair preponderance of the evidence" standard prescribed by Fam.Ct.Act § 622 violates the Due Process Clause of the Fourteenth Amendment.[18] The Court noted in *Addington* : "The individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state." 441 U.S., at 427, 99 S.Ct., at 1810. Thus, at a parental rights termination proceeding, a near-equal allocation of risk between the parents and the State is constitutionally intolerable. The next question, then, is whether a "beyond a reasonable doubt" or a "clear and convincing" standard is constitutionally mandated.

In *Addington*, the Court concluded that application of a reasonable-doubt standard is inappropriate in civil commitment proceedings for two reasons—because of our hesitation to apply that unique standard ****1403** "too broadly or casually in noncriminal cases," *id.*, at 428, 99 S.Ct., at 1810, and because the psychiatric evidence ordinarily adduced at commitment proceedings is ***769** rarely susceptible to proof beyond a reasonable doubt. *Id.*, at 429–430, 432–433, 99 S.Ct., at 1811–1812, 1812–1813. To be sure, as has been noted above, in the Indian Child Welfare Act of 1978, Pub.L. 95–608, § 102(f), 92 Stat. 3072, 25 U.S.C. § 1912(f) (1976 ed., Supp.IV), Congress requires "evidence beyond a reasonable doubt" for termination of Indian parental rights, reasoning that "the removal of a child from the parents is a penalty as great [as], if not greater, than a criminal penalty...." H.R.Rep.No. 95–1386, p. 22 (1978), U.S.Code Cong. & Admin.News 1978, pp. 7530, 7545. Congress did not consider, however, the evidentiary problems that would arise if proof beyond a reasonable doubt were required in all state-initiated parental rights termination hearings.

Like civil commitment hearings, termination proceedings often require the factfinder to evaluate medical and psychiatric testimony, and to decide issues difficult to prove to a level of absolute certainty, such as lack of parental motive, absence of affection between parent and child, and failure of parental foresight and progress. Cf. *Lassiter v. Department of Social Services*, 452 U.S., at 30, 101 S.Ct., at 2161; *id.*, at 44–46, 101 S.Ct., at 2168–2169 (first dissenting opinion) (describing issues raised in state termination proceedings). The substantive standards applied vary from State to State. Although Congress found a "beyond a reasonable doubt" standard proper in one type of parental rights termination case, another legislative body might well conclude that a reasonable-doubt standard would erect an unreasonable barrier to state efforts to free permanently neglected children for adoption.

[14] **[15]** A majority of the States have concluded that a "clear and convincing evidence" standard of proof strikes a fair balance between the rights of the natural parents and the State's legitimate concerns. See n. 3, *supra.* We hold that such a standard adequately conveys to the factfinder the level of subjective certainty about his factual conclusions necessary to satisfy due process. We further hold that determination of the precise burden equal to or greater than that standard ***770** is a matter of state law properly left to state legislatures and state courts. Cf. *Addington v. Texas*, 441 U.S., at 433, 99 S.Ct., at 1813.

We, of course, express no view on the merits of petitioners' claims.[19] At a hearing conducted under a constitutionally proper standard, they may or may not prevail. Without deciding the outcome under any of the standards we have approved, we vacate the judgment of the Appellate Division and remand the case for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice REHNQUIST, with whom THE CHIEF JUSTICE, Justice WHITE, and Justice O'CONNOR join, dissenting.
I believe that few of us would care to live in a society where every aspect of life was regulated by a single source of law, whether that source be this Court or some other organ of our complex body politic. But today's decision certainly moves us in that direction. By parsing the New York scheme and holding one narrow provision unconstitutional, the majority invites further federal-court intrusion into every facet of state family law. If ever there were an area in which federal courts should heed the admonition of Justice Holmes that "a page of history is worth a volume of logic,"[1] it is in the area of domestic relations. This area has been left to the States from ****1404** time immemorial, and not without good reason.

Equally as troubling is the majority's due process analysis. The Fourteenth Amendment guarantees that a State will treat individuals with "fundamental fairness" whenever its actions infringe their protected liberty or property interests.

By adoption of the procedures relevant to this case, New ***771** York has created an exhaustive program to assist parents in regaining the custody of their children and to protect parents from the unfair deprivation of their parental rights. And yet the majority's myopic scrutiny of the standard of proof blinds it to the very considerations and procedures which make the New York scheme "fundamentally fair."

I

State intervention in domestic relations has always been an unhappy but necessary feature of life in our organized society. For all of our experience in this area, we have found no fully satisfactory solutions to the painful problem of child abuse and neglect. We have found, however, that leaving the States free to experiment with various remedies has produced novel approaches and promising progress.

Throughout this experience the Court has scrupulously refrained from interfering with state answers to domestic relations questions. "Both theory and the precedents of this Court teach us solicitude for state interests, particularly in the field of family and family-property arrangements." *United States v. Yazell*, 382 U.S. 341, 352, 86 S.Ct. 500, 507, 15 L.Ed.2d 404 (1966). This is not to say that the Court should blink at clear constitutional violations in state statutes, but rather that in this area, of all areas, "substantial weight must be given to the good-faith judgments of the individuals [administering a program] ... that the procedures they have provided assure fair consideration of the ... claims of individuals." *Mathews v. Eldridge*, 424 U.S. 319, 349, 96 S.Ct. 893, 909, 47 L.Ed.2d 18 (1976).

This case presents a classic occasion for such solicitude. As will be seen more fully in the next part, New York has enacted a comprehensive plan to *aid* marginal parents in regaining the custody of their child. The central purpose of the New York plan is to reunite divided families. Adoption of the preponderance-of-the-evidence standard represents New York's good-faith effort to balance the interest of parents ***772** against the legitimate interests of the child and the State. These earnest efforts by state officials should be given weight in the Court's application of due process principles. "Great constitutional provisions must be administered with caution. Some play must be allowed for the joints of the machine, and it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." *Missouri, K. & T.R. Co. v. May*, 194 U.S. 267, 270, 24 S.Ct. 638, 639, 48 L.Ed. 971 (1904).[2]

The majority may believe that it is adopting a relatively unobtrusive means of ensuring that termination proceedings provide "due process of law." In fact, however, ****1405** fixing the standard of proof as a matter of federal constitutional law will only lead to further federal-court intervention in state schemes. By holding that due process requires proof by clear and convincing evidence the majority surely cannot mean that any state scheme passes constitutional muster so long as it applies that standard of proof. A state law permitting termination of parental rights upon a showing of neglect by clear and convincing evidence certainly would not be acceptable ***773** to the majority if it provided no procedures other than one 30-minute hearing. Similarly, the majority probably would balk at a state scheme that permitted termination of parental rights on a clear and convincing showing merely that such action would be in the best interests of the child. See *Smith v. Organization of Foster Families*, 431 U.S. 816, 862–863, 97 S.Ct. 2094, 2119, 53 L.Ed.2d 14 (1977) (Stewart, J., concurring in judgment).

After fixing the standard of proof, therefore, the majority will be forced to evaluate other aspects of termination proceedings with reference to that point. Having in this case abandoned evaluation of the overall effect of a scheme, and with it the possibility of finding that strict substantive standards or special procedures compensate for a lower burden of proof, the majority's approach will inevitably lead to the federalization of family law. Such a trend will only thwart state searches for better solutions in an area where this Court should encourage state experimentation. "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311, 52 S.Ct. 371, 386, 76 L.Ed. 747 (1932) (Brandeis, J., dissenting). It should not do so in the absence of a clear constitutional violation. As will be seen in the next part, no clear constitutional violation has occurred in this case.

II

As the majority opinion notes, petitioners are the parents of five children, three of whom were removed from petitioners' care on or before August 22, 1974. During the next four and

one-half years, those three children were in the custody of the State and in the care of foster homes or institutions, and the State was diligently engaged in efforts to prepare petitioners for the children's return. Those efforts were unsuccessful, ***774** however, and on April 10, 1979, the New York Family Court for Ulster County terminated petitioners' parental rights as to the three children removed in 1974 or earlier. This termination was preceded by a judicial finding that petitioners had failed to plan for the return and future of their children, a statutory category of permanent neglect. Petitioners now contend, and the Court today holds, that they were denied due process of law, not because of a general inadequacy of procedural protections, but simply because the finding of permanent neglect was made on the basis of a preponderance of the evidence adduced at the termination hearing.

It is well settled that "[t]he requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property." *Board of Regents v. Roth*, 408 U.S. 564, 569, 92 S.Ct. 2701, 2705, 33 L.Ed.2d 548 (1972). In determining whether such liberty or property interests are implicated by a particular government action, "we must look not to the 'weight' but to the *nature* of the interest at stake." *Id.*, at 571, 92 S.Ct., at 2706 (emphasis in original). I do not disagree with the majority's conclusion that the interest of parents in their relationship with their children is sufficiently fundamental to come within the finite class of liberty interests protected by the Fourteenth Amendment. See *Smith v. Organization of Foster Families, supra*, at 862–863, 97 S.Ct., at 2119 (Stewart, J., concurring in judgment). "Once it is determined that due ****1406** process applies, [however,] the question remains what process is due." *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2595, 2600, 33 L.Ed.2d 484 (1972). It is the majority's answer to this question with which I disagree.

A

Due process of law is a flexible constitutional principle. The requirements which it imposes upon governmental actions vary with the situations to which it applies. As the Court previously has recognized, "not all situations calling for ***775** procedural safeguards call for the same kind of procedure." *Morrissey v. Brewer, supra*, at 481, 92 S.Ct., at 2600. See also *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 12, 99 S.Ct. 2100, 2106, 60 L.Ed.2d 668 (1979); *Mathews v. Eldridge*, 424 U.S., at 334, 96 S.Ct., at 902; *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230 (1961). The adequacy of a scheme of procedural protections cannot, therefore, be determined merely by the application of general principles unrelated to the peculiarities of the case at hand.

Given this flexibility, it is obvious that a proper due process inquiry cannot be made by focusing upon one narrow provision of the challenged statutory scheme. Such a focus threatens to overlook factors which may introduce constitutionally adequate protections into a particular government action. Courts must examine *all* procedural protections offered by the State, and must assess the *cumulative* effect of such safeguards. As we have stated before, courts must consider "the fairness and reliability of the existing ... procedures" before holding that the Constitution requires more. *Mathews v. Eldridge, supra*, 424 U.S., at 343, 96 S.Ct., at 907. Only through such a broad inquiry may courts determine whether a challenged governmental action satisfies the due process requirement of "fundamental fairness."[3] In some instances, the Court has even looked to nonprocedural restraints on official action in determining whether the deprivation of a protected interest was effected without due process of law. *E.g.,* ***776** *Ingraham v. Wright*, 430 U.S. 651, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977). In this case, it is just such a broad look at the New York scheme which reveals its fundamental fairness.[4]

The termination of parental rights on the basis of permanent neglect can occur under New York law only by order of the Family Court. N.Y.Soc.Serv.Law (SSL) § 384–b.3. (d) (McKinney Supp.1981–1982). Before a petition for permanent termination can be filed in that court, however, several other events must first occur.

****1407** The Family Court has jurisdiction only over those children who are in the care of an authorized agency. N.Y.Family Court Act (FCA) § 614.1. (b) (McKinney 1975 and Supp.1981–1982). Therefore, the children who are the subject of a termination petition must previously have been removed from their parents' home on a temporary basis. Temporary removal of a child can occur in one of two ways. The parents may consent to the removal, FCA § 1021, or, as occurred in this case, the Family Court can order the removal pursuant to a finding that the child is abused or neglected.[5] FCA §§ 1051, 1052.

***777** Court proceedings to order the temporary removal of a child are initiated by a petition alleging abuse or neglect, filed by a state-authorized child protection agency or by a person designated by the court. FCA §§ 1031, 1032. Unless the court finds that exigent circumstances require removal of the child before a petition may be filed and a hearing held, see FCA § 1022, the order of temporary removal results from a "dispositional hearing" conducted to determine the appropriate form of alternative care. FCA § 1045. See also FCA § 1055. This "dispositional hearing" can be held only after the court, at a separate "fact-finding hearing," has found the child to be abused or neglected within the specific statutory definition of those terms. FCA §§ 1012, 1044, 1051. Parents subjected to temporary removal proceedings are provided extensive procedural protections. A summons and copy of the temporary removal petition must be served upon the parents within two days of issuance by the court, FCA §§ 1035, 1036, and the parents may, at their own request, delay the commencement of the factfinding hearing for three days after service of the summons. FCA § 1048.[6] The factfinding hearing may not commence without a determination by the court that the parents are present at the hearing and have been served with the petition. FCA § 1041. At the hearing itself, "only competent, material and relevant evidence may be admitted," with some enumerated exceptions ***778** for particularly probative evidence. FCA § 1046(b)(ii). In addition, indigent parents are provided with an attorney to represent them at both the factfinding and dispositional hearings, as well as at all other proceedings related to temporary removal of their child. FCA § 262(a)(i).

An order of temporary removal must be reviewed every 18 months by the Family Court. SSL § 392.2. Such review is conducted by hearing before the same judge who ordered the temporary removal, and a notice of the hearing, including a statement of the dispositional alternatives, must be given to the parents at least 20 days before the hearing is held. SSL § 392.4. As in the initial removal action, the parents must be parties to the proceedings, *ibid.*, and are entitled to court-appointed counsel if indigent. FCA § 262(a).

One or more years after a child has been removed temporarily from the parents' home, permanent termination proceedings may be commenced by the filing of a petition in the court which ordered the temporary removal. The petition must be filed by a state agency or by a foster parent authorized by the court, SSL § 384–b.3.(b), and must allege that the child has been ****1408** permanently neglected by the parents. SSL §§ 384–b.3.(d).[7] Notice of the petition and the dispositional proceedings must be served upon the parents at least 20 days before the commencement of the hearing, SSL § 384–b.3.(e), must inform them of the potential consequences of the hearing, *ibid.*, and must inform them "of their right to the assistance of counsel, including [their] right ... to have counsel assigned by the court [if] they are financially unable to obtain counsel." *Ibid.* See also FCA § 262.

As in the initial removal proceedings, two hearings are held in consideration of the permanent termination petition. ***779** SSL § 384–b.3.(f). At the factfinding hearing, the court must determine, by a fair preponderance of the evidence, whether the child has been permanently neglected. SSL § 384–b.3.(g). "Only competent, material and relevant evidence may be admitted in a fact-finding hearing." FCA § 624. The court may find permanent neglect if the child is in the care of an authorized agency or foster home and the parents have "failed for a period of more than one year ... substantially and continuously or repeatedly to maintain contact with or plan for the future of the child, although physically and financially able to do so." SSL 384–b.7.(a).[8] In addition, because the State considers its "first obligation" to be the reuniting of the child with its natural parents, SSL § 384–b.1.(iii), the court must also find that the supervising state agency has, without success, made "*diligent* efforts to encourage and strengthen the parental relationship." SSL § 384–b.7.(a) (emphasis added).[9]

***780** Following the factfinding hearing, a separate, dispositional hearing is held to determine what course of action would be in "the best interests of the child." FCA § 631. A finding of permanent neglect at the fact-finding hearing, although necessary to a termination of parental rights, does not control the court's order at the dispositional hearing. The court may dismiss the petition, suspend judgment on the petition and retain jurisdiction for a period of one year in order to provide further opportunity for a reuniting of the family, or terminate the parents' right to the custody and care of the child. FCA §§ 631–634. The court must base its decision solely upon the record of "material and relevant evidence" introduced at the dispositional ****1409** hearing, FCA § 624; *In re "Female" M.*, 70 A.D.2d 812, 417 N.Y.S.2d 482 (1979), and may not entertain any presumption that the best interests of the child "will be promoted by any particular disposition." FCA § 631.

As petitioners did in this case, parents may appeal any unfavorable decision to the Appellate Division of the New

York Supreme Court. Thereafter, review may be sought in the New York Court of Appeals and, ultimately, in this Court if a federal question is properly presented.

As this description of New York's termination procedures demonstrates, the State seeks not only to protect the interests of parents in rearing their own children, but also to assist and encourage parents who have lost custody of their children to reassume their rightful role. Fully understood, the New York system is a comprehensive program to *aid* parents such as petitioners. Only as a last resort, when "diligent efforts" to reunite the family have failed, does New ***781** York authorize the termination of parental rights. The procedures for termination of those relationships which cannot be aided and which threaten permanent injury to the child, administered by a judge who has supervised the case from the first temporary removal through the final termination, cannot be viewed as fundamentally unfair. The facts of this case demonstrate the fairness of the system.

The three children to which this case relates were removed from petitioners' custody in 1973 and 1974, before petitioners' other two children were born. The removals were made pursuant to the procedures detailed above and in response to what can only be described as shockingly abusive treatment.[10] At the temporary removal hearing held before the Family Court on September 30, 1974, petitioners were represented by counsel, and allowed the Ulster County Department of Social Services (Department) to take custody of the three children.

Temporary removal of the children was continued at an evidentiary hearing held before the Family Court in December 1975, after which the court issued a written opinion concluding that petitioners were unable to resume their parental responsibilities due to personality disorders. Unsatisfied with the progress petitioners were making, the court also directed ***782** the Department to reduce to writing the plan which it had designed to solve the problems at petitioners' home and reunite the family.

A plan for providing petitioners with extensive counseling and training services was submitted to the court and approved in February 1976. Under the plan, petitioners received training by a mother's aide, a nutritional aide, and a public health nurse, and counseling at a family planning clinic. In addition, the plan provided psychiatric treatment and vocational training for the father, and counseling at a family service center for the mother. Brief for Respondent Kramer 1–7. Between early 1976 and the final termination decision in April 1979, the State spent more than $15,000 in these efforts to rehabilitate petitioners as parents. App. 34.

Petitioners' response to the State's effort was marginal at best. They wholly disregarded some of the available services and participated only sporadically in the others. ****1410** As a result, and out of growing concern over the length of the children's stay in foster care, the Department petitioned in September 1976 for permanent termination of petitioners' parental rights so that the children could be adopted by other families. Although the Family Court recognized that petitioners' reaction to the State's efforts was generally "non-responsive, even hostile," the fact that they were "at least superficially cooperative" led it to conclude that there was yet hope of further improvement and an eventual reuniting of the family. Exhibit to Brief for Respondent Kramer 618. Accordingly, the petition for permanent termination was dismissed.

Whatever progress petitioners were making prior to the 1976 termination hearing, they made little or no progress thereafter. In October 1978, the Department again filed a termination petition alleging that petitioners had completely failed to plan for the children's future despite the considerable efforts rendered in their behalf. This time, the Family Court agreed. The court found that petitioners had "failed in any meaningful way to take advantage of the many social ***783** and rehabilitative services that have not only been made available to them but have been diligently urged upon them." App. 35. In addition, the court found that the "infrequent" visits "between the parents and their children were at best superficial and devoid of any real emotional content." *Id.*, at 21. The court thus found "nothing in the situation which holds out any hope that [petitioners] may ever become financially self sufficient or emotionally mature enough to be independent of the services of social agencies. More than a reasonable amount of time has passed and still, in the words of the case workers, there has been no discernible forward movement. At some point in time, it must be said, 'enough is enough.' " *Id.*, at 36.

In accordance with the statutory requirements set forth above, the court found that petitioners' failure to plan for the future of their children, who were then seven, five, and four years old and had been out of petitioners' custody for at least four years, rose to the level of permanent neglect. At a subsequent dispositional hearing, the court terminated

petitioners' parental rights, thereby freeing the three children for adoption.

As this account demonstrates, the State's extraordinary 4-year effort to reunite petitioners' family was not just unsuccessful, it was altogether rebuffed by parents unwilling to improve their circumstances sufficiently to permit a return of their children. At every step of this protracted process petitioners were accorded those procedures and protections which traditionally have been required by due process of law. Moreover, from the beginning to the end of this sad story all judicial determinations were made by one Family Court Judge. After four and one-half years of involvement with petitioners, more than seven complete hearings, and additional periodic supervision of the State's rehabilitative efforts, the judge no doubt was intimately familiar with this case and the prospects for petitioners' rehabilitation.

It is inconceivable to me that these procedures were "fundamentally unfair" to petitioners. Only by its obsessive ***784** focus on the standard of proof and its almost complete disregard of the facts of this case does the majority find otherwise.[11] As the discussion ****1411** above indicates, however, such a ***785** focus does not comport with the flexible standard of fundamental fairness embodied in the Due Process Clause of the Fourteenth Amendment.

B

In addition to the basic fairness of the process afforded petitioners, the standard of proof chosen by New York clearly reflects a constitutionally permissible balance of the interests at stake in this case. The standard of proof "represents an attempt to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." *In re Winship*, 397 U.S. 358, 370, 90 S.Ct. 1068, 1076, 25 L.Ed.2d 368 (1970) (Harlan, J. concurring); *Addington v. Texas*, 441 U.S. 418, 423, 99 S.Ct. 1804, 1807, 60 L.Ed.2d 323 (1979). In this respect, the standard of proof is a crucial component of legal process, the primary function of which is "to minimize the risk of erroneous decisions."[12] ***786** *Greenholtz v. Nebraska Penal Inmates*, 442 U.S., at 13, 99 S.Ct., at 2106. See also *Addington v. Texas, supra*, at 425, 99 S.Ct., at 1808–1809; *Mathews v. Eldridge*, 424 U.S., at 344, 96 S.Ct., at 907.

****1412** In determining the propriety of a particular standard of proof in a given case, however, it is not enough simply to say that we are trying to minimize the risk of error. Because errors in factfinding affect more than one interest, we try to minimize error as to those interests which we consider to be most important. As Justice Harlan explained in his well-known concurrence to *In re Winship*:

> "In a lawsuit between two parties, a factual error can make a difference in one of two ways. First, it can result in a judgment in favor of the plaintiff when the true facts warrant a judgment for the defendant. The analogue in a criminal case would be the conviction of an innocent man. On the other hand, an erroneous factual determination can result in a judgment for the defendant when the true facts justify a judgment in plaintiff's favor. The criminal analogue would be the acquittal of a guilty man.
>
> The standard of proof influences the relative frequency of these two types of erroneous outcomes. If, for example, the standard of proof for a criminal trial were a preponderance of the evidence rather than proof ***787** beyond a reasonable doubt, there would be a smaller risk of factual errors that result in freeing guilty persons, but a far greater risk of factual errors that result in convicting the innocent. Because the standard of proof affects the comparative frequency of these two types of erroneous outcomes, the choice of the standard to be applied in a particular kind of litigation should, in a rational world, reflect an assessment of the comparative social disutility of each." 397 U.S., at 370–371, 90 S.Ct., at 1076.

When the standard of proof is understood as reflecting such an assessment, an examination of the interests at stake in a particular case becomes essential to determining the propriety of the specified standard of proof. Because proof by a preponderance of the evidence requires that "[t]he litigants ... share the risk of error in a roughly equal fashion," *Addington v. Texas, supra*, at 423, 99 S.Ct., at 1808, it rationally should be applied only when the interests at stake are of roughly equal societal importance. The interests at stake in this case demonstrate that New York has selected a constitutionally permissible standard of proof.

On one side is the interest of parents in a continuation of the family unit and the raising of their own children. The importance of this interest cannot easily be overstated. Few consequences of judicial action are so grave as the severance of natural family ties. Even the convict committed to prison and thereby deprived of his physical liberty often retains the

love and support of family members. "This Court's decisions have by now made plain beyond the need for multiple citation that a parent's desire for and right to 'the companionship, care, custody, and management of his or her children' is an important interest that 'undeniably warrants deference and, absent a powerful countervailing interest, protection.' *Stanley v. Illinois*, 405 U.S. 645, 651 [92 S.Ct. 1208, 1212, 31 L.Ed.2d 551]." *Lassiter v. Department of Social Services*, 452 U.S. 18, 27, 101 S.Ct. 2153, 2161, 68 L.Ed.2d 640 (1981). In creating the scheme at issue in this case, the New York Legislature ***788** was expressly aware of this right of parents "to bring up their own children." SSL § 384–b.1.(a)(ii).

On the other side of the termination proceeding are the often countervailing interests of the child.[13] A stable, loving ***789** homelife ****1413** is essential to a child's physical, emotional, and spiritual well-being. It requires no citation of authority to assert that children who are abused in their youth generally face extraordinary problems developing into responsible, productive citizens. The same can be said of children who, though not physically or emotionally abused, are passed from one foster home to another with no constancy of love, trust, or discipline. If the Family Court makes an incorrect factual determination resulting in a failure to terminate a parent-child relationship which rightfully should be ended, the child involved must return either to an abusive home[14] or to the often unstable world of foster care.[15] The reality of these ***790** risks is magnified by the fact that the only families faced with termination actions are those which have voluntarily surrendered custody of their child to the State, or, as in this case, those from which the child has been removed by judicial action because of threatened irreparable injury through ****1414** abuse or neglect. Permanent neglect findings also occur only in families where the child has been in foster care for at least one year.

In addition to the child's interest in a normal homelife, "the State has an urgent interest in the welfare of the child." *Lassiter v. Department of Social Services*, 452 U.S., at 27, 101 S.Ct., at 2160.[16] Few could doubt that the most valuable resource of a self-governing society is its population of children who will one day become adults and themselves assume the responsibility of self-governance. "A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies." *Prince v. Massachusetts*, 321 U.S. 158, 168, 64 S.Ct. 438, 443, 88 L.Ed. 645 (1944). Thus, "the whole community" has an interest "that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed ... citizens." *Id.*, at 165, 64 S.Ct., at 442. See also *Ginsberg v. New York*, 390 U.S. 629, 640–641, 88 S.Ct. 1274, 1281–82, 20 L.Ed.2d 195 (1968).

When, in the context of a permanent neglect termination proceeding, the interests of the child and the State in a stable, ***791** nurturing homelife are balanced against the interests of the parents in the rearing of their child, it cannot be said that either set of interests is so clearly paramount as to require that the risk of error be allocated to one side or the other. Accordingly, a State constitutionally may conclude that the risk of error should be borne in roughly equal fashion by use of the preponderance-of-the-evidence standard of proof. See *Addington v. Texas*, 441 U.S., at 423, 99 S.Ct., at 1807–1808. This is precisely the balance which has been struck by the New York Legislature: "It is the intent of the legislature in enacting this section to provide procedures not only assuring that the rights of the natural parent are protected, but also, where positive, nurturing parent-child relationships no longer exist, furthering the best interests, needs, and rights of the child by terminating the parental rights and freeing the child for adoption." SSL § 384–b.1.(b).

III

For the reasons heretofore stated, I believe that the Court today errs in concluding that the New York standard of proof in parental-rights termination proceedings violates due process of law. The decision disregards New York's earnest efforts to *aid* parents in regaining the custody of their children and a host of procedural protections placed around parental rights and interests. The Court finds a constitutional violation only by a tunnel-vision application of due process principles that altogether loses sight of the unmistakable fairness of the New York procedure.

Even more worrisome, today's decision cavalierly rejects the considered judgment of the New York Legislature in an area traditionally entrusted to state care. The Court thereby begins, I fear, a trend of federal intervention in state family law matters which surely will stifle creative responses to vexing problems. Accordingly, I dissent.

All Citations

455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 At oral argument, counsel for petitioners asserted that, in New York, natural parents have no means of restoring terminated parental rights. Tr. of Oral Arg. 9. Counsel for respondents, citing Fam.Ct.Act § 1061, answered that parents may petition the Family Court to vacate or set aside an earlier order on narrow grounds, such as newly discovered evidence or fraud. Tr. of Oral Arg. 26. Counsel for respondents conceded, however, that this statutory provision has never been invoked to set aside a permanent neglect finding. *Id.*, at 27.

2 Most notably, natural parents have a statutory right to the assistance of counsel and of court-appointed counsel if they are indigent. Fam.Ct.Act § 262(a)(iii).

3 Fifteen States, by statute, have required "clear and convincing evidence" or its equivalent. See Alaska Stat.Ann. § 47.10.080(c)(3) (1980); Cal.Civ.Code Ann. § 232(a)(7) (West Supp.1982); Ga.Code §§ 24A–2201(c), 24A–3201 (1979); Iowa Code § 600A.8 (1981) ("clear and convincing proof"); Me.Rev.Stat.Ann., Tit. 22, § 4055.1.B.(2) (Supp.1981–1982); Mich.Comp.Laws § 722.25 (Supp.1981–1982); Mo.Rev.Stat. § 211.447.2(2) (Supp.1981) ("clear, cogent and convincing evidence"), N.M.Stat.Ann. § 40–7–4.J. (Supp.1981); N.C.Gen.Stat. § 7A–289.30(e) (1981) ("clear, cogent, and convincing evidence"); Ohio Rev.Code Ann. §§ 2151.35, 2151.414(B) (Page Supp.1982); R.I.Gen.Laws § 15–7–7(d) (Supp.1980); Tenn.Code Ann. § 37–246(d) (Supp.1981); Va.Code § 16.1–283.B (Supp.1981); W.Va.Code § 49–6–2(c) (1980) ("clear and convincing proof"); Wis.Stat. § 48.31(1) (Supp.1981–1982).

Fifteen States, the District of Columbia, and the Virgin Islands, by court decision, have required "clear and convincing evidence" or its equivalent. See *Dale County Dept. of Pensions & Security v. Robles*, 368 So.2d 39, 42 (Ala.Civ.App.1979); *Harper v. Caskin*, 265 Ark. 558, 560–561, 580 S.W.2d 176, 178 (1979); *In re J. S. R.*, 374 A.2d 860, 864 (D.C.1977); *Torres v. Van Eepoel*, 98 So.2d 735, 737 (Fla.1957); *In re Kerns*, 225 Kan. 746, 753, 594 P.2d 187, 193 (1979); *In re Rosenbloom*, 266 N.W.2d 888, 889 (Minn.1978) ("clear and convincing proof"); *In re J. L. B.*, 182 Mont. 100, 116–117, 594 P.2d 1127, 1136 (1979); *In re Souza*, 204 Neb. 503, 510, 283 N.W.2d 48, 52 (1979); *J. v. M.*, 157 N.J.Super. 478, 489, 385 A.2d 240, 246 (App.Div.1978); *In re J.A.*, 283 N.W.2d 83, 92 (N.D.1979); *In re Darren Todd H.*, 615 P.2d 287, 289 (Okl.1980); *In re William L.*, 477 Pa. 322, 332, 383 A.2d 1228, 1233, cert. denied *sub nom. Lehman v. Lycoming County Children's Services*, 439 U.S. 880, 99 S.Ct. 216, 58 L.Ed.2d 192 (1978); *In re G. M.*, 596 S.W.2d 846, 847 (Tex.1980); *In re Pitts*, 535 P.2d 1244, 1248 (Utah 1975); *In re Maria*, 15 V.I. 368, 384 (1978); *In re Sego*, 82 Wash.2d 736, 739, 513 P.2d 831, 833 (1973) ("clear, cogent, and convincing evidence"); *In re X.*, 607 P.2d 911, 919 (Wyo.1980) ("clear and unequivocal").

South Dakota's Supreme Court has required a "clear preponderance" of the evidence in a dependency proceeding. See *In re B.E.*, 287 N.W.2d 91, 96 (1979). Two States, New Hampshire and Louisiana, have barred parental rights terminations unless the key allegations have been proved beyond a reasonable doubt. See *State v. Robert H.*, 118 N.H. 713, 716, 393 A.2d 1387, 1389 (1978); La.Rev.Stat.Ann. § 13:1603.A (West Supp.1982). Two States, Illinois and New York, have required clear and convincing evidence, but only in certain types of parental rights termination proceedings. See Ill.Rev.Stat. ch. 37, ¶¶ 705–9(2), (3) (1979), amended by Act of Sept. 11, 1981, 1982 Ill.Laws, P.A. 82–437 (generally requiring a preponderance of the evidence, but requiring clear and convincing evidence to terminate the rights of minor parents and mentally ill or mentally deficient parents); N.Y.Soc.Serv.Law §§ 384–b.3(g), 384–b.4(c), and 384–b.4(e) (requiring "clear and convincing proof" before parental rights may be terminated for reasons of mental illness and mental retardation or severe and repeated child abuse).

So far as we are aware, only two federal courts have addressed the issue. Each has held that allegations supporting parental rights termination must be proved by clear and convincing evidence. *Sims v. State Dept. of Public Welfare*, 438 F.Supp. 1179, 1194 (S.D.Tex.1977), rev'd on other grounds *sub nom. Moore v. Sims*, 442 U.S. 415, 99 S.Ct. 2371, 60 L.Ed.2d 994 (1979); *Alsager v. District Court of Polk County*, 406 F.Supp. 10, 25 (S.D.Iowa 1975), aff'd on other grounds, 545 F.2d 1137 (CA8 1976).

4 Respondent had made an earlier and unsuccessful termination effort in September 1976. After a factfinding hearing, the Family Court Judge dismissed respondent's petition for failure to prove an essential element of Fam.Ct.Act § 614.1.(d). See *In re Santosky*, 89 Misc.2d 730, 393 N.Y.S.2d 486 (1977). The New York Supreme Court, Appellate Division, affirmed, finding that "the record as a whole" revealed that petitioners had "substantially planned for the future of the children." *In re John W.*, 63 App.Div.2d 750, 751, 404 N.Y.S.2d 717, 719 (1978).

5 Since respondent Kramer took custody of Tina, John III, and Jed, the Santoskys have had two other children, James and Jeremy. The State has taken no action to remove these younger children. At oral argument, counsel for respondents

replied affirmatively when asked whether he was asserting that petitioners were "unfit to handle the three older ones but not unfit to handle the two younger ones." Tr. of Oral Arg. 24.

6 Petitioners initially had sought review in the New York Court of Appeals. That court *sua sponte* transferred the appeal to the Appellate Division, Third Department, stating that a direct appeal did not lie because "questions other than the constitutional validity of a statutory provision are involved." App. 50.

7 We therefore reject respondent Kramer's claim that a parental rights termination proceeding does not interfere with a fundamental liberty interest. See Brief for Respondent Kramer 11–18; Tr. of Oral Arg. 38. The fact that important liberty interests of the child and its foster parents may also be affected by a permanent neglect proceeding does not justify denying the *natural parents* constitutionally adequate procedures. Nor can the State refuse to provide natural parents adequate procedural safeguards on the ground that the family unit already has broken down; that is the very issue the permanent neglect proceeding is meant to decide.

8 The dissent charges, *post*, at 1404, n. 2, that "this Court simply has no role in establishing the standards of proof that States must follow in the various judicial proceedings they afford to their citizens." As the dissent properly concedes, however, the Court must examine a State's chosen standard to determine whether it satisfies "the constitutional minimum of 'fundamental fairness.' " *Ibid.* See, *e.g., Addington v. Texas*, 441 U.S. 418, 427, 433, 99 S.Ct. 1804, 1810, 1813, 60 L.Ed.2d 323 (1979) (unanimous decision of participating Justices) (Fourteenth Amendment requires at least clear and convincing evidence in a civil proceeding brought under state law to commit an individual involuntarily for an indefinite period to a state mental hospital); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1072, 25 L.Ed.2d 368 (1970) (Due Process Clause of the Fourteenth Amendment protects the accused in state proceeding against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged).

9 For this reason, we reject the suggestions of respondents and the dissent that the constitutionality of New York's statutory procedures must be evaluated as a "package." See Tr. of Oral Arg. 25, 36, 38. Indeed, we would rewrite our precedents were we to excuse a constitutionally defective standard of proof based on an amorphous assessment of the "cumulative effect" of state procedures. In the criminal context, for example, the Court has never assumed that "strict substantive standards or special procedures compensate for a lower burden of proof...." *Post*, at 1404. See *In re Winship*, 397 U.S., at 368, 90 S.Ct., at 1074. Nor has the Court treated appellate review as a curative for an inadequate burden of proof. See *Woodby v. INS*, 385 U.S. 276, 282, 87 S.Ct. 483, 486, 17 L.Ed.2d 362 (1966) ("judicial review is generally limited to ascertaining whether the evidence relied upon by the trier of fact was of sufficient quality and substantiality to support the rationality of the judgment").

As the dissent points out, "the standard of proof is a crucial component of legal process, the primary function of which is 'to minimize the risk of erroneous decisions.' " *Post*, at 1411, quoting *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 13, 99 S.Ct. 2100, 2106, 60 L.Ed.2d 668 (1979). Notice, summons, right to counsel, rules of evidence, and evidentiary hearings are all procedures to place information *before* the factfinder. But only the standard of proof "instruct[s] the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions" he draws from that information. *In re Winship*, 397 U.S., at 370, 90 S.Ct., at 1076 (Harlan, J., concurring). The statutory provision of right to counsel and multiple hearings before termination cannot suffice to protect a natural parent's fundamental liberty interests if the State is willing to tolerate undue uncertainty in the determination of the dispositive facts.

10 The Family Court Judge in the present case expressly refused to terminate petitioners' parental rights on a "non-statutory, no-fault basis." App. 22–29. Nor is it clear that the State constitutionally could terminate a parent's rights *without* showing parental unfitness. See *Quilloin v. Walcott*, 434 U.S. 246, 255, 98 S.Ct. 549, 554, 54 L.Ed.2d 511 (1978) ("We have little doubt that the Due Process Clause would be offended '[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest,' " quoting *Smith v. Organization of Foster Families*, 431 U.S. 816, 862–863, 97 S.Ct. 2094, 2119, 53 L.Ed.2d 14 (1977) (Stewart, J., concurring in judgment)).

11 For a child, the consequences of termination of his natural parents' rights may well be far-reaching. In Colorado, for example, it has been noted: "The child loses the right of support and maintenance, for which he may thereafter be dependent upon society; the right to inherit; and all other rights inherent in the legal parent-child relationship, not just for [a limited] period ..., but forever." *In re K.S.*, 33 Colo.App. 72, 76, 515 P.2d 130, 133 (1973).

Some losses cannot be measured. In this case, for example, Jed Santosky was removed from his natural parents' custody when he was only three days old; the judge's finding of permanent neglect effectively foreclosed the possibility that Jed would ever know his natural parents.

12 For example, a New York court appraising an agency's "diligent efforts" to provide the parents with social services can excuse efforts *not* made on the grounds that they would have been "detrimental to the best interests of the

child." Fam.Ct.Act § 614.1.(c). In determining whether the parent "substantially and continuously or repeatedly" failed to "maintain contact with ... the child," § 614.1.(d), the judge can discount actual visits or communications on the grounds that they were insubstantial or "overtly demonstrat[ed] a lack of affectionate and concerned parenthood." Soc.Serv.Law § 384–b.7.(b). When determining whether the parent planned for the child's future, the judge can reject as unrealistic plans based on overly optimistic estimates of physical or financial ability. § 384–b.7.(c). See also dissenting opinion, *post* at 1407–1408, nn. 8 and 9.

13 In this case, for example, the parents claim that the State sought court orders denying them the right to visit their children, which would have prevented them from maintaining the contact required by Fam.Ct.Act. § 614.1.(d). See Brief for Petitioners 9. The parents further claim that the State cited their rejection of social services they found offensive or superfluous as proof of the agency's "diligent efforts" and their own "failure to plan" for the children's future. *Id.*, at 10–11. We need not accept these statements as true to recognize that the State's unusual ability to structure the evidence increases the risk of an erroneous factfinding. Of course, the disparity between the litigants' resources will be vastly greater in States where there is no statutory right to court-appointed counsel. See *Lassiter v. Department of Social Services*, 452 U.S. 18, 34, 101 S.Ct. 2153, 2163, 68 L.Ed.2d 640 (1981) (only 33 States and the District of Columbia provide that right by statute).

14 The dissent makes a similar claim. See *post*, at 1411–1414.

15 This is a hazardous assumption at best. Even when a child's natural home is imperfect, permanent removal from that home will not necessarily improve his welfare. See, *e.g.*, Wald, State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards, 27 Stan.L.Rev. 985, 993 (1975) ("In fact, under current practice, coercive intervention frequently results in placing a child in a more detrimental situation than he would be in without intervention").

Nor does termination of parental rights necessarily ensure adoption. See Brief for Community Action for Legal Services, Inc., et al. as *Amici Curiae* 22–23. Even when a child eventually finds an adoptive family, he may spend years moving between state institutions and "temporary" foster placements after his ties to his natural parents have been severed. See *Smith v. Organization of Foster Families*, 431 U.S., at 833–838, 97 S.Ct., at 2103–06 (describing the "limbo" of the New York foster care system).

16 When the termination proceeding occurs, the child is not living at his natural home. A child cannot be adjudicated "permanently neglected" until, "for a period of more than one year," he has been in "the care of an authorized agency." Soc.Serv.Law § 384–b.7.(a); Fam.Ct.Act § 614.1.(d). See also dissenting opinion, *post*, at 1413.

Under New York law, a judge has ample discretion to ensure that, once removed from his natural parents on grounds of neglect, a child will not return to a hostile environment. In this case, when the State's initial termination effort failed for lack of proof, see n. 4, *supra*, the court simply issued orders under Fam.Ct. Act § 1055(b) extending the period of the child's foster home placement. See App. 19–20. See also Fam.Ct. Act § 632(b) (when State's permanent neglect petition is dismissed for insufficient evidence, judge retains jurisdiction to reconsider underlying orders of placement); § 633 (judge may suspend judgment at dispositional hearing for an additional year).

17 Any *parens patriae* interest in terminating the natural parents' rights arises only at the dispositional phase, *after* the parents have been found unfit.

18 The dissent's claim that today's decision "will inevitably lead to the federalization of family law," *post*, at 1404, is, of course, vastly overstated. As the dissent properly notes, the Court's duty to "refrai[n] from interfering with state answers to domestic relations questions" has never required "that the Court should blink at clear constitutional violations in state statutes." *Post*, at 1403.

19 Unlike the dissent, we carefully refrain from accepting as the "facts of this case" findings that are not part of the record and that have been found only to be more likely true than not.

1 *New York Trust Co. v. Eisner*, 256 U.S. 345, 349, 41 S.Ct. 506, 507, 65 L.Ed. 963 (1921).

2 The majority asserts that "the degree of proof required in a particular type of proceeding 'is the kind of question which has traditionally been left to the judiciary to resolve.' *Woodby v. INS*, 385 U.S. 276, 284, 87 S.Ct. 483, 487, 17 L.Ed.2d 362 (1966)." *Ante*, at 1395. To the extent that the majority seeks, by this statement, to place upon the federal judiciary the primary responsibility for deciding the appropriate standard of proof in state matters, it arrogates to itself a responsibility wholly at odds with the allocation of authority in our federalist system and wholly unsupported by the prior decisions of this Court. In *Woodby v. INS*, 385 U.S. 276, 87 S.Ct. 483, 17 L.Ed.2d 362 (1966), the Court determined the proper standard of proof to be applied under a *federal* statute, and did so only after concluding that "Congress ha [d] not addressed itself to the question of what degree of proof [was] required in deportation proceedings." *Id.*, at 284, 87 S.Ct., at 487. Beyond an examination for the constitutional minimum of "fundamental fairness"—which clearly is satisfied by the New

York procedures at issue in this case—this Court simply has no role in establishing the standards of proof that States must follow in the various judicial proceedings they afford to their citizens.

3 Although, as the majority states, we have held that the minimum requirements of procedural due process are a question of federal law, such a holding does not mean that the procedural protections afforded by a State will be inadequate under the Fourteenth Amendment. It means simply that the adequacy of the state-provided process is to be judged by constitutional standards—standards which the majority itself equates to "fundamental fairness." *Ante*, at 1394. I differ, therefore, not with the majority's statement that the requirements of due process present a federal question, but with its apparent assumption that the presence of "fundamental fairness" can be ascertained by an examination which completely disregards the plethora of protective procedures accorded parents by New York law.

4 The majority refuses to consider New York's procedure as a whole, stating that "[t]he statutory provision of right to counsel and multiple hearings before termination cannot suffice to protect a natural parent's fundamental liberty interests if the State is willing to tolerate undue uncertainty in the determination of the dispositive facts." *Ante*, at 1396, n. 9. Implicit in this statement is the conclusion that the risk of error may be reduced to constitutionally tolerable levels only by raising the standard of proof—that other procedures can never eliminate "undue uncertainty" so long as the standard of proof remains too low. Aside from begging the question of whether the risks of error tolerated by the State in this case are "undue," see *infra*, at 1410–1414, this conclusion denies the flexibility that we have long recognized in the principle of due process; understates the error-reducing power of procedural protections such as the right to counsel, evidentiary hearings, rules of evidence, and appellate review; and establishes the standard of proof as the *sine qua non* of procedural due process.

5 An abused child is one who has been subjected to intentional physical injury "which causes or creates a substantial risk of death, or serious or protracted disfigurement, or protracted impairment of physical or emotional health or protracted loss or impairment of the function of any bodily organ." FCA § 1012(e)(i). Sexual offenses against a child are also covered by this category. A neglected child is one "whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his parent ... to exercise a minimum degree of care in supplying the child with adequate food, clothing, shelter or education." FCA § 1012(f)(i)(A).

6 The relatively short time between notice and commencement of hearing provided by § 1048 undoubtedly reflects the State's desire to protect the child. These proceedings are designed to permit prompt action by the court when the child is threatened with imminent and serious physical, mental, or emotional harm.

7 Permanent custody also may be awarded by the Family Court if both parents are deceased, the parents abandoned the child at least six months prior to the termination proceedings, or the parents are unable to provide proper and adequate care by reason of mental illness or mental retardation. SSL § 384–b.4.(c).

8 As to maintaining contact with the child, New York law provides that "evidence of insubstantial or infrequent contacts by a parent with his or her child shall not, of itself, be sufficient as a matter of law to preclude a determination that such child is a permanently neglected child. A visit or communication by a parent with the child which is of such a character as to overtly demonstrate a lack of affectionate and concerned parenthood shall not be deemed a substantial contact." SSL § 384–b.7.(b).

Failure to plan for the future of the child means failure "to take such steps as may be necessary to provide an adequate, stable home and parental care for the child within a period of time which is reasonable under the financial circumstances available to the parent. The plan must be realistic and feasible, and good faith effort shall not, of itself, be determinative. In determining whether a parent has planned for the future of the child, the court may consider the failure of the parent to utilize medical, psychiatric, psychological and other social and rehabilitative services and material resources made available to such parent." SSL § 384–b.7.(c).

9 "Diligent efforts" are defined under New York law to "mean reasonable attempts by an authorized agency to assist, develop and encourage a meaningful relationship between the parent and child, including but not limited to:

"(1) consultation and cooperation with the parents in developing a plan for appropriate services to the child and his family;

"(2) making suitable arrangements for the parents to visit the child;

"(3) provision of services and other assistance to the parents so that problems preventing the discharge of the child from care may be resolved or ameliorated; and

"(4) informing the parents at appropriate intervals of the child's progress, development and health." SSL § 384–b.7.(f).

10 Tina Apel, the oldest of petitioners' five children, was removed from their custody by court order in November 1973 when she was two years old. Removal proceedings were commenced in response to complaints by neighbors and reports from a local hospital that Tina had suffered injuries in petitioners' home including a fractured left femur, treated with a home-made splint; bruises on the upper arms, forehead, flank, and spine; and abrasions of the upper leg. The following summer John Santosky III, petitioners' second oldest child, was also removed from petitioner's custody. John, who was

less than one year old at the time, was admitted to the hospital suffering malnutrition, bruises on the eye and forehead, cuts on the foot, blisters on the hand, and multiple pin pricks on the back. Exhibit to Brief for Respondent Kramer 1–5. Jed Santosky, the third oldest of petitioners' children, was removed from his parents' custody when only three days old as a result of the abusive treatment of the two older children.

11 The majority finds, without any reference to the facts of this case, that "numerous factors [in New York termination proceedings] combine to magnify the risk of erroneous factfinding." *Ante*, at 1399. Among the factors identified by the majority are the "unusual discretion" of the Family Court Judge "to underweigh probative facts that might favor the parent"; the often uneducated, minority status of the parents and their consequent "vulnerab[ility] to judgments based on cultural or class bias"; the "State's ability to assemble its case," which "dwarfs the parents' ability to mount a defense" by including an unlimited budget, expert attorneys, and "full access to all public records concerning the family"; and the fact that "natural parents have no 'double jeopardy' defense against repeated state" efforts, "with more or better evidence," to terminate parental rights "even when the parents have attained the level of fitness required by the State." *Ante*, at 1399–1400. In short, the majority characterizes the State as a wealthy and powerful bully bent on taking children away from defenseless parents. See *ante*, at 1398–1400. Such characterization finds no support in the record.

The intent of New York has been stated with eminent clarity: "the [S]tate's *first obligation* is to *help* the family with services to *prevent* its break-up or to *reunite* it if the child has already left home." SSL § 384–b.1.(a)(iii) (emphasis added). There is simply no basis in fact for believing, as the majority does, that the State does not mean what it says; indeed, the facts of this case demonstrate that New York has gone the extra mile in seeking to effectuate its declared purpose. See *supra*, at 1397–1398. More importantly, there should be no room in the jurisprudence of this Court for decisions based on unsupported, inaccurate assumptions.

A brief examination of the "factors" relied upon by the majority demonstrates its error. The "unusual" discretion of the Family Court Judge to consider the " 'affectio[n] and concer[n]' " displayed by parents during visits with their children, *ante*, at 1398, n. 12, is nothing more than discretion to consider reality; there is not one shred of evidence in this case suggesting that the determination of the Family Court was "based on cultural or class bias"; if parents lack the "ability to mount a defense," the State provides them with the full services of an attorney, FCA § 262, and they, like the State, have "full access to all *public* records concerning the family" (emphasis added); and the absence of "double jeopardy" protection simply recognizes the fact that family problems are often ongoing and may in the future warrant action that currently is unnecessary. In this case the Family Court dismissed the first termination petition because it desired to give petitioners "the benefit of the doubt," Exhibit to Brief for Respondent Kramer 620, and a second opportunity to raise themselves to "an acceptable minimal level of competency as parents." *Id.*, at 624. It was their complete failure to do so that prompted the second, successful termination petition. See *supra*, at 1408–1409 and this page.

12 It is worth noting that the significance of the standard of proof in New York parental termination proceedings differs from the significance of the standard in other forms of litigation. In the usual adjudicatory setting, the factfinder has had little or no prior exposure to the facts of the case. His only knowledge of those facts comes from the evidence adduced at trial, and he renders his findings solely upon the basis of that evidence. Thus, normally, the standard of proof is a crucial factor in the final outcome of the case, for it is the scale upon which the factfinder weighs his knowledge and makes his decision. Although the standard serves the same function in New York parental termination proceedings, additional assurances of accuracy are present in its application. As was adduced at oral argument, the practice in New York is to assign one judge to supervise a case from the initial temporary removal of the child to the final termination of parental rights. Therefore, as discussed above, the factfinder is intimately familiar with the case before the termination proceedings ever begin. Indeed, as in this case, he often will have been closely involved in protracted efforts to rehabilitate the parents. Even if a change in judges occurs, the Family Court retains jurisdiction of the case and the newly assigned judge may take judicial notice of all prior proceedings. Given this familiarity with the case, and the necessarily lengthy efforts which must precede a termination action in New York, decisions in termination cases are made by judges steeped in the background of the case and peculiarly able to judge the accuracy of evidence placed before them. This does not mean that the standard of proof in these cases can escape due process scrutiny, only that additional assurances of accuracy attend the application of the standard in New York termination proceedings.

13 The majority dismisses the child's interest in the accuracy of determinations made at the factfinding hearing because "[t]he factfinding does not purport ... to balance the child's interest in a normal family home against the parents' interest in raising the child," but instead "pits the State directly against the parents." *Ante*, at 1397. Only "[a]fter the State has established parental unfitness," the majority reasons, may the court "assume ... that the interests of the child and the natural parents do diverge." *Ante*, at 1398.

This reasoning misses the mark. The child has an interest in the outcome of the factfinding hearing independent of that of the parent. To be sure, "the child and his parents share a vital interest in preventing *erroneous* termination of their natural relationship." *Ibid.* (emphasis added). But the child's interest in a continuation of the family unit exists only to the extent that such a continuation would not be harmful to him. An error *in the factfinding hearing* that results in a failure to terminate a parent-child relationship which rightfully should be terminated may well detrimentally affect the child. See nn. 14, 15, *infra.*

The preponderance-of-the-evidence standard, which allocates the risk of error more or less evenly, is employed when the social disutility of error *in either direction* is roughly equal—that is, when an incorrect finding of fault would produce consequences as undesirable as the consequences that would be produced by an incorrect finding of *no* fault. Only when the disutility of error in one direction discernibly outweighs the disutility of error in the other direction do we choose, by means of the standard of proof, to reduce the likelihood of the more onerous outcome. See *In re Winship*, 397 U.S. 358, 370–372, 90 S.Ct. 1068, 1075–1077, 25 L.Ed.2d 368 (1970) (Harlan, J., concurring).

New York's adoption of the preponderance-of-the-evidence standard reflects its conclusion that the undesirable consequence of an erroneous finding of parental unfitness—the unwarranted termination of the family relationship—is roughly equal to the undesirable consequence of an erroneous finding of parental fitness—the risk of permanent injury to the child either by return of the child to an abusive home or by the child's continued lack of a permanent home. See nn. 14, 15, *infra.* Such a conclusion is well within the province of state legislatures. It cannot be said that the New York procedures are unconstitutional simply because a majority of the Members of this Court disagree with the New York Legislature's weighing of the interests of the parents and the child in an error-free factfinding hearing.

14 The record in this case illustrates the problems that may arise when a child is returned to an abusive home. Eighteen months after Tina, petitioners' oldest child, was first removed from petitioners' home, she was returned to the home on a trial basis. Katherine Weiss, a supervisor in the Child Protective Unit of the Ulster County Child Welfare Department, later testified in Family Court that "[t]he attempt to return Tina to her home just totally blew up." Exhibit to Brief for Respondent Kramer 135. When asked to explain what happened, Mrs. Weiss testified that "there were instances on the record in this court of Mr. Santosky's abuse of his wife, alleged abuse of the children and proven neglect of the children." *Ibid.* Tina again was removed from the home, this time along with John and Jed.

15 The New York Legislature recognized the potential harm to children of extended, non-permanent foster care. It found "that many children who have been placed in foster care experience unnecessarily protracted stays in such care without being adopted or returned to their parents or other custodians. Such unnecessary stays may deprive these children of positive, nurturing family relationships and have deleterious effects on their development into responsible, productive citizens." SSL § 384–b.1. (b). Subsequent studies have proved this finding correct. One commentator recently wrote of "the lamentable conditions of many foster care placements" under the New York system even today. He noted: "Over fifty percent of the children in foster care have been in this 'temporary' status for more than two years; over thirty percent for more than five years. During this time, many children are placed in a sequence of ill-suited foster homes, denying them the consistent support and nurturing that they so desperately need." Besharov, State Intervention To Protect Children: New York's Definition of "Child Abuse" and "Child Neglect," 26 N.Y.L. S. L.Rev. 723, 770–771 (1981) (footnotes omitted). In this case, petitioners' three children have been in foster care for more than four years, one child since he was only three days old. Failure to terminate petitioners' parental rights will only mean a continuation of this unsatisfactory situation.

16 The majority's conclusion that a state interest in the child's well-being arises only after a determination of parental unfitness suffers from the same error as its assertion that the child has no interest, separate from that of its parents, in the accuracy of the factfinding hearing. See n. 13, *supra.*

KeyCite Yellow Flag - Negative Treatment
Declined to Extend by Parents for Privacy v. Barr, 9th Cir.(Or.), February 12, 2020

120 S.Ct. 2054
Supreme Court of the United States

Jenifer TROXEL, et vir., Petitioners,
v.
Tommie GRANVILLE.

No. 99–138.
|
Argued Jan. 12, 2000.
|
Decided June 5, 2000.

Synopsis

Paternal grandparents petitioned for visitation with children born out-of-wedlock. The Superior Court, Skagit County, Michael Rickert, J., awarded visitation, and mother appealed. The Court of Appeals, 87 Wash.App. 131, 940 P.2d 698,reversed, and grandparents appealed. The Washington Supreme Court, Madsen, J., affirmed. Certiorari was granted. The Supreme Court, Justice O'Connor, held that Washington statute providing that any person may petition court for visitation at any time, and that court may order visitation rights for any person when visitation may serve best interest of child, violated substantive due process rights of mother, as applied to permit paternal grandparents, following death of children's father, to obtain increased court-ordered visitation, in excess of what mother had thought appropriate, based solely on state trial judge's disagreement with mother as to whether children would benefit from such increased visitation.

Affirmed.

Justice Souter concurred in judgment and filed opinion.

Justice Thomas concurred in judgment and filed opinion.

Justice Stevens dissented and filed opinion.

Justice Scalia dissented and filed opinion.

Justice Kennedy dissented and filed opinion.

West Headnotes (8)

[1] **Constitutional Law** Levels of scrutiny; strict or heightened scrutiny

Due Process Clause of the Fourteenth Amendment, like its Fifth Amendment counterpart, guarantees more than fair process; it also includes substantive component that provides heightened protection against government interference with certain fundamental rights and liberty interests. U.S.C.A. Const.Amends. 5, 14.

427 Cases that cite this headnote

[2] **Child Custody** Persons entitled in general

Custody, care and nurture of child reside first with parents, whose primary function and freedom include preparing for obligations the state can neither supply nor hinder. (Per Justice O'Connor, with the Chief Justice and two Justices concurring, and with two Justices concurring in result.)

91 Cases that cite this headnote

[3] **Constitutional Law** Parent and Child Relationship

Due Process Clause of the Fourteenth Amendment protects fundamental right of parents to make decisions as to care, custody, and control of their children. U.S.C.A. Const.Amend. 14.

2754 Cases that cite this headnote

[4] **Child Custody** Grandparents

Constitutional Law Child custody, visitation, and support

Washington statute providing that any person may petition court for visitation at any time, and that court may order visitation rights for any person when visitation may serve best interest of child, violated substantive due process rights of mother, as applied to

permit paternal grandparents, following death of children's father, to obtain increased court-ordered visitation, in excess of what mother had thought appropriate, based solely on state trial judge's disagreement with mother as to whether children would benefit from such increased visitation; at minimum, trial judge had to accord special weight to mother's own determination of her children's best interests. U.S.C.A. Const.Amend. 14; West's RCWA 26.10.160(3). (Per Justice O'Connor, with the Chief Justice and two Justices concurring, and with two Justices concurring in result.)

803 Cases that cite this headnote

[5] **Child Custody** Fitness

There is presumption that fit parents act in best interests of their children. (Per Justice O'Connor, with the Chief Justice and two Justices concurring, and with two Justices concurring in result.)

241 Cases that cite this headnote

[6] **Parent and Child** Care, Custody, and Control of Child; Child Raising

As long as parent adequately cares for his or her children, i.e., is fit, there will normally be no reason for state to inject itself into private realm of the family, in order to further question ability of that parent to make best decisions as to rearing of that parent's children. (Per Justice O'Connor, with the Chief Justice and two Justices concurring, and with two Justices concurring in result.)

438 Cases that cite this headnote

[7] **Child Custody** Objections of parent

Whether it will be beneficial to child to have relationship with grandparent is, in any specific case, a decision for parent to make in first instance, and if a fit parent's decision becomes subject to judicial review, court must accord at least some special weight to parent's own determination. (Per Justice O'Connor, with the Chief Justice and two Justices concurring, and with two Justices concurring in result.)

823 Cases that cite this headnote

[8] **Constitutional Law** Parent and Child Relationship

Due Process Clause does not permit state to infringe on fundamental right of parents to make child-rearing decisions simply because state judge believes a "better" decision could be made. U.S.C.A. Const.Amend. 14. (Per Justice O'Connor, with the Chief Justice and two Justices concurring, and with two Justices concurring in result.)

585 Cases that cite this headnote

West Codenotes

Unconstitutional as Applied
West's RCWA 26.10.160(3).

****2055 *57** *Syllabus*[*]

Washington Rev.Code § 26.10.160(3) permits "[a]ny person" to petition for visitation rights "at any time" and authorizes state superior courts to grant such rights whenever visitation may serve a child's best interest. Petitioners Troxel petitioned for the right to visit their deceased son's daughters. Respondent Granville, the girls' mother, did not oppose all visitation, but objected to the amount sought by the Troxels. The Superior Court ordered more visitation than Granville desired, and she appealed. The State Court of Appeals reversed and dismissed the Troxels' petition. In affirming, the State Supreme Court held, *inter alia,* that § 26.10.160(3) unconstitutionally infringes on parents' fundamental right to rear their children. Reasoning that the Federal Constitution permits a State to interfere with this right only to prevent harm or potential harm to ****2056** the child, it found that § 26.10.160(3) does not require a threshold showing of harm and sweeps too broadly by permitting any person to petition at any time with the only requirement being that the visitation serve the best interest of the child.

Held: The judgment is affirmed.

137 Wash.2d 1, 137 Wash.2d 1, 969 P.2d 21, affirmed.

Justice O'CONNOR, joined by THE CHIEF JUSTICE, Justice GINSBURG, and Justice BREYER, concluded that § 26.10.160(3), as applied to Granville and her family, violates her due process right to make decisions concerning the care, custody, and control of her daughters. Pp. 2059–2065.

(a) The Fourteenth Amendment's Due Process Clause has a substantive component that "provides heightened protection against government interference with certain fundamental rights and liberty interests," *Washington v. Glucksberg,* 521 U.S. 702, 720, 117 S.Ct. 2258, 138 L.Ed.2d 772, including parents' fundamental right to make decisions concerning the care, custody, and control of their children, see, *e.g., Stanley v. Illinois,* 405 U.S. 645, 651, 92 S.Ct. 1208, 31 L.Ed.2d 551. Pp. 2059–2060.

(b) Washington's breathtakingly broad statute effectively permits a court to disregard and overturn *any* decision by a fit custodial parent concerning visitation whenever a third party affected by the decision files a visitation petition, based solely on the judge's determination of the child's best interest. A parent's estimation of the child's best interest is accorded no deference. The State Supreme Court had the opportunity, ***58** but declined, to give § 26.10.160(3) a narrower reading. A combination of several factors compels the conclusion that § 26.10.160(3), as applied here, exceeded the bounds of the Due Process Clause. First, the Troxels did not allege, and no court has found, that Granville was an unfit parent. There is a presumption that fit parents act in their children's best interests, *Parham v. J. R.,* 442 U.S. 584, 602, 99 S.Ct. 2493, 61 L.Ed.2d 101; there is normally no reason for the State to inject itself into the private realm of the family to further question fit parents' ability to make the best decisions regarding their children, see, *e.g., Reno v. Flores,* 507 U.S. 292, 304, 113 S.Ct. 1439, 123 L.Ed.2d 1. The problem here is not that the Superior Court intervened, but that when it did so, it gave no special weight to Granville's determination of her daughters' best interests. More importantly, that court appears to have applied the opposite presumption, favoring grandparent visitation. In effect, it placed on Granville the burden of *disproving* that visitation would be in her daughters' best interest and thus failed to provide any protection for her fundamental right. The court also gave no weight to Granville's having assented to visitation even before the filing of the petition or subsequent court intervention. These factors, when considered with the Superior Court's slender findings, show that this case involves nothing more than a simple disagreement between the court and Granville concerning her children's best interests, and that the visitation order was an unconstitutional infringement on Granville's right to make decisions regarding the rearing of her children. Pp. 2060–2064.

(c) Because the instant decision rests on § 26.10.160(3)'s sweeping breadth and its application here, there is no need to consider the question whether the Due Process Clause requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation or to decide the precise scope of the parental due process right in the visitation context. There is also no reason to remand this case for further proceedings. The visitation order clearly violated the Constitution, and the parties should not be forced into additional litigation that would further burden Granville's parental right. Pp. 2064–2065.

****2057** Justice SOUTER concluded that the Washington Supreme Court's second reason for invalidating its own state statute—that it sweeps too broadly in authorizing any person at any time to request (and a judge to award) visitation rights, subject only to the State's particular best-interests standard—is consistent with this Court's prior cases. This ends the case, and there is no need to decide whether harm is required or to consider the precise scope of a parent's right or its necessary protections. Pp. 2065–2067.

***59** Justice THOMAS agreed that this Court's recognition of a fundamental right of parents to direct their children's upbringing resolves this case, but concluded that strict scrutiny is the appropriate standard of review to apply to infringements of fundamental rights. Here, the State lacks a compelling interest in second-guessing a fit parent's decision regarding visitation with third parties. Pp. 2067–2068.

O'CONNOR, J., announced the judgment of the Court and delivered an opinion, in which REHNQUIST, C.J., and GINSBURG and BREYER, JJ., joined. SOUTER, J., *post,* p. 2065, and THOMAS, J., *post,* p. 2067, filed opinions concurring in the judgment. STEVENS, J., *post,* p. 2068, SCALIA, J., *post,* p. 2074, and KENNEDY, J., *post,* p. 2075, filed dissenting opinions.

Attorneys and Law Firms

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Opinion

***60** Justice O'CONNOR announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE, Justice GINSBURG, and Justice BREYER join.

Section 26.10.160(3) of the Revised Code of Washington permits "[a]ny person" to petition a superior court for visitation rights "at any time," and authorizes that court to grant such visitation rights whenever "visitation may serve the best interest of the child." Petitioners Jenifer and Gary Troxel petitioned a Washington Superior Court for the right to visit their grandchildren, Isabelle and Natalie Troxel. Respondent Tommie Granville, the mother of Isabelle and Natalie, opposed the petition. The case ultimately reached the Washington Supreme Court, which held that § 26.10.160(3) unconstitutionally interferes with the fundamental right of parents to rear their children.

I

Tommie Granville and Brad Troxel shared a relationship that ended in June 1991. The two never married, but they had two daughters, Isabelle and Natalie. Jenifer and Gary Troxel are Brad's parents, and thus the paternal grandparents of Isabelle and Natalie. After Tommie and Brad separated in 1991, Brad lived with his parents and regularly brought his daughters to his parents' home for weekend visitation. Brad committed suicide in May 1993. Although the Troxels at first continued to see Isabelle and Natalie on a regular basis after their son's death, Tommie Granville informed ***61** the Troxels in October 1993 that she wished to limit their visitation with her daughters to one short visit per month. *In re Smith,* 137 Wash.2d 1, 6, 969 P.2d 21, 23–24 (1998); *In re Troxel,* 87 Wash.App. 131, 133, 940 P.2d 698, 698–699 (1997).

In December 1993, the Troxels commenced the present action by filing, in the Washington Superior Court for Skagit County, a petition to obtain visitation rights with Isabelle and Natalie. The Troxels filed their petition under two Washington statutes, Wash. Rev.Code §§ 26.09.240 and 26.10.160(3) (1994). Only the latter statute is at issue in this case. Section 26.10.160(3) provides: "Any person may petition the court for visitation rights at any time including, but not limited to, custody proceedings. The ****2058** court may order visitation rights for any person when visitation may serve the best interest of the child whether or not there has been any change of circumstances." At trial, the Troxels requested two weekends of overnight visitation per month and two weeks of visitation each summer. Granville did not oppose visitation altogether, but instead asked the court to order one day of visitation per month with no overnight stay. 87 Wash.App., at 133–134, 940 P.2d, at 699. In 1995, the Superior Court issued an oral ruling and entered a visitation decree ordering visitation one weekend per month, one week during the summer, and four hours on both of the petitioning grandparents' birthdays. 137 Wash.2d, at 6, 969 P.2d, at 23; App. to Pet. for Cert. 76a–78a.

Granville appealed, during which time she married Kelly Wynn. Before addressing the merits of Granville's appeal, the Washington Court of Appeals remanded the case to the Superior Court for entry of written findings of fact and conclusions of law. 137 Wash.2d, at 6, 969 P.2d, at 23. On remand, the Superior Court found that visitation was in Isabelle's and Natalie's best interests:

> "The Petitioners [the Troxels] are part of a large, central, loving family, all located in this area, and the Petitioners ***62** can provide opportunities for the children in the areas of cousins and music.
>
> "... The court took into consideration all factors regarding the best interest of the children and considered all the testimony before it. The children would be benefitted from spending quality time with the Petitioners, provided that that time is balanced with time with the childrens' *[sic]* nuclear family. The court finds that the childrens' *[sic]* best interests are served by spending time with their mother and stepfather's other six children." App. 70a.

Approximately nine months after the Superior Court entered its order on remand, Granville's husband formally adopted Isabelle and Natalie. *Id.,* at 60a–67a.

The Washington Court of Appeals reversed the lower court's visitation order and dismissed the Troxels' petition for visitation, holding that nonparents lack standing to seek visitation under § 26.10.160(3) unless a custody action is pending. In the Court of Appeals' view, that limitation on nonparental visitation actions was "consistent with the constitutional restrictions on state interference with parents' fundamental liberty interest in the care, custody, and management of their children." 87 Wash.App., at 135, 940 P.2d, at 700 (internal quotation marks omitted). Having resolved the case on the statutory ground, however, the Court

of Appeals did not expressly pass on Granville's constitutional challenge to the visitation statute. *Id.,* at 138, 940 P.2d, at 701.

The Washington Supreme Court granted the Troxels' petition for review and, after consolidating their case with two other visitation cases, affirmed. The court disagreed with the Court of Appeals' decision on the statutory issue and found that the plain language of § 26.10.160(3) gave the Troxels standing to seek visitation, irrespective of whether a custody action was pending. ***63** 137 Wash.2d, at 12, 969 P.2d, at 26–27. The Washington Supreme Court nevertheless agreed with the Court of Appeals' ultimate conclusion that the Troxels could not obtain visitation of Isabelle and Natalie pursuant to § 26.10.160(3). The court rested its decision on the Federal Constitution, holding that § 26.10.160(3) unconstitutionally infringes on the fundamental right of parents to rear their children. In the court's view, there were at least two problems with the nonparental visitation statute. First, according to the Washington Supreme Court, the Constitution permits a State to interfere with the right of parents to rear their children only to prevent harm or potential harm to a child. Section 26.10.160(3) fails that standard because it requires no threshold showing of harm. *Id.,* at 15–20, 969 P.2d, at 28–30. Second, ****2059** by allowing " 'any person' to petition for forced visitation of a child at 'any time' with the only requirement being that the visitation serve the best interest of the child," the Washington visitation statute sweeps too broadly. *Id.,* at 20, 969 P.2d, at 30. "It is not within the province of the state to make significant decisions concerning the custody of children merely because it could make a 'better' decision." *Ibid.,* 969 P.2d, at 31. The Washington Supreme Court held that "[p]arents have a right to limit visitation of their children with third persons," and that between parents and judges, "the parents should be the ones to choose whether to expose their children to certain people or ideas." *Id.,* at 21, 969 P.2d, at 31. Four justices dissented from the Washington Supreme Court's holding on the constitutionality of the statute. *Id.,* at 23–43, 969 P.2d 21, 969 P.2d, at 32–42.

We granted certiorari, 527 U.S. 1069, 120 S.Ct. 11, 144 L.Ed.2d 842 (1999), and now affirm the judgment.

II

The demographic changes of the past century make it difficult to speak of an average American family. The composition of families varies greatly from household to household. While many children may have two married parents and ***64** grandparents who visit regularly, many other children are raised in single-parent households. In 1996, children living with only one parent accounted for 28 percent of all children under age 18 in the United States. U.S. Dept. of Commerce, Bureau of Census, Current Population Reports, 1997 Population Profile of the United States 27 (1998). Understandably, in these single-parent households, persons outside the nuclear family are called upon with increasing frequency to assist in the everyday tasks of child rearing. In many cases, grandparents play an important role. For example, in 1998, approximately 4 million children—or 5.6 percent of all children under age 18—lived in the household of their grandparents. U.S. Dept. of Commerce, Bureau of Census, Current Population Reports, Marital Status and Living Arrangements: March 1998 (Update), p. *i* (1998).

The nationwide enactment of nonparental visitation statutes is assuredly due, in some part, to the States' recognition of these changing realities of the American family. Because grandparents and other relatives undertake duties of a parental nature in many households, States have sought to ensure the welfare of the children therein by protecting the relationships those children form with such third parties. The States' nonparental visitation statutes are further supported by a recognition, which varies from State to State, that children should have the opportunity to benefit from relationships with statutorily specified persons—for example, their grandparents. The extension of statutory rights in this area to persons other than a child's parents, however, comes with an obvious cost. For example, the State's recognition of an independent third-party interest in a child can place a substantial burden on the traditional parent-child relationship. Contrary to Justice STEVENS' accusation, our description of state nonparental visitation statutes in these terms, of course, is not meant to suggest that "children are so much chattel." *Post,* at 2072 (dissenting opinion). Rather, our terminology is intended to highlight the fact that these ***65** statutes can present questions of constitutional import. In this case, we are presented with just such a question. Specifically, we are asked to decide whether § 26.10.160(3), as applied to Tommie Granville and her family, violates the Federal Constitution.

[1] The Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." We have long recognized that the Amendment's Due Process Clause, like its Fifth Amendment counterpart, "guarantees more than fair process." ****2060** *Washington v. Glucksberg,* 521 U.S. 702, 719, 117 S.Ct. 2258

(1997). The Clause also includes a substantive component that "provides heightened protection against government interference with certain fundamental rights and liberty interests." *Id.,* at 720, 117 S.Ct. 2258; see also *Reno v. Flores,* 507 U.S. 292, 301–302, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993).

[2] The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court. More than 75 years ago, in *Meyer v. Nebraska,* 262 U.S. 390, 399, 401, 43 S.Ct. 625, 67 L.Ed. 1042 (1923), we held that the "liberty" protected by the Due Process Clause includes the right of parents to "establish a home and bring up children" and "to control the education of their own." Two years later, in *Pierce v. Society of Sisters,* 268 U.S. 510, 534–535, 45 S.Ct. 571, 69 L.Ed. 1070 (1925), we again held that the "liberty of parents and guardians" includes the right "to direct the upbringing and education of children under their control." We explained in *Pierce* 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." *Id.,* at 535, 45 S.Ct. 571. We returned to the subject in *Prince v. Massachusetts,* 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944), and again confirmed that there is a constitutional dimension to the right of parents to direct the upbringing of their children. "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary ***66** function and freedom include preparation for obligations the state can neither supply nor hinder." *Id.,* at 166, 64 S.Ct. 438.

[3] In subsequent cases also, we have recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children. See, *e.g., Stanley v. Illinois,* 405 U.S. 645, 651, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972) ("It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children 'come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements' " (citation omitted)); *Wisconsin v. Yoder,* 406 U.S. 205, 232, 92 S.Ct. 1526, 32 L.Ed.2d 15 (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"); *Quilloin v. Walcott,* 434 U.S. 246, 255, 98 S.Ct. 549, 54 L.Ed.2d 511 (1978) ("We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected"); *Parham v. J. R.,* 442 U.S. 584, 602, 99 S.Ct. 2493, 61 L.Ed.2d 101 (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"); *Santosky v. Kramer,* 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982) (discussing "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child"); *Glucksberg, supra,* at 720, 117 S.Ct. 2258 ("In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes the righ [t] ... to direct the education and upbringing of one's children" (citing *Meyer* and *Pierce*)). In light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.

***67** Section 26.10.160(3), as applied to Granville and her family in this case, unconstitutionally infringes on that fundamental ****2061** parental right. The Washington nonparental visitation statute is breathtakingly broad. According to the statute's text, "*[a]ny person* may petition the court for visitation rights *at any time,*" and the court may grant such visitation rights whenever "visitation may serve *the best interest of the child.*" § 26.10.160(3) (emphases added). That language effectively permits any third party seeking visitation to subject any decision by a parent concerning visitation of the parent's children to state-court review. Once the visitation petition has been filed in court and the matter is placed before a judge, a parent's decision that visitation would not be in the child's best interest is accorded no deference. Section 26.10.160(3) contains no requirement that a court accord the parent's decision any presumption of validity or any weight whatsoever. Instead, the Washington statute places the best-interest determination solely in the hands of the judge. Should the judge disagree with the parent's estimation of the child's best interests, the judge's view necessarily prevails. Thus, in practical effect, in the State of Washington a court can disregard and overturn *any* decision by a fit custodial parent concerning visitation whenever a third party affected by the decision files a visitation petition, based solely on the judge's determination of the child's best interests. The Washington Supreme Court had the opportunity to give § 26.10.160(3) a narrower reading, but it declined to do so. See, *e.g.,* 137 Wash.2d, at 5, 969 P.2d, at 23 ("[The statute] allow[s] any person, at any time, to petition for visitation

without regard to relationship to the child, without regard to changed circumstances, and without regard to harm"); *id.,* at 20, 969 P.2d, at 30 ("[The statute] allow[s] 'any person' to petition for forced visitation of a child at 'any time' with the only requirement being that the visitation serve the best interest of the child").

[4] ***68** Turning to the facts of this case, the record reveals that the Superior Court's order was based on precisely the type of mere disagreement we have just described and nothing more. The Superior Court's order was not founded on any special factors that might justify the State's interference with Granville's fundamental right to make decisions concerning the rearing of her two daughters. To be sure, this case involves a visitation petition filed by grandparents soon after the death of their son—the father of Isabelle and Natalie—but the combination of several factors here compels our conclusion that § 26.10.160(3), as applied, exceeded the bounds of the Due Process Clause.

[5] **[6]** First, the Troxels did not allege, and no court has found, that Granville 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. As this Court explained in *Parham:*

> "[O]ur 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. ... 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." 442 U.S., at 602, 99 S.Ct. 2493 (alteration in original) (internal quotation marks and citations omitted).

Accordingly, so long as a parent adequately cares for his or her children (*i.e.,* is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the ***69** best decisions concerning the rearing of that parent's children. See, *e.g., Flores,* 507 U.S., at 304, 113 S.Ct. 1439.

****2062** The problem here is not that the Washington Superior Court intervened, but that when it did so, it gave no special weight at all to Granville's determination of her daughters' best interests. More importantly, it appears that the Superior Court applied exactly the opposite presumption. In reciting its oral ruling after the conclusion of closing arguments, the Superior Court judge explained:

> "The burden is to show that it is in the best interest of the children to have some visitation and some quality time with their grandparents. I think in most situations a commonsensical approach [is that] it is normally in the best interest of the children to spend quality time with the grandparent, unless the grandparent, *[sic]* there are some issues or problems involved wherein the grandparents, their lifestyles are going to impact adversely upon the children. That certainly isn't the case here from what I can tell." Verbatim Report of Proceedings in *In re Troxel,* No. 93–3–00650–7 (Wash.Super.Ct., Dec. 14, 19, 1994), p. 213 (hereinafter Verbatim Report).

The judge's comments suggest that he presumed the grandparents' request should be granted unless the children would be "impact[ed] adversely." In effect, the judge placed on Granville, the fit custodial parent, the burden of *disproving* that visitation would be in the best interest of her daughters. The judge reiterated moments later: "I think [visitation with the Troxels] would be in the best interest of the children and I haven't been shown it is not in [the] best interest of the children." *Id.,* at 214, 113 S.Ct. 1439.

[7] The decisional framework employed by the Superior Court directly contravened the traditional presumption that a fit parent will act in the best interest of his or her child. See *Parham, supra,* at 602, 99 S.Ct. 2493. In that respect, the court's presumption ***70** failed to provide any protection for Granville's fundamental constitutional right to make decisions concerning the rearing of her own daughters. Cf., *e.g.,* Cal. Fam.Code Ann. § 3104(e) (West 1994) (rebuttable presumption that grandparent visitation is not in child's best interest if parents agree that visitation rights should not be granted); Me.Rev.Stat. Ann., Tit. 19A, § 1803(3) (1998) (court may award grandparent visitation if in best interest of child and "would not significantly interfere with any parent-child relationship or with the parent's rightful authority over the child"); Minn.Stat. § 257.022(2)(a)(2) (1998) (court may award grandparent visitation if in best interest of child and "such visitation would not interfere with the parent-child relationship"); Neb.Rev.Stat. § 43–1802(2) (1998) (court must find "by clear and convincing evidence" that grandparent visitation "will not adversely interfere with the parent-child relationship"); R.I. Gen. Laws § 15–5–24.3(a)(2)(v) (Supp.1999) (grandparent must rebut, by clear and convincing evidence, presumption that parent's decision to refuse grandparent visitation was reasonable);

Utah Code Ann. § 30–5–2(2)(e) (1998) (same); *Hoff v. Berg,* 595 N.W.2d 285, 291–292 (N.D.1999) (holding North Dakota grandparent visitation statute unconstitutional because State has no "compelling interest in presuming visitation rights of grandparents to an unmarried minor are in the child's best interests and forcing parents to accede to court-ordered grandparental visitation unless the parents are first able to prove such visitation is not in the best interests of their minor child"). In an ideal world, parents might always seek to cultivate the bonds between grandparents and their grandchildren. Needless to say, however, our world is far from perfect, and in it the decision whether such an intergenerational relationship would be beneficial in any specific case is for the parent to make in the first instance. And, if a fit parent's decision of the kind at issue here becomes subject to judicial review, the court must accord at least some special weight to the parent's own determination.

***71** Finally, we note that there is no allegation that Granville ever sought to cut off ****2063** visitation entirely. Rather, the present dispute originated when Granville informed the Troxels that she would prefer to restrict their visitation with Isabelle and Natalie to one short visit per month and special holidays. See 87 Wash.App., at 133, 940 P.2d, at 699; Verbatim Report 12. In the Superior Court proceedings Granville did not oppose visitation but instead asked that the duration of any visitation order be shorter than that requested by the Troxels. While the Troxels requested two weekends per month and two full weeks in the summer, Granville asked the Superior Court to order only one day of visitation per month (with no overnight stay) and participation in the Granville family's holiday celebrations. See 87 Wash.App., at 133, 940 P.2d, at 699; Verbatim Report 9 ("Right off the bat we'd like to say that our position is that grandparent visitation is in the best interest of the children. It is a matter of how much and how it is going to be structured") (opening statement by Granville's attorney). The Superior Court gave no weight to Granville's having assented to visitation even before the filing of any visitation petition or subsequent court intervention. The court instead rejected Granville's proposal and settled on a middle ground, ordering one weekend of visitation per month, one week in the summer, and time on both of the petitioning grandparents' birthdays. See 87 Wash.App., at 133–134, 940 P.2d, at 699; Verbatim Report 216–221. Significantly, many other States expressly provide by statute that courts may not award visitation unless a parent has denied (or unreasonably denied) visitation to the concerned third party. See, *e.g.,* Miss.Code Ann. § 93–16–3(2)(a) (1994) (court must find that "the parent or custodian of the child unreasonably denied the grandparent visitation rights with the child"); Ore.Rev.Stat. § 109.121(1)(a)(B) (1997) (court may award visitation if the "custodian of the child has denied the grandparent reasonable opportunity to visit the child"); R.I. Gen. Laws §§ 15–5–24.3(a)(2)(iii)–(iv) ***72** Supp.1999) (court must find that parents prevented grandparent from visiting grandchild and that "there is no other way the petitioner is able to visit his or her grandchild without court intervention").

[8] Considered together with the Superior Court's reasons for awarding visitation to the Troxels, the combination of these factors demonstrates that the visitation order in this case was an unconstitutional infringement on Granville's fundamental right to make decisions concerning the care, custody, and control of her two daughters. The Washington Superior Court failed to accord the determination of Granville, a fit custodial parent, any material weight. In fact, the Superior Court made only two formal findings in support of its visitation order. First, the Troxels "are part of a large, central, loving family, all located in this area, and the [Troxels] can provide opportunities for the children in the areas of cousins and music." App. 70a. Second, "[t]he children would be benefitted from spending quality time with the [Troxels], provided that that time is balanced with time with the childrens' *[sic]* nuclear family." *Ibid.* These slender findings, in combination with the court's announced presumption in favor of grandparent visitation and its failure to accord significant weight to Granville's already having offered meaningful visitation to the Troxels, show that this case involves nothing more than a simple disagreement between the Washington Superior Court and Granville concerning her children's best interests. The Superior Court's announced reason for ordering one week of visitation in the summer demonstrates our conclusion well: "I look back on some personal experiences .... We always spen[t] as kids a week with one set of grandparents and another set of grandparents, [and] it happened to work out in our family that [it] turned out to be an enjoyable experience. Maybe that can, in this family, if that is how it works out." Verbatim Report 220–221. As we have explained, ****2064** the Due Process Clause does not permit a State to infringe on the fundamental right ***73** of parents to make child rearing decisions simply because a state judge believes a "better" decision could be made. Neither the Washington nonparental visitation statute generally—which places no limits on either the persons who may petition for visitation or the circumstances in which such a petition may be granted—nor the Superior Court in this specific case required anything more. Accordingly, we hold that § 26.10.160(3), as applied in this case, is unconstitutional.

Because we rest our decision on the sweeping breadth of § 26.10.160(3) and the application of that broad, unlimited power in this case, we do not consider the primary constitutional question passed on by the Washington Supreme Court—whether the Due Process Clause requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation. We do not, and need not, define today the precise scope of the parental due process right in the visitation context. In this respect, we agree with Justice KENNEDY that the constitutionality of any standard for awarding visitation turns on the specific manner in which that standard is applied and that the constitutional protections in this area are best "elaborated with care." *Post,* at 2079 (dissenting opinion). Because much state-court adjudication in this context occurs on a case-by-case basis, we would be hesitant to hold that specific nonparental visitation statutes violate the Due Process Clause as a *per se* matter.[*] See, *e.g., Fairbanks* ***74** *v. McCarter,* 330 Md. 39, 49–50, 622 A.2d 121, 126–127 (1993) (interpreting best-interest standard in grandparent visitation statute normally to require court's consideration of certain factors); *Williams v. Williams,* 256 Va. 19, 501 S.E.2d 417, 418 (1998) (interpreting Virginia nonparental visitation statute to require finding of harm as condition precedent to awarding visitation).

Justice STEVENS criticizes our reliance on what he characterizes as merely "a guess" about the Washington courts' interpretation of § 26.10.160(3). *Post,* at 2068 (dissenting opinion). Justice KENNEDY likewise states that "[m]ore specific guidance should await a case in which a State's highest court has considered all of the facts in the course of elaborating the protection afforded to parents by the laws of the State and by the Constitution itself." *Post,* at 2079 (dissenting opinion). ****2065** We respectfully disagree. There is no need to hypothesize about how the Washington courts *might* apply § 26.10.160(3) because the Washington Superior Court *did* apply the statute in this very case. Like the Washington Supreme Court, then, we are presented with an actual visitation order and the reasons why the Superior Court believed ***75** entry of the order was appropriate in this case. Faced with the Superior Court's application of § 26.10.160(3) to Granville and her family, the Washington Supreme Court chose not to give the statute a narrower construction. Rather, that court gave § 26.10.160(3) a literal and expansive interpretation. As we have explained, that broad construction plainly encompassed the Superior Court's application of the statute. See *supra,* at 2060–2061.

There is thus no reason to remand the case for further proceedings in the Washington Supreme Court. As Justice KENNEDY recognizes, the burden of litigating a domestic relations proceeding can itself be "so disruptive of the parent-child relationship that the constitutional right of a custodial parent to make certain basic determinations for the child's welfare becomes implicated." *Post,* at 2079. In this case, the litigation costs incurred by Granville on her trip through the Washington court system and to this Court are without a doubt already substantial. As we have explained, it is apparent that the entry of the visitation order in this case violated the Constitution. We should say so now, without forcing the parties into additional litigation that would further burden Granville's parental right. We therefore hold that the application of § 26.10.160(3) to Granville and her family violated her due process right to make decisions concerning the care, custody, and control of her daughters.

Accordingly, the judgment of the Washington Supreme Court is affirmed.

It is so ordered.

Justice SOUTER, concurring in the judgment.

I concur in the judgment affirming the decision of the Supreme Court of Washington, whose facial invalidation of its own state statute is consistent with this Court's prior cases addressing the substantive interests at stake. I would say no more. The issues that might well be presented by reviewing a decision addressing the specific application of the ***76** state statute by the trial court, *ante,* at 2061–2064, are not before us and do not call for turning any fresh furrows in the "treacherous field" of substantive due process. *Moore v. East Cleveland,* 431 U.S. 494, 502, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977) (opinion of Powell, J.).

The Supreme Court of Washington invalidated its state statute based on the text of the statute alone, not its application to any particular case.[1] Its ruling rested on two independently sufficient grounds: the ****2066** failure of the statute to require harm to the child to justify a disputed visitation order, *In re Smith,* 137 Wash.2d 1, 17, 969 P.2d 21, 29 (1998), and the statute's authorization of "any person" at "any time" to petition for and to receive visitation rights subject only to a free-ranging best-interests-of-the-child standard, *id.,* at 20–21, 969 P.2d, at 30–31. *Ante,* at 2058–2059, 969 P.2d 21. I see no error in the second reason, that because the state statute

authorizes any person at any time to request (and a judge to award) visitation rights, subject only to the State's particular best-interests ***77** standard, the state statute sweeps too broadly and is unconstitutional on its face. Consequently, there is no need to decide whether harm is required or to consider the precise scope of the parent's right or its necessary protections.

We have long recognized that a parent's interests in the nurture, upbringing, companionship, care, and custody of children are generally protected by the Due Process Clause of the Fourteenth Amendment. See, *e.g., Meyer v. Nebraska,* 262 U.S. 390, 399, 401, 43 S.Ct. 625, 67 L.Ed. 1042 (1923); *Pierce v. Society of Sisters,* 268 U.S. 510, 535, 45 S.Ct. 571, 69 L.Ed. 1070 (1925); *Stanley v. Illinois,* 405 U.S. 645, 651, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972); *Wisconsin v. Yoder,* 406 U.S. 205, 232, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972); *Quilloin v. Walcott,* 434 U.S. 246, 255, 98 S.Ct. 549, 54 L.Ed.2d 511 (1978); *Parham v. J. R.,* 442 U.S. 584, 602, 99 S.Ct. 2493, 61 L.Ed.2d 101 (1979); *Santosky v. Kramer,* 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982); *Washington v. Glucksberg,* 521 U.S. 702, 720, 117 S.Ct. 2258 (1997). As we first acknowledged in *Meyer,* the right of parents to "bring up children," 262 U.S., at 399, 43 S.Ct. 625, and "to control the education of their own" is protected by the Constitution, *id.,* at 401, 43 S.Ct. 625. See also *Glucksberg, supra,* at 761 (SOUTER, J., concurring in judgment).

On the basis of this settled principle, the Supreme Court of Washington invalidated its statute because it authorized a contested visitation order at the intrusive behest of any person at any time subject only to a best-interests-of-the-child standard. In construing the statute, the state court explained that the "any person" at "any time" language was to be read literally, 137 Wash.2d, at 10–11, 969 P.2d, at 25–27, and that "[m]ost notably the statut[e] do[es] not require the petitioner to establish that he or she has a substantial relationship with the child," *id.,* at 20–21, 969 P.2d, at 31. Although the statute speaks of granting visitation rights whenever "visitation may serve the best interest of the child," Wash. Rev.Code § 26.10.160(3) (1994), the state court authoritatively read this provision as placing hardly any limit on a court's discretion to award visitation rights. As the court understood it, the specific best-interests provision in the ***78** statute would allow a court to award visitation whenever it thought it could make a better decision than a child's parent had done. See 137 Wash.2d, at 20, 969 P.2d, at 31 ("It is not within the province of the state to make significant decisions concerning the custody of children merely because it could make a 'better' decision").[2] On that basis in part, the Supreme Court of Washington invalidated the State's own statute: "Parents have a right to limit visitation of their children with third persons." *Id.,* at 21, 969 P.2d, at 31.

Our cases, it is true, have not set out exact metes and bounds to the protected interest of a parent in the relationship with his child, but *Meyer*'s repeatedly recognized right of upbringing would be a sham if it failed to encompass the right to be free of judicially compelled visitation by "any party" at "any time" a judge believed ****2067** he "could make a 'better' decision"[3] than the objecting parent had done. The strength of a parent's interest in controlling a child's associates is as obvious as the influence of personal associations on the development of the child's social and moral character. Whether for good or for ill, adults not only influence but may indoctrinate children, and a choice about a child's social companions is not essentially different from the designation of the adults who will influence the child in school. Even a State's considered judgment about the preferable political and religious character of schoolteachers is not entitled ***79** to prevail over a parent's choice of private school. *Pierce, supra,* at 535, 45 S.Ct. 571 ("The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The 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"). It would be anomalous, then, to subject a parent to any individual judge's choice of a child's associates from out of the general population merely because the judge might think himself more enlightened than the child's parent.[4] To say the least (and as the Court implied in *Pierce*), parental choice in such matters is not merely a default rule in the absence of either governmental choice or the government's designation of an official with the power to choose for whatever reason and in whatever circumstances.

Since I do not question the power of a State's highest court to construe its domestic statute and to apply a demanding standard when ruling on its facial constitutionality,[5] see *Chicago v. Morales,* 527 U.S. 41, 55, n. 22, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999) (opinion of STEVENS, J.), this for me is the end of the case. I would simply affirm the decision of the Supreme Court of Washington that its statute, authorizing courts to grant visitation rights to any person at any time,

is unconstitutional. I therefore respectfully concur in the judgment.

***80** Justice THOMAS, concurring in the judgment.
I write separately to note that neither party has argued that our substantive due process cases were wrongly decided and that the original understanding of the Due Process Clause precludes judicial enforcement of unenumerated rights under that constitutional provision. As a result, I express no view on the merits of this matter, and I understand the plurality as well to leave the resolution of that issue for another day.[*]

****2068** Consequently, I agree with the plurality that this Court's recognition of a fundamental right of parents to direct the upbringing of their children resolves this case. Our decision in *Pierce v. Society of Sisters,* 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925), holds that parents have a fundamental constitutional right to rear their children, including the right to determine who shall educate and socialize them. The opinions of the plurality, Justice KENNEDY, and Justice SOUTER recognize such a right, but curiously none of them articulates the appropriate standard of review. I would apply strict scrutiny to infringements of fundamental rights. Here, the State of Washington lacks even a legitimate governmental interest—to say nothing of a compelling one—in second-guessing a fit parent's decision regarding visitation with third parties. On this basis, I would affirm the judgment below.

Justice STEVENS, dissenting.
The Court today wisely declines to endorse either the holding or the reasoning of the Supreme Court of Washington. In my opinion, the Court would have been even wiser to deny certiorari. Given the problematic character of the trial court's decision and the uniqueness of the Washington statute, there was no pressing need to review a State Supreme ***81** Court decision that merely requires the state legislature to draft a better statute.

Having decided to address the merits, however, the Court should begin by recognizing that the State Supreme Court rendered a federal constitutional judgment holding a state law invalid on its face. In light of that judgment, I believe that we should confront the federal questions presented directly. For the Washington statute is not made facially invalid either because it may be invoked by too many hypothetical plaintiffs, or because it leaves open the possibility that someone may be permitted to sustain a relationship with a child without having to prove that serious harm to the child would otherwise result.

I

In response to Tommie Granville's federal constitutional challenge, the State Supreme Court broadly held that Wash. Rev.Code § 26.10.160(3) (Supp.1996) was invalid on its face under the Federal Constitution.[1] Despite the nature of this judgment, Justice O'CONNOR would hold that the Washington visitation statute violated the Due Process Clause of the Fourteenth Amendment only as applied. *Ante,* at 2059–2060, 2060–2061, 2064 (plurality opinion). I agree with Justice SOUTER, *ante,* at 2065–2066, and n. 1 (opinion concurring in judgment), that this approach is untenable.

The task of reviewing a trial court's application of a state statute to the particular facts of a case is one that should be performed in the first instance by the state appellate courts. In this case, because of their views of the Federal Constitution, the Washington state appeals courts have yet to decide whether the trial court's findings were adequate under the ***82** statute.[2] Any as-applied critique of the trial court's judgment that this Court might offer could only be based upon a guess about the state courts' application of that State's statute, ****2069** and an independent assessment of the facts in this case—both judgments that we are ill-suited and ill-advised to make.[3]

***83** While I thus agree with Justice SOUTER in this respect, I do not agree with his conclusion that the State Supreme Court made a definitive construction of the visitation statute that necessitates the constitutional conclusion he would draw.[4] As I read the State Supreme Court's opinion, *In re Smith,* 137 Wash.2d 1, 19–20, 969 P.2d 21, 30–31 (1998), its interpretation of the Federal Constitution made it unnecessary to adopt a definitive construction of the statutory text, or, critically, to decide whether the statute had been correctly applied in this case. In particular, the state court gave no content to the phrase, "best interest of the child," Wash. Rev.Code § 26.10.160(3) (Supp.1996)—content that might well be gleaned from that State's own statutes or decisional law employing the same phrase in different contexts, ***84** and from the myriad other state statutes and court decisions at least nominally applying the same standard.[5] Thus, ****2070** I believe that Justice SOUTER'S conclusion that the statute unconstitutionally imbues state trial court judges with "

'too much discretion in *every* case,' " *ante,* at 2067, n. 3 (opinion concurring in judgment) (quoting *Chicago v. Morales,* 527 U.S. 41, 71, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999) (BREYER, J., concurring)), is premature.

We are thus presented with the unconstrued terms of a state statute and a State Supreme Court opinion that, in my view, significantly misstates the effect of the Federal Constitution upon any construction of that statute. Given that posture, I believe the Court should identify and correct the two flaws in the reasoning of the state court's majority opinion, ***85** and remand for further review of the trial court's disposition of this specific case.

II

In my view, the State Supreme Court erred in its federal constitutional analysis because neither the provision granting "any person" the right to petition the court for visitation, 137 Wash.2d, at 20, 969 P.2d, at 30, nor the absence of a provision requiring a "threshold ... finding of harm to the child," *ibid.,* provides a sufficient basis for holding that the statute is invalid in all its applications. I believe that a facial challenge should fail whenever a statute has "a 'plainly legitimate sweep,' " *Washington v. Glucksberg,* 521 U.S. 702, 739–740, and n. 7, 117 S.Ct. 2258 (1997) (STEVENS, J., concurring in judgment).[6] Under the Washington statute, there are plainly any number of cases—indeed, one suspects, the most common to arise—in which the "person" among "any" seeking visitation is a once-custodial caregiver, an intimate relation, or even a genetic parent. Even the Court would seem to agree that in many circumstances, it would be constitutionally permissible for a court to award some visitation of a child to a parent or previous caregiver in cases of parental separation or divorce, cases of disputed custody, cases involving temporary foster care or guardianship, and so forth. As the statute plainly sweeps in a great deal of the permissible, the State Supreme Court majority incorrectly concluded that a statute authorizing "any person" to file a petition seeking visitation privileges would invariably run afoul of the Fourteenth Amendment.

The second key aspect of the Washington Supreme Court's holding—that the Federal Constitution requires a showing of actual or potential "harm" to the child before a court may ***86** order visitation continued over a parent's objections—finds no support in this Court's case law. While, as ****2071** the Court recognizes, the Federal Constitution certainly protects the parent-child relationship from arbitrary impairment by the State, see *infra* this page and 2072, we have never held that the parent's liberty interest in this relationship is so inflexible as to establish a rigid constitutional shield, protecting every arbitrary parental decision from any challenge absent a threshold finding of harm.[7] The presumption that parental decisions generally serve the best interests of their children is sound, and clearly in the normal case the parent's interest is paramount. But even a fit parent is capable of treating a child like a mere possession.

Cases like this do not present a bipolar struggle between the parents and the State over who has final authority to determine what is in a child's best interests. There is at a minimum a third individual, whose interests are implicated in every case to which the statute applies—the child.

It has become standard practice in our substantive due process jurisprudence to begin our analysis with an identification of the "fundamental" liberty interests implicated by the challenged state action. See, *e.g., ante,* at 2059–2060 (opinion of O'CONNOR, J.); *Washington v. Glucksberg,* 521 U.S. 702, 117 S.Ct. 2258 (1997); *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992). My colleagues are of course correct to recognize that the right of a parent to maintain a relationship with his or her child is among the interests included ***87** most often in the constellation of liberties protected through the Fourteenth Amendment. *Ante,* at 2059–2060 (opinion of O'CONNOR, J.). Our cases leave no doubt that parents have a fundamental liberty interest in caring for and guiding their children, and a corresponding privacy interest—absent exceptional circumstances—in doing so without the undue interference of strangers to them and to their child. Moreover, and critical in this case, our cases applying this principle have explained that with this constitutional liberty comes a presumption (albeit a rebuttable one) that "natural bonds of affection lead parents to act in the best interests of their children." *Parham v. J. R.,* 442 U.S. 584, 602, 99 S.Ct. 2493, 61 L.Ed.2d 101 (1979); see also *Casey,* 505 U.S., at 895, 112 S.Ct. 2791; *Santosky v. Kramer,* 455 U.S. 745, 759, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982) (State may not presume, at factfinding stage of parental rights termination proceeding, that interests of parent and child diverge); see also *ante,* at 2061–2062 (opinion of O'CONNOR, J.).

Despite this Court's repeated recognition of these significant parental liberty interests, these interests have never been seen to be without limits. In *Lehr v. Robertson,* 463 U.S. 248,

103 S.Ct. 2985, 77 L.Ed.2d 614 (1983), for example, this Court held that a putative biological father who had never established an actual relationship with his child did not have a constitutional right to notice of his child's adoption by the man who had married the child's mother. As this Court had recognized in an earlier case, a parent's liberty interests " 'do not spring full-blown from the biological connection between parent and child. They require relationships more enduring.' " *Id.,* at 260, 103 S.Ct. 2985 (quoting *Caban v. Mohammed,* 441 U.S. 380, 397, 99 S.Ct. 1760, 60 L.Ed.2d 297 (1979)).

**2072 Conversely, in *Michael H. v. Gerald D.,* 491 U.S. 110, 109 S.Ct. 2333, 105 L.Ed.2d 91 (1989), this Court concluded that despite both biological parenthood and an established relationship with a young child, a father's due process liberty interest in maintaining some connection with that child was not sufficiently powerful to overcome a state statutory presumption that the husband of the child's mother was the child's parent. As a result of the *88 presumption, the biological father could be denied even visitation with the child because, as a matter of state law, he was not a "parent." A plurality of this Court there recognized that the parental liberty interest was a function, not simply of "isolated factors" such as biology and intimate connection, but of the broader and apparently independent interest in family. See, *e.g., id.,* at 123, 109 S.Ct. 2333; see also *Lehr,* 463 U.S., at 261, 103 S.Ct. 2985; *Smith v. Organization of Foster Families For Equality & Reform,* 431 U.S. 816, 842–847, 97 S.Ct. 2094, 53 L.Ed.2d 14 (1977); *Moore v. East Cleveland,* 431 U.S. 494, 498–504, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977).

A parent's rights with respect to her child have thus never been regarded as absolute, but rather are limited by the existence of an actual, developed relationship with a child, and are tied to the presence or absence of some embodiment of family. These limitations have arisen, not simply out of the definition of parenthood itself, but because of this Court's assumption that a parent's interests in a child must be balanced against the State's long-recognized interests as *parens patriae,* see, *e.g., Reno v. Flores,* 507 U.S. 292, 303–304, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993); *Santosky v. Kramer,* 455 U.S., at 766, 102 S.Ct. 1388; *Parham,* 442 U.S., at 605, 99 S.Ct. 2493; *Prince v. Massachusetts,* 321 U.S. 158, 166, 64 S.Ct. 438, 88 L.Ed. 645 (1944), and, critically, the child's own complementary interest in preserving relationships that serve her welfare and protection, *Santosky,* 455 U.S., at 760, 102 S.Ct. 1388.

While this Court has not yet had occasion to elucidate the nature of a child's liberty interests in preserving established familial or family-like bonds, 491 U.S., at 130, 109 S.Ct. 2333 (reserving the question), it seems to me extremely likely that, to the extent parents and families have fundamental liberty interests in preserving such intimate relationships, so, too, do children have these interests, and so, too, must their interests be balanced in the equation.[8] At a minimum, our prior cases recognizing *89 that children are, generally speaking, constitutionally protected actors require that this Court reject any suggestion that when it comes to parental rights, children are so much chattel. See *ante,* at 2059–2060 (opinion of O'CONNOR, J.) (describing States' recognition of "an independent third-party interest in a child"). The constitutional protection against arbitrary state interference with parental rights should not be extended to prevent the States from protecting children against the arbitrary exercise of parental authority that is not in fact motivated by an interest in the welfare of the child.[9]

**2073 This is not, of course, to suggest that a child's liberty interest in maintaining contact with a particular individual is to be treated invariably as on a par with that child's parents' contrary interests. Because our substantive due process case law includes a strong presumption that a parent will act *90 in the best interest of her child, it would be necessary, were the state appellate courts actually to confront a challenge to the statute as applied, to consider whether the trial court's assessment of the "best interest of the child" incorporated that presumption. Neither would I decide whether the trial court applied Washington's statute in a constitutional way in this case, although, as I have explained, n. 3, *supra,* I think the outcome of this determination is far from clear. For the purpose of a facial challenge like this, I think it safe to assume that trial judges usually give great deference to parents' wishes, and I am not persuaded otherwise here.

But presumptions notwithstanding, we should recognize that there may be circumstances in which a child has a stronger interest at stake than mere protection from serious harm caused by the termination of visitation by a "person" other than a parent. The almost infinite variety of family relationships that pervade our ever-changing society strongly counsel against the creation by this Court of a constitutional rule that treats a biological parent's liberty interest in the care and supervision of her child as an isolated right that may be exercised arbitrarily. It is indisputably the business of the States, rather than a federal court employing a national standard, to assess in the first instance the relative importance of the conflicting interests that give rise to disputes such as this.[10] Far from guaranteeing that *91 parents' interests

will be trammeled in the sweep of cases arising under the statute, the Washington law merely gives an individual—with whom a child may have an established relationship—the procedural right to ask the State to act as arbiter, through the entirely well-known best-interests standard, between the parent's protected interests and the child's. **2074 It seems clear to me that the Due Process Clause of the Fourteenth Amendment leaves room for States to consider the impact on a child of possibly arbitrary parental decisions that neither serve nor are motivated by the best interests of the child.

Accordingly, I respectfully dissent.

Justice SCALIA, dissenting.

In my view, a right of parents to direct the upbringing of their children is among the "unalienable Rights" with which the Declaration of Independence proclaims "all men ... are endowed by their Creator." And in my view that right is also among the "othe[r] [rights] retained by the people" which the Ninth Amendment says the Constitution's enumeration of rights "shall not be construed to deny or disparage." The Declaration of Independence, however, is not a legal prescription conferring powers upon the courts; and the Constitution's refusal to "deny or disparage" other rights is far removed from affirming any one of them, and even further removed from authorizing judges to identify what they might be, and to enforce the judges' list against laws duly enacted by the people. Consequently, while I would think it entirely compatible with the commitment to representative *92 democracy set forth in the founding documents to argue, in legislative chambers or in electoral campaigns, that the State has *no power* to interfere with parents' authority over the rearing of their children, I do not believe that the power which the Constitution confers upon me *as a judge* entitles me to deny legal effect to laws that (in my view) infringe upon what is (in my view) that unenumerated right.

Only three holdings of this Court rest in whole or in part upon a substantive constitutional right of parents to direct the upbringing of their children[1]—two of them from an era rich in substantive due process holdings that have since been repudiated. See *Meyer v. Nebraska,* 262 U.S. 390, 399, 401, 43 S.Ct. 625, 67 L.Ed. 1042 (1923); *Pierce v. Society of Sisters,* 268 U.S. 510, 534–535, 45 S.Ct. 571, 69 L.Ed. 1070 (1925); *Wisconsin v. Yoder,* 406 U.S. 205, 232–233, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972). Cf. *West Coast Hotel Co. v. Parrish,* 300 U.S. 379, 57 S.Ct. 578, 81 L.Ed. 703 (1937) (overruling *Adkins v. Children's Hospital of D. C.,* 261 U.S. 525, 43 S.Ct. 394, 67 L.Ed. 785 (1923)). The sheer diversity of today's opinions persuades me that the theory of unenumerated parental rights underlying these three cases has small claim to *stare decisis* protection. A legal principle that can be thought to produce such diverse outcomes in the relatively simple case before us here is not a legal principle that has induced substantial reliance. While I would not now overrule those earlier cases (that has not been urged), neither would I extend the theory upon which they rested to this new context.

Judicial vindication of "parental rights" under a Constitution that does not even mention them requires (as Justice KENNEDY'S opinion rightly points out) not only a judicially crafted definition of parents, but also—unless, as no one believes, *93 the parental rights are to be absolute—judicially approved assessments of "harm to the child" and judicially defined gradations of other persons (grandparents, extended family, adoptive family in an adoption later found to be invalid, long-term guardians, etc.) who may have some claim against the wishes of the parents. If we **2075 embrace this unenumerated right, I think it obvious—whether we affirm or reverse the judgment here, or remand as Justice STEVENS or Justice KENNEDY would do—that we will be ushering in a new regime of judicially prescribed, and federally prescribed, family law. I have no reason to believe that federal judges will be better at this than state legislatures; and state legislatures have the great advantages of doing harm in a more circumscribed area, of being able to correct their mistakes in a flash, and of being removable by the people.[2]

For these reasons, I would reverse the judgment below.

Justice KENNEDY, dissenting.

The Supreme Court of Washington has determined that petitioners Jenifer and Gary Troxel have standing under state law to seek court-ordered visitation with their grandchildren, notwithstanding the objections of the children's parent, respondent Tommie Granville. The statute relied upon provides:

> "Any person may petition the court for visitation rights at any time including, but not limited to, custody proceedings. The court may order visitation rights for any person when visitation may serve the best interest of the child whether or not there has been any change of circumstances." Wash. Rev.Code § 26.10.160(3) (1994).

*94 After acknowledging this statutory right to sue for visitation, the State Supreme Court invalidated the statute

as violative of the United States Constitution, because it interfered with a parent's right to raise his or her child free from unwarranted interference. *In re Smith,* 137 Wash.2d 1, 969 P.2d 21 (1998). Although parts of the court's decision may be open to differing interpretations, it seems to be agreed that the court invalidated the statute on its face, ruling it a nullity.

The first flaw the State Supreme Court found in the statute is that it allows an award of visitation to a nonparent without a finding that harm to the child would result if visitation were withheld; and the second is that the statute allows any person to seek visitation at any time. In my view the first theory is too broad to be correct, as it appears to contemplate that the best interests of the child standard may not be applied in any visitation case. I acknowledge the distinct possibility that visitation cases may arise where, considering the absence of other protection for the parent under state laws and procedures, the best interests of the child standard would give insufficient protection to the parent's constitutional right to raise the child without undue intervention by the State; but it is quite a different matter to say, as I understand the Supreme Court of Washington to have said, that a harm to the child standard is required in every instance.

Given the error I see in the State Supreme Court's central conclusion that the best interests of the child standard is never appropriate in third-party visitation cases, that court should have the first opportunity to reconsider this case. I would remand the case to the state court for further proceedings. If it then found the statute has been applied in an unconstitutional manner because the best interests of the child standard gives insufficient protection to a parent under the circumstances of this case, or if it again declared the statute a nullity because the statute seems to allow any person ***95** at all to seek visitation at any time, the decision would present other issues which may or may not warrant further review in this Court. These include not only the protection the ****2076** Constitution gives parents against state-ordered visitation but also the extent to which federal rules for facial challenges to statutes control in state courts. These matters, however, should await some further case. The judgment now under review should be vacated and remanded on the sole ground that the harm ruling that was so central to the Supreme Court of Washington's decision was error, given its broad formulation.

Turning to the question whether harm to the child must be the controlling standard in every visitation proceeding, there is a beginning point that commands general, perhaps unanimous, agreement in our separate opinions: As our case law has developed, the custodial parent has a constitutional right to determine, without undue interference by the state, how best to raise, nurture, and educate the child. The parental right stems from the liberty protected by the Due Process Clause of the Fourteenth Amendment. See, *e.g., Meyer v. Nebraska,* 262 U.S. 390, 399, 401, 43 S.Ct. 625, 67 L.Ed. 1042 (1923); *Pierce v. Society of Sisters,* 268 U.S. 510, 534–535, 45 S.Ct. 571, 69 L.Ed. 1070 (1925); *Prince v. Massachusetts,* 321 U.S. 158, 166, 64 S.Ct. 438, 88 L.Ed. 645 (1944); *Stanley v. Illinois,* 405 U.S. 645, 651–652, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972); *Wisconsin v. Yoder,* 406 U.S. 205, 232–233, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972); *Santosky v. Kramer,* 455 U.S. 745, 753–754, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982). *Pierce* and *Meyer,* had they been decided in recent times, may well have been grounded upon First Amendment principles protecting freedom of speech, belief, and religion. Their formulation and subsequent interpretation have been quite different, of course; and they long have been interpreted to have found in Fourteenth Amendment concepts of liberty an independent right of the parent in the "custody, care and nurture of the child," free from state intervention. *Prince, supra,* at 166, 64 S.Ct. 438. The principle exists, then, in broad formulation; yet courts must use considerable restraint, including careful adherence to the incremental instruction ***96** given by the precise facts of particular cases, as they seek to give further and more precise definition to the right.

The State Supreme Court sought to give content to the parent's right by announcing a categorical rule that third parties who seek visitation must always prove the denial of visitation would harm the child. After reviewing some of the relevant precedents, the Supreme Court of Washington concluded " '[t]he requirement of harm is the sole protection that parents have against pervasive state interference in the parenting process.' " 137 Wash.2d, at 19–20, 969 P.2d, at 30 (quoting *Hawk v. Hawk,* 855 S.W.2d 573, 580 (Tenn.1993)). For that reason, "[s]hort of preventing harm to the child," the court considered the best interests of the child to be "insufficient to serve as a compelling state interest overruling a parent's fundamental rights." 137 Wash.2d, at 20, 969 P.2d, at 30.

While it might be argued as an abstract matter that in some sense the child is always harmed if his or her best interests are not considered, the law of domestic relations, as it has evolved to this point, treats as distinct the two standards, one harm to the child and the other the best interests of the child. The judgment of the Supreme Court of Washington rests on that assumption, and I, too, shall assume that there are real and consequential differences between the two standards.

On the question whether one standard must always take precedence over the other in order to protect the right of the parent or parents, "[o]ur Nation's history, legal traditions, and practices" do not give us clear or definitive answers. *Washington v. Glucksberg,* 521 U.S. 702, 721, 117 S.Ct. 2258 (1997). The consensus among courts and commentators is that at least through the 19th century there was no legal right of visitation; court-ordered visitation appears to be a 20th-century phenomenon. ****2077** See, *e.g.,* 1 D. Kramer, Legal Rights of Children 124, 136 (2d ed.1994); 2 J. Atkinson, Modern ***97** Child Custody Practice § 8.10 (1986). A case often cited as one of the earliest visitation decisions, *Succession of Reiss,* 46 La. Ann. 347, 353, 15 So. 151, 152 (1894), explained that "the obligation ordinarily to visit grandparents is moral and not legal"—a conclusion which appears consistent with that of American common-law jurisdictions of the time. Early 20th-century exceptions did occur, often in cases where a relative had acted in a parental capacity, or where one of a child's parents had died. See *Douglass v. Merriman,* 163 S.C. 210, 161 S.E. 452 (1931) (maternal grandparent awarded visitation with child when custody was awarded to father; mother had died); *Solomon v. Solomon,* 319 Ill.App. 618, 49 N.E.2d 807 (1943) (paternal grandparents could be given visitation with child in custody of his mother when their son was stationed abroad; case remanded for fitness hearing); *Consaul v. Consaul,* 63 N.Y.S.2d 688 (Sup.Ct. Jefferson Cty.1946) (paternal grandparents awarded visitation with child in custody of his mother; father had become incompetent). As a general matter, however, contemporary state-court decisions acknowledge that "[h]istorically, grandparents had no legal right of visitation," *Campbell v. Campbell,* 896 P.2d 635, 642, n. 15 (Utah App.1995), and it is safe to assume other third parties would have fared no better in court.

To say that third parties have had no historical right to petition for visitation does not necessarily imply, as the Supreme Court of Washington concluded, that a parent has a constitutional right to prevent visitation in all cases not involving harm. True, this Court has acknowledged that States have the authority to intervene to prevent harm to children, see, *e.g., Prince, supra,* at 168–169, 64 S.Ct. 438; *Yoder, supra,* at 233–234, 92 S.Ct. 1526, but that is not the same as saying that a heightened harm to the child standard must be satisfied in every case in which a third party seeks a visitation order. It is also true that the law's traditional presumption has been "that natural bonds of affection lead parents to act in the ***98** best interests of their children," *Parham v. J. R.,* 442 U.S. 584, 602, 99 S.Ct. 2493, 61 L.Ed.2d 101 (1979); and "[s]imply because the decision of a parent is not agreeable to a child or because it involves risks does not automatically transfer the power to make that decision from the parents to some agency or officer of the state," *id.,* at 603, 99 S.Ct. 2493. The State Supreme Court's conclusion that the Constitution forbids the application of the best interests of the child standard in any visitation proceeding, however, appears to rest upon assumptions the Constitution does not require.

My principal concern is that the holding seems to proceed from the assumption that the parent or parents who resist visitation have always been the child's primary caregivers and that the third parties who seek visitation have no legitimate and established relationship with the child. That idea, in turn, appears influenced by the concept that the conventional nuclear family ought to establish the visitation standard for every domestic relations case. As we all know, this is simply not the structure or prevailing condition in many households. See, *e.g., Moore v. East Cleveland,* 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977). For many boys and girls a traditional family with two or even one permanent and caring parent is simply not the reality of their childhood. This may be so whether their childhood has been marked by tragedy or filled with considerable happiness and fulfillment.

Cases are sure to arise—perhaps a substantial number of cases—in which a third party, by acting in a caregiving role over a significant period of time, has developed a relationship with a child which is not necessarily subject to absolute parental veto. See *Michael H. v. Gerald D.,* 491 U.S. 110, 109 S.Ct. 2333, 105 L.Ed.2d 91 (1989) (putative natural father not entitled to rebut state-law presumption that child born in a ****2078** marriage is a child of the marriage); *Quilloin v. Walcott,* 434 U.S. 246, 98 S.Ct. 549, 54 L.Ed.2d 511 (1978) (best interests standard sufficient in adoption proceeding to protect interests of natural father who had not legitimated the child); see also *Lehr v. Robertson,* 463 U.S. 248, 261, 103 S.Ct. 2985, 77 L.Ed.2d 614 (1983) (" '[T]he importance of the familial relationship, to the individuals involved ***99** and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in "promot[ing] a way of life" through the instruction of children ... as well as from the fact of blood relationship' " (quoting *Smith v. Organization of Foster Families For Equality & Reform,* 431 U.S. 816, 844, 97 S.Ct. 2094, 53 L.Ed.2d 14 (1977), in turn quoting *Yoder,* 406 U.S., at 231–233, 92 S.Ct. 1526)). Some pre-existing relationships, then, serve to identify persons who have a strong attachment to the

child with the concomitant motivation to act in a responsible way to ensure the child's welfare. As the State Supreme Court was correct to acknowledge, those relationships can be so enduring that "in certain circumstances where a child has enjoyed a substantial relationship with a third person, arbitrarily depriving the child of the relationship could cause severe psychological harm to the child," 137 Wash.2d, at 20, 969 P.2d, at 30; and harm to the adult may also ensue. In the design and elaboration of their visitation laws, States may be entitled to consider that certain relationships are such that to avoid the risk of harm, a best interests standard can be employed by their domestic relations courts in some circumstances.

Indeed, contemporary practice should give us some pause before rejecting the best interests of the child standard in all third-party visitation cases, as the Washington court has done. The standard has been recognized for many years as a basic tool of domestic relations law in visitation proceedings. Since 1965 all 50 States have enacted a third-party visitation statute of some sort. See *ante,* at 2064, 969 P.2d 21, n. (plurality opinion). Each of these statutes, save one, permits a court order to issue in certain cases if visitation is found to be in the best interests of the child. While it is unnecessary for us to consider the constitutionality of any particular provision in the case now before us, it can be noted that the statutes also include a variety of methods for limiting parents' exposure to third-party visitation petitions and for ensuring parental decisions are given respect. Many States ***100** limit the identity of permissible petitioners by restricting visitation petitions to grandparents, or by requiring petitioners to show a substantial relationship with a child, or both. See, *e.g.,* Kan. Stat. Ann. § 38–129 (1993 and Supp.1998) (grandparent visitation authorized under certain circumstances if a substantial relationship exists); N.C. Gen.Stat. §§ 50–13.2, 50–13.2A, 50–13.5 (1999) (same); Iowa Code § 598.35 (Supp.1999) (same; visitation also authorized for great-grandparents); Wis. Stat. § 767.245 (Supp.1999) (visitation authorized under certain circumstances for "a grandparent, greatgrandparent, stepparent or person who has maintained a relationship similar to a parent-child relationship with the child"). The statutes vary in other respects—for instance, some permit visitation petitions when there has been a change in circumstances such as divorce or death of a parent, see, *e.g.,* N.H.Rev.Stat. Ann. § 458:17–d (1992), and some apply a presumption that parental decisions should control, see, *e.g.,* Cal. Fam.Code Ann. §§ 3104(e)–(f) (West 1994); R.I. Gen. Laws § 15–5–24.3(a)(2)(v) (Supp.1999). Georgia's is the sole state legislature to have adopted a general harm to the child standard, see Ga.Code Ann. § 19–7–3(c) (1999), and it did so only after the Georgia Supreme Court held the State's prior visitation statute invalid under the Federal and Georgia Constitutions, see *Brooks v. Parkerson,* 265 Ga. 189, 454 S.E.2d 769, cert. denied, 516 U.S. 942, 116 S.Ct. 377, 133 L.Ed.2d 301 (1995).

****2079** In light of the inconclusive historical record and case law, as well as the almost universal adoption of the best interests standard for visitation disputes, I would be hard pressed to conclude the right to be free of such review in all cases is itself " 'implicit in the concept of ordered liberty.' " *Glucksberg,* 521 U.S., at 721, 117 S.Ct. 2258 (quoting *Palko v. Connecticut,* 302 U.S. 319, 325, 58 S.Ct. 149, 82 L.Ed. 288 (1937)). In my view, it would be more appropriate to conclude that the constitutionality of the application of the best interests standard depends on more specific factors. In short, a fit parent's right vis-a-vis a complete ***101** stranger is one thing; her right vis-a-vis another parent or a *de facto* parent may be another. The protection the Constitution requires, then, must be elaborated with care, using the discipline and instruction of the case law system. We must keep in mind that family courts in the 50 States confront these factual variations each day, and are best situated to consider the unpredictable, yet inevitable, issues that arise. Cf. *Ankenbrandt v. Richards,* 504 U.S. 689, 703–704, 112 S.Ct. 2206, 119 L.Ed.2d 468 (1992).

It must be recognized, of course, that a domestic relations proceeding in and of itself can constitute state intervention that is so disruptive of the parent-child relationship that the constitutional right of a custodial parent to make certain basic determinations for the child's welfare becomes implicated. The best interests of the child standard has at times been criticized as indeterminate, leading to unpredictable results. See, *e.g.,* American Law Institute, Principles of the Law of Family Dissolution 2, and n. 2 (Tent. Draft No. 3, Mar. 20, 1998). If a single parent who is struggling to raise a child is faced with visitation demands from a third party, the attorney's fees alone might destroy her hopes and plans for the child's future. Our system must confront more often the reality that litigation can itself be so disruptive that constitutional protection may be required; and I do not discount the possibility that in some instances the best interests of the child standard may provide insufficient protection to the parent-child relationship. We owe it to the Nation's domestic relations legal structure, however, to proceed with caution.

It should suffice in this case to reverse the holding of the State Supreme Court that the application of the best interests

of the child standard is always unconstitutional in third-party visitation cases. Whether, under the circumstances of this case, the order requiring visitation over the objection of this fit parent violated the Constitution ought to be reserved for further proceedings. Because of its sweeping ruling requiring ***102** the harm to the child standard, the Supreme Court of Washington did not have the occasion to address the specific visitation order the Troxels obtained. More specific guidance should await a case in which a State's highest court has considered all of the facts in the course of elaborating the protection afforded to parents by the laws of the State and by the Constitution itself. Furthermore, in my view, we need not address whether, under the correct constitutional standards, the Washington statute can be invalidated on its face. This question, too, ought to be addressed by the state court in the first instance.

In my view the judgment under review should be vacated and the case remanded for further proceedings.

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Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

* All 50 States have statutes that provide for grandparent visitation in some form. See Ala.Code § 30–3–4.1 (1989); Alaska Stat. Ann. § 25.20.065 (1998); Ariz.Rev.Stat. Ann. § 25–409 (1994); Ark.Code Ann. § 9–13–103 (1998); Cal. Fam.Code Ann. § 3104 (West 1994); Colo.Rev.Stat. § 19–1–117 (1999); Conn. Gen.Stat. § 46b–59 (1995); Del.Code Ann., Tit. 10, § 1031(7) (1999); Fla. Stat. § 752.01 (1997); Ga.Code Ann. § 19–7–3 (1991); Haw.Rev.Stat. § 571–46.3 (1999); Idaho Code § 32–719 (1999); Ill. Comp. Stat., ch. 750, § $^{5}/_{607}$ (1998); Ind.Code § 31–17–5–1 (1999); Iowa Code § 598.35 (1999); Kan. Stat. Ann. § 38–129 (1993); Ky.Rev.Stat. Ann. § 405.021 (Baldwin 1990); La.Rev.Stat. Ann. § 9:344 (West Supp.2000); La. Civ.Code Ann., Art. 136 (West Supp.2000); Me.Rev.Stat. Ann., Tit. 19A, § 1803 (1998); Md. Fam. Law Code Ann. § 9–102 (1999); Mass. Gen. Laws § 119:39D (1996); Mich. Comp. Laws Ann. § 722.27b (West Supp.1999); Minn.Stat. § 257.022 (1998); Miss.Code Ann. § 93–16–3 (1994); Mo.Rev.Stat. § 452.402 (Supp.1999); Mont.Code Ann. § 40–9–102 (1997); Neb.Rev.Stat. § 43–1802 (1998); Nev.Rev.Stat. § 125C.050 (Supp.1999); N.H.Rev.Stat. Ann. § 458:17–d (1992); N.J. Stat. Ann. § 9:2–7.1 (West Supp.1999–2000); N.M. Stat. Ann. § 40–9–2 (1999); N.Y. Dom. Rel. Law § 72 (McKinney 1999); N.C. Gen.Stat. §§ 50–13.2, 50–13.2A (1999); N.D. Cent.Code § 14–09–05.1 (1997); Ohio Rev.Code Ann. §§ 3109.051, 3109.11 (Supp.1999); Okla. Stat., Tit. 10, § 5 (Supp.1999); Ore.Rev.Stat. § 109.121 (1997); 23 Pa. Cons.Stat. §§ 5311–5313 (1991); R.I. Gen. Laws §§ 15–5–24 to 15–5–24.3 (Supp.1999); S.C.Code Ann. § 20–7–420(33) (Supp.1999); S.D. Codified Laws § 25–4–52 (1999); Tenn.Code Ann. §§ 36–6–306, 36–6–307 (Supp.1999); Tex. Fam.Code Ann. § 153.433 (Supp.2000); Utah Code Ann. § 30–5–2 (1998); Vt. Stat. Ann., Tit. 15, §§ 1011–1013 (1989); Va.Code Ann. § 20–124.2 (1995); W. Va.Code §§ 48–2B–1 to 48–2B–7 (1999); Wis. Stat. §§ 767.245, 880.155 (1993–1994); Wyo. Stat. Ann. § 20–7–101 (1999).

1 The Supreme Court of Washington made its ruling in an action where three separate cases, including the Troxels', had been consolidated. *In re Smith,* 137 Wash.2d 1, 6–7, 969 P.2d 21, 23–24 (1998). The court also addressed two statutes, Wash. Rev.Code § 26.10.160(3) (Supp.1996) and former Wash. Rev.Code § 26.09.240 (1994), 137 Wash.2d, at 7, 969 P.2d, at 24, the latter of which is not even at issue in this case. See Brief for Petitioners 6, n. 9; see also *ante,* at 2057–2058, 969 P.2d 21. Its constitutional analysis discussed only the statutory language and neither mentioned the facts of any of the three cases nor reviewed the records of their trial court proceedings below. 137 Wash.2d, at 13–21, 969 P.2d, at 27–31. The decision invalidated both statutes without addressing their application to particular facts: "We conclude petitioners have standing but, *as written,* the statutes violate the parents' constitutionally protected interests. These statutes allow any person, at any time, to petition for visitation without regard to relationship to the child, without regard to changed circumstances, and without regard to harm." *Id.,* at 5, 969 P.2d, at 23 (emphasis added); see also *id.,* at 21, 969 P.2d, at 31 ("RCW 26.10.160(3) and former RCW 26.09.240 impermissibly interfere with a parent's fundamental interest in the care, custody and companionship of the child" (citations and internal quotation marks omitted)).

2 As Justice O'CONNOR points out, the best-interests provision "contains no requirement that a court accord the parent's decision any presumption of validity or any weight whatsoever. Instead, the Washington statute places the best-interest determination solely in the hands of the judge." *Ante,* at 2061, 969 P.2d 21.

3 Cf. *Chicago v. Morales,* 527 U.S. 41, 71, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999) (BREYER, J., concurring in part and concurring in judgment) ("The ordinance is unconstitutional, not because a policeman applied this discretion wisely or poorly in a particular case, but rather because the policeman enjoys too much discretion in *every* case. And if every application of the ordinance represents an exercise of unlimited discretion, then the ordinance is invalid in all its applications").

4 The Supreme Court of Washington invalidated the broadly sweeping statute at issue on similarly limited reasoning: "Some parents and judges will not care if their child is physically disciplined by a third person; some parents and judges will not care if a third person teaches the child a religion inconsistent with the parents' religion; and some judges and parents will not care if the child is exposed to or taught racist or sexist beliefs. But many parents and judges will care, and, between the two, the parents should be the ones to choose whether to expose their children to certain people or ideas." 137 Wash.2d, at 21, 969 P.2d, at 31 (citation omitted).

5 This is the pivot between Justice KENNEDY'S approach and mine.

* This case also does not involve a challenge based upon the Privileges and Immunities Clause and thus does not present an opportunity to reevaluate the meaning of that Clause. See *Saenz v. Roe,* 526 U.S. 489, 527–528, 119 S.Ct. 1518, 143 L.Ed.2d 689 (1999) (THOMAS, J., dissenting).

1 The State Supreme Court held that, "as written, the statutes violate the parents' constitutionally protected interests." *In re Smith,* 137 Wash.2d 1, 5, 969 P.2d 21, 23 (1998).

2 As the dissenting judge on the state appeals court noted, "[t]he trial court here was not presented with any guidance as to the proper test to be applied in a case such as this." *In re Troxel,* 87 Wash.App. 131, 143, 940 P.2d 698, 703 (1997) (opinion of Ellington, J.). While disagreeing with the appeals court majority's conclusion that the state statute was constitutionally infirm, Judge Ellington recognized that despite this disagreement, the appropriate result would not be simply to affirm. Rather, because there had been no definitive guidance as to the proper construction of the statute, "[t]he findings necessary to order visitation over the objections of a parent are thus not in the record, and I would remand for further proceedings." *Ibid.*

3 Unlike Justice O'CONNOR, *ante,* at 2061–2062, I find no suggestion in the trial court's decision in this case that the court was applying any presumptions at all in its analysis, much less one in favor of the grandparents. The first excerpt Justice O'CONNOR quotes from the trial court's ruling, *ante,* at 2062, says nothing one way or another about *who* bears the burden under the statute of demonstrating "best interests." There is certainly no indication of a presumption *against* the parents' judgment, only a " 'commonsensical' " estimation that, usually but not always, visiting with grandparents can be good for children. *Ibid.* The second quotation, " 'I think [visitation] would be in the best interest of the children and I haven't been shown it is not in [the] best interest of the children,' " *ibid.,* sounds as though the judge has simply concluded, based on the evidence before him, that visitation in this case would be in the best interests of both girls. Verbatim Report of Proceedings in *In re Troxel,* No. 93–3–00650–7 (Wash.Super.Ct., Dec. 14, 1994), p. 214. These statements do not provide us with a definitive assessment of the law the court applied regarding a "presumption" either way. Indeed, a different impression is conveyed by the judge's very next comment: "That has to be balanced, of course, with Mr. and Mrs. Wynn [a.k.a. Tommie Granville], who are trying to put together a family that includes eight children, ... trying to get all those children together at the same time and put together some sort of functional unit wherein the children can be raised as brothers and sisters and spend lots of quality time together." *Ibid.* The judge then went on to reject the Troxels' efforts to attain the same level of visitation that their son, the girls' biological father, would have had, had he been alive. "[T]he fact that Mr. Troxel is deceased and he was the natural parent and as much as the grandparents would maybe like to step into the shoes of Brad, under our law that is not what we can do. The grandparents cannot step into the shoes of a deceased parent, per say *[sic],* as far as whole gamut of visitation rights are concerned." *Id.,* at 215. Rather, as the judge put it, "I understand your desire to do that as loving grandparents. Unfortunately that would impact too dramatically on the children and their ability to be integrated into the nuclear unit with the mother." *Id.,* at 222–223.

However one understands the trial court's decision—and my point is merely to demonstrate that it is surely open to interpretation—its validity under the state statute as written is a judgment for the state appellate courts to make in the first instance.

4 Justice SOUTER would conclude from the state court's statement that the statute "do[es] not require the petitioner to establish that he or she has a substantial relationship with the child," 137 Wash.2d, at 21, 969 P.2d, at 31, that the state court has "authoritatively read [the 'best interests'] provision as placing hardly any limit on a court's discretion to award visitation rights," *ante,* at 2066 (opinion concurring in judgment). Apart from the question whether one can deem this description of the statute an "authoritative" construction, it seems to me exceedingly unlikely that the state court held

the statute unconstitutional because it believed that the "best interests" standard imposes "hardly any limit" on courts' discretion. See n. 5, *infra.*

5 The phrase "best interests of the child" appears in no less than 10 current Washington state statutory provisions governing determinations from guardianship to termination to custody to adoption. See, *e.g.,* Wash. Rev.Code § 26.09.240(6) (Supp.1996) (amended version of visitation statute enumerating eight factors courts may consider in evaluating a child's best interests); § 26.09.002 (in cases of parental separation or divorce "best interests of the child are served by a parenting arrangement that best maintains a child's emotional growth, health and stability, and physical care"; "best interest of the child is ordinarily served when the existing pattern of interaction between a parent and child is altered only to the extent necessitated by the changed relationship of the parents or as required to protect the child from physical, mental, or emotional harm"); § 26.10.100 ("The court shall determine custody in accordance with the best interests of the child"). Indeed, the Washington state courts have invoked the standard on numerous occasions in applying these statutory provisions—just as if the phrase had quite specific and apparent meaning. See, *e.g., In re McDole,* 122 Wash.2d 604, 859 P.2d 1239 (1993) (upholding trial court "best interest" assessment in custody dispute); *McDaniels v. Carlson,* 108 Wash.2d 299, 310, 738 P.2d 254, 261 (1987) (elucidating "best interests" standard in paternity suit context). More broadly, a search of current state custody and visitation laws reveals fully 698 separate references to the "best interest of the child" standard, a number that, at a minimum, should give the Court some pause before it upholds a decision implying that those words, on their face, may be too boundless to pass muster under the Federal Constitution.

6 It necessarily follows that under the far more stringent demands suggested by the majority in *United States v. Salerno,* 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987) (plaintiff seeking facial invalidation "must establish that no set of circumstances exists under which the Act would be valid"), respondent's facial challenge must fail.

7 The suggestion by Justice THOMAS that this case may be resolved solely with reference to our decision in *Pierce v. Society of Sisters,* 268 U.S. 510, 535, 45 S.Ct. 571, 69 L.Ed. 1070 (1925), is unpersuasive. *Pierce* involved a parent's choice whether to send a child to public or private school. While that case is a source of broad language about the scope of parents' due process rights with respect to their children, the constitutional principles and interests involved in the schooling context do not necessarily have parallel implications in this family law visitation context, in which multiple overlapping and competing prerogatives of various plausibly interested parties are at stake.

8 This Court has on numerous occasions acknowledged that children are in many circumstances possessed of constitutionally protected rights and liberties. See *Parham v. J. R.,* 442 U.S. 584, 600, 99 S.Ct. 2493, 61 L.Ed.2d 101 (1979) (liberty interest in avoiding involuntary confinement); *Planned Parenthood of Central Mo. v. Danforth,* 428 U.S. 52, 74, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976) ("Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights"); *Tinker v. Des Moines Independent Community School Dist.,* 393 U.S. 503, 506–507, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969) (First Amendment right to political speech); *In re Gault,* 387 U.S. 1, 13, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967) (due process rights in criminal proceedings).

9 Cf., *e.g., Wisconsin v. Yoder,* 406 U.S. 205, 244–246, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) (Douglas, J., dissenting) ("While the parents, absent dissent, normally speak for the entire family, the education of the child is a matter on which the child will often have decided views. He may want to be a pianist or an astronaut or an oceanographer. To do so he will have to break from the Amish tradition. It is the future of the student, not the future of the parents, that is imperiled by today's decision. If a parent keeps his child out of school beyond the grade school, then the child will be forever barred from entry into the new and amazing world of diversity that we have today .... It is the student's judgment, not his parents', that is essential if we are to give full meaning to what we have said about the Bill of Rights and of the right of students to be masters of their own destiny"). The majority's disagreement with Justice Douglas in that case turned not on any contrary view of children's interest in their own education, but on the impact of the Free Exercise Clause of the First Amendment on its analysis of school-related decisions by the Amish community.

10 See *Palmore v. Sidoti,* 466 U.S. 429, 431, 104 S.Ct. 1879, 80 L.Ed.2d 421 (1984) ("The judgment of a state court determining or reviewing a child custody decision is not ordinarily a likely candidate for review by this Court"); cf. *Collins v. City of Harker Heights,* 503 U.S. 115, 128, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992) (matters involving competing and multifaceted social and policy decisions best left to local decisionmaking); *Regents of Univ. of Mich. v. Ewing,* 474 U.S. 214, 226, 106 S.Ct. 507, 88 L.Ed.2d 523 (1985) (emphasizing our "reluctance to trench on the prerogatives of state and local educational institutions" as federal courts are ill-suited to "evaluate the substance of the multitude of academic decisions that are made daily by" experts in the field evaluating cumulative information). That caution is never more essential than in the realm of family and intimate relations. In part, this principle is based on long-established, if somewhat arbitrary, tradition in allocating responsibility for resolving disputes of various kinds in our federal system. *Ankenbrandt*

v. Richards, 504 U.S. 689, 112 S.Ct. 2206, 119 L.Ed.2d 468 (1992). But the instinct against overregularizing decisions about personal relations is sustained on firmer ground than mere tradition. It flows in equal part from the premise that people and their intimate associations are complex and particular, and imposing a rigid template upon them all risks severing bonds our society would do well to preserve.

1 Whether parental rights constitute a "liberty" interest for purposes of procedural due process is a somewhat different question not implicated here. *Stanley v. Illinois,* 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972), purports to rest in part upon that proposition, see *id.,* at 651–652, 92 S.Ct. 1208; but see *Michael H. v. Gerald D.,* 491 U.S. 110, 120–121, 109 S.Ct. 2333, 105 L.Ed.2d 91 (1989) (plurality opinion), though the holding is independently supported on equal protection grounds, see *Stanley, supra,* at 658, 92 S.Ct. 1208.

2 I note that respondent is asserting only, *on her own behalf,* a substantive due process right to direct the upbringing of her own children, and is not asserting, *on behalf of her children,* their First Amendment rights of association or free exercise. I therefore do not have occasion to consider whether, and under what circumstances, the parent could assert the latter enumerated rights.

IN THE MICHIGAN SUPREME COURT
Appeal from the Michigan Court of Appeals

In re Guardianship of Versalle, Minors

MSC No. 1624434-5
COA No. 351758; 351757

Muskegon County Probate
LC Nos. 19-2586-GM; 19-2589-GM

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AMICUS CURIAE FAMILY LAW SECTION
APPENDIX II: Index and Summary of Key Michigan Supreme Court Precedent

A. Bowie v Arder, 441 Mich 23, 45 (1992). [Child Custody Act]

Summary: Father prevails. Grandparent who sought custody after years of residing with child was found to lack standing to initiate custody dispute. Third parties do not "attain a legal right to custody on the basis of the fact that a child has resided with them."

B. DeBoer v Schmidt (In re Clausen), 442 Mich 648, 682 (1993). [Child Custody Act and UCCJEA]

Summary: Parents prevail against potential adoptive parents who initiated custody action in Michigan following invalidation of adoption in Iowa. Third parties do not gain substantive rights by virtue of a child living with them.

C. Heltzel v Heltzel, 248 Mich App 1, 26 (2001). [Child Custody Act]

Summary: Mother prevails against grandmother. Action to regain custody after she relinquished custody three years prior. It is unconstitutional to place burden of proof on parent in action against third party. Third parties cannot "eliminate the fundamental constitutional presumption favoring custody with the natural parent" based upon their custodial environment.

D. *Derose v Derose*, 469 Mich 320, 350 (July 2003). [Child Custody Act]

Summary: Mother prevails against grandmother who sought visitation. Grandparent visitation statute found unconstitutional because (1) no indication it requires deference to decisions of fit parents; (2) fails to accord 'special weight' to decision of parents; (3) fails to place burden of proof on the third party grandparent rather than on the parents.

E. *Hunter v Hunter*, 484 Mich 247, 265-271 (2009). [Child Custody Act]

Summary: Mother prevails against relatives after long-term voluntary placement and guardianship. (1) parental presumption in MCL 722.25 controls over presumption favoring established custodial environment in MCL 722.27; (2) parental presumption applies to all natural parents in custody disputes with third persons; (3) parental presumption not dependent on parental fitness; (4) overruled separate opinion of the Court of Appeals which had set a fitness standard to limit parental presumption.

F. *In re Sanders*, 495 Mich 394, 422 (2014). [Juvenile Code]

Summary: Father prevails against State. "One parent doctrine" —that permitted court to exercise jurisdiction over child based upon adjudication of other parent's unfitness— found unconstitutional. "[D]ue process requires a specific adjudication of a parent's unfitness before the state can infringe the constitutionally protected parent-child relationship."

Respectfully submitted,
AUSTIN+KOFFRON

Dated: November 5, 2021

By: */s/Saraphoena B. Koffron*
Saraphoena B. Koffron, P67571
on behalf of the Family Law Section
of the State Bar of Michigan

441 Mich. 23
Supreme Court of Michigan.

Darresia BOWIE, Plaintiff–Appellant,
v.
Milton Junior ARDER,
Defendant–Appellee.
Thanh Quoc DUONG and Tuyet Trieu, Plaintiffs–Appellees,
v.
Long Han HONG and Phan Hue Ong, Defendants–Appellants.

Docket Nos. 92477, 92629.
|
Calendar Nos. 4–5, April Term 1992.
|
Argued April 7, 1992.
|
Decided Sept. 22, 1992.

Synopsis
Grandmother brought action under Child Custody Act seeking custody of granddaughter who resided with her. The Circuit Court, Genesee County, Earl E. Borradaile, J., dismissed action for lack of subject matter jurisdiction. The Court of Appeals, 190 Mich.App. 571, 476 N.W.2d 649, affirmed. Third parties brought action under Child Custody Act seeking custody of parents' child, who had been allowed to reside with third parties. The Circuit Court, Kent County, entered award in accordance with stipulation recognizing custody in third parties and thereafter parents twice unsuccessfully petitioned for change of custody. The Court of Appeals, 191 Mich.App. 462, 478 N.W.2d 922, affirmed. Appeals from cases were consolidated. The Supreme Court, Brickley, J., held that: (1) circuit courts have subject matter jurisdiction to hear and determine child custody actions pursuant to Child Custody Act without regard to identity of party who files action; (2) however, third party does not gain standing to petition for custody under Act merely because child resides with third party; and (3) circuit courts have subject matter jurisdiction to hear and determine bona fide custody disputes, but exceed their jurisdiction when they enter order transferring custody from parent to third party where there is no dispute between parties with regard to custody.

Case one affirmed; case two reversed and remanded.

Levin, J., filed dissenting opinion.

West Headnotes (16)

[1] **Child Custody** Jurisdiction

Circuit courts have subject matter jurisdiction to hear child custody disputes, including third-party child custody actions. M.C.L.A. §§ 600.601(2), 600.605, 722.26.

13 Cases that cite this headnote

[2] **Child Custody** Right of biological parent as to third persons in general

Except with regard to grandparents and guardians, Child Custody Act did not create substantive rights of entitlement to custody of child, whether the child lives with parents or with someone else; Act cannot be read to give third party, who is not guardian or limited guardian, right to legal custody of child on basis of child's residence or past residence with that party. Overruling *In re Weldon*, 244 N.W.2d 827. M.C.L.A. §§ 722.21 et seq., 722.26b, 722.27b.

13 Cases that cite this headnote

[3] **Child Custody** Constitutional and Statutory Provisions

Child Custody Parties; intervention

Child Custody Act does not create substantive rights of entitlement to legal custody of child, and does not give standing to third party who does not have legal right of entitlement to custody of child, to seek out child custody. M.C.L.A. § 722.21 et seq.

8 Cases that cite this headnote

[4] **Child Custody** Parties; intervention

Third party cannot create custody dispute by simply filing complaint in circuit court alleging that giving legal custody to third party is in best interest of child; third party does not have standing to create custody dispute not incidental to divorce or separate maintenance proceedings, unless third party is guardian of child or has substantive right of entitlement to custody of child. M.C.L.A. § 722.21 et seq.

42 Cases that cite this headnote

[5] **Child Custody** Parties; intervention

When circuit court entertains original action for child custody by party who does not have standing, court errs in exercise of jurisdiction, rather than taking action for which it is without jurisdiction. M.C.L.A. § 722.21 et seq.

[6] **Courts** Exclusive or Concurrent Jurisdiction

Although circuit courts are courts of general jurisdiction, with original jurisdiction to hear and determine all civil claims and remedies, circuit courts do not have jurisdiction in matters in which jurisdiction is given exclusively by constitutional provision or by statute to another court. M.C.L.A. §§ 600.601, 600.605, 722.26.

21 Cases that cite this headnote

[7] **Child Custody** Jurisdiction

Circuit court exceeds subject matter jurisdiction when, in original action pursuant to Child Custody Act, it enters order transferring custody from parent to third party where there is no dispute between parent and third party with regard to custody of child. M.C.L.A. § 722.21 et seq.

3 Cases that cite this headnote

[8] **Child Custody** Parties; intervention

Grandparent did not have standing to bring action for custody under Child Custody Act, even though child resided with her after her mother's death, where grandmother was not child's guardian or limited guardian at time she filed action. M.C.L.A. § 722.21 et seq.

3 Cases that cite this headnote

[9] **Courts** Guardianship; infants and incompetents

Circuit court's equitable jurisdiction over children who are subject of custody disputes does not allow court to "rubber stamp" voluntary transfer of legal custody from parent to third party pursuant to dispute-resolution provisions of Child Custody Act; proper forum for voluntary suspension of parental rights is probate court, to which legislature has given exclusive jurisdiction over guardianship proceedings. M.C.L.A. §§ 700.424a, 700.424a(2, 5), 700.424b(1), 700.431(1)(d), 722.21 et seq., 722.27(1)(c); MCR 5.769.

11 Cases that cite this headnote

[10] **Courts** Consent of Parties as to Jurisdiction

Parties cannot give court jurisdiction by stipulation where court would otherwise have no jurisdiction.

12 Cases that cite this headnote

[11] **Courts** Acts and proceedings without jurisdiction

When court lacks subject matter jurisdiction to hear and determine claim, any action it takes, other than to dismiss action, is void.

50 Cases that cite this headnote

[12] **Courts** Determination of questions of jurisdiction in general

Court must take notice of limits of its authority, and should on its own motion recognize its lack of jurisdiction and dismiss action at any stage of the proceedings.

7 Cases that cite this headnote

[13] **Judgment** Jurisdiction of cause of action

Judgment Errors and Irregularities

Error in exercise of court's jurisdiction is not subject to collateral attack; however, want of jurisdiction renders court's judgment void.

18 Cases that cite this headnote

[14] **Child Custody** Jurisdiction

Jurisdiction was lacking when circuit court entered original custody order giving third parties legal custody of child of married parents.

2 Cases that cite this headnote

[15] **Child Custody** Jurisdiction

Not only original order granting custody of child of married parents to third parties, but all subsequent orders entered by circuit court with respect to custody of child, were void for want of subject matter jurisdiction. M.C.L.A. § 722.21 et seq.

5 Cases that cite this headnote

[16] **Child Custody** Parties; intervention

Parents had standing to petition for physical custody of child who resided with third parties, and circuit court would have jurisdiction to decide case because of bona fide dispute between parties with regard to custody of child. M.C.L.A. § 722.21 et seq.

12 Cases that cite this headnote

Attorneys and Law Firms

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Janet E. Lanyon, Women Lawyers Ass'n of Michigan, Bloomfield Hills, Suellyn Scarnecchia, Julie Kunce Field, University of Michigan Law School, Women in the Law Clinic, Ann Arbor, Ann L. Routt, ****570** Legal Services of Southeastern Michigan, Ann Arbor, Michael R. Yales, Legal Services of Southeastern Michigan, Monroe, Kenneth C. Penokie, Legal Services of Northern Michigan, Escanaba, John Forczak, Michigan Legal Services, Detroit, amicus for defendant-appellee.

Opinion

BRICKLEY, Justice.

We granted leave to appeal in these cases to resolve several issues with respect to original child custody actions in circuit court. The questions presented are: 1) Does the circuit court have subject matter jurisdiction to hear and determine an original third-party child custody complaint under the Child Custody Act, M.C.L. § 722.21 *et seq.;* M.S.A. § 25.312(1) *et seq.*? 2) If the circuit court does have jurisdiction over such a claim, does a third party have standing to petition for custody under the act because the child resides with the third party, or resided with the third party in the past? 3) Does the circuit court have subject matter ***27** jurisdiction over an original petition for custody under the act where there is no dispute with regard to the custody of a child? and 4) Where there has been no finding of parental unfitness, and absent divorce or separate maintenance proceedings, is a circuit court award of custody to a third party rather than a parent, on the basis of the best interests of the child, a violation of due process?

We hold that the circuit courts have subject matter jurisdiction to hear and determine child custody actions pursuant to the Child Custody Act, without regard to the identity of the party who files the action. We further hold that, although the circuit courts do not lack subject matter jurisdiction to hear an original action for custody filed by a third party, a third party does not gain standing to petition for custody under the act because a child resides with the third party, or resided with the third party in the past. Finally, we hold that while the circuit courts have subject matter jurisdiction to hear and determine bona fide custody disputes, a circuit court

exceeds its jurisdiction when it enters an order transferring custody from a parent to a third party where there is no dispute between the parties with regard to the custody of the child. Because we resolve these cases as a matter of statutory construction, we do not reach the constitutional question.

Thus, we affirm the decision of the Court of Appeals in *Bowie v. Arder,* 190 Mich.App. 571, 476 N.W.2d 649 (1991), on grounds different from those relied on by the lower courts, and we reverse the decision of the Court of Appeals in *Duong v. Hong,* 191 Mich.App. 462, 478 N.W.2d 922 (1991).

I

In each of these cases the parent or parents of a child allowed the child to reside with one or more ***28** third parties[1] for a period of time without either the parents or the nonparents taking steps to formalize the arrangement. In each case, however, the third parties filed an action in circuit court pursuant to the Child Custody Act, alleging that the child had resided with the nonparents for a period of time and also alleging that giving custody of the child to the nonparents would be in the best interests of the child.

A

Carolyn Bowie, now deceased, and Milton Arder affirmed that they were the natural parents of Ashlee Bowie.[2] After Ashlee's birth on January 6, 1988, Carolyn and Ashlee lived with Carolyn's mother, Darresia Bowie. Milton lived elsewhere. Less than a year later, on December 9, 1988, Carolyn died. Since the spring of 1990 Ashlee has lived with her father.

The parties dispute the events and circumstances of the period between Carolyn's death in December 1988 and the spring of 1990. Darresia alleges that Ashlee continued to live with her during this period and that Milton had minimal contact ****571** with Ashlee and herself. She further alleges that Milton demonstrated little love, care, or concern for the child, and that he picked up Ashlee, saying he would take her for a ride in his car, and then failed to return the child to her grandmother. Milton denies these allegations and alleges that he left Ashlee with Darresia for a short period of time. Milton further alleges that he asserted his parental rights in the spring of 1990 ***29** when he picked up Ashlee at Darresia's home and brought the child home to live with him.

Darresia filed an action in circuit court on May 22, 1990, seeking custody of Ashlee pursuant to the Child Custody Act. Following a hearing, the circuit court dismissed the action for lack of subject matter jurisdiction, relying on *Ruppel v. Lesner,* 421 Mich. 559, 364 N.W.2d 665 (1984). Darresia appealed as of right, and the Court of Appeals affirmed. We granted leave to appeal. 439 Mich. 918 (1992).

B

Long Han Hong and Phan Hue Ong are the natural parents of Kaye Star Hong, born December 30, 1981. Long and Phan emigrated from Vietnam in early 1981 and 1980, at the ages of twenty-one and nineteen, respectively. Phan gave birth to the couple's first child, a son named Oai, in the United States before her husband Long arrived here. The couple also have a younger daughter, Lily. Upon their arrival in the United States, Long and Phan had no home or jobs, nor could they speak, read, or understand English.

During an English class, Long and Phan met another couple who had emigrated from Vietnam. Mike Seng Yang[3] and Tuyet Trieu came to the United States in 1971. At the time the couples met, Mike and Tuyet were in their early thirties and did not have any children.

For reasons that are in dispute, Long and Phan allowed Kaye Star to live with Mike and Tuyet when she was approximately four months old. After caring for Kaye Star for approximately two months, Mike and Tuyet filed an action in circuit ***30** court on June 29, 1982, seeking custody of Kaye Star pursuant to the Child Custody Act. Long and Phan stipulated to the awarding of custody to Mike and Tuyet,[4] and the circuit court entered an order consistent with the stipulation on July 16, 1982.[5] Before entry of the order, the parties did not appear in court and no hearing was held.

The parties dispute whether the transfer of custody to Mike and Tuyet was intended to be permanent. Mike and Tuyet allege that Long and Phan wanted them to adopt Kaye Star, but discovered that a consent adoption would not be possible,[6] and instead decided to give Mike and Tuyet permanent custody of Kaye Star. Long and Phan deny these allegations, and allege that the arrangement was never intended to last

more than three years or until Mike and Tuyet had their own child, with the option to terminate the arrangement sooner if Long and Phan desired.

In the time period from July of 1982, when the ***31** custody order was entered, until March of 1983, there does not appear to ****572** be any dispute that Long and Phan continued to visit Kaye Star while she resided with Mike and Tuyet. The parties' relationship appears to have been amicable at this time. It also appears that Long and Phan provided some assistance in the form of clothes and food, but the extent of this assistance is in dispute.

For reasons that are unclear, in March of 1983 Long and Phan moved to California. They did not take action to terminate the custody arrangement at this time. The parties disagree over promises made regarding contact between Long and Phan and Kaye Star after the move to California.

Six months later, Tuyet gave birth to a baby boy, whom Mike and Tuyet named Steven. By December of 1983, when Kaye Star was two years old, the parties' relationship was no longer amicable. Long and Phan wanted to terminate the custody arrangement and asked that Kaye Star be returned to them. The reason for Long and Phan's desire to terminate the arrangement is in dispute. Mike and Tuyet allege that Long and Phan were unhappy with them because they would not assist in sponsoring relatives of Long and Phan to allow them to immigrate to the United States. Long and Phan deny this allegation and allege that they wanted to terminate the arrangement because they feared Mike and Tuyet would favor their own son over Kaye Star. Mike and Tuyet did not consent to the termination of the custody arrangement.

Long and Phan contacted legal counsel and filed a petition for change of custody on September 14, 1984, alleging, inter alia, that they intended the custody arrangement to be temporary only. Kaye Star was almost four years old at this time. The case was referred to the Family Services Associationfor ***32** an evaluation. The evaluator recommended that Kaye Star remain with Mike and Tuyet on a permanent basis, and that Long and Phan not be granted regular visitation. The evaluator felt that the situation should be treated like an adoption. After a trial, the circuit court, in an order dated May 2, 1985, ordered that custody would remain with Mike and Tuyet, and that Long and Phan would have weekly visitation with Kaye Star.

By the time the circuit court denied Long and Phan's petition for a change of custody, Mike and Tuyet had two more children, twin sons born in 1985. Also, at some point, Mike and Tuyet began calling Kaye Star "Jenny." In 1987, when Kaye Star was five years old, Long and Phan again unsuccessfully petitioned for a change of custody. Another evaluation was done, and apparently because of the recommendation against a change of custody, Long and Phan abandoned their petition.

Mike and Tuyet petitioned for child support in September of 1988, but their petition was denied by the circuit court. At some point in 1990, Long and Phan voluntarily suspended visitation because of Kaye Star's behavioral problems during visits with their family, which they attributed to Mike and Tuyet's interference. Mike and Tuyet deny this allegation. Mike and Tuyet petitioned the circuit court to formally suspend visitation, but this petition was denied. Long and Phan resumed visitation with Kaye Star in June 1990.

On September 18, 1990, Long and Phan filed in the circuit court a motion to vacate the court's original order of July 16, 1982, granting custody to Mike and Tuyet, and all subsequent orders, on the basis that the court lacked subject matter jurisdiction to enter the original order. The circuit court denied this motion. Long and Phan appealed as of right, and the circuit court's denial was ***33** affirmed by the Court of Appeals. We granted leave to appeal. 439 Mich. 918 (1992).

II

In *Ruppel v. Lesner, supra,* this Court reversed a decision of the Court of Appeals affirming a circuit court's grant of temporary custody of a child to the child's maternal grandparents. At the time the grandparents petitioned for custody under the Child Custody Act, the child was living with her parents, who had not instituted divorce or separate maintenance proceedings. In reversing the lower court decisions, we held that

> ****573** "*where a child is living with its parents,* and divorce or separate maintenance proceedings have not been instituted, and there has been no finding of parental unfitness in an appropriate proceeding, *the circuit court lacks the authority* to enter an order giving custody to a third party over the parents' objection." *Id.* 421 Mich. at 565, 364 N.W.2d 665 (emphasis added).

The parties in the instant cases focus their arguments on the emphasized language. The parents argue that this Court, by stating that the circuit court lacks "authority," meant that subject matter jurisdiction is lacking where divorce or separate maintenance proceedings have not been initiated and where there has been no finding of parental unfitness. The nonparents argue that the issue is not jurisdiction, but standing, and that where a child resides with a third party rather than the parents, or has resided with a third party in the past, that third party has standing to petition for custody of the child under the act.

The Court of Appeals has interpreted our holding in *Ruppel* in various ways. In *Marshall v. Beal,* 158 Mich.App. 582, 589, 405 N.W.2d 101 (1986), the Court held that a circuit court may only consider third-party claims of child custody where the court ***34** has otherwise obtained jurisdiction over the child.[7] In *Prawdzik v. Hiner,* 183 Mich.App. 245, 249, 454 N.W.2d 399 (1990), the Court held that a circuit court has jurisdiction over a third-party child custody petition in three circumstances: where divorce or separate maintenance proceedings have been initiated, where there has been a finding of parental unfitness, *and where the child is living with the third party rather than the parents.*

A further interpretation of our decision in *Ruppel* was advanced in *Solomon v. Lewis,* 184 Mich.App. 819, 459 N.W.2d 505 (1990) (opinion of Marilyn J. Kelly, J.).[8] Judge Kelly reasoned that *Ruppel* addressed the question of standing rather than jurisdiction, and she concluded that a third party who has physical custody of a child has standing to petition for legal custody of that child under the Child Custody Act.

In *Tallman v. Milton,* 192 Mich.App. 606, 482 N.W.2d 187 (1992), the Court agreed with the earlier panels that held that the issue in *Ruppel* was standing, rather than jurisdiction. However, it noted that "[t]o have standing one must have a legally protected interest that is in jeopardy of being adversely affected," *id.* 192 Mich.App. at 612–613, 482 N.W.2d 187, and affirmed the circuit court's dismissal of the third-parties' custody petition. The Court reasoned that, as foster parents, the third-parties' rights were controlled by their agency/foster parent agreement with the Department of Social Services, and that the agreement did not give them the right to ***35** seek permanent legal custody of their foster child, and therefore they had no standing under the act. *Id.* at 613, 482 N.W.2d 187.

In each of the instant cases, the panels of the Court of Appeals adopted one of these interpretations. In *Bowie v. Arder, supra,* 190 Mich.App. at 573, 476 N.W.2d 649, the Court held:

> "The import of the *Ruppel* decision is to limit the authority of the circuit court. The *Ruppel* Court held that the Child Custody Act does not give third parties the right to file original child custody actions in circuit court.
>
> "On the basis of the holding in *Ruppel,* we affirm the trial court's finding that it lacked subject matter jurisdiction. We interpret the *Ruppel* decision as holding that once judicial intervention has already taken place, the court may award custody to third parties. Otherwise, ****574** there is no authority allowing a nonparent to create a child custody dispute."

In contrast, the Court in *Duong v. Hong, supra,* 191 Mich.App. at 465–466, 478 N.W.2d 922, found Judge Kelly's opinion in *Solomon* persuasive, and held that circuit courts have subject matter jurisdiction over custody disputes and that the issue of who can initiate an action for custody under the Child Custody Act is a question of standing. Further, the *Duong* Court held that a third party with whom a child resides has standing to petition the circuit court for custody of that child under the act. *Id.* 191 Mich.App. at 466, 478 N.W.2d 922. The panel distinguished *Duong* from *Bowie* because in *Bowie,* at the time the nonparent petitioned for custody, the child resided with her father, while in *Duong* the child resided with the third parties when they filed their custody action. *Id.* 191 Mich.App. at 467, n. 2, 478 N.W.2d 922.

III

We must decide, then, whether this Court's decision ***36** in *Ruppel* rested on a lack of standing or subject matter jurisdiction. "Jurisdiction, when applied to courts, is the power to hear and determine a cause or matter." *Langdon v. Wayne Circuit Judges,* 76 Mich. 358, 367, 43 N.W. 310 (1889). "Jurisdiction lies at the foundation of all legal adjudications. The court must have cognizance of the class of cases to which the one to be adjudicated belongs...." *Ward v. Hunter Machinery Co.,* 263 Mich. 445, 449, 248 N.W. 864 (1933).

The parents argue that the Child Custody Act does not create subject matter jurisdiction over child custody disputes, and that a circuit court must look outside the act for subject matter jurisdiction to hear *any* child custody case. For example, pursuant to statute, a circuit court has jurisdiction to hear

and decide a child custody dispute that is ancillary to divorce proceedings.[9] The parents concede that the act contemplates original actions for custody as well as actions for custody that are incidental to other actions before the court.[10] However, citing this Court's decision in *Sovereign v. Sovereign,* 354 Mich. 65, 92 N.W.2d 585 (1958), the parents argue that a circuit court's equitable jurisdiction over original custody actions is limited to disputes between the natural and legal parents of a child.

In *Sovereign,* this Court held that while circuit courts do not retain for all purposes the broad jurisdiction over children formerly exercised by chancery courts, they do have jurisdiction to hear ***37** a custody dispute between the parents of a child, who had been denied a divorce, under the general and historic chancery power. The Court stated:

> "The custody controversy is between 2 persons who are the natural and legal parents of the child. With prior dismissal of the divorce suits, there is no specific statutory remedy available in any court—indeed, there is no provision for adjudication of this parental dispute over child custody at all—absent general chancery jurisdiction." *Id.* at 96, 92 N.W.2d 585.

The parents argue, then, that while *Sovereign* recognized continuing equitable jurisdiction in circuit courts over children who are the subject of custody disputes, such jurisdiction only extends to disputes between a child's parents.

In contrast, the nonparents point out that the circuit court's subject matter jurisdiction is conferred by the constitution and by statute in broad and affirmative terms, rather than by the enumeration of powers. Const. 1963, art. 6, § 13 provides that "[t]he circuit court shall have original jurisdiction ****575** in all matters not prohibited by law...." Further, M.C.L. § 600.601; M.S.A. § 27A.601 provides:

> "Circuit courts have the power and jurisdiction
>
> "(1) possessed by courts of record at the common law, as altered by the constitution and laws of this state and the rules of the supreme court, and
>
> "(2) possessed by courts and judges in chancery in England on March 1, 1847, as altered by the constitution and laws of this state and the rules of the supreme court, and
>
> "(3) prescribed by rule of the supreme court."

Finally, M.C.L. § 600.605; M.S.A. § 27A.605 provides:

> "Circuit courts have original jurisdiction to hear and determine all civil claims and remedies, except ***38** where exclusive jurisdiction is given in the constitution or by statute to some other court or where the circuit courts are denied jurisdiction by the constitution or statutes of this state."

Thus, because circuit courts are courts of general jurisdiction, where subject matter jurisdiction is presumed unless expressly prohibited or given exclusively to another court by constitution or statute,[11] the nonparents argue that circuit courts have jurisdiction over custody disputes, whether instituted by parents or third parties. The nonparents state that they are not aware of, nor have the parents cited, any provision that denies a circuit court jurisdiction over an original third-party custody action or gives exclusive jurisdiction over such an action to another court.

[1] We agree with the nonparents that the circuit court did not lack subject matter jurisdiction over the original third-party child custody action in *Ruppel.* A circuit court's equitable jurisdiction extends to the power and jurisdiction "possessed by courts and judges in chancery in England on March 1, 1847, as altered by the constitution and laws of this state and the rules of the supreme court." M.C.L. § 600.601(2); M.S.A. § 27A.601(2). The source of chancery court equitable jurisdiction over children is somewhat obscure, but is generally thought to derive from the king's executive power as *parens patriae* to protect his subjects, as delegated to chancery courts. 4 Pomeroy, Equity Jurisprudence (5th ed), § 1304, p 870. Infants are persons not *sui juris,* i.e., they do not have the capacity to manage their own affairs, therefore the king, as *parens patriae,* took over the care of their persons and property when they were without a ***39** guardian for either. 3 Story, Equity Jurisprudence (14th ed), § 1743, p 361.

Thus, the subject matter of a custody dispute—the child—was clearly within the jurisdiction of the English chancery courts, and therefore also falls under the subject matter jurisdiction of the circuit court, unless prohibited or given exclusively to another court. We agree with the nonparents that circuit court jurisdiction over child custody disputes has not been denied by the constitution or by statute, nor has such jurisdiction been given to another court.

Although the parents do not dispute that the circuit court has the power to hear and resolve custody disputes, the parents

attempt to define the scope of the circuit court's jurisdiction over original child custody actions in terms of who the plaintiff is and whether that plaintiff has a right to custody of a child. However,

> " '[j]urisdiction over the subject matter is the right of the court to exercise judicial power over that class of cases; not the particular case before it, but rather the abstract power to try a case of the kind or character of the one pending; and not whether the particular case is one that presents a cause of action, or under the particular facts is triable before the court in which it is pending, because of some inherent facts which exist and may be developed during the trial.' " *Joy v. Two–Bit Corp.,* 287 Mich. 244, 253–254, 283 N.W. 45 (1938).

Thus, the parents' argument with respect to the circuit court's jurisdiction over child ****576** custody actions confuses the question whether the court has jurisdiction over a class of cases, namely, child custody disputes, with the question whether a particular plaintiff has a cause of action. The parents' approach to the circuit court's subject ***40** matter jurisdiction would potentially transform every motion for summary disposition under MCR 2.116(C)(8) into a challenge to the court's jurisdiction.[12] This Court has previously noted:

> "The loose practice has grown up, even in some opinions, of saying that a court had no 'jurisdiction' to take certain legal action when what is actually meant is that the court had no legal 'right' to take the action, that it was in error. If the loose meaning were correct it would reduce the doctrine of res judicata to a shambles and provoke endless litigation, since any decree or judgment of an erring tribunal would be a mere nullity." *Buczkowski v. Buczkowski,* 351 Mich. 216, 222, 88 N.W.2d 416 (1958).
>
> Therefore, while the circuit court in *Ruppel* erred in the exercise of its jurisdiction, it did not lack subject matter jurisdiction over the original child custody action in that case merely because it was initiated by a third party.

IV

Having concluded that the circuit court had subject matter jurisdiction in *Ruppel,* we next consider whether this Court's decision in that case was based on the nonparent plaintiffs' lack of standing to petition for custody under the Child Custody Act. In *Girard v. Wagenmaker,* 437 Mich. 231, 251, 470 N.W.2d 372 (1991), this Court interpreted *Ruppel* as a decision addressing standing, holding that a putative father who did not have standing to establish his paternity under the Paternity Act as it existed in 1985[13] was a nonparent for purposes of the Child Custody Act, and, therefore, ***41** the putative father also did not have standing under the Child Custody Act.

We agree with the nonparents that our decision in *Ruppel* turned on the third-party plaintiffs' lack of standing to petition for custody of their granddaughter under the Child Custody Act.

> "[N]othing in the Child Custody Act, nor in any other authority of which we are aware, authorizes a nonparent to create a child custody 'dispute' by simply filing a complaint in circuit court alleging that giving custody to the third party is in the 'best interests of the child.' " *Id.* 421 Mich. at 566, 364 N.W.2d 665.

In *Ruppel* we declined to interpret the Child Custody Act as a statutory means by which any interested person has standing to request the circuit court to make a determination of a child's best interests with respect to the custody of that child.[14]

However, the nonparents in these cases argue that our holding in *Ruppel* turned on the fact that the child in that case was not living with her grandparents when they filed their custody action. They emphasize that this Court concluded that "where a child is living with its parents," who have not instituted divorce or separate maintenance proceedings, the circuit court could not award custody to a third party. *Id.* at 565, 364 N.W.2d 665. The nonparents claim that a different case is presented where a child either resides with the third-party ***42** petitioner or has lived with the third party in the past.

The nonparents urge this Court to adopt the reasoning of Judge Kelly in *Solomon, supra,* which emphasized that the child lived with the third-party petitioners at the ****577** time they sought custody and that the petitioners had possibly become the child's "psychological parents," *id.* 184 Mich.App. at 824, 459 N.W.2d 505, and concluded that because the petitioners had a sufficient "personal stake" in the outcome of the litigation over the child's custody, they had standing to bring an action for custody under the Child Custody Act. *Id.* Judge Kelly noted that in order to have standing a party must have a "legally protected interest which is in jeopardy of being adversely affected." *Id.* at 822, 459 N.W.2d 505. See also *Tallman, supra,* 192 Mich.App. at 612, 482 N.W.2d 187. However, she appears to have assumed that because a child lives with a party other than the parent, that

party thereby attains a *legal right* to the custody of the child, in competition with the child's parents or anyone else.

The question of standing is not merely whether a party has a "personal stake" in the outcome that will ensure "sincere and vigorous advocacy." See *Solomon, supra,* 184 Mich.App. at 824, 459 N.W.2d 505. Indeed, the third-party petitioners in *Ruppel* surely had a personal stake in the outcome of their custody action, and it was never claimed that they were not sincere and vigorous advocates. However,

> "[o]ne cannot rightfully invoke the jurisdiction of the court to enforce private rights, or maintain a civil action for the enforcement of such rights, unless one has in an individual or representative capacity some real interest in the cause of action, or a legal or equitable right, title, or interest in the subject matter of the controversy. This interest ***43** is generally spoken of as 'standing'...." 59 AmJur2d, Parties, § 30, p 414.

We concluded in *Ruppel* that the Child Custody Act involves procedure only, setting forth "presumptions and standards by which competing claims to the right of custody are to be judged," but that the act "*does not create substantive rights of entitlement to custody of a child.*" *Id.* 421 Mich. at 565, 364 N.W.2d 665 (emphasis added).

We noted one exception in *Ruppel* to our conclusion that the act does not create substantive rights. M.C.L. § 722.27b; M.S.A. § 25.312(7b) provides for limited rights of visitation for grandparents. However, we cautioned that in a case where the third-party petitioners are close relatives of the child, "we must remember that, except for limited visitation rights, grandparents have no greater claim to custody than any other relative, or indeed any other persons." *Ruppel, supra,* 421 Mich. at 566, 364 N.W.2d 665. Since our decision in *Ruppel,* the Legislature has also given a guardian, and a limited guardian in certain circumstances, a right to petition under the act for legal custody of a child for whom the petitioner is a guardian. M.C.L. § 722.26b; M.S.A. § 25.312(6b).

[2] We reiterate, however, that except with regard to grandparents and guardians, the Child Custody Act does not create substantive rights of entitlement to custody of a child, whether the child lives with the parents or with someone else. There is simply no provision of the act that can be read to give a third party, who is not a guardian or a limited guardian, a right to legal custody of a child on the basis of the fact that the child either resides with or has resided with that party. Neither Judge Kelly, nor the nonparents in these cases, have cited any other authority for the proposition that third parties who have physical custody of a child attain a right to the legal custody ***44** of that child. Presumably the Legislature could create such a right,[15] but at this point it has not.

****578** Instead, in its most recent amendment of the Child Custody Act, the Legislature gave the guardian of a child, and a limited guardian in certain circumstances, standing to bring an action for custody of the child. M.C.L. § 722.26b; M.S.A. § 25.312(6b). It is true that guardians are a subgroup of the larger group known as "third parties." However, the Legislature has provided that guardians have "the powers and responsibilities of a ***45** parent who is not deprived of custody of the parent's minor and unemancipated child," including the power to consent to the child's marriage or adoption. M.C.L. § 700.431; M.S.A. § 27.5431.[16] Clearly, then, the explicit grant of standing to guardians in the act does not indicate that the Legislature concluded that third parties who do not have the status of a guardian also have standing to bring an original action for custody, and in fact suggests just the opposite.[17] Thus, just as the relatives of a child have no greater right to custody than any other person, by reason of their close biological relationship, neither do third parties attain a legal right to custody on the basis of the fact that a child has resided with them.

While neither the Child Custody Act nor any other authority of which we are aware gives a third party a right to legal custody of a child because the child resides with the third party, the Family Law Section of the State Bar of Michigan, as amicus curiae, urges this Court to create such a right. The Family Law Section suggests that the right should turn on an intricate balancing test based on both objective and subjective factors, including the length of time the child had resided ***46** with the third party, the intent of the parent and the third party in allowing the child to reside with the third party, the nature and frequency of the contact between the child and the parent during the time the child resides with the third party, and the age of the child. The Family Law Section would have a circuit court consider these factors to determine, case by case, whether a particular third party has a legal right to custody of a child, and therefore standing under the act to create a custody dispute.

We are mindful of the extensive writings with regard to parental rights, the "best interests of the child" standard, "psychological parents," and the arguments, pro and con, for creating third-party rights to custody.[18] We are also aware of the constitutional ****579** issues raised by the creation

of third-party rights to custody.[19] However, we are not in a ***47** position to make such policy judgments, especially in light of the fact that the Legislature appears to have chosen a different course in its consideration of the competing interests involved. Therefore, we leave to the Legislature the task of creating substantive rights, subject to any constitutional restraints, if it finds that public policy so requires.

Further, to the extent that this Court's decision in *In re Weldon,* 397 Mich. 225, 244 N.W.2d 827 (1976), is inconsistent with our holding in these cases and our decision in *Ruppel,* it is overruled. *Weldon* was a factually and procedurally complex case where third parties, with whom a child resided under color of a legal adoption placement, brought an action in circuit court under the Child Custody Act for legal custody of the child against the child's natural mother, who had successfully challenged in federal court the constitutionality of probate court proceedings terminating her parental rights. With only five justices participating,[20] the Court held that comity required recognition of the federal court decision that the mother's due process rights had been violated by the probate court parental termination proceedings. *Id.* at 239, 244 N.W.2d 827. The Court also reversed the circuit court's decision ***48** that the act did not apply to the facts of that case, and held that the "best interests of the child" should govern the circuit court's decision with regard to custody. *Id.* at 240, 244 N.W.2d 827.[21]

Justice Coleman concurred, concluding that because of the emphasis on the "best interests of the child" in the act, third parties with whom a child has resided under the color of a legal adoption placement could not be "elimin [ated] ... from consideration for placement by the circuit court." *Id.* at 263, 244 N.W.2d 827. However, once the termination proceedings, upon which the adoption proceedings depended, were declared invalid, the third-party petitioners in *Weldon* had the same status as any other third parties with whom a child resides. Thus, the Court in *Weldon* gave the third-party petitioners standing to bring a custody action under the act despite the fact that the third parties did not have a legal right to custody of the child.

****580** [3] Therefore, the decision in *Weldon* is in conflict with our holding in *Ruppel* that the Child Custody Act does not create substantive rights of entitlement to legal custody of a child. Further, the decision in *Weldon* is also called into question by the Legislature's subsequent amendment of the act explicitly giving guardians, and not other third parties, standing to petition for custody. Because the *Weldon* decision, giving standing under the act to a third party who does not have a legal right of entitlement to the custody of a child, is inconsistent with *Ruppel* and our decision here, it is overruled.

[4] Therefore, we reaffirm our holding in *Ruppel* that a third party cannot create a custody dispute ***49** by simply filing a complaint in circuit court alleging that giving legal custody to the third party is in the best interests of the child. A third party does not have standing to create a custody dispute not incidental to divorce or separate maintenance proceedings[22] unless the third party is a guardian of the child or has a substantive right of entitlement to custody of the child. The Legislature has not created a substantive right to custody of a child on the basis of the child's residence with someone other than a parent, and this Court is not in a position to do so.

[5] However, when a circuit court entertains an original action for custody by a party who does not have standing, the court errs in the exercise of jurisdiction, rather than taking action for which it is without jurisdiction.

> " 'Want of jurisdiction must be distinguished from error in the exercise of jurisdiction. Where jurisdiction has once attached, mere errors or irregularities in the proceedings, however grave, although they may render the judgment erroneous and subject to be set aside in a proper proceeding for that purpose, will not render the judgment void, and until set aside it is valid and binding for all purposes and cannot be collaterally attacked.' " *Jackson City Bank & Trust v. Fredrick,* 271 Mich. 538, 545, 260 N.W. 908 (1935).

V

We must next consider an issue not addressed by this Court in *Ruppel:* Whether the circuit court ***50** has subject matter jurisdiction to hear an original petition for custody under the Child Custody Act where there is no dispute with regard to the custody of a child. While there is no question that the circuit courts have equitable jurisdiction to hear and decide custody *disputes,* we must determine whether a circuit court exceeds its jurisdiction when the court entertains an original action for custody, and makes an award of custody pursuant to that original action, where there is no dispute between the parties with regard to the custody of the child.

[6] Although circuit courts are courts of general jurisdiction, with original jurisdiction to hear and determine all civil claims

and remedies, circuit courts do not have jurisdiction in matters in which jurisdiction is given exclusively by constitutional provision or by statute to another court. M.C.L. § 600.605; M.S.A. § 27A.605. Circuit courts have all the power and jurisdiction possessed by English chancery courts in 1847, except "as altered by the constitution and laws of this state...." M.C.L. § 600.601(2); M.S.A. § 27A.601(2). Therefore, we must determine whether the circuit court's traditional equitable jurisdiction over children has been altered by the constitution or by statute to the extent it would preclude an award of custody by consent in an original action under the Child Custody Act.

In *Sovereign, supra,* while this Court held that a circuit court retained its general and historic chancery power to hear and determine a custody dispute between the parents of a child who had been denied a ****581** divorce, we did not believe that "the circuit courts of Michigan sitting in chancery retain for all purposes the broad jurisdiction over children formerly exercised by the chancery courts." *Id.* 354 Mich. at 94, 92 N.W.2d 585. For example, while the English ***51** chancery courts, through their *parens patriae* power, could appoint or remove a guardian of a child,[23] M.C.L. § 700.21(c); M.S.A. § 27.5021(c) provides that guardianship proceedings are *exclusively* within the jurisdiction of the probate court.

The creation of a limited guardianship involves a voluntary suspension of parental rights upon the petition of the parent of a child. M.C.L. § 700.424a; M.S.A. § 27.5424(1). The parent must consent to the appointment of the limited guardian and must consent to a suspension of parental rights, and the court must approve a placement plan agreed to by both the parent and the limited guardian. *Id.* The placement plan includes such provisions as the reason the parent seeks the appointment of the limited guardian, the visitation and contact the parent will have with the child during the guardianship, and the financial support that will be provided by the parent. *Id.* Through the guardianship provisions of the Probate Code, the Legislature has enacted a detailed statutory scheme governing the voluntary suspension of parental rights and transfer of such rights to a limited guardian.

In contrast to the guardianship provisions, the Child Custody Act governs the resolution of *disputes* between one or more parties claiming a right to the custody of a child. The act provides that in all actions

> "filed in a circuit court involving *dispute of custody* of a minor child, the court shall declare the inherent rights of the child and establish the rights and duties as to custody, support and visitation of the child in accordance with this act." M.C.L. § 722.24; M.S.A. § 25.312(4) (emphasis added).

***52** The act further provides:

> "If a child *custody dispute* has been submitted to the circuit court as an original action under this act or has arisen incidentally from another action in the circuit court or an order or judgment of the circuit court, for the best interests of the child the court may:
>
> "(a) Award custody of the child to 1 or more of the parties involved or to others and provide for payment of support...." M.C.L. § 722.27(1)(a); M.S.A. § 25.312(7)(1)(a) (emphasis added).

Finally, in *Ruppel* we held that the act

> "creates presumptions and standards by which *competing claims* to the right of custody are to be judged, sets forth procedures to be followed in *litigation* regarding such claims, and authorizes the forms of relief available in the circuit court." *Ruppel, supra,* 421 Mich. at 565, 364 N.W.2d 665 (emphasis added).

By enacting the Child Custody Act, the Legislature standardized the criteria for resolving child custody disputes by requiring the circuit court to evaluate eleven factors in making its determination of the best interests of a child. *Baker v. Baker,* 411 Mich. 567, 576, 309 N.W.2d 532 (1981). Before enactment of the Child Custody Act, a circuit court's exercise of its discretion in determining the best interests of a child was "virtually unfettered." *Id.* It is clear that the act was intended to provide a framework for the resolution of *disputes* with regard to the custody of a child.

However, a comparison of the guardianship provisions of the Probate Code and the Child Custody Act persuades us that the act was not intended to be used as a means to "legalize" voluntary transfers of physical custody of a child from a parent to a third party. The guardianship provisions set forth detailed procedures whereby a parent may voluntarily consent to the suspension of parental ***53** rights and request the appointment by the probate court of a limited guardian for the parent's child. The limited guardianship placement plan, required by statute, protects the child's best interests by requiring the parent to maintain a relationship with the child and provides notice to the parent that "substantial failure to

comply with the plan without **582 good cause may result in the termination of the parent's parental rights....” M.C.L. § 700.424a(2); M.S.A. § 27.5424(1)(2). The guardianship statutes permit periodic review by the probate court, with annual review required if the child is under six years of age, M.C.L. § 700.424b(1); M.S.A. § 27.5424(2)(1), and annual reports by the guardian pursuant to court rule. M.C.L. § 700.431(1)(d); M.S.A. § 27.5431(1)(d).[24] Further, the guardianship provisions protect the parent's interests by allowing the parent to terminate the arrangement and summon the child home if the parent has substantially complied with the placement plan. See M.C.L. § 700.424a(5); M.S.A. § 27.5424(1)(5).

In contrast, the Child Custody Act refers repeatedly to the bringing of an “action” for custody and to the resolution of “disputes” with regard to custody. Once the circuit court takes jurisdiction over a child and issues an order pursuant to the act, the court's jurisdiction continues until the child is eighteen years old, M.C.L. § 722.27(1)(c); M.S.A. § 25.312(7)(1)(c); however, the act does not provide for periodic court review, nor does it require annual reports to the circuit court by the child's custodian. Further, unlike the guardianship provisions, the act emphasizes the maintenance of an established custodial environment, even if the child resides with a third party rather than a parent. See M.C.L. § 722.27(1)(c); M.S.A. § 25.312(7)(1)(c).

*54 [7] We find it clear that the Legislature never intended to regulate voluntary transfers of legal custody through application by the circuit courts of the dispute resolution criteria of the Child Custody Act. Nor did the Legislature intend the circuit courts to exercise their traditional equitable jurisdiction to hear and resolve custody disputes in order to “rubber stamp” such voluntary transfers of custody. Instead, the Legislature enacted specific and detailed legislation governing the voluntary suspension of parental rights through guardianship proceedings, and placed such proceedings exclusively within the jurisdiction of the probate court.[25] We hold, then, that a circuit court exceeds its subject matter jurisdiction when, in an original action pursuant to the Child Custody Act, it enters an order transferring custody from a parent to a third party where there is no dispute between the parent and the third party with regard to the custody of the child.

VI

[8] In *Bowie v. Arder,* the circuit court incorrectly concluded that it was without subject matter jurisdiction to hear and determine Darresia Bowie's petition for custody. Darresia's petition, and Milton Arder's answer to her petition, indicate that there was a bona fide dispute between the parties with regard to Ashlee's custody. However, the *55 circuit court could have based its dismissal on the fact that Darresia Bowie did not have standing to bring an action for custody under the Child Custody Act. Darresia was not Ashlee's guardian or limited guardian at the time she filed the action. Nor did she attain a right to legal custody of Ashlee because the child resided with her after Carolyn Bowie's death. Therefore, we affirm the circuit court's dismissal of the original third-party custody action in *Bowie v. Arder.*

In *Duong v. Hong,* the original third-party action for custody, filed by Mike Yang and Tuyet Trieu in June of 1982, alleged that awarding the nonparents custody of Kaye Star Hong would be in the best interests of the child. Rather than disputing the claims in the petition for custody, **583 Long Han Hong and Phan Hue Ong signed a stipulation to the entry of an order granting Mike and Tuyet custody of Kaye Star Hong and giving Long and Phan reasonable rights of visitation. The circuit court entered the order without holding a hearing and without the parties ever appearing before the court.

[9] While the parties in *Duong v. Hong* disagree with regard to their intentions in allowing Mike and Tuyet to have custody of Kaye Star, and with regard to how long the arrangement was intended to last, it is clear that at the time the order was entered in 1982 there was *no dispute* between the parties with regard to the custody of the child. The parties agree that their intention was to “legalize” the informal arrangement they had made allowing Kaye Star to reside with Mike and Tuyet. As we have held, the circuit court's equitable jurisdiction over children who are the subject of custody disputes does not allow the court to “rubber stamp” a voluntary transfer of legal custody from a parent to a third party pursuant to the dispute-resolution *56 provisions of the Child Custody Act. The proper forum for the voluntary suspension of parental rights is the probate court, to which the Legislature has given exclusive jurisdiction over guardianship proceedings.

[10] [11] [12] Although Long and Phan did not move to vacate the original custody order and all subsequent orders until September 18, 1990, their delay does not prevent their recovery. The jurisdiction of a court arises by law, not by the consent of the parties. *Straus v. Barbee,* 262 Mich. 113, 114,

247 N.W. 125 (1933). Parties cannot give a court jurisdiction by stipulation where it otherwise would have no jurisdiction. *Shane v. Hackney,* 341 Mich. 91, 98, 67 N.W.2d 256 (1954). When a court lacks subject matter jurisdiction to hear and determine a claim, any action it takes, other than to dismiss the action, is void. *Fox v. Univ. of Michigan Bd. of Regents,* 375 Mich. 238, 242, 134 N.W.2d 146 (1965). Further, a court must take notice of the limits of its authority, and should on its own motion recognize its lack of jurisdiction and dismiss the action at any stage in the proceedings. *Id.*

[13] **[14]** Thus, while an error in the exercise of a court's jurisdiction is not subject to collateral attack, want of jurisdiction renders a judgment void. *Jackson City Bank & Trust, supra.* The circuit court in *Duong v. Hong* should have taken notice of its lack of jurisdiction and should have dismissed the original custody petition. Any action the court took other than dismissing the action was void for want of subject matter jurisdiction.

[15] The nonparents argue, however, that even if jurisdiction was lacking when the circuit court entered the original custody order giving them legal custody of Kaye Star, the court did not lack jurisdiction in 1985 when it entered an order continuing custody of the child with the nonparents. ***57** The 1985 order was the result of a petition for change of custody filed by Long and Phan, and it is clear that by this point there was a dispute between the parties with regard to the custody of Kaye Star. Thus, the nonparents argue, the circuit court did not exceed its subject matter jurisdiction by hearing and determining the parent's petition for a change of custody pursuant to the Child Custody Act.

We cannot agree with the nonparents' reasoning. In order for Long and Phan to attempt to regain custody of their child, a petition for a change of custody pursuant to the act was necessitated by the circuit court's original order awarding legal custody to Mike and Tuyet. We cannot hold that the original custody order is null and void, but uphold the subsequent custody order that was dependent upon it, without gross speculation with regard to what action the parties would have taken had the circuit court properly dismissed the original action for want of jurisdiction.

Had the parties merely continued the informal arrangement, Long and Phan may have indeed filed a subsequent action for custody in the circuit court, over which the circuit court would have had jurisdiction if there was a bona fide dispute between the parties with regard to the child's custody at ****584** that time. However, had Long and Phan instead sought the appointment of Mike and Tuyet as limited guardians for Kaye Star, a petition for custody or for a change of custody would not have been necessary. We cannot say what would have happened had the circuit court not exceeded its jurisdiction, and we cannot base our decision on action taken by the circuit court that may not have been taken had the court not erred in the entry of its original order. Thus, we hold that the original order awarding custody of Kaye Star to ***58** Mike and Tuyet and all subsequent orders entered by the circuit court with respect to the custody of Kaye Star are void for want of subject matter jurisdiction.

[16] Because all circuit court orders with respect to the custody of Kaye Star are without force and effect, Long and Phan were never effectively deprived of legal custody of their daughter. However, Mike and Tuyet now have physical custody of the child. Thus, it appears that the parents may attempt to secure relief through a new cause of action pursuant to the Child Custody Act. Long and Phan clearly have standing to petition for physical custody of their child, and the circuit court would have jurisdiction to decide the case because of the bona fide dispute between the parties with regard to the custody of Kaye Star.

We caution, however, that because of the unusual circumstances of this case, in any such new cause of action the circuit court must take into account the inequitable and unfortunate result of the court's jurisdictional error at the commencement of the original action for custody filed by the nonparents. Should Long and Phan choose to file a new action under the act, special care must be taken to rectify, if possible, the damage visited upon them by the circuit court's previous orders entered in error. Thus, in the interest of judicial economy, we urge that the factors to be considered under the act, especially with respect to the continuity of the child's living environment, M.C.L. § 722.23(d); M.S.A. § 25.312(3)(d), be tempered by the fact that the parents were deprived of an opportunity to have their interests properly adjudicated.

Thus, we affirm the decision of the Court of Appeals in *Bowie v. Arder,* and reverse the decision of the Court of Appeals in *Duong v. Hong,* and ***59** pursuant to MCR 7.316(A)(7), we order that the status quo with respect to the custody of Kaye Star be maintained for a period of ninety days from the date of the issuance of the judgment order, or until jurisdiction is vested in an appropriate court pursuant to a newly initiated

cause of action, whichever occurs first. We remand to the circuit court for the monitoring and enforcement of this order.

MICHAEL F. CAVANAGH, C.J., and BRICKLEY, BOYLE, ROBERT P. GRIFFIN, MALLETT and RILEY, JJ., concur.

LEVIN, Justice (*separate opinion*).

I am not persuaded that the Legislature has deprived the circuit courts of subject matter jurisdiction of these controversies, or that any of the parties lack standing to maintain an action concerning custody.*

All Citations

441 Mich. 23, 490 N.W.2d 568

Footnotes

1 Throughout this opinion the terms “nonparent” and “third party” refer to any person who is not the parent of a child.

2 Carolyn and Milton executed an affidavit of parentage on January 10, 1988.

3 Appellee Thanh Quoc Duong legally changed his name to Mike Seng Yang.

4 Apparently the stipulation was signed at the office of Mike and Tuyet's legal counsel, Joseph Smigiel. Long and Phan were not represented by counsel at this meeting, although a friend of Mike's was present as an interpreter.

5 The stipulation and order provided as follows:
“Now come the above-named parties and hereby stipulate and agree to the entry of the following order awarding custody of Kaye Star Hong to the plaintiffs.
* * * * * *
“It is hereby ordered that the plaintiffs, Thanh Quoc Duong and Tuyet Trieu, shall have and are hereby awarded the joint care and custody of the minor child, to-wit; Kaye Star Hong, born December 30, 1981.
“It is further ordered that the defendants, Long Han Hong and Phan Hue Ong, shall not be ordered to pay any amount as child support at this time.
“It is further ordered that the defendants, Long Han Hong and Phan Hue Ong, shall have reasonable rights of visitation with the minor child.”

6 See M.C.L. § 710.43(1)(a)(v); M.S.A. § 27.3178(555.43)(1)(a)(v).

7 See also *Hastings v. Hastings,* 154 Mich.App. 96, 101, 397 N.W.2d 232 (1986); *Doss v. Baker,* 173 Mich.App. 546, 548, 434 N.W.2d 190 (1988).

8 Rather than granting leave to appeal in *Solomon,* this Court vacated the decision of the Court of Appeals and remanded for a determination whether the third-party plaintiffs had standing to petition for custody under 1990 P.A. 315, M.C.L. § 722.26b(2); M.S.A. § 25.312(6b)(2), giving the limited guardian of a child standing to petition for custody in certain circumstances. 437 Mich. 983, 468 N.W.2d 228 (1991).

9 M.C.L. § 552.16(1); M.S.A. § 25.96(1) provides that upon entering a judgment of divorce the circuit court may enter an order concerning the care, custody, and support of the minor children of the parties. The circuit court's jurisdiction over a child pursuant to divorce proceedings continues until the child is eighteen years old. M.C.L. § 552.17a(1); M.S.A. § 25.97(1)(1).

10 M.C.L. § 722.26; M.S.A. § 25.312(6) provides that the act “shall apply to all circuit court child custody disputes and actions, whether original or incidental to other actions.”

11 See Practice Commentary to M.C.L.A. § 600.601, pp 461–466.

12 Such a motion argues that “[t]he opposing party has failed to state a claim upon which relief can be granted.”

13 M.C.L. § 722.711–722.730; M.S.A. § 25.491–25.510.

14 In contrast, “a person” may give information to the juvenile division of the probate court that a child has been abandoned or is without proper custody, upon the basis of which the court may conduct a preliminary inquiry to decide if the interests of the public or the child require further action. If the court decides that formal jurisdiction should be acquired, it will authorize the filing of a petition. M.C.L. § 712A.11(2); M.S.A. § 27.3178(598.11)(2).
Similarly, “[a] person interested in the welfare of a minor ... may petition for the appointment of a guardian of the minor.” M.C.L. § 700.424; M.S.A. § 27.5424.

15 For example, by statute a nonparent in Illinois may commence a custody proceeding, “but only if [the child] is not in the physical custody of one of his parents.” Ill.Ann.Stat. ch. 40, ¶ 601(b)(2).
Texas law provides:

"An original suit affecting the parent-child relationship may be brought at any time by:

"(1) a parent of the child;

"(2) the child (through a representative authorized by the court);

* * * * * *

"(4) a guardian of the person or of the estate of the child;

* * * * * *

"(8) a person who has had actual possession and control of the child for at least six months immediately preceding the filing of the petition...." Tex.Fam.Code Ann. § 11.03.

Under Oregon law a person who has "established emotional ties creating a child-parent relationship with a child" may either intervene in a pending custody action or may petition for an order providing for custody, placement of the child, or visitation. Or.Rev.Stat. 109.119(1). A "child-parent relationship" is defined as

"a relationship that exists or did exist, in whole or in part, within the last six months preceding the filing of an action under this section, and in which relationship a person having physical custody of a child or residing in the same household as the child supplied, or otherwise made available to the child, food, clothing, shelter and incidental necessaries and provided the child with necessary care, education and discipline, and which relationship continued on a day-to-day basis, through interaction, companionship, interplay and mutuality, that fulfilled the child's psychological needs for a parent as well as the child's physical needs." Or.Rev.Stat. 109.119(4).

16 A limited guardian has all the powers of a guardian, except that a limited guardian may not consent to the marriage or the adoption of the child. M.C.L. § 700.424a(6); M.S.A. § 27.5424(1)(6).

17 The limitation placed on limited guardian standing also counsels against a holding that the Legislature intended that a third party has a legal right to custody and standing under the act on the basis of the fact that the child resides with the third party. As long as a parent substantially complies with a limited guardianship placement plan, the limited guardian may not bring an action for custody under the act, M.C.L. § 722.26b(2); M.S.A. § 25.312(6b)(2), and the probate court must terminate the limited guardianship upon the parent's petition and reintegrate the child into the parent's home. M.C.L. § 700.424c(3); M.S.A. § 27.5424(3)(3). These limitations on the limited guardian's ability either to petition for custody or oppose the termination of the guardianship exist without regard to the fact that during the guardianship a child may reside with the guardian rather than his parent.

18 See, e.g., McCarthy, *The confused constitutional status and meaning of parental rights,* 22 GaLR 975 (1988); Schoonmaker, *Constitutional issues raised by third-party access to children,* 25 FamLQ 95 (1991); note, *Third party custody and visitation: How many ways should we slice the pie?,* 1989 DetColLR 163; Morris, *Grandparents, uncles, aunts, cousins, friends: How is the court to decide which relationships will continue?,* 12 FamAdvocate 11 (1989); Gitlin, *Defining the best interest of children: Parents v others in custody proceedings,* 79 IllBJ 566 (1991); Symposium, *The impact of psychological parenting on child welfare decision-making,* 12 NYURL & Social Change 485 (1983–84); Curtis, *The psychological parent doctrine in custody disputes between foster parents and biological parents,* 16 ColumJL & Social Problems 149 (1980).

See also Victor, *Statutory review of third-party rights regarding custody, visitation, and support,* 25 FamLQ 19 (1991) (stating that "[s]ince there are no inherent rights of third parties to request custody or visitation of another person's child, it is incumbent on state legislatures to create such a right by drafting and passing of legislation affecting children and third parties").

19 See, generally, *Stanley v. Illinois,* 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972); *Santosky v. Kramer,* 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982).

See also *Smith v. Organization of Foster Families for Equality and Reform,* 431 U.S. 816, 846–847, 97 S.Ct. 2094, 2110–11, 53 L.Ed.2d 14 (1977):

"It is one thing to say that individuals may acquire a liberty interest against arbitrary governmental interference in the family-like associations into which they have freely entered, even in the absence of biological connection or state-law recognition of the relationship. It is quite another to say that one may acquire such an interest in the face of another's constitutionally recognized liberty interest that derives from blood relationship, state-law sanction, and basic human right—an interest the foster parent has recognized by contract from the outset. Whatever liberty interest might otherwise exist in the foster family as an institution, that interest must be substantially attenuated where the proposed removal from the foster family is to return the child to his natural parents."

20 Justice Williams stated the holding of the Court. He concurred in part with Justice Coleman, joined by Justice Fitzgerald, and also concurred in part with Justice Levin, joined by Chief Justice T.G. Kavanagh.

21 Justice Levin dissented, arguing that "[t]he Child Custody Act does not require that the best interests of the child shall control where the dispute is between a parent and a third party." *Id.* at 293–294, 244 N.W.2d 827.

22 "While custody may be awarded to grandparents or other third parties according to the best interests of the child in an appropriate case (typically involving divorce)," *Ruppel, supra,* 421 Mich. at 565–566, 364 N.W.2d 665, such an award of custody is based not on the third party's legal right to custody of the child, but on the court's determination of the child's best interests.

23 See 3 Story, *supra,* § 1754, p 371; 4 Pomeroy, *supra,* § 1306, p 873.

24 MCR 5.769 requires a guardian to file a written report annually and at other times pursuant to court order.

25 We reach the same conclusion with regard to a parent's attempt to voluntarily relinquish, as opposed to merely suspend, all parental rights pursuant to the act. Adoption in this state is purely statutory, *In re Draime,* 356 Mich. 368, 370, 97 N.W.2d 115 (1959), and the voluntary relinquishment of parental rights is governed exclusively by the Adoption Code. M.C.L. § 710.21 *et seq.;* M.S.A. § 27.3178(555.21) *et seq.* The Child Custody Act is not a substitute for the procedures and requirements of the Adoption Code where an adoption by consent is not possible because the child is not related within the fifth degree to the prospective adoptive parents. See M.C.L. § 710.43(1)(a)(v); M.S.A. § 27.3178(555.43)(1)(a)(v).

* See *Ruppel v. Lesner,* 421 Mich. 559, 364 N.W.2d 665 (1984).

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442 Mich. 648
Supreme Court of Michigan.

In re Baby Girl CLAUSEN.
Roberta and Jan DeBOER,
Petitioners–Appellants,
v.
Daniel SCHMIDT, Respondent–Appellee.
Jessica DeBOER (a/k/a Baby Girl Clausen), by her next friend, Peter DARROW, Plaintiff–Appellee,
v.
Roberta and Jan DeBOER,
Defendants–Appellees,
and
Cara and Daniel Schmidt,
Defendants–Appellants.

Nos. 96366, 96441, 96531 and 96532.
|
Calendar Nos. 1–2.
|
Argued June 3, 1993.
|
Decided July 2, 1993.
|
Dissenting opinion by Justice Levin, July 8, 1993.

Synopsis
Child's former temporary custodian petitioned for modification of Iowa court orders denying former custodians' adoption petition and granting custody of child to child's biological parents. The Circuit Court, Washtenau County, William F. Ager, Jr., J., denied biological father's motion for summary judgment. After his application for leave to appeal was denied, case was remanded to Court of Appeals, which reversed and remanded, 199 Mich.App. 10, 501 N.W.2d 193. Former custodians appealed. In related action, child, by her next friend, brought action for custody and declaratory and injunctive relief, asserting independent right to best interest hearing to determine custody. The Circuit Court, continued status quo. Biological parents sought leave to appeal before decision by State Board of Appeals. The Supreme Court held that: (1) Parental Kidnapping Prevention Act (PKPA) required enforcement of Iowa decision; (2) Iowa courts were not required to conduct hearing regarding best interests of child; and (3) former custodian lacked standing to bring custody action.

Affirmed in part, vacated in part, and remanded.

Levin, J., issued dissenting opinion.

West Headnotes (7)

[1] **Child Custody** Preemption by federal law
States Domestic Relations
Parental Kidnapping Prevention Act (PKPA) preempts inconsistent state law. 28 U.S.C.A. § 1738A.
2 Cases that cite this headnote

[2] **Adoption** Amendment and correction; modification
Child Custody Preemption by federal law
Child Custody Continuing jurisdiction
Courts Exclusive or concurrent jurisdiction
Courts Pendency and scope of prior proceeding
Infants Inter-jurisdictional issues in general
Infants Jurisdiction and venue
Parental Kidnapping Prevention Act (PKPA) precluded Michigan court's exercise of jurisdiction in adoptive parents' action to modify Iowa court orders terminating adoptive parents' rights as temporary guardians and custodians, denying their adoption petition, and directing that child's natural parents have custody; Iowa court custody determinations were made consistently with provision of PKPA, and jurisdiction of Iowa courts was exclusive and continuing, as natural father continued to reside in Iowa, and Iowa law provides for continuing

jurisdiction in custody matters. 28 U.S.C.A. § 1738A(a).

4 Cases that cite this headnote

[3] **Child Custody** Duty to recognize foreign decree

Judgment Enforcement in other states

Iowa court orders terminating Michigan adoptive parents' custody of child, denying their adoption petition, and awarding custody of child to her natural parents, were enforceable under Uniform Child Custody Jurisdiction Act (UCCJA) and Parental Kidnapping Prevention Act (PKPA), even if Iowa court failed to conduct hearing into best interests of child in making custody decision; overruling *Bull*, 311 N.W.2d 768. M.C.L.A. § 600.651 et seq.; 28 U.S.C.A. § 1738A.

19 Cases that cite this headnote

[4] **Child Custody** Hearing

Under Michigan law, where party has no legally cognizable claim to custody of child, there is no right to best interests hearing.

1 Cases that cite this headnote

[5] **Child Custody** Parties; intervention

Infants Construction, operation, and effect in general

Child's former temporary custodians whose adoption petition was denied when custody was awarded to child's natural parents lacked standing to litigate regarding custody of child; when temporary custody order was rescinded, former custodians became third parties to child and no longer had basis from which to claim substantive right of custody, and they had no federal constitutional right to seek custody. M.C.L.A. § 600.653(1), (1)(a, b).

7 Cases that cite this headnote

[6] **Child Custody** Parties; intervention

Minor child has no right to bring Child Custody Act action and obtain best interest of child hearing regarding her custody; act's consistent distinction between "parties" and "child" makes clear that act is intended to resolve disputes among adults seeking custody of child. M.C.L.A. § 722.24.

4 Cases that cite this headnote

[7] **Child Custody** Factors Relating to Parties Seeking Custody

Natural parent's right to custody is not to be disturbed absent showing of parental unfitness.

5 Cases that cite this headnote

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OPINION

PER CURIAM.

These two related cases arise out of a child custody dispute involving the competing claims of the child's natural parents (Cara and Daniel Schmidt) and the third- ****651** party custodians with whom the child now lives (Roberta and Jan DeBoer).

While we will deal at length with the various arguments marshalled in support of their claims, we sum up our analysis of the competing arguments by reference to the words of the United States Supreme Court: "No one would seriously dispute that a deeply loving and interdependent relationship with an adult and a child in his or her care may exist even in the absence of blood relationship." *Smith v. Organization of Foster Families,* 431 U.S. 816, 843–844, 97 S.Ct. 2094, 2109–2110, 53 L.Ed.2d 14 (1977). But there are limits to such claims. In the context of foster care, the Court has said:

> "[T]here are also important distinctions between the foster family and the natural family. First, unlike the earlier cases recognizing a right to family privacy, the State here seeks to interfere, not with a relationship having its origins entirely ***655** apart from the power of the State, but rather with a foster family which has its source in state law and contractual arrangements.... [T]he liberty interest in family privacy has its source, and its contours are ordinarily to be sought, not in state law, but in intrinsic human rights, as they have been understood in 'this Nation's history and tradition.' Here, however, whatever emotional ties may develop between foster parent and foster child have their origins in an arrangement in which the State has been a partner from the outset.
>
> * * * * * *
>
> "A second consideration related to this is that ordinarily procedural protection may be afforded to a liberty interest of one person without derogating from the substantive liberty of another.... It is one thing to say that individuals may acquire a liberty interest against arbitrary governmental interference in the family-like associations into which they have freely entered, even in the absence of biological connection or state-law recognition of the relationship. It is quite another to say that one may acquire such an interest in the face of another's constitutionally recognized liberty interest that derives from blood relationship, state-law sanction, and basic human right—an interest the foster parent has recognized by contract from the outset." 431 U.S. pp. 845–846, 97 S.Ct. pp. 2110–2111.

Likewise, the DeBoers acquired temporary custody of this child, with whom they had no prior relationship, through the power of the state and must be taken to have known that their right to continue custody was contingent on the completion of the Iowa adoption. Within nine days of assuming physical custody and less than one month after the child's birth, the DeBoers learned of Cara Schmidt's claim that the waiver of rights procured by the attorney acting on behalf of the DeBoers was unlawful because she had not been afforded the seventy-two hour waiting period required by ***656** Iowa law.[1] Within two months of the child's birth, the DeBoers learned of Daniel Schmidt's claim of paternity when on March

27, 1991, he filed a petition to intervene in the DeBoers' adoption proceeding.

The State of Iowa has not arbitrarily interfered "in a family-like association freely entered." Rather, the Iowa courts have proceeded with the adoption action initiated by the DeBoers, and at the conclusion of that litigation ruled that there would be no adoption, preventing the creation of the family unit that was the objective of the adoption petition.

In Docket No. 96366,[2] we affirm the judgment of the Court of Appeals for two ****652** independent reasons. First, the Uniform Child Custody Jurisdiction Act[3] (UCCJA) and the federal Parental Kidnapping Prevention Act[4] (PKPA) deprive the Michigan courts of jurisdiction over this custody dispute and require the enforcement of the orders of the Iowa courts directing that the Schmidts have custody of the child. Second, the DeBoers lack standing to bring this custody action under our decision in *Bowie v. Arder,* 441 Mich. 23, 490 N.W.2d 568 (1992).

***657** In Docket Nos. 96441, 96531, and 96532[5] we vacate the orders of the Washtenaw Circuit Court and direct that the action be dismissed for failure to state a claim upon which relief may be granted. While a child has a constitutionally protected interest in family life, that interest is not independent of its parents' in the absence of a showing that the parents are unfit. In this case, in the Iowa litigation the DeBoers were unable to prove that the child's father would not be a fit parent, and no claim has been made that her mother is unfit.

I

The facts are set out at length in the opinion of the Court of Appeals. Briefly, on February 8, 1991, Cara Clausen gave birth to a baby girl in Iowa. Proceedings in Iowa have established that defendant Daniel Schmidt is the child's father. On February 10, 1991, Clausen signed a release of custody form, relinquishing her parental rights to the child. Clausen, who was unmarried at the time of the birth,[6] had named Scott Seefeldt as the father. On February 14, 1991, he executed a release of custody form.

On February 25, 1991, petitioners Roberta and Jan DeBoer, who are Michigan residents, filed a petition for adoption of the child in juvenile court ***658** in Iowa. A hearing was held the same day, at which the parental rights of Cara Clausen and Seefeldt were terminated, and petitioners were granted custody of the child during the pendency of the proceeding. The DeBoers returned to Michigan with the child, and she has lived with them in Michigan continuously since then.

However, the prospective adoption never took place. On March 6, 1991, nine days after the filing of the adoption petition, Cara Clausen filed a motion in the Iowa Juvenile Court to revoke her release of custody. In an affidavit accompanying the request, Clausen stated that she had lied when she named Seefeldt as the father of the child, and that the child's father actually was Daniel Schmidt. Schmidt filed an affidavit of paternity on March 12, 1991, and on March 27, 1991, he filed a petition in the Iowa district court, seeking to intervene in the adoption proceeding initiated by the DeBoers.

On November 4, 1991, the district court in Iowa conducted a bench trial on the issues of paternity, termination of parental rights, and adoption. On December 27, 1991, the district court found that Schmidt established by a preponderance of the evidence that he was the biological father of the child; that the DeBoers failed to establish by clear and convincing evidence that Schmidt had abandoned the child or that ****653** his parental rights should be terminated; and that a best interests of the child analysis did not become appropriate unless abandonment was established. On the basis of these findings, the court concluded that the termination proceeding was void with respect to Schmidt, and that the DeBoers' petition to adopt ***659** the child must be denied. Those decisions have been affirmed by the Iowa appellate courts.[7]

On remand from the Iowa Supreme Court, the district court ordered the DeBoers to appear on December 3, 1992, with the child.[8] The DeBoers did not appear at the hearing; instead, their Iowa attorney informed the court that the DeBoers had received actual notice of the hearing but had decided not to appear. In an order entered on December 3, 1992, the district court terminated the DeBoers' rights as temporary guardians and custodians of the child. The court found that

> "Mr. and Mrs. Deboer have no legal right or claim to the physical custody of this child. They are acting outside any legal claim to physical control and possession of this child."

On the same day their rights were terminated in Iowa, the DeBoers filed a petition in Washtenaw Circuit Court, asking the court to assume jurisdiction under the UCCJA. The petition requested that the court enjoin enforcement of the

Iowa custody order and find that it was not enforceable, or, in the alternative, to modify it to give custody to the DeBoers. On December 3, 1992, the Washtenaw Circuit Court entered an ex parte temporary restraining order, which directed that the child remain in the custody of the DeBoers, and ordered Schmidt not to remove the child from Washtenaw County.

On December 11, 1992, Schmidt filed a motion for summary judgment to dissolve the preliminary injunction and to recognize and enforce the Iowa ***660** judgment. The Washtenaw Circuit Court held a hearing on Schmidt's motion on January 5, 1993. It found that it had jurisdiction to determine the best interests of the child. It denied Schmidt's motion for summary judgment, and directed that the child remain with the DeBoers until further order of the court.[9]

On March 29, 1993, the Court of Appeals reversed[10] the Washtenaw Circuit Court's denial of Schmidt's motion for summary judgment, concluding that that court lacked jurisdiction under the UCCJA, and that under our decision in *Bowie v. Arder, supra,* the DeBoers lacked standing to bring the action. 199 Mich.App. 10, 501 N.W.2d 193 (1993).

Following the Court of Appeals decision, on April 14, 1993, a complaint for "child custody, declaratory relief, and injunctive relief" was filed in Washtenaw Circuit Court. The plaintiff was described as "Jessica DeBoer (a/k/a Baby Girl Clausen), by her next friend, Peter Darrow." Mr. Darrow, a Washtenaw County attorney, had been appointed as one of the co-guardians ad litem for the child in the earlier custody case. On that date, the Washtenaw Circuit Court entered an order appointing Darrow as next friend in the new action, and an order to show cause directing the ***661** DeBoers and Schmidts to appear on April 22. ****654** The latter included language that pending that hearing, "the minor child's residence *status quo* shall be maintained." At the hearing on April 22, after hearing argument by counsel for the Schmidts and the DeBoers, the circuit court entered an "order continuing status quo." It provided, in part:

> "1. The status quo as to the residence of the Plaintiff, Jessica DeBoer, with Defendants, Roberta and Jan DeBoer shall be maintained during the pendency of this action or until further order of this Court, or any appellate court.
>
> "2. Counsel for the parties, and all other interested persons, if they obtain permission from the Court, may file briefs on the legal and constitutional issues raised by this action within 21 days from the date of this Order."

On April 27, 1993, the Schmidts filed an application for leave to appeal to the Court of Appeals. They also filed an application for leave to appeal to this Court before decision by the Court of Appeals under MCR 7.302(C)(1). On May 6, 1993, we granted the DeBoers' application in Docket No. 96366,[11] and the Schmidts' application for leave to appeal before decision by the Court of Appeals in Docket Nos. 96441, 96531, and 96532.[12] 442 Mich. 903.

II

Interstate enforcement of child custody orders ***662** has long presented vexing problems. This arose principally from uncertainties about the applicability of the Full Faith and Credit Clause of the United States Constitution.[13] Because custody decrees were generally regarded as subject to modification, states had traditionally felt free to modify another state's prior order.[14]

The initial attempt to deal with these jurisdictional problems was the drafting of the Uniform Child Custody Jurisdiction Act, promulgated by the National Conference of Commissioners on Uniform State Laws in 1968. 9 ULA 123. That uniform act has now been enacted, in some form, in all fifty states, the District of Columbia, and the U.S. Virgin Islands. The Michigan version of the act is found at M.C.L. § 600.651 *et seq.;* M.S.A. § 27A.651 *et seq.* The act provides standards for determining whether a state may take jurisdiction of a child custody dispute,[15] and sets forth the ****655** circumstances ***663** in which the courts of other states are prohibited from subsequently taking jurisdiction,[16] are required to enforce custody decisions of the original state,[17] and are permitted to modify such decisions.[18]

***664** Despite the widespread enactment of the UCCJA, variations in the versions adopted in some states, and differing interpretations, resulted in continuing uncertainty about the enforceability of custody decisions.[19] In 1980, Congress responded by adopting the Parental Kidnapping Prevention Act,[20] 28 U.S.C. § 1738A. The PKPA "imposes a duty on the States to enforce a child custody determination entered by a court of a sister State if the determination is consistent with the provisions of the Act." *Thompson v. Thompson,* 484 U.S. 174, 175–176, 108 S.Ct. 513, 514, 98 L.Ed.2d 512 (1988). The PKPA includes provisions similar to the UCCJA, and

emphatically ***665** imposes the requirement that sister-state custody orders be given effect.[21]

****656** III

In its March 29, 1993, opinion, the Court of Appeals agreed with Daniel Schmidt that the ***666** Washtenaw Circuit Court lacked jurisdiction to modify the Iowa custody orders and was instead required to enforce them. It explained:

> "Schmidt asserts that pursuant to the Full Faith and Credit Clauses in both the United States Constitution, US Const., art. IV, § 1, and the UCCJA, M.C.L. § 600.663; M.S.A. § 27A.663, the Washtenaw Circuit Court was obligated to recognize and enforce the valid judgment from Iowa. Iowa exercised jurisdiction, entered a judgment, and retained jurisdiction. Iowa has continued to exercise jurisdiction throughout, even to holding the DeBoers in contempt of court.
>
> "We find that the Washtenaw Circuit Court lacked jurisdiction to intervene in this case. The UCCJA has been enacted by every state, including Michigan. See 1975 P.A. 297. Its primary purpose is to avoid jurisdictional competition between states by establishing uniform rules for deciding when states have jurisdiction to make child custody determinations. MCL 600.651; MSA 27A.651. Pursuant to § 656(1) of the UCCJA, MCL 600.656(1); MSA 27A.656(1), Michigan is precluded from exercising jurisdiction if a matter concerning custody is pending in another state at the time the petition to modify is filed in this state. See *Moore v. Moore,* 186 Mich.App. 220, 226, 463 N.W.2d 230 (1990). An adoption proceeding is included in the definition of a custody proceeding under the UCCJA. MCL 600.652(c); MSA 27A.652(c). *Foster v. Stein,* 183 Mich.App. 424, 430, 454 N.W.2d 244 (1990). The DeBoers filed their petition in Washtenaw Circuit Court on December 3, 1992. On that date the Iowa district court entered an order terminating the DeBoers' rights as temporary guardians and custodians of [the child], and scheduled a hearing for the DeBoers to show cause why they should not be held in contempt. Although the issues concerning the dismissal of the DeBoers' adoption petition and the right to physical custody of [the child] had been determined by the Iowa Supreme Court before December 3, 1992, further proceedings were ***667** scheduled in the case. Under § 656(1) of the UCCJA, the Washtenaw Circuit Court was precluded from intervening in this case, and was obligated to recognize and enforce the Iowa order of December 3, 1992. US Const, art IV, § 1; MCL 600.663; MSA 27A.663.
>
> "We find that the DeBoers' contention that a Michigan court could modify the Iowa order because Iowa did not act substantially in conformity with the UCCJA by doing a 'best interests of the child' analysis is without merit. The Iowa court dismissed the adoption petition and granted custody of [the child] to Schmidt because he was the biological father of the child and because his parental rights had not been terminated. The Iowa court found that Iowa statutes and case law did not require the type of best interests analysis sought by the DeBoers in Michigan unless statutory grounds for termination had been established." 199 Mich.App. pp. 18–19, 501 N.W.2d 193.

IV

A

The DeBoers argue that the Iowa custody orders were subject to modification by Michigan courts because the Iowa proceedings were no longer "pending" under the UCCJA at the time the Washtenaw Circuit Court action was filed on December 3, 1992. They point to ****657** *Ford Motor Co. v. Jackson,* 47 Mich.App. 700, 209 N.W.2d 794 (1973), for the proposition that an action is no longer pending once a final determination has been made on appeal. They maintain that when the Iowa Supreme Court affirmed the judgment awarding custody to the natural father on September 23, 1992, and thereafter denied the DeBoers' request for rehearing, that made the decree final, and therefore modifiable. The only remaining matters ***668** in Iowa were hearings to enforce the final order. They maintain that such enforcement proceedings do not involve custody issues, and thus the proceeding with regard to custody was no longer pending.

[1] **[2]** We reject the DeBoers' construction of the UCCJA.[22] Enforcement of the Iowa decision is required by the PKPA,[23] and therefore a detailed analysis of the UCCJA is not required.

***669** The congressionally declared purpose of the PKPA is to deal with inconsistent and conflicting laws and practices by which courts determine their jurisdiction to decide disputes

between persons claiming rights of custody. Inconsistency in the determination by courts of their jurisdiction to decide custody disputes contributes to

> "the disregard of court orders, excessive relitigation of cases, [and] obtaining of conflicting orders by the courts of various jurisdictions...." P.L. 96–611, § 7(a)(3), 94 Stat. 3569.

Congress also recognized that

> "among the results of those conditions and activities are the failure of the courts of such jurisdictions to give full faith and credit to the judicial proceedings of the other jurisdictions ... and harm to the welfare of children and their parents and other custodians." P.L. 96–611, § 7(a)(4), 94 Stat. 3569.

For these reasons, among others, Congress declared that the best interests of the child required the establishment of a uniform system for the assumption of jurisdiction to

> "(3) facilitate the enforcement of custody and visitation decrees of sister States;
>
> ****658** "(4) discourage continuing interstate controversies over child custody in the interest of greater stability of home environment and of secure family relationships for the child;
>
> ***670** "(5) avoid jurisdictional competition and conflict between State courts in matters of child custody and visitation which have in the past resulted in the shifting of children from State to State with harmful effects on their well-being." *Id.,* § 7(c)(3–5).

The suggestion that in this context the best interests purpose of the PKPA mandates a best interests analysis in Iowa, failing which the Iowa decision is not entitled to full faith and credit, would permit the forum state's view of the merits of the case to govern the assumption of jurisdiction to modify the foreign decree. It also suggests that Congress intended to impose the substantive best interests rule in all custody determinations on the laws of the fifty states.[24] This interpretation is in conflict with the directive of Congress that "[t]he appropriate authorities of every State shall enforce according to its terms, and shall not modify except as provided ... any child custody determination made consistently with the provisions of this section by a court of another State." 28 U.S.C. § 1738A(a).

***671** It has been aptly noted that the vulnerability of a custody decree to an out-of-state modification presented the greatest need of all for the reform effort of the PKPA. "In language that is subject to little or no misinterpretation the jurisdiction of the initial court continues to the exclusion of all others as long as that court has jurisdiction under the law of that state and the state remains the residence of the child or any contestant." Baron, *Federal preemption in the resolution of child custody jurisdiction disputes,* 45 Ark.L.R. 885, 901 (1993).

Certainty and stability are given priority under the PKPA, which gives the home state exclusive continuing jurisdiction. Thus, the PKPA expressly provides that if a custody determination is made consistently with its provisions, "[t]he appropriate authorities of every State *shall* enforce [it] according to its terms, and *shall not* modify" that custody decision. 28 U.S.C. § 1738A(a) (emphasis added). "A child custody determination ... is consistent with the provisions [of the PKPA] only if" the court making the determination had jurisdiction under its own laws, and the state was the "home state" of the child when the proceedings were commenced. 28 U.S.C. § 1738A(c)(1). At the time of commencement of both the termination and adoption proceedings, Iowa unquestionably had jurisdiction under its own laws and Iowa was unquestionably the home state of the child. Thus, the child custody determination made by the Iowa court was made consistently with the provisions of the PKPA.

Where the custody determination is made consistently with the provisions of the PKPA, the jurisdiction of the court that made the decision is exclusive and continuing as long as that state "remains the residence of the child or of any contestant," and it still had jurisdiction under its ***672** own laws.[25] 28 U.S.C. § 1738A(d). Unquestionably, ****659** Daniel Schmidt continues to reside in Iowa. Furthermore, Iowa law provides for continuing jurisdiction in custody matters,[26] and the Iowa courts regarded themselves as continuing to have jurisdiction of the custody proceeding because they continued to issue orders in the case: the order of December 3, 1992, terminating the DeBoers' right to custody and appointing Daniel Schmidt as custodian, and the order of January 27, 1993, holding the DeBoers in contempt. Because the Iowa custody determination was made consistently with the terms of the PKPA, and because Iowa's jurisdiction ***673** continues, the Iowa court's order must be enforced.

The courts of this state may only modify Iowa's order if Iowa has declined to exercise its jurisdiction to modify it.

28 U.S.C. § 1738A(f). Iowa has not declined to exercise its jurisdiction to modify its custody order; it has simply declined to order the relief sought by the DeBoers. Modification is not permitted on these facts:[27] Iowa continues to have jurisdiction, it has not declined to exercise that jurisdiction, its jurisdiction is, therefore, exclusive, and Iowa's exclusive continuing jurisdiction precludes the courts of this state from exercising jurisdiction to modify the Iowa order.

The UCCJA and the PKPA are legislative responses to the concerns expressed by Justice Jackson regarding the failure to recognize a custody judgment of a sister state. "A state of the law such as this, where possession is not merely nine points of the law but all of them and self-help the ultimate authority, has little to commend it in legal logic or as a principle of order in a federal system."[28] However, the uniformity of decisions contemplated by Congress cannot be realized if "judicial home-state favoritism and the substitution of 'the best interest of the child' inquiry for jurisdictional inquiry ... promote continuing custody litigation...." Blakesley, *Child custody—jurisdiction and procedure,* 35 Emory L.J. 291, 359 (1986).

> "The PKPA does indeed preempt state law in the resolution of jurisdictional disputes. Initial custody jurisdiction is limited to just one forum—the home state. Modification jurisdiction is exclusively reserved ***674** to the court that rendered the initial decree. Notice and opportunity to be heard must be given prior to a custody determination. Sister states are required to enforce those decrees and give them full faith and credit. Sister states are prohibited from interfering with those courts which are properly asserting jurisdiction.
> * * * * * *
> ****660** "Custody litigation is full of injustice—let there be no doubt about that. No system of laws is perfect. Consistency in the application of the laws, however, goes a long way toward curing much of the injustice. While the laws of the fifty states may vary as to the substantive rules in custody determinations, at least there is a uniform standard imposed equally on all the states by the PKPA for determining which court makes that determination. The PKPA and its preemptive effect can no longer be avoided." Baron, *supra* at 912.

B

[3] The DeBoers argue that the Iowa judgment should not be enforced because the Iowa courts did not conduct a hearing into the best interests of the child in making the custody decision. They maintain that this undercuts the Iowa decision in two respects. First, they say this means that the Iowa decision was not in conformity with the UCCJA,[29] and therefore not entitled to enforcement under ***675** that statute.[30] Second, they believe that the Iowa proceeding was repugnant to Michigan public policy.

We reject the contention that the decision of the Iowa courts not to conduct a best interests of the child hearing in the circumstances of this case justifies the refusal to enforce the Iowa judgments.[31]

The UCCJA and the PKPA are procedural statutes. To be sure, they express the purpose of assuring that the state that is in the best position to make ***676** a proper determination regarding custody of the child be the one in which the action is brought, and that other states will follow the decision made there. That purpose has been achieved in this case. There can be no doubt that at the time the Iowa proceedings commenced in February 1991, that state was the appropriate one to take jurisdiction; it was in the best position to resolve ****661** the issues presented. As was conceded by counsel for the DeBoers during oral argument, the statutes do not provide that a best interests of the child standard is the substantive test by which all custody decisions are to be made. Each state, through legislation and the interpretative decisions of its courts, is free to fashion its own substantive law of family relationships within constitutional limitations.

Further, we do not find the Iowa proceedings to be so contrary to Michigan public policy as to require us to refuse to enforce the Iowa judgments. Before turning to Michigan public policy, however, a preliminary matter must be examined.

After passage of the PKPA, we are not free to refuse to enforce the Iowa judgment as being contrary to public policy. That statute says:

> "The appropriate authorities of every State shall enforce according to its terms, and shall not modify except as provided in subsection (f) of this section, any child custody determination made consistently with the provisions of this section by a court of another State." 28 U.S.C. § 1738A(a).

Subsection (f) does not provide a basis for declining to enforce the Iowa order. For the first time at oral argument, the DeBoers asserted that the order was not made consistently with the PKPA. As they contended regarding the UCCJA, they think an order is not made consistently with the statute if a best interests of the child test is not used. However, ***677** they point to no provision of the statute with which the Iowa courts did not comply, and they cite no authority for their interpretation of the PKPA.

Turning to the matter of Michigan public policy, while in many custody disputes Michigan does apply a best interests of the child test, there are circumstances in which we do not. For example, § 39 of the Adoption Code has a pair of provisions regarding the termination of parental rights of putative fathers who seek custody of a child:

> "(1) If the putative father does not come within the provisions of subsection (2), and if the putative father appears at the hearing and requests custody of the child, the court shall inquire into his fitness and his ability to properly care for the child and shall determine whether the best interests of the child will be served by granting custody to him. If the court finds that it would not be in the best interest of the child to grant custody to the putative father, the court shall terminate his rights to the child.
>
> "(2) If the putative father has established a custodial relationship with the child or has provided support or care for the mother during pregnancy or for either mother or child after the child's birth during the 90 days before notice of the hearing was served upon him, the rights of the putative father shall not be terminated except by proceedings in accordance with section 51(6) of this chapter[32] or section 2 of chapter XIIA.[33]" M.C.L. § 710.39; M.S.A. § 27.3178(555.39).

There will be many cases in which the putative ***678** father meets the conditions that bring him within subsection 2, but in which someone else could make a persuasive showing that the best interests of the child require denying the father custody. Nevertheless, under the statute, the best interests standard of subsection 1 would not apply.[34]

Similarly, in the case of limited guardianships, if the hearing establishes that the parent or parents have substantially complied with a limited guardianship placement plan, the court is required to terminate the guardianship without using the best interests test that is applied where there has ****662** not been such compliance. M.C.L. § 700.424c(3); M.S.A. § 27.5424(3)(3). This is so even if the guardian could prevail on a best interests standard.

[4] Finally, under Michigan law where a party has no legally cognizable claim to custody of a child, there is no right to a best interests hearing. E.g., *Ruppel v. Lesner,* 421 Mich. 559, 364 N.W.2d 665 (1984); *Bowie v. Arder, supra.*

We express no opinion about whether we would require a Michigan court to hold a best interests of the child hearing if we were faced with the circumstances presented to the Iowa courts. However, we cannot hold that the Iowa judgment is unenforceable under the UCCJA and PKPA because such a hearing was not held.

V

The Court of Appeals also concluded that the DeBoers lacked standing to claim custody of the child. The Court said:

> "We hold that the DeBoers lacked standing to bring this action in Washtenaw Circuit Court. The ***679** Iowa district court order of December 3, 1992, implemented the decision of the Iowa Supreme Court and stripped the DeBoers of any legal claim to custody of [the child]. The grant of temporary custody was rescinded. At that time, the DeBoers became third parties with respect to [the child], and no longer had a basis on which to claim a substantive right to custody. *Bowie, supra,* 441 Mich. at 43–45, 49, 490 N.W.2d 568, states that neither the Child Custody Act[35] nor 'any other authority' gives a third party who does not possess a substantive right to custody or is not a guardian, standing to create a custody dispute. A right to legal custody cannot be based on the fact that a child resides or has resided with the third party. We take the reference in *Bowie, supra* at 45, 490 N.W.2d 568, to 'any other authority' to include the UCCJA.
>
> "The DeBoers' argument that *Bowie, supra,* does not apply to this case is without merit. As noted, the pronouncement in *Bowie, supra,* regarding the standing of third parties to create custody disputes is expressly not limited to actions brought under the Child Custody Act. Moreover, contrary to the DeBoers' assertions, they have created a custody dispute by filing a petition in Washtenaw Circuit Court. The

Iowa Supreme Court decision, implemented by the Iowa district court's order of December 3, 1992, dismissed the DeBoers' petition to adopt [the child] and rescinded their status as temporary guardians and custodians. The DeBoers had no further legal rights to [the child]. The DeBoers have attempted to use the UCCJA and the Washtenaw Circuit Court to create anew a right that the Iowa courts had extinguished. The DeBoers initiated a custody dispute in this state. Pursuant to *Bowie, supra,* they had no standing to do so. To disavow *Bowie* in this case would give an advantage to third parties in interstate custody disputes not enjoyed by third parties in intrastate disputes.

> "The DeBoers' reliance on *In re Danke,* 169 Mich.App. 453; 426 N.W.2d 740 (1988), and ***680** *In re Weldon,* 397 Mich. 225, 244 N.W.2d 827 (1976) (cases in which third parties with no legal right to custody were granted standing to bring a custody action), is misplaced. Both cases were decided before *Bowie, supra.* The *Bowie* Court specifically stated that *Weldon, supra,* was overruled, and that a third party could not gain standing simply by filing a complaint and asserting that a change in custody would be in the best interests of the child. *Bowie, supra* [441 Mich.] at 48–49 [490 N.W.2d 568]" 199 Mich.App. p. 20, 501 N.W.2d 193.

VI

[5] The DeBoers advance a variety of arguments in support of their claim that they have standing to litigate regarding the custody of the child.[36] First, they argue ****663** that the UCCJA grants them standing, pointing particularly to two of the jurisdictional provisions in § 653(1).[37]

***681** The DeBoers also argue that *Bowie v. Arder* does not deny them standing. To begin with, they think that *Bowie* let stand statements in the lower court decision to the effect that "once judicial intervention has already taken place, the court may award custody to third parties." 190 Mich.App. 571, 573, 476 N.W.2d 649 (1991). Further, they see the only prohibition as being on the ability of a third party to *create* a custody dispute. In their view, judicial intervention in this dispute began over two years ago, and they did not create the dispute. The initial decree in Iowa resulted from Schmidt's creation of a custody dispute when he filed a petition for intervention on March 27, 1991. Their filing of the petition in Michigan was a response to and an effort to modify the Iowa custody decree dissolving their right to custody of the child.

Further, the DeBoers believe that *Bowie* is inapplicable because it is a case dealing with the Child Custody Act. This is a UCCJA action in which the Child Custody Act's provisions regarding best interests of the child are only incidentally involved. Even *Bowie* recognized that kind of incidental use of the Child Custody Act.

In addition *Bowie* said that a circuit court has the power to grant custody to "third parties according to the best interests of the child in an appropriate case (typically involving divorce)" and that "such an award of custody is based not on the third party's legal right to custody of the child, but on the court's determination of the child's best interests." 441 Mich. p. 49, n. 22, 490 N.W.2d 568.

Finally, the DeBoers assert that despite *Bowie* they had a substantive right to custody because they had custody pursuant to the February 25, 1991, order of the Iowa district court.

***682** In addition, the DeBoers maintain that there is a protected liberty interest in their relationship with the child, which gives them standing. They trace the recent history of constitutional protection of parental rights beginning with *Stanley v. Illinois,* 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972), through *Quilloin v. Walcott,* 434 U.S. 246, 98 S.Ct. 549, 54 L.Ed.2d 511 (1978), *Smith v. Organization of Foster Families,* 431 U.S. 816, 97 S.Ct. 2094, 53 L.Ed.2d 14 (1977), and *Lehr v. Robertson,* 463 U.S. 248, 103 S.Ct. 2985, 77 L.Ed.2d 614 (1983), to *Michael H. v. Gerald D.,* 491 U.S. 110, 109 S.Ct. 2333, 105 L.Ed.2d 91 (1989). From these cases, they extract the principles that it is the relationship between the parent and child that triggers significant constitutional protection and that the mere existence of a biological link is not determinative.

We reject these arguments. As the Court of Appeals noted, *Bowie* was not limited to Child Custody Act cases. The UCCJA is a procedural statute governing the jurisdiction of courts to entertain custody disputes. It is not enough that a person assert to be a "contestant" or "claim" a right to custody with respect to a child. If that were so, then any person could obtain standing by simply asserting a claim to ****664** custody, whether there was any legal basis for doing so or not. The Court of Appeals has correctly read our decision in *Bowie* as requiring the existence of some substantive right to custody of the child. We adhere to the holding of *Bowie* that a third party does not obtain such a substantive right by virtue of the

child's having resided with the third party. 441 Mich. p. 43, 490 N.W.2d 568.[38]

We also agree with the Court of Appeals rejection of the DeBoers' arguments regarding the "creation ***683** " of a dispute and that they only seek to modify the Iowa order. It is true that *Bowie* recognized the incidental application of the Child Custody Act standards in other kinds of actions —typically divorce cases. However, the problem with the DeBoers' reasoning is that there is no action that they are entitled to bring to which the Child Custody Act can be applied incidentally.

It may be that the Iowa district court's February 25, 1991, order appointing the DeBoers as custodians during the pendency of the Iowa adoption proceeding was sufficiently analogous to a Michigan guardianship (which would create standing)[39] to have given them standing to prosecute a custody action during the effectiveness of that order. However, as the Court of Appeals said, when the temporary custody order was rescinded, they became third parties to the child and no longer had a basis on which to claim a substantive right of custody.[40]

The United States Supreme Court cases on which the DeBoers rely do not establish that they have a federal constitutional right to seek custody of the child. None involved disputes between a natural parent or parents on one side and nonparents on the other. While some of those cases place limits on the rights of natural parents, particularly unwed fathers, they involve litigation pitting one natural parent against the other, in which, almost of necessity, one natural parent must be ***684** denied rights that otherwise would have been protected. Sometimes a nonparent in a sense "prevails" in such actions, but that has been in the context of adoption by a stepfather who is married to the child's natural mother[41] or legitimization of the status of the natural mother's husband, who is not the biological father.[42]

Several of the cases talk about an unwed father's rights as being dependent on the development of a relationship with the child. We read those decisions as providing the justification for denying the unwed father's rights, rather than as establishing that nonparent custodians obtain such rights merely by having custody. Further, as the Iowa district court noted after reviewing these United States Supreme Court cases:

> "It is therefore now clearly established that an unwed father who has not had a custodial relationship with a child nevertheless has a constitutionally protected interest in establishing that relationship."

And, as the Iowa Supreme Court concluded:

> "We agree with the district court that abandonment was not established by clear and convincing evidence. In fact, virtually all of the evidence regarding Daniel's intent regarding this baby suggests just the opposite: Daniel did everything he could reasonably do to assert his parental rights, beginning even before ****665** he actually knew that he was the father."[43]

***685** VII

[6] In Docket Nos. 96441, 96531, and 96532, the next friend for the child argues that we should recognize the right of a minor child to bring a Child Custody Act action and obtain a best interests of the child hearing regarding her custody. Because of the interrelationship of this action to the DeBoers' application for leave to appeal in Docket No. 96366, we granted leave to appeal before decision by the Court of Appeals and directed the parties to brief the question whether the action should be dismissed for failure to state a claim upon which relief may be granted. Basically, the next friend advances three theories on which a child is entitled to bring such an action.

First, the next friend maintains that the Child Custody Act gives children the right to bring such actions. M.C.L. § 722.24; M.S.A. § 25.312(4), says that in actions under the act, "the court shall declare the inherent rights of the child." The next friend asserts that there is nothing in the act that would deprive the child of the right to bring an action.

Second, the next friend maintains that the child has a due process liberty interest in her relationship with the DeBoers. Cases in other contexts are cited for the proposition that children are "persons" under the constitution and that constitutionally protected liberty interests run both to adults and minors. E.g., *In re Gault,* 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967); *Planned Parenthood v. Danforth,* 428 U.S. 52, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976); *Tinker v. Des Moines Independent Community School Dist.,* 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969). The next friend

reiterates the arguments ***686** made by the DeBoers that cases such as *Lehr v. Robertson* and *Smith v. Organization of Foster Families* establish that the liberty interest in family life arises out of relationships based on day-to-day contact and not on biological relationships.

Third, the next friend argues that the child is denied equal protection on two grounds. First, children are treated differently on the basis of whether they are in the custody of "psychological" parents rather than a biological parent. Second, the Child Custody Act grants some children residing with third-party custodians the right to a best interests hearing (those living with court-appointed guardians), but not others.

We do not believe that the Child Custody Act can be read as authorizing such an action.[44] The act's consistent distinction between the "parties" and the "child" makes clear that the act is intended to resolve disputes among adults seeking custody of the child.

It is true that children, as well as their parents, have a due process liberty interest in their family life. However, in our view those interests are not independent of the child's parents. The Legislature has provided a right of parental custody and control of children:

> "Unless otherwise ordered by a court order, the ***687** parents[45] of an unemancipated ****666** minor are equally entitled to the custody, control, services and earnings of the minor, but if 1 parent provides, to the exclusion of the other parent, for the maintenance and support of the minor, that parent has the paramount right to control the services and earnings of the minor." M.C.L. § 722.2; M.S.A. § 25.244(2).

[7] The mutual rights of the parent and child come into conflict only when there is a showing of parental unfitness.[46] As we have held in a series of cases, the natural parent's right to custody is not to be disturbed absent such a showing, sometimes despite the preferences of the child.

In *Burkhardt v. Burkhardt,* 286 Mich. 526, 282 N.W. 231 (1938), the child was one year old at the time of his parents' divorce. The mother was awarded custody, but voluntarily placed the child with third parties. Several years later, the mother took custody of the child. The father obtained an order giving him legal custody, but directing that the child actually be in the care of the third ***688** parties. We reversed, awarding custody to the mother:

> "It is a well established principle of law, too well grounded to need citation of authority, that the parents, whether rich or poor, have the natural right to the custody of their children, subject to judicial control only when the safety or interests of the child demand it.... The choice of a child of the tender age of four years cannot be considered by the court in its determination of what disposition shall be made of the case." 286 Mich. pp. 534–535, 282 N.W. 231.

Liebert v. Derse, 309 Mich. 495, 15 N.W.2d 720 (1944), involved the custody of a six year old. He had been legally adopted by a couple. His adoptive mother died when the child was two years old, and the adoptive father temporarily placed him with the child's aunt. Several years later, when the child was six, he objected to returning to his father, who petitioned for habeas corpus, seeking return of the child. The trial court declined to disturb the "wholesome and happy surroundings" of custody with the aunt. We reversed:

> "We recognize the long-established rule that the best interest of the child is of paramount importance, ... and that it is our judicial duty to safeguard his welfare and care.... However, we never have interpreted such rule so as to deprive a parent of the custody of his or her child, unless it was shown that the parent was an unsuitable person to have such custody.
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> * * * * * *
>
> "When placed on the witness stand, the boy said, in substance, that he thought his father would be good to him but that he preferred to stay with defendants. Such preference was the natural desire of a small child to remain in the environment ***689** to which he had become accustomed. While his wishes are entitled ****667** to consideration, it is clear that a six-year-old child is hardly competent to determine what environment and whose custody are best for his present and future welfare. Furthermore, his present wish to remain with defendants cannot overrule the established legal right of his father to his custody." 309 Mich. p. 500, 504, 15 N.W.2d 720.

In *Riemersma v. Riemersma,* 311 Mich. 452, 18 N.W.2d 891 (1945), the child had lived with her grandparents since she was two years old. Two years later, the mother took her back, and the grandparents brought an action for custody. After quoting from *Liebert v. Derse,* we held the mother entitled to custody:

> "There was no allegation or showing that the mother was not a suitable person to have the custody of her infant daughter. In the absence of such a showing, she was ... clearly entitled to the child's custody." 311 Mich. at 462, 18 N.W.2d 891.

Finally, In *Herbstman v. Shiftan,* 363 Mich. 64, 108 N.W.2d 869 (1961), the natural father placed his one and one-half-year-old daughter with relatives of his deceased wife. Three and one-half years later he sought to have the child returned to him. We summarized the applicable principles:

> "It is a well-established principle of law that the parents, whether rich or poor, have the natural right to the custody of their children. The rights of parents are entitled to great consideration, and the court should not deprive them of custody of their children without extremely good cause. A child also has rights, which include the right to proper and necessary support; education as required by law; medical, surgical, and other care necessary for his health, morals, or well-being; the right to proper custody by his parents, guardian, ***690** or other custodian; and the right to live in a suitable place free from neglect, cruelty, drunkenness, criminality, or depravity on the part of his parents, guardians, or other custodian. It is only when these rights of the child are violated by the parents themselves that the child becomes subject to judicial control." 363 Mich. p. 67–68, 108 N.W.2d 869.

Despite the limited contact that the father had had with the child during the years, we reversed the trial court and awarded custody to him.

Nothing in the more recent United States Supreme Court decisions requires a different result.[47] Indeed, several of its decisions emphasize the limitations on minors' rights to independently assert rights regarding their custody and care. *Michael H. v. Gerald D., supra; Parham v. J.R.,* 442 U.S. 584, 99 S.Ct. 2493, 61 L.Ed.2d 101 (1979).

In the Iowa proceedings, a challenge to Daniel Schmidt's fitness was vigorously prosecuted by the DeBoers, and they failed to prove that he was unfit. That determination is no longer challenged.

We also disagree with the next friend's assertion that the child's interests were not considered in Iowa. A guardian ad litem was appointed before Daniel Schmidt moved to intervene in the action. We have no reason to believe that the guardian ad litem's advice to the court was anything but a good-faith effort to advise regarding the interests of the child. While that proceeding did not use the "best interests of the child" standard that the next friend and the DeBoers prefer, there is no basis for requiring use of that standard.[48]

****668** ***691** With regard to the equal protection arguments, we reject the view that children residing with their parents are similarly situated to those residing with nonparents; as just explained, the relationship between natural parents and their children is fundamentally different than that between a child and nonparent custodians. Nor does the Child Custody Act's exception for guardians deny equal protection. Children living with guardians and those living with other third-party custodians are also not similarly situated. The safeguards in the guardianship statute provide protection against manipulative attempts to temporarily obtain possession and use that as the basis for a Child Custody Act action.

VIII

In Docket No. 96366, we affirm the judgment of the Court of Appeals, and in Docket Nos. 96441, 96531, and 96532, we remand the case to the Washtenaw Circuit Court with directions that the action be dismissed for failure to state claims upon which relief may be granted. The clerk is directed to issue the judgment orders forthwith. Pursuant to MCR 7.317(C)(3), the filing of a motion for ***692** rehearing will not stay enforcement of the judgments.

We direct the Washtenaw Circuit Court to enter an order enforcing the custody orders entered by the Iowa courts. In consultation with counsel for the Schmidts and the DeBoers, the circuit court shall promptly establish a plan for the transfer of custody, with the parties directed to cooperate in the transfer with the goal of easing the child's transition into the Schmidt home. The circuit court shall monitor and enforce the transfer process, employing all necessary resources of the court, and shall notify the clerk of this Court 21 days following the release of this opinion of the arrangements for transfer of custody. The actual transfer shall take place within 10 days thereafter.

To a perhaps unprecedented degree among the matters that reach this Court, these cases have been litigated through fervent emotional appeals, with counsel and the adult parties pleading that their only interests are to do what is best for the

child, who is herself blameless for this protracted litigation and the grief that it has caused.[49] However, the clearly applicable legal principles require that the Iowa judgment be enforced and that the child be placed in the custody of her natural parents. It is now time for the adults to move beyond saying that their only concern is the welfare of the child and to put those words into action by assuring that the transfer of custody is accomplished ***693** promptly with minimum disruption of the life of the child.

MICHAEL F. CAVANAGH, C.J., and MALLETT, RILEY, BRICKLEY, BOYLE and GRIFFIN, JJ., concur.

LEVIN, Justice (dissenting).

I would agree with the majority's analysis if the DeBoers had gone to Iowa, purchased a carload of hay from Cara Clausen, and then found themselves in litigation in Iowa with Daniel Schmidt, who also claimed an interest in the hay. It could then properly be said that the DeBoers "must be taken to have known"[1] that, rightly or wrongly, the Iowa courts might rule against them, and they should, as gracefully as possible,[2] accept an adverse decision of the Iowa courts. Michigan would then have had no interest in the outcome, and would routinely enforce a decree of the Iowa courts against the DeBoers.

But this is not a lawsuit concerning the ownership, the legal title, to a bale of hay. This is not the usual *A* v *B* lawsuit; ****669** *Schmidts v. DeBoers,* or, if you prefer, *DeBoers v. Schmidts.*

There is a *C,* the child, "a feeling, vulnerable, and [about to be] sorely put upon little human being":[3] Baby Girl Clausen, also known as Jessica DeBoer, who will now be told, "employing all necessary resources of the [Washtenaw Circuit] [C]ourt," that she is not Jessie, that the DeBoers are not Mommy and Daddy, that her name is ***694** Anna Lee Schmidt,[4] and that the Schmidts, whom she has never met, are Mommy and Daddy. This child might, indeed, as the circuit judge essentially concluded, have difficulty trying that on for size at two and one-half years, she might, indeed, suffer an identity crisis. The judge said:

> "We had different degrees of testimony from the experts. All the way from permanent, serious damage, she would never recover from, down to the child would recover in time. But every expert testified that there would be *serious traumatic injury to the child at this time.*" (Emphasis added.)[5]

A

The majority's analysis, that the DeBoers should have known when they filed their petition for adoption in Iowa that they might lose, overlooks that the child did not choose to litigate in Iowa, over four hundred miles from her only home, the legal and factual issues that would decide whether her world would be destroyed, and know that she might lose.

A leading commentator, Professor Homer H. Clark, Jr., suggests that the preferable jurisdiction for adoption is the *child's* home state[6] and, thus, not necessarily the home state of a biological parent.

***695 B**

The well established standard for resolving custody disputes between biological parents is the best interests of the child.[7] Many courts apply essentially the same standard for resolving custody disputes between biological parents and third parties, persons who have had actual physical custody of a child for an extended period of time.[8] Chief Judge Charles D. Breitel, speaking for the New York Court of Appeals, expressed it well:

> "*The day is long past* in this State, if it had ever been, *when the right of a parent to the custody of his or her child, where the extraordinary circumstances are present, would be enforced inexorably, contrary to the best interest of the child, on the theory solely of an absolute legal right.* Instead, in the extraordinary circumstance, when there is a conflict, the best interest of the child has always been regarded as superior to the right of parental custody. Indeed, analysis of the cases reveals a shifting of emphasis rather than a remaking of substance. This shifting reflects more the modern principle that *a child is a person, and not a subperson over whom the parent has an absolute possessory interest. A child has rights too, some of which are of a constitutional magnitude....*" *Bennett v. Jeffreys,* 40 N.Y.2d 543, 546, 387 N.Y.S.2d 821, 356 N.E.2d 277 (1976). (Emphasis added.)

Other courts adhere to the "parental right" theory, and generally, in a dispute between a parent and a third-party custodian, award custody to the parent unless the ****670** parent is unfit.[9] Professor Clark criticizes the rigidity of that approach:

> "The parental right doctrine has acquired rigidity ***696** from the dubious and amorphous principle that the natural parent has some sort of constitutional 'right' to the custody of his child. This principle comes dangerously close to treating the child in some sense as the property of his parent, an unhappy analogy which the Supreme Court has been guilty of in another context.
> * * * * * *
> "There would not be insuperable obstacles to the development of workable principles in these cases if the courts could manage to avoid doctrinaire statements about parental rights. In general this would require recognition that the child's welfare is the principle guiding the process of decision, but in addition that the emotional and psychological advantages to the child of a parent's care should be placed high in the scale of factors which contribute to that welfare. The application of these principles should vary with the specific type of case before the court."[10]

***697** The majority's analysis focusing on the contest between the Schmidts and the DeBoers for possession of the child misfocuses on whether biological parents or persons acting as parents have the better "legal right," better legal title, not to a carload of hay, but to a child.[11] The focus of the Parental Kidnapping Protection Act is not on the interests of the contestants—parents or persons acting as parents—but, rather, on the best interests of the child.

C

The superior claim of the child to be heard in this case is grounded not just in law, but in basic human morality. Adults like the Schmidts and the DeBoers make ****671** choices in their lives, and society holds them responsible for their choices. When adults are forced to bear the consequences of their ***698** choices, however disastrous, at least their character and personality have been fully formed, and that character can provide the foundation for recovery, the will to go on.

The character and personality of a child two and one-half years old is just beginning to take shape. To visit the consequences of adult choices upon the child during the formative years of her life, and to force her to sort out the competing emotional needs of the Schmidts and DeBoers, is unnecessarily harsh and without legal justification. The PKPA does not require this result.

The PKPA was enacted to protect the child.[12] This Court, by ignoring obvious issues concerning the welfare of the child and by focusing exclusively on the concerns of competing adults, as if this were a dispute about the vesting of contingent remainders, reduces the PKPA to a robot of legal formality with results that Congress did not intend.

D

The motif of the majority opinion is that the PKPA made us do it, that this Court had no choice consistent with the "law."[13] That thesis ignores the legislative history of the PKPA[14] and judicial decisions that construe the PKPA. The PKPA does not oblige this Court to turn its back on the child.

The majority rejects the rationale[15] of *E.E.B. v.* ***699** *D.A.,* 89 N.J. 595, 446 A.2d 871 (1982), cert. den. sub nom. *Angle v. Bowen,* 459 U.S. 1210, 103 S.Ct. 1203, 75 L.Ed.2d 445 (1983). The New Jersey Supreme Court, in the context of an adoption that failed because parental rights were not duly terminated, ruled that prospective adoptive parents should retain custody of the child in preference to the biological parent because that was in the child's best interests.

The majority states that the approach of the New Jersey Supreme Court in *E.E.B.* "would form the basis for an opportunity to *relitigate* best interests."[16] (Emphasis added.) *E.E.B.* does not, however, provide an opportunity for "relitigation" of best interests; *E.E.B.,* as stated by the majority, declined to enforce the Ohio custody decree because the Ohio court "did *not* conduct a hearing using a best interests of the child test."[17] (Emphasis added.)

This Michigan litigation is not *relitigation.* The DeBoers accept the Iowa court's determination that Daniel Schmidt is the biological father and do not contest the decision to restore Cara Schmidt's parental rights. They seek, rather, to litigate,

for the first time, whether transferring custody of the child to the Schmidts is in her best interests.

E.E.B. is one of two state supreme court decisions in which the court considered the issue whether a state is obliged by the PKPA or the UCCJA to enforce a custody determination made by another state following a failed adoption where the other state did not, before making its custody determination, consider the best interests of the child. The other case is *Lemley v. Barr,* 176 W.Va. 378, 343 S.E.2d 101 (1986). The West Virginia Supreme ***700** Court, cognizant of the UCCJA,[18] concluded that ****672** there must be a best interests hearing before it could decide whether to require prospective adoptive parents to transfer custody of the child to biological parents whose parental rights had not been duly terminated. As in *E.E.B.* and the instant case, the courts of the state where the biological parents resided had failed to conduct such a hearing before requiring the prospective adoptive parents to return the child to them.

Because the United States Supreme Court has ruled that the PKPA does not provide an implied cause of action in United States courts to determine which of two conflicting state custody determinations is valid,[19] there are no federal court decisions construing the PKPA and there will be none. The conflict between the New Jersey and the West Virginia decisions on the one hand, and this Court's decision in the instant case on the other, can only be resolved by the United States Supreme Court.

I agree with the New Jersey and West Virginia Supreme Courts—the only courts before the instant case to consider the precise issue before us—that the PKPA does not require a state, such as Michigan, to transfer, without a best interests hearing, custody of the child from prospective adoptive parents with whom she has bonded almost since birth, to comply with the decree of a state in which the biological parents live, when that decree was entered without considering ***701** whether a transfer of custody would serve the child's best interests.[20]

E

Professor Clark, after reviewing at length the history of adjudication under the PKPA[21] and the UCCJA, found little or no consistency in adjudication. He saw little diminution in what he characterized as local court chauvinism, the awarding of custody to the home town parent.

He also observed that the PKPA and the UCCJA have provided an excuse for courts that wished to avoid the difficult and distasteful task of reaching the merits, the evaluation of parents as candidates for custody, "of trying to discover what disposition will best serve or least harm the child." Instead of grappling with the tough issues of deciding the case on the merits, "the case can be analyzed in terms technical enough to delight a medieval property lawyer. And if the judge is sufficiently determined, ***702** he can often find that the case should be heard in some other state."[22]

I

The majority states that enforcement of the Iowa decree is required by the PKPA, and that it is unnecessary to consider the UCCJA because the PKPA preempts inconsistent state law.[23]

The majority identifies Iowa as the "home state" of the child under the PKPA. The majority errs in so concluding. Michigan is the home state under the PKPA, and therefore the Iowa decree is not enforceable under the PKPA in Michigan.

****673 A**

Congress enacted the PKPA, not because of an abstract concern about "interstate controversies over child custody," but rather "in the interest of greater stability of home environment and of secure *family relationships* for the child" (emphasis added)[24]—to secure "family relationships," not ***703** solely biological family relationships. Among the evils that Congress found and sought to remedy was "harm to the welfare of children and their parents *and other custodians*." (Emphasis added.)[25]

Congress sought to achieve its objective of "secure family relationships for the child"[26] by assuring that a "determination of custody and visitation is rendered in the *state which can best decide the case in the interest of the child.*" (Emphasis added.)[27] Michigan, not Iowa, is the state that can best decide this case in the interest of the child.

B

Congress identified the "home state" of the child as the "state which can best decide the case in the interest of the child."[28] "Home state" is defined as ***704** the "State in which, immediately preceding the time involved, the child lived with his parents, a parent, *or a person acting as a parent, for at least six consecutive months,* and in the case of a child less than six months old, the State in which the child *lived from birth* with any of such persons."[29] (Emphasis added.)

In this case, the child did not "live from birth" with either Cara Clausen or the DeBoers. The child resided for a few days at the hospital where she was born, then for two weeks with caregivers to whom the child had been entrusted, and has lived in Michigan since the end of February 1991, when, within three weeks of birth, physical ****674** custody was transferred to the DeBoers pursuant to a court order then entered in Iowa.

Michigan is the child's home state because she has lived in Michigan with the DeBoers, persons "acting as a parent,"[30] for at least six consecutive ***705** months—actually for over two years.[31]

Michigan, the home state, would also qualify as the state having jurisdiction under the PKPA pursuant to the alternative "significant connection" test for a case where no state is the home state. In such a case, Congress designated as the "state which can best decide the case in the interest of the child," a state where "it is in the best interest of the child that a court of such state assume jurisdiction because" the "child and his parents, or the child and at least one contestant, have a significant connection" "other than mere physical presence in such State" *and* where there is available "substantial evidence concerning the child's present or future care, protection, training, and personal relationships."[32]

***706** The child did not have a significant connection with Daniel Schmidt in Iowa. There is more substantial evidence concerning the child's present or future care, protection, training and personal relationships in Michigan than in Iowa. There has not been a finding that it is in the child's best interests that Iowa assume jurisdiction of ****675** the custody dispute that arose—after an Iowa court entered an order transferring custody of the child to the DeBoers and they had set up home with the child in Michigan—when it became known that Cara Clausen had committed a fraud on the court and Daniel Schmidt came forward to assert his rights as a putative father.

C

The majority acknowledges that the PKPA "gives the home state exclusive continuing jurisdiction,"[33] and that " '[a] child custody determination ... *is consistent with the provisions* [of the PKPA] *only* if" the court making the determination had jurisdiction under its own laws, and the state was the 'home state' of the child when the proceedings were commenced."[34] The majority then asserts that *Iowa was "unquestionably the home state of the* ***707** *child* "[35] without any reference to or consideration of the statutory definitions[36] of "home state."

Iowa "unquestionably" was *not* the home state of the child, either at the time of the commencement of the adoption, or of the termination of parental rights proceedings,[37] or at any other time. *Only* a state in which the child has resided for at least six consecutive months can be a home state.[38] The child in the instant case resided in Iowa for less than three weeks.

The majority misstates the facts and misreads the PKPA, on which it so heavily relies, when it asserts that Iowa was "unquestionably the home state of the child."

The majority also asserts that "[t]here can be *no doubt* that at the time the Iowa proceedings commenced in February 1991, that state was the *appropriate one* to take jurisdiction; it was in the *best position* to resolve the issues presented."[39] (Emphasis added.)

The formulations "appropriate" and "best position" do not appear in the PKPA. It is an overstatement to assert that there can be "no doubt" that Iowa had jurisdiction, that it was the "appropriate ***708** one" under the PKPA, when it was neither the "home state" nor the state of "significant connection" within the meaning of the PKPA. While Iowa may have been in the "best position" to resolve the issues concerning Daniel Schmidt's assertion of parental rights, it is not undoubted that Iowa was in the "best position" to resolve the custody issues here presented.

D

That Michigan, not Iowa, is the state that had jurisdiction within the meaning of the PKPA is clear from the commentary to the UCCJA on which the PKPA is modeled:

> "The first clause of the paragraph is important: Jurisdiction exists only if it is in the *child's* interest [emphasis in original], *not merely the interest or convenience of the feuding parties* [emphasis added], to determine custody in a particular state. The interest of the child is served when the forum has optimum access to relevant evidence about the child and family. There must be maximum rather than minimum contact with the state. The *submission of the parties to a forum* [emphasis added], perhaps for purposes of divorce, *is not sufficient* [emphasis added] without additional factors establishing closer ties with the state. Divorce jurisdiction does not necessarily include custody jurisdiction. See Clark, Domestic Relations 578 (1968)." Comment to § 3, UCCJA, 9 ULA; part I, p. 145.

The issue to whom custody of the child should be awarded did not arise until after ****676** the child had left Iowa and had begun to reside in Michigan. That issue—the central issue in this case—did not fully ripen for adjudication until it was determined, following a hearing in November 1991, and a decision affirmed by the Iowa Supreme Court in September 1992, *after* the child had been living in ***709** Michigan for over six months, that Daniel Schmidt was the biological father of the child, that he had not abandoned the child, and that he was not unfit under Iowa's standards.

As stated in the commentary, jurisdiction exists "*only* if it is in the *child's interest,* not merely the interest or convenience of the feuding parties, to determine custody in a particular state" (emphasis added).[40] "The interest of the child is served when the forum has optimum access to relevant evidence about the child and family. *There must be maximum rather than minimum contact with the state.*"[41] (Emphasis added.)

Neither the Iowa Supreme Court nor this Court has found that it is "in the child's interest" that Iowa assume jurisdiction to decide the custody dispute between the Schmidts and the DeBoers, which arose after the child began living in Michigan with the DeBoers.

There was no contact between Daniel Schmidt and the child in Iowa, minimum contact between Cara Schmidt and the child in Iowa, and maximum contact between the child and the DeBoers in Michigan.

The "submission of the parties" to Iowa jurisdiction for purposes of determining whether the Iowa court would enter an order of adoption, and later whether Daniel Schmidt was the biological father, had abandoned the child, or was a fit parent, *was "not sufficient without additional factors establishing closer ties with the state.* Divorce jurisdiction [and I would add parental rights termination jurisdiction[42]] *does not necessarily include custody jurisdiction.*"[43]

***710** The bases for PKPA jurisdiction are "required" to "be interpreted in the *spirit of the legislative purposes* expressed in" the PKPA and the UCCJA,[44] among which are to achieve the entry of a custody decree "rendered in that state which can best decide the case in the interest of the child," and to "assure that litigation concerning the custody of a child take place ordinarily in the *state with which the child and his family have the closest connection* and where significant evidence concerning his care, protection, training, and personal relationships is most readily available."[45]

E

In sum, the underlying theme of the PKPA and the UCCJA is that a determination of custody and visitation should be made according to the child's best interests. Jurisdiction should be exercised by the state that has the most "significant connection" to the child if "it is in the *best interest of the child.*"[46] Congress has said that that state is the home state, in this case Michigan.

The PKPA seeks to assure that a custody determination is "rendered in the State which can *best decide the case in the interest of the child.*"[47] Congress has said that that state is the home state, in this case Michigan.

The PKPA was enacted to avoid jurisdictional competition between states that had, in the past, ***711** resulted in shifting children ****677** from state to state "*with harmful effects on their well-being.*"[48]

In according jurisdictional priority to the home state, or the state with significant connections, in this case Michigan, Congress sought to avoid jurisdictional competition, shifting children from state to state, and the resulting harmful effects on their well-being.

F

Assuming that the PKPA applies to adoption proceedings,[49] and that is the assumption on which the majority opinion is predicated,[50] the underlying themes of the act must be observed.

Professor Clark wrote that subject matter jurisdiction in adoption should be given to the home state of the child:

> "If the rationale of jurisdictional rules has been correctly outlined, it points to subject matter jurisdiction in adoption where a) the prospective adoptive parents, the petitioners, reside in the jurisdiction, *and* b) the child is physically present in the jurisdiction. 'Reside' should be construed here to mean not technical domicile, but residence in the popular sense, of a person's home for the time ***712** being, the purpose of this construction being merely to require a sufficient connection with the jurisdiction *to enable the court to make the necessary judgments about the child's prospective environment.*"[51] (Emphasis added.)

He continues, stating that the analysis he suggests seems to be in the process of being adopted through the UCCJA and the PKPA:

> "If the foregoing argument is sound and the UCCJA and PKPA do apply to adoption and termination of parental rights, *then the usual basis for jurisdiction over such proceedings will be proof that the child's 'home state' is the state of the forum.* Under the UCCJA jurisdiction may also be based on proof that the state of the forum has a 'significant connection' with the child and at least one of the contesting parties. The use of either of these bases for jurisdiction should go far to achieve the purposes outlined above as being the purposes which jurisdictional rules governing adoption should serve."[52] (Emphasis added.)

As Professor Clark explains, the only issues in an adoption proceeding with respect to the natural parents, are "whether the consent is genuine, or whether the alleged abandonment or neglect did occur. These resemble *the issues in the ordinary transitory lawsuit,* and there is thus no need for any requirements of domicile or residence on the part of the natural parents."[53]

But, suggests Professor Clark, "[s]ince adoption consists of matching a child with a new parent or set of parents," there is a need for a "thorough opportunity to study the child and his background. To give the court this opportunity, the child must ***713** be present and available in the jurisdiction."[54] He concludes for those reasons that that ****678** subject matter jurisdiction in adoption should be where the adoptive parents reside and the child is physically present.

Iowa might have been the appropriate jurisdiction and in the best position to decide whether Cara Clausen's consent was genuine and whether Daniel Schmidt's claimed parental rights should be terminated because he abandoned the child or was unfit. Merely because Iowa might have been the appropriate jurisdiction for those purposes, does not mean that it had jurisdiction within the *meaning of the PKPA* to decide whether custody of the child should be permanently awarded, in the case of this failed adoption, to the Schmidts or the DeBoers.

If, as Professor Clark contends, the PKPA provides "the governing rules for jurisdiction in [adoption] cases and for the effect to be given to decrees of adoption or for the termination of parental rights,"[55] then Michigan, the home state, and not Iowa had subject matter jurisdiction within the meaning of the PKPA.

G

I conclude that because Iowa was not the home state, or the state with significant connection, and thus did not have jurisdiction within the meaning of the PKPA, the PKPA does not require Michigan to enforce an Iowa decree transferring custody of the child from the DeBoers to the Schmidts.

II

It was necessary to resolve whether Daniel ***714** Schmidt was the biological father, had abandoned the child, and was fit or unfit before Iowa could decide that he had parental rights and that his parental rights should not be terminated.

Until those issues were adjudicated, the issue whether custody should remain with the DeBoers because that was in the child's best interests had not ripened for adjudication.

The Iowa decree is not res judicata.

A

Although Iowa had in personam jurisdiction over all the parties, and, under traditional views of *in personam jurisdiction,* could enter a custody order transferring the child from the DeBoers to the Schmidts, it did not have *subject matter jurisdiction* to make a custody determination within the meaning of the PKPA, enforceable under the strictures of the PKPA, because Michigan, by then, had become the home state of the child and the state with significant connection. The DeBoers left Iowa with the child in good faith, not to escape Iowa jurisdiction.

The issues actually litigated and determined in Iowa were whether Daniel Schmidt was the biological father, had abandoned the child, and was fit or unfit. Because it was determined that he was the biological father, had not abandoned the child, and was not unfit, it was decreed that he had parental rights and that the DeBoers' petition for adoption must therefore be dismissed. Subsequently, it was determined that Cara Schmidt's parental rights would be restored because she and Daniel Schmidt had married, not because it was determined that her consent to the adoption of the child was invalid.

The proceedings in Iowa, which began as adoption ***715** proceedings, were transformed into parental rights termination proceedings after Daniel Schmidt intervened in the adoption proceedings. In holding that his parental rights would be recognized and not terminated, the Iowa Supreme Court said that, in a parental rights termination proceeding, the best interests of the child are not to be considered under Iowa law in deciding whether parental rights should be terminated unless the statutory grounds for termination have been established. Having concluded that Daniel Schmidt's parental rights would not be terminated, the custody of the child was ordered transferred to him.

The DeBoers' petition for rehearing, asserting that although it had been adjudicated that Daniel Schmidt's *parental rights* would not be terminated, the best interests of the child should be considered before ordering the transfer of *custody* from the ****679** DeBoers to the Schmidts was denied without comment.

B

The only issues actually litigated and decided[56] were whether Daniel Schmidt's parental rights should be recognized and not terminated. The reason given by the Iowa Supreme Court for not considering the best interests of the child was that the child's best interests are not relevant on the issues in a parental rights termination proceeding.

The separate question whether, in a dispute between a parent and a third-party custodian, the ***716** best interests of the child should be considered in deciding whether to transfer custody from the custodian to the parent was not actually litigated. And, as stated by the Iowa Supreme Court, a determination of the best interests of the child was not essential or even pertinent to decision of the question whether Daniel Schmidt's parental rights should be recognized and not terminated.

In denying rehearing, the Iowa Supreme Court did not enlarge on the reasons set forth in its opinion. Its silence does not provide a basis for concluding, contrary to the statements in the opinion explaining why the best interests of the child could not be considered on the *termination of parental rights issue,* that it had considered, adjudicated and decided that the best interests of the child may not be considered in deciding the *separate issue whether custody should be transferred* from the custodian, the DeBoers, to the parent, Daniel Schmidt. That issue, not having been adjudicated and decided, and not being necessary or pertinent to decision under Iowa law on the question whether Daniel Schmidt's parental rights should be terminated, is not precluded under the doctrine of res judicata.[57]

III

For reasons already stated, I would hold that the Iowa decree may not be enforced under the PKPA ***717** because Iowa was not the home state, and thus did not have jurisdiction.

A

Assuming that Iowa had jurisdiction, the question remains whether the Iowa decree was subject to *modification* in Michigan, because Iowa declined to exercise jurisdiction to

conduct a hearing to consider whether to modify on the basis of the best interests of the child following its conclusions that Daniel Schmidt was the biological father, had not abandoned the child, and was not unfit, and that his parental rights would be recognized. I would hold that the decree was subject to modification because Iowa declined to exercise jurisdiction to conduct such a hearing.[58]

The majority stresses[59] that, under the PKPA, the jurisdiction of Iowa courts "continues" as long as those courts have jurisdictions ****680** under the law of Iowa, and any contestant resides in Iowa,[60] and that a court of another state "shall not exercise jurisdiction in any proceeding for a custody determination ***718** commenced during the pendency of a proceeding in a court of another State where such court of that other State is exercising jurisdiction consistently with the provisions of this section *to make a custody determination.*"[61] (Emphasis added.)

I acknowledge, assuming that Iowa had jurisdiction, although it was not the home state or the state of significant connection, that its jurisdiction "continued." I further acknowledge that Michigan could not then exercise jurisdiction while Iowa courts were exercising jurisdiction "*to make* a custody determination." But the Iowa courts had made their custody determination, ordering that custody of the child be transferred, before Michigan exercised jurisdiction to consider whether the Iowa decree should be modified. The continuing jurisdiction provision of the PKPA does not bar Michigan from considering whether to modify the Iowa decree after Iowa had made its determination.

Proceeding on the hypothesis that Iowa had jurisdiction, although not the home state or state of significant connection, Michigan could exercise jurisdiction to modify the Iowa decree only if Iowa courts had "declined to exercise such jurisdiction to modify such determination."[62] The Iowa Supreme Court failed to exercise jurisdiction to modify when it denied rehearing to consider the best interests of the child, and, therefore, Michigan could properly exercise jurisdiction to modify the Iowa decree.

The New Jersey Supreme Court, in similar circumstances, held that "Ohio's failure to conduct a best interest hearing constitutes refusal to exercise jurisdiction under 28 U.S.C.A. § 1738A(f)(2). Under ***719** PKPA, therefore, New Jersey is free to modify the Ohio decree. This result comports with the congressional intent that child custody decisions be made in the state best able to determine the best interest of the child." *E.E.B. v. D.A., supra,* 89 N.J. p. 607, 446 A.2d 871.[63] The court said:

> "A custody dispute is more than a jurisdictional chess game in which winning depends on compliance with predetermined rules of play. A child is not a ****681** pawn. In exercising its discretion within the confines of UCCJA and PKPA, a court should consider not only the literal wording of the statutes ***720** but their purpose: to define and stabilize the right to custody in the best interest of the child." *E.E.B. v. D.A., supra,* p. 611, 446 A.2d 871.

The West Virginia Supreme Court reached essentially the same conclusion in the construction of the UCCJA, and required a best interests hearing before it would decide, following a failed adoption, whether to enforce a decree ordering transfer of custody entered by the state where the biological parents resided where a best interests hearing had not been conducted. *Lemley v. Barr, supra.*[64]

B

As in *E.E.B.,* the DeBoers litigated the termination of parental rights issue in the Iowa courts. The DeBoers requested a best interests determination at each stage in the proceedings. After the Iowa Supreme Court ruled that the best interests of the child were not a factor to be considered in deciding whether to terminate the parental rights of Daniel Schmidt, the DeBoers, like the adoptive parents in *E.E.B.,* petitioned for rehearing, seeking a best interests hearing with respect to a change in custody. The Iowa Supreme Court, like the Ohio ***721** Supreme Court in *E.E.B.,* denied rehearing.[65] The DeBoers then, like the adoptive parents in *E.E.B.* and *Lemley,*[66] asked that the home state, Michigan, conduct a best interests hearing.

As in *E.E.B.,* the refusal of the Iowa Supreme Court to hear the petition for rehearing constituted a refusal to exercise jurisdiction to modify. Because the Iowa Supreme Court declined to exercise jurisdiction to conduct a hearing to consider whether to modify on the basis of the best interests of the child, Michigan may, consistent with the PKPA, exercise jurisdiction to conduct a hearing to consider whether to modify on the basis of the best interests of the child.

C

In *Interest of Brandon L.E.,* the Supreme Court of West Virginia modified a Florida custody decree that required that a custodial grandmother transfer custody of a child to his father with whom he had little contact.[67] The court wrote: "To protect ****682** the equitable rights of a child in this situation, the ***722** child's environment should not be disturbed without a clear showing of significant benefit to him, notwithstanding the parent's assertion of a legal right to the child."[68]

Daniel Schmidt, like the father in *Brandon L.E.,* prevailed on the issue of parental fitness. He asserted, as does Daniel Schmidt, that it was through no fault of his that he did not have an opportunity to establish a relationship with his child. The West Virginia Supreme Court, nevertheless, concluded that the child's best interests must prevail. The child's right to a best interests determination lies in equity and is not dissipated by a finding of parental fitness.[69]

Even in child snatching cases, courts have placed consideration of the child's best interests ahead of punishment of the wrongdoer. Courts have recognized that the passage of time may mean that it is in the child's best interests to continue living with the party that "kidnapped" the child from the lawful custodian.[70]

***723 D**

The majority states that the suggestion that "the best interests purpose of the PKPA mandates a best interests analysis in Iowa" also suggests that "Congress intended to impose the substantive best interests rule in all custody determinations on the laws of the fifty states."[71]

I acknowledge that the "PKPA is a procedural and jurisdictional statute, which does not impose principles of substantive law on the states."[72]

Iowa may indeed be free to award the custody of children, in particular circumstances, without regard to their best interests. It does not follow that a decree rendered without consideration of the child's best interests is entitled to enforcement under the PKPA, where the court rendering the decree declined to exercise jurisdiction to conduct ***724** a hearing to consider whether to modify the decree on the basis of the child's best interests.

A decree rendered by a state other than the home state is not a determination made ****683** "consistent with the provisions" of the PKPA.[73] A decree rendered without consideration of the child's best interests is not a decree that the Congress intended that all other states must enforce.

IV

The DeBoers advance several theories to support their argument that they have standing to litigate their claims to custody of the child. They argue that the UCCJA[74] grants them standing, that they have a protected liberty interest in their relationship with the child, and that *Bowie v. Arder*[75] does not deny them standing. The majority discusses and rejects all these arguments.[76]

I would hold that the DeBoers have standing under the PKPA. Because the DeBoers have standing under the PKPA, and, as the majority notes, the PKPA "clearly preempts inconsistent state law"[77] the majority's analysis and rejection of the DeBoers' arguments is incorrect.

A

The controlling provisions in the standing dispute are those defining jurisdiction. The DeBoers claim jurisdiction under both the "home state" ***725** and "significant connection" tests of the PKPA.[78] "Home state" jurisdiction requires that the child be living with "his parents, a parent, or a person acting as parent" for at least six months "immediately preceding the time involved."[79] The PKPA provides that " '*person acting as a parent* ' means a person, other than a parent, who has physical custody of a child and who has *either been awarded custody by a court or claims a right to custody.*"[80] (Emphasis added.)

"[S]ignificant connection" jurisdiction hinges on whether "the child and his parents, or the child and at least one *contestant,* have a significant connection with the State other than mere physical presence."[81] (Emphasis added.) The PKPA provides that " '[c]ontestant' means a person, including

a parent, who *claims a right to custody* or visitation of a child."[82]

The question, then, is whether the DeBoers are either "person[s] acting as ... parent[s]" or "contestants" within the meaning of the act. I would hold that the DeBoers are "person[s] acting as ... parent[s]" because they have physical custody of the child and were granted custody by a court, and also because they claim a right to custody.

It is undisputed that the DeBoers have physical custody of the child. Physical custody alone is not, however, enough under the definition of "person acting as a parent." A person must have physical custody *and* have been "awarded" custody by a court *or* claim a right to custody. Alternatively, ***726** because they "claim a right to custody" they are "contestants" within the meaning of the PKPA.

The DeBoers obtained custody when Cara Schmidt signed the consent to adoption. They were granted and permitted to retain physical custody by court order during each step of the proceedings in Iowa, until the order of the Iowa district court terminating all rights to custody on December 3, 1992. Michigan courts have maintained the status quo thereafter.

The majority holds that the rescission of the temporary custody order by the Iowa district court made the DeBoers third parties to the child and stripped them of any basis on which to claim a substantive right of custody.[83]

****684** The PKPA provides however, that a person acting as a parent is someone who "has ... been" awarded custody. "Has" refers to the past. In the past, the DeBoers were granted physical custody by the Iowa courts.

The DeBoers also have standing as persons who "claim[ ] a right to custody" of the child. The DeBoers' claim to a right of custody rests on the court orders granting them custody. The action of the Iowa courts granting the DeBoers physical custody of the child and maintaining physical custody with them throughout the proceedings in Iowa is evidence that the Iowa courts saw merit in the DeBoers' claim to custody. Although the Iowa courts have now ruled against the DeBoers, that does not strip the DeBoers of their claim to custody when their claim challenges the enforceability in Michigan of the Iowa decree.

The majority relies on *Bowie* to conclude that the DeBoers have no claim to custody. *Bowie,* however, does not address the definition of claim to custody. *Bowie* construes Michigan's Child Custody ***727** Act.[84] *Bowie* and the Child Custody Act are preempted by the PKPA.

B

The majority concludes that the PKPA preempts inconsistent state law and that it controls the issue of jurisdiction in this case.[85] Since the PKPA preempts inconsistent state law when jurisdiction is the issue, then it preempts inconsistent state law on standing issues. This Court's decision in *Bowie* denying standing to third parties is necessarily limited to intrastate custody disputes and does not govern whether the DeBoers have standing in the instant case.

To conclude that the PKPA preempts in determining jurisdiction but not with respect to standing is untenable. The PKPA definitions of standing are part and parcel of the jurisdictional definitions. Standing in a "home state" depends on the presence in the state of a "person acting as a parent." Standing in a "significant connection" state depends on the presence in the state of a "contestant."

The PKPA is structured so that a determination of jurisdiction incorporates a finding of standing. The PKPA cannot be parsed to conclude that it preempts state law on jurisdiction but not on standing.

Superimposing this Court's decision in *Bowie* depriving third parties of standing in *intrastate* disputes upon third parties in *interstate* disputes governed by the PKPA violates the Supremacy Clause. The statement in *Bowie* that this Court was not limiting the decision to third-party actions brought under the Child Custody Act must necessarily ***728** be limited to intrastate disputes in light of PKPA preemption.[86]

Because the PKPA governs this dispute and provides the DeBoers with standing, either as persons acting as parents or as contestants, there is no need to address any of the other standing arguments raised by the parties.

V

The majority states:

> "We express no opinion about whether we would require a Michigan court to hold a best interests of the child hearing if we were faced with the circumstances presented to the Iowa courts."[87]

This litigation unavoidably requires this Court to consider and decide whether a Michigan court would hold a best interests hearing were it faced with the circumstances presented to the Iowa courts. I think it clear that Michigan law would require such a hearing.

Also implicated are the child's and the DeBoers' constitutional right to equal protection of the laws and due process of law. To grant to some citizens of this state such a hearing, and to refuse to provide such a ****685** hearing to other citizens similarly situated, poses constitutional issues that can be avoided by recognizing that a best interests hearing is required in this case.

Consideration of the child's best interests is required in all manner of custody disputes, including adoptions, parental rights termination proceedings, ***729** and proceedings concerning parental rights of putative fathers.[88]

The public policy of Michigan, as declared by the Legislature in § 39[89] of the Michigan Adoption Code,[90] requires a Michigan court to consider whether the best interests of a child would be served by awarding custody to a putative father, such as Daniel Schmidt, who did not live with the mother or contribute to her support during the pregnancy:[91]

> ***730** "(1) *If the putative father does not come within the provisions of subsection* (2), and if the putative father appears at the hearing and requests custody of the child, the court shall inquire into his fitness and his ability to properly ****686** care for the child *and shall determine whether the best interests of the child will be served granting custody to him. If the court finds that it would not be in the best interest of the child to grant custody to the putative father, the court shall terminate his rights to the child.*
>
> "(2) *If the putative father has established a custodial relationship with the child or has provided* ***731** *support or care for the mother during pregnancy* or for either mother or child after the child's birth during the 90 days before notice of the hearing was served upon him, the rights of the putative father shall not be terminated except by proceedings in accordance with section 51(6) of this chapter or section 2 of chapter XIIA." M.C.L. § 710.39; M.S.A. § 27.3178(555.39). (Emphasis added.)

Daniel Schmidt does not qualify under subsection 2 of the statute because he did not "establish a custodial relationship with the child" or provide "support or care for the mother during pregnancy" as required under subsection 2. Accordingly, Daniel Schmidt falls into the category of putative fathers for whom Michigan requires a best interests hearing before his parental rights would be recognized and he could obtain custody.[92]

VI

The sympathetic portrayal of the Schmidts in the majority opinion ignores that it was Cara Schmidt's fraud on the Iowa court and on Daniel Schmidt that is at the root of this controversy. If she had identified Daniel Schmidt as the father when she consented to waive her parental rights, before she had a change of heart, he too might have relinquished his parental rights. If Daniel Schmidt had refused to relinquish his rights, the DeBoers would not have assumed custody of the child and this litigation would have been avoided.

To fault the DeBoers is unwarranted. Why should they have believed that Cara Schmidt was telling the truth when she said she had fraudulently named the other man as the father? The DeBoers discovered that Schmidt had a dismal ***732** record as a father.[93] They chose, as provided by the legal system, to challenge his claim that he was the biological father and also to contest his fitness as a father.

The Iowa courts thought there was sufficient merit in the DeBoers' claims that they maintained custody of the child with the DeBoers until after the Iowa Supreme Court ruled. One justice agreed with the DeBoers.[94] Justice Snell observed in dissent ***733** that holding the rights of biological ****687** parents paramount to other values casts a cloud over adoptions.

The majority suggests that the DeBoers are posturing when they claim that they seek to vindicate the best interests of the child, and would be emotional not to accept unquestioning without seeking relief in another forum, the decision of this Court.[95]

The majority is not troubled that the result of its decision will be to return the child to Cara Schmidt despite her fraud. The majority appears to excuse her fraud by stressing that she gave her consent within forty hours, not seventy-two hours.[96] This was brought to the attention of the Iowa courts. The Iowa Supreme Court declined to hold that a consent given within seventy-two hours is necessarily invalid and remanded for a determination whether she waived the seventy-two hour provision.[97]

The decisions of this Court are entitled to respect. I am hopeful, however much I disagree with this decision, that it will be duly respected. But the Court goes too far in asking of the DeBoers unquestioning obedience to its decision. The Court's preachment bespeaks a grandiose view of its authority.

VII

The majority, by ignoring the best interests of ***734** the child, has approached this case as if it were a contest between two parties over a piece of property. If the majority were true even to this approach, it would find for the DeBoers and not the Schmidts.

The relevant property law analysis would involve the allocation of risk of loss among innocent persons in cases of fraud. Here, the DeBoers and Daniel Schmidt are the victims of Cara Schmidt's fraud on the Iowa court. The question before a court would then be who must suffer the consequences of the fraud.

The law generally places the risk of loss on the person in the best position to avoid the loss in the first place.[98] Putative fathers are aware that sexual ***735** intercourse may result in pregnancy, and of the potential opportunity to establish a family. If they wish to protect that opportunity, they can do so by maintaining some relationship with the women with whom they had intercourse to determine whether they become pregnant.

Daniel Schmidt and Cara Clausen ceased their sexual relationship within a month of ****688** the time the child was conceived. Daniel Schmidt had observed that Cara Clausen was pregnant. He was thus on notice and inquiry. The child was conceived in the last days of April, 1990 and was born on February 8, 1991. If Daniel Schmidt had bothered to count, he would have known that the child was probably his. Cara Schmidt's subterfuge was successful because, as Judge Snell observed, Daniel, knowing that Cara was pregnant, "did nothing to protect his rights." Where there is fraud, the law must place the risk of loss somewhere. I would not place that risk on the child but rather on the putative father.

VIII

The majority's decision appears to be driven by the same philosophical preference for the rights of biological parents reflected in this Court's decisions in *Ruppel v. Lesner,* 421 Mich. 559, 364 N.W.2d 665 (1984),[99] and *Bowie v. Arder,* 441 Mich. 23, 490 N.W.2d 568 (1992).[100]

***736** Those decisions and the instant litigation have inspired legislative efforts to amend the Child Custody Act to reverse the rule enunciated in *Bowie* effective as of the date it was decided, and to restore the standing of persons such as the DeBoers.[101]

The majority directs that this Court's judgment order enter forthwith. This has only been done, in the last twenty-five years, when, on recommendation of the Judicial Tenure Commission, a judge is removed from office,[102] or when, on two occasions, such a directive was necessary because otherwise scheduled bond sales would fall through. See *Bigger v. Pontiac,* 390 Mich. 1, 210 N.W.2d 1 (1973), concerning the sale of bonds for the construction of the Silverdome, and *Eby v. Lansing Bd. of Water & Light,* 417 Mich. 297, 336 N.W.2d 205 (1983), concerning the sale of bonds for the construction of the Belle River power plant. Directing that the judgment order issue forthwith is clearly extraordinary.

The majority has not explained why such a direction is being given in this case. It might be to forestall the possible application to this case of any amendment of the Child Custody Act.

The majority's specific direction imposing time limits regarding the return of the child also reflects its apparent conclusion that the Schmidts are the aggrieved parties and the majority's determination to see to it that nothing prevents righting the wrong done them by the DeBoers in prolonging this litigation and by the Washtenaw Circuit Court in deciding to hold a best interests hearing.

I recognize that this litigation must come to an ***737** end. But the judicial process has not run its course simply because this Court has announced its decision. The DeBoers may seek rehearing. They may seek a stay from this Court, which clearly will be refused; they may then seek a stay from a justice of the United States Supreme Court and apply for certiorari. They may even seek relief in Iowa. There may be other courses of legal action that resourceful counsel may recommend or undertake. It is unseemly for this Court to appear to be thwarting such efforts.

****689 IX**

Decisions of the United States Supreme Court[103] concerning the rights of putative fathers to retain custody of a child *where a family relationship has been established* have been relied on to construe Iowa statutes to provide Daniel Schmidt with the *opportunity* to create a family relationship. Viewing the matter as a contest between adults, the Schmidts and the DeBoers, the majority sees the Schmidts as having a better claim to the child than the DeBoers. The majority rules that the DeBoers have no standing in this Court, and cannot have a hearing on the merits whether their claim is better than the Schmidts.

There is a third party, the child. She, too, is a person with a liberty interest under the constitution. But, says the majority, that interest cannot be asserted by the DeBoers because they have no standing. It also rules that the child's next friend cannot assert her interest because there cannot be ***738** any infringement of her independent liberty interest unless Daniel Schmidt is unfit.[104]

I would avoid reaching the question whether a child has a separate claim under the constitution until it is necessary to grapple with that momentous issue. That issue can be avoided by recognizing the child's statutory right under the Child Custody Act to have the court "declare the inherent rights"[105] of the child and by holding that the Iowa decree cannot be enforced in Michigan without a best interests hearing in the child's home state, Michigan.

Since the majority has decided that a best interests hearing is not required by the Child Custody Act or the PKPA, the Court should consider and decide whether the child's interests in protecting *her family relationship* with the DeBoers is as constitutionally protected as a liberty interest as Daniel Schmidt's asserted constitutionally protected liberty interest in having an opportunity to establish a family relationship with the child. The Court should also consider and decide how those interests can be reconciled, either by a hearing concerning the best interests of the child, or by another standard or other means.

If the danger confronting this child were physical injury, no one would question her right to invoke judicial process to protect herself against such injury. There is little difference, when viewed from the child's frame of reference, between a physical assault and a psychological assault.

The law provides compensation for mental distress in countless situations, and has recognized that persons who suffer psychological injury are ***739** entitled to the protection of the law. It is only because this child cannot speak for herself that adults can avert their eyes from the pain that she will suffer.

All Citations

442 Mich. 648, 502 N.W.2d 649, 62 USLW 2041

Footnotes

1 Iowa Code Ann. 600A.4(2)(d). There is no dispute that a lawyer representing the DeBoers went to her hospital room and obtained the mother's signature on the consent form forty hours after the child was born.

2 Docket No. 96366 began as an action by the DeBoers seeking an order rejecting or modifying the orders of the Iowa courts that directed that Daniel Schmidt have custody of the child. The Court of Appeals reversed the Washtenaw Circuit Court's denial of Schmidt's motion for summary judgment. The court concluded that the circuit court lacked jurisdiction under the Uniform Child Custody Jurisdiction Act, and that the Iowa judgment awarding custody to the child's father must be enforced. The Court of Appeals also ruled that under our decision in *Bowie v. Arder,* 441 Mich. 23, 490 N.W.2d 568 (1992), the DeBoers lacked standing to bring the action. We granted the DeBoers' application for leave to appeal.

3 M.C.L. § 600.651 *et seq.;* M.S.A. § 27A.651 *et seq.*

4 28 U.S.C. § 1738A.

5 Docket Nos. 96441, 96531, and 96532 involve an action brought by an attorney as next friend of the child against both the Schmidts and the DeBoers, asserting that the child has an independent right to a best interests hearing to determine custody. The Schmidts filed an application for leave to appeal to the Court of Appeals from the Washtenaw Circuit Court's appointment of the next friend and its issuance of a temporary injunction against transfer of custody. They also filed an application for leave to appeal to this Court before decision by the Court of Appeals. We granted leave to appeal and directed the parties to brief the issue whether the action should be dismissed for failure to state a claim upon which relief may be granted.

6 She and Daniel Schmidt married in April 1992.

7 See *In re BGC,* 496 N.W.2d 239 (Iowa, 1992).

8 The Iowa district court's December 27, 1991, order had directed that the DeBoers return the child to the physical custody of Schmidt no later than January 12, 1992. That order was stayed during the Iowa appellate proceedings.

9 After the Washtenaw Circuit Court's denial of the natural father's motion for summary judgment, proceedings have continued in Iowa. On January 27, 1993, the Iowa district court held the DeBoers in contempt of court, and issued bench warrants for their arrest. The Iowa juvenile court entered an order on February 17, 1993, restoring Cara (Clausen) Schmidt's parental rights.

A best interests of the child determination hearing began in Washtenaw Circuit Court on January 29, 1993, and continued for eight days. In a decision rendered from the bench on February 12, 1993, the Washtenaw Circuit Court found that it was in the best interests of the child for her to remain with the DeBoers. That decision is not at issue in the instant appeal.

10 The Court of Appeals had initially denied Schmidt's application for leave to appeal for failure to persuade the Court of the need for immediate appellate review. We remanded the case to that Court for consideration as on leave granted.

11 The order stated that the grant of leave to appeal was “limited to the issues of jurisdiction and standing.”

12 That order stated that the grant of leave to appeal was “limited to the question whether the complaint should be dismissed for failure to state a claim on which relief may be granted.”

In addition, the order stayed proceedings in the Court of Appeals and the Washtenaw Circuit Court until further order of this Court.

13 U.S. Const., art. IV, § 1.

14 See, generally, Foster, *Child custody jurisdiction: UCCJA and PKPA,* 27 NYLS L R 297 (1981).

15 M.C.L. § 600.653; M.S.A. § 27A.653 provides, in part:

“(1) A court of this state which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree or judgment if any of the following exist:

“(a) This state is the home state of the child at the time of commencement of the proceeding or had been the child's home state within 6 months before commencement of the proceeding and the child is absent from this state because of his removal or retention by a person claiming his custody or for other reasons, and a parent or person acting as parent continues to live in this state.

“(b) It is in the best interest of the child that a court of this state assume jurisdiction because the child and his parents, or the child and at least 1 contestant, have a significant connection with this state and there is available in this state substantial evidence concerning the child's present or future care, protection, training, and personal relationships.

“(c) The child is physically present in this state and the child has been abandoned or it is necessary in an emergency to protect the child because the child has been subjected to or threatened with mistreatment or abuse or is otherwise neglected or dependent.

“(d) It appears that no other state would have jurisdiction under prerequisites substantially in accordance with subdivisions (a), (b), or (c) or another state has declined to exercise jurisdiction on the ground that this state is the more appropriate forum to determine the custody of the child and it is in the best interest of the child that this court assume jurisdiction.”

Home state is defined in M.C.L. § 600.652(e); M.S.A. § 27A.652(e):

“ ‘Home State’ means the state in which the child immediately preceding the time involved lived with his or her parents, a parent, or a person acting as parent, for at least 6 consecutive months, and in the case of a child less than 6 months old the state in which the child lived from birth with any of the persons mentioned. Periods of temporary absence of the named persons are counted as part of the 6–month or other period.”

16 M.C.L. § 600.656(1); M.S.A. § 27A.656(1) provides that a court shall not exercise jurisdiction if a case is pending in another jurisdiction:

“A court of this state shall not exercise its jurisdiction under sections 651 to 673 if at the time of filing the petition a proceeding concerning the custody of the child is pending in a court of another state exercising jurisdiction substantially in conformity with sections 651 to 673, unless the proceeding is stayed by the court of the other state because this state

is a more appropriate forum or for other reasons or unless temporary action by a court of this state is necessary in an emergency to protect the child because the child has been subjected to or threatened with mistreatment or abuse or is otherwise neglected or dependent."

17 M.C.L. § 600.663; M.S.A. § 27A.663 requires the enforcement of custody decisions rendered in other states:
"The courts of this state shall recognize and enforce an initial or modification decree or judgment of a court of another state which had assumed jurisdiction under statutory provisions substantially in accordance with sections 651 to 673 or which was made under factual circumstances meeting the jurisdictional standards of sections 651 to 673 as long as this decree or judgment has not been modified in accordance with jurisdictional standards substantially similar to those of sections 651 to 673."

18 M.C.L. § 600.664(1); M.S.A. § 27A.664(1) provides that a decree shall not be modified if the court which entered the decree still has jurisdiction under the act:
"If a court of another state has made a custody decree or judgment, a court of this state shall not modify that decree or judgment unless it appears to the court of this state that the court which rendered the decree or judgment does not now have jurisdiction under jurisdictional prerequisites substantially in accordance with sections 651 to 673 or has declined to assume jurisdiction to modify the decree or judgment and the court of this state has jurisdiction."

19 See, generally, Baron, *Federal preemption in the resolution of child custody jurisdiction disputes,* 45 Ark.L.R. 885 (1993).

20 Although the title of the act refers to "parental kidnapping," and concerns about parents taking children out of a state in violation of a custody order were doubtless an important impetus for the enactment of the statute, it applies to any custody determination, which is defined as:
"[A] judgment, decree, or other order of a court providing for the custody or visitation of a child, and includes permanent and temporary orders, and initial orders and modifications...." 28 U.S.C. § 1738A(b)(3).

21 The statute provides, in part:
"(a) The appropriate authorities of every State shall enforce according to its terms, and shall not modify except as provided in subsection (f) of this section, any child custody determination made consistently with the provisions of this section by a court of another State.
* * * * * *
"(c) A child custody determination made by a court of a State is consistent with the provisions of this section only if—
"(1) such court has jurisdiction under the law of such State; and
"(2) one of the following conditions is met:
"(A) such State (i) is the home State of the child on the date of the commencement of the proceeding....
* * * * * *
"(d) The jurisdiction of a court of a State which has made a child custody determination consistently with the provisions of this section continues as long as the requirement of subsection (c)(1) of this section continues to be met and such State remains the residence of the child or of any contestant.
"(e) Before a child custody determination is made, reasonable notice and opportunity to be heard shall be given to the contestants, any parent whose parental rights have not been previously terminated and any person who has physical custody of a child.
"(f) A court of a State may modify a determination of the custody of the same child made by a court of another State, if—
"(1) it has jurisdiction to make such a child custody determination; and
"(2) the court of the other State no longer has jurisdiction, or it has declined to exercise such jurisdiction to modify such determination.
"(g) A court of a State shall not exercise jurisdiction in any proceeding for a custody determination commenced during the pendency of a proceeding in a court of another State where such court of the other State is exercising jurisdiction consistently with the provisions of this section to make a custody determination."

22 On the very day that they commenced this action in Washtenaw Circuit Court, the Iowa district court was holding a hearing at which it terminated the DeBoers' rights to act as temporary custodians or temporary guardians, appointed Daniel Schmidt as temporary guardian or custodian, and authorized him to proceed by any legal means, "to enforce this order directing that Jan and Roberta DeBoer relinquish immediate physical custody and possession of the child to him or his designee." Any construction of the UCCJA that would lead to the conclusion that this Iowa proceeding was no longer pending would destroy the act as a tool for avoiding jurisdictional disputes. Litigants having custody could relocate, wait until the jurisdictional requisites are met in the new state, and bring a modification action any time after the first state's order had become final.

Such a result would render courts powerless to enforce judgments entered in full compliance with procedural due process, and make the adjudicated rights of persons held to be adoptive parents, as well as those found to be fit biological parents, vulnerable to collateral attack by the disappointed contestant. Such a result is not in the best interests of families, biological or adoptive.

In addition, there is substantial doubt whether the Iowa decision is the kind of "custody order" that is modifiable at all. When we speak of modifying custody orders, we are ordinarily talking about the typical case of a contest between natural parents. Such orders are at least theoretically perpetually modifiable. Where circumstances change, modification can be made in the child's best interests, because the biological parents have an inherent right to care, custody, and control of the child. That rationale, however, does not apply in a case such as this involving an adoption petition. The decision not to terminate Daniel Schmidt's rights and to dismiss the adoption petition put an end to the proceeding, just as would have been the case had the Iowa courts terminated Schmidt's rights and finalized the adoption. To say that the order in the instant case is modifiable would have the effect of destabilizing finalized adoptions as well as other final orders.

23 The Michigan Court of Appeals cases on which the DeBoers principally rely, *In re Danke,* 169 Mich.App. 453, 426 N.W.2d 740 (1988), and *Bull v. Bull,* 109 Mich.App. 328, 311 N.W.2d 768 (1981), do not mention the PKPA. The order being appealed in *Bull* was entered before that act's effective date.

At oral argument, counsel for the DeBoers conceded the applicability of the act to the instant case. The PKPA clearly preempts inconsistent state law. *Ex parte Lee,* 445 So.2d 287, 290 (Ala.Civ.App., 1983); *In re Marriage of Pedowitz,* 179 Cal.App.3d 992, 999, 225 Cal.Rptr. 186 (1986); *Tufares v. Wright,* 98 N.M. 8, 10, 644 P.2d 522 (1982); *Voninski v. Voninski,* 661 S.W.2d 872, 876 (Tenn.App., 1982); *Arbogast v. Arbogast,* 174 W.Va. 498, 327 S.E.2d 675, 679 (1984).

24 The PKPA is a procedural and jurisdictional statute, which does not impose principles of substantive law on the states. As the United States Supreme Court has said:

" 'The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.' *In re Burrus,* 136 US 586, 593–594 [10 S.Ct. 850, 34 L.Ed. 500] (1890).... On the rare occasion when state family law has come into conflict with a federal statute, this Court has limited review under the Supremacy Clause to a determination whether Congress has 'positively required by direct enactment' that state law be pre-empted." *Hisquierdo v. Hisquierdo,* 439 U.S. 572, 581, 99 S.Ct. 802, 808, 59 L.Ed.2d 1 (1979). See also *Rose v. Rose,* 481 U.S. 619, 625, 107 S.Ct. 2029, 2033, 95 L.Ed.2d 599 (1987). The Court reviewed the legislative history of the PKPA in *Thompson v. Thompson, supra,* and concluded that its purpose was to "remedy the inapplicability of full faith and credit requirements to custody determinations." 484 U.S. p. 181, 108 S.Ct. p. 517.

25 28 U.S.C. § 1738A(c)(1).

Though they arise in varying factual circumstances, cases interpreting the PKPA have given an expansive interpretation of continuing exclusive jurisdiction in the original state. The undertaking of enforcement proceedings is certainly sufficient. Even a considerable period of inactivity does not establish that jurisdiction no longer exists. Indeed, it does not appear that any ongoing activity in the original state is required, as long as under that state's law the original court would have had jurisdiction over requests for enforcement, modification, etc.

For example, in *State ex rel. Valles v. Brown,* 97 N.M. 327, 639 P.2d 1181 (1981), a divorce judgment, including a custody order, was entered in Washington. No further proceedings had taken place there, but New Mexico courts concluded that they lacked jurisdiction to modify a custody order.

In *Murphy v. Woerner,* 748 P.2d 749 (Alas., 1988), there was a 1981 Kansas divorce. The custodial parent moved to Alaska in 1982. The Kansas court ruled on several visitation and custody disputes. In 1985, a change of custody order was sought in Alaska to modify the Kansas decree. The Alaska Supreme Court held that there was no Alaska jurisdiction. *Barndt v. Barndt,* 397 Pa.Super. 321, 580 A.2d 320 (1990), involved a 1983 divorce in North Dakota, with no further proceedings taking place there. An action was filed in Pennsylvania in 1987 to change custody. The Pennsylvania court found that under North Dakota law the original court would have had continuing jurisdiction to modify custody, and therefore Pennsylvania lacked jurisdiction.

In *Michalik v. Michalik,* 164 Wis.2d 544, 476 N.W.2d 586 (1991), there was an Indiana divorce in 1987, with several contempt proceedings in 1989 regarding denial of visitation. The custodial parent moved to Wisconsin. The Wisconsin court held that Indiana still had exclusive jurisdiction.

26 See, e.g., *In re Marriage of Cervetti,* 497 N.W.2d 897, 899 (Iowa, 1993); *In re Leyda,* 398 N.W.2d 815, 819 (Iowa, 1987).

27 *In re Custody of Ross,* 291 Or. 263, 279, 630 P.2d 353 (1981).

28 *May v. Anderson,* 345 U.S. 528, 539, 73 S.Ct. 840, 846, 97 L.Ed. 1221 (1953) (Jackson, J., dissenting).

29 The DeBoers are also critical of the Court of Appeals for focusing on the avoidance of jurisdictional competition between states as the principal purpose of the UCCJA. Rather, they see it as having two purposes, that noted by the Court

of Appeals and also the purpose of insuring that the state with the maximum contacts with the child makes custody determinations because that is in the child's best interests. They point to several places in the act where the term "interest" of the child or the child's "best interests" are used. Sections 651(1)(b), 657(3), and 658(2).

30 The DeBoers also include arguments to the effect that even under Iowa law, a best interests hearing was required, citing several cases, *Halstead v. Halstead,* 259 Iowa 526, 144 N.W.2d 861 (1966); *Painter v. Bannister,* 258 Iowa 1390, 140 N.W.2d 152 (1966), and statutes, Iowa Code Ann. §§ 600.1, 600.13(1)(c) (Adoption Code); § 600A.1 (termination of parental rights); § 600B.40 (Paternity Act). The Iowa courts relied on the constitutionally protected opportunity interest of a biological father in Schmidt's circumstance to conclude that termination was not in the best interest of the child unless unfitness was shown, and found, as fact, that the DeBoers had not shown unfitness. We have not had occasion to construe our adoption statute, M.C.L. § 710.39(1); M.S.A. § 27.3178(555.39)(1), in light of *Lehr v. Robertson,* 463 U.S. 248, 103 S.Ct. 2985, 77 L.Ed.2d 614 (1983). We cannot say, however, that if the constitution requires such construction, it would be against our public policy to do so.

31 The DeBoers rely principally on two cases, *Bull v. Bull,* n. 22 *supra,* and the New Jersey decision in *E.E.B. v. D.A.,* 89 N.J. 595, 446 A.2d 871 (1982), cert. den. sub nom. *Angle v. Bowen,* 459 U.S. 1210, 103 S.Ct. 1203, 75 L.Ed.2d 445 (1983), which refused to enforce custody awards by courts in other states where the other state court did not conduct a hearing using a best interests of the child test. As noted earlier, the decision being appealed in *Bull v. Bull* was made before the effective date of the PKPA. Further, the *Bull* Court found that the Georgia decision did not comport with the UCCJA. We find no such flaw in the Iowa decisions in the instant case. However, insofar as *Bull v. Bull* is inconsistent with this opinion, it is overruled.

We reject the rationale of *E.E.B. v. D.A.,* to the extent that it is cited for the proposition that an order transferring custody pursuant to a judgment determining custody is modifiable per se on a best-interests analysis. The DeBoers have cited neither Michigan nor Iowa law for this proposition, which, if accepted, would mean that an order granting custody would be enforceable only if the losing party voluntarily complied. Such a construction would invite the losing party to resist transfer, in order to have the court issue an enforcement order, which would form the basis for an opportunity to relitigate best interests. Such a result would introduce a degree of instability into this jurisprudence antithetical to the best interests of all parties.

32 This is the "stepparent adoption" section of the code, M.C.L. § 710.51(6); M.S.A. § 27.3178(555.51)(6), which permits the termination of a natural father's parental rights in certain circumstances.

33 That chapter governs juveniles and the juvenile division of the probate court and permits termination of parental rights for abuse and neglect.

34 We are not aware of any similar provision in the Iowa Adoption Code.

35 M.C.L. § 722.21 *et seq.;* M.S.A. § 25.312(1) *et seq.*

36 They also point to other states that have given third parties such standing. E.g., *Buness v. Gillen,* 781 P.2d 985 (Alas., 1989); *In re Janette H.,* 196 Cal.App.3d 1421, 242 Cal.Rptr. 567 (1987); *Patzer v. Glaser,* 368 N.W.2d 561 (N.D., 1985).

37 Subsection (1)(a) says, in part:

"This state is the home state of the child at the time of commencement of the proceeding or had been the child's home state within 6 months before commencement of the proceeding ... and a parent *or person acting as parent* continues to live in this state." M.C.L. § 600.653(1)(a); M.S.A. § 27A.653(1)(a). (Emphasis added.)

The UCCJA defines "[p]erson acting as parent" as "a person, other than a parent, who *has physical custody* of a child and ... *claims a right to custody.*" M.C.L. § 600.652(i); M.S.A. § 27A.652(i). (Emphasis added.)

Subsection (1)(b) refers to a "contestant":

"It is in the best interest of the child that a court of this state assume jurisdiction because the child and his parents, or the child and at least 1 *contestant,* have a significant connection with this state...." M.C.L. § 600.653(1)(b); M.S.A. § 27A.653(1)(b). (Emphasis added.)

"Contestant," as defined in the UCCJA, means, "a person, including a parent, who *claims a right to custody* or visitation rights with respect to a child." M.C.L. § 600.652(a); M.S.A. § 27A.652(a). (Emphasis added.)

38 Thus, the argument regarding application of the Child Custody Act as incidental to otherwise existing jurisdiction never arises—the UCCJA does not create standing.

39 M.C.L. § 722.26b(1); M.S.A. § 25.312(6b)(1).

40 The situation would have been the same if, after having determined that Daniel Schmidt was the father of the child, the Iowa courts had terminated his parental rights. He would have had standing to litigate the custody issue while established as the natural father, but that right would have disappeared with the termination order. The rescission of the temporary

custody order has the same effect on the rights of the DeBoers, whether that rescission took place before the filing of the instant Washtenaw Circuit Court action, or after the action had been instituted.

41 *Lehr v. Robertson, supra; Quilloin v. Walcott, supra.*

42 *Michael H. v. Gerald D., supra.*

43 Michigan courts in similar circumstances have noted that prompt action by the father to assert parental rights, combined with the father's being prevented from developing a relationship with the child by actions of the courts or the custodians, are factors that excuse or mitigate the failure to establish such a relationship. See, e.g., *In re Baby Boy Barlow,* 404 Mich. 216, 237–238, 273 N.W.2d 35 (1978); *In re Robert P.,* 36 Mich.App. 497, 500, 194 N.W.2d 18 (1971).

44 The next friend has pointed to no appellate decisions recognizing such an action by a minor. Indeed, it is clear that what is sought in this case is not so much recognition of a child's right to bring an action, but a procedure by which persons like the DeBoers, who lack standing to bring a Child Custody Act action, may circumvent those rules. It is obviously a fiction to speak of this two-year-old child as expressing a preference regarding custody. This is a case of adults deciding what they think is best for her and using the next-friend procedure. As counsel for the next friend said in oral argument, third-party custodians who lack standing will simply see that a next friend is appointed.

45 M.C.L. § 722.1(b); M.S.A. § 25.244(1)(b), defines "parents" as follows:

" 'Parents' means natural parents, if married prior or subsequent to the minor's birth; adopting parents, if the minor has been legally adopted; or the mother, if the minor is illegitimate."

46 In those circumstances, typically through the intervention of governmental agencies, a determination can be made regarding whether the parents' unfitness so breaks the mutual due process liberty interests as to justify interference with the parent-child relationship. In addition, mechanisms are provided for the child to seek such protection. See, e.g., M.C.L. § 712A.19b; M.S.A. § 27.3178(598.19b) (allowing a child who has been in foster care or in the custody of a guardian or limited guardian to petition for a termination of parental rights); M.C.L. § 700.426; M.S.A. § 27.5426 (allowing a minor age fourteen or older to nominate a person as the minor's guardian); M.C.L. §§ 722.4 to 722.4e; M.S.A. §§ 25.244(4) to 25.244(4e) (allowing a minor who is at least sixteen years old to petition the court for emancipation). These procedures, are, of course, in addition to the commonly used provisions for guardianships in the revised Probate Code, M.C.L. § 700.401 *et seq.;* M.S.A. § 27.5401 *et seq.,* and the abuse and neglect procedures of the Juvenile Code. M.C.L. § 712A.1 *et seq.;* M.S.A. § 27.3178(598.1) *et seq.*

47 Courts in other states have followed these principles in recent decisions. *Sheppard v. Sheppard,* 230 Kan. 146, 630 P.2d 1121 (Kan., 1981); *Woodfin v. Bentley,* 596 So.2d 918 (Ala., 1992); *In re SBL,* 150 Vt. 294, 553 A.2d 1078 (1988); *Stuhr v. Stuhr,* 240 Neb. 239, 481 N.W.2d 212 (1992).

48 Even if we were to conclude that the child has liberty interests that were not adequately represented in the previous Iowa proceedings, the PKPA would require that any new action on her behalf be brought in Iowa, which has continuing exclusive jurisdiction. Like the case filed by the DeBoers, the child's action seeks to modify the custody determination made by the Iowa courts. The fact that she is nominally a new party is of no significance. Analytically, the case is no different than a more typical custody dispute in which the court of one state has entered a custody order in a divorce case and the custodial parent moves with the child to another state. The original state would have exclusive continuing jurisdiction to modify the order. If the custodial parent remarries that jurisdiction could not be avoided by having the stepparent file a new action (for example, to eliminate visitation by the noncustodial parent) in the second state. Thus, the Washtenaw Circuit Court lacked jurisdiction to hear the second case.

49 Like the Iowa Supreme Court, we echo the sentiments of the Iowa district judge:

"[T]he Court is under no illusion that this tragic case is other than an unbelievably traumatic event.... While cognizant of the heartache which this decision will ultimately cause, this Court is presented with no other option than that dictated by the law in this state. Purely equitable principles cannot be substituted for well established principles of law."

1 Op., p. 651.

2 Op., p. 668.

3 *Lemley v. Barr,* 176 W.Va. 378, 381, 343 S.E.2d 101 (1986).

4 The media reports that the Schmidts have said that they may or will call the child Jessica Schmidt.

5 This Court granted leave to appeal limited to the issues of jurisdiction and standing (No. 96366), and failure to state a claim on which relief may be granted (Nos. 96441, 96531, 96532). The decision of the circuit judge that it was in the child's best interests that she remain with the DeBoers is not at issue in this appeal (see Op., p. 653, n. 8, p. 653, ns. 10–11) and remains subject to appellate review.

6 See part F, p. 22, n. 51 *et seq.*

7 2 Clark, Domestic Relations, 2d ed., § 20.1, p. 479.

8 *Id.,* § 20.6, pp. 530 ff.

9 *Id.,* p. 529.

10 *Id.,* pp. 532–533.

Professor Clark continues:

"The most difficult cases are those in which a parent places his child temporarily in the custody of another person, perhaps with the understanding that the parent will resume custody when he is able to, or in which a parent places the child with prospective adoptive parents. The problems arise when the parent seeks to reclaim the child or to revoke his consent to adoption and the non-parent refuses to restore the child to the custody of the parent. In the temporary placement cases, if the child is not returned to the parent, the parent's expectations will be frustrated thereby deepening the parent's heartache and bitterness. And in the adoption cases the parent may have consented to the adoption under the stress of circumstances and may have tried to change her mind relatively soon after giving the consent. Due to these factors, the parent's interest should perhaps be given greater weight than in the stepparent cases, and the child retained in the custody of the non-parent only where his welfare clearly dictates that result. Even in these circumstances, however, *it should not be necessary to prove the parent unfit as a condition of awarding custody to the non-parent. If the child has been in the non-parent's care for a substantial period of time, taking into account that time may have a different significance for a child, and if the child is strongly attached to the non-parent emotionally and psychologically, so that the child will suffer serious harm by being shifted to another's custody, then the non-parent should be awarded custody. It should not matter for this purpose that delays in the process of litigation account for much of the time during which the child remains with the non-parent, since the effect on the child is the same regardless of the source of the delay.* It must be conceded that some of the cases would strongly disagree with an award of custody to the non-parent in these circumstances, absent proof of unfitness, thereby exhibiting a startling lack of concern for the interests of the children." *Id.,* pp. 534–535.

11 The majority relies on *Smith v. Organization of Foster Families,* 431 U.S. 816, 843–844, 97 S.Ct. 2094, 53 L.Ed.2d 14 (1977). In that case, the United States Supreme Court held that in a contest between foster parents and biological parents, that procedures enacted by New York respecting the removal of children from foster care were constitutional.

I see no need to decide whether the DeBoers, as prospective adoptive persons, have a constitutionally protected "liberty" interest in preservation of their family relationship with the child.

Rather, I would hold that Congress did not, in enacting the PKPA, designating the "home state" of the child as the state where a custody determination, enforceable under the PKPA, shall be made, intend to require the home state of the child, in this case Michigan, to enforce an Iowa decree made without consideration of, and other than on the basis of, the best interests of the child.

12 The state laws, the Uniform Child Custody Jurisdiction Act, 9 ULA, part I, p. 115 *et seq.;* M.C.L. § 600.651; M.S.A. § 27A.651, and the Child Custody Act, M.C.L. § 722.21 *et seq.;* M.S.A. § 25.312(1) *et seq.,* were enacted to serve the same purpose.

13 Op., p. 652, ns. 3–4 and accompanying text; Op. p. 668, following n. 48.

14 And also the legislative history of the UCCJA on which the PKPA was modeled.

15 Op., p. 660, n. 30.

16 Op., p. 660, n. 30.

17 Op., p. 660, n. 30.

18 *Lemley* did not consider the PKPA, but since the PKPA is modeled on the UCCJA, and the relevant language is identical, the analysis of the West Virginia Supreme Court is not to be faulted simply because it did not consider the PKPA separately from the UCCJA.

19 *Thompson v. Thompson,* 484 U.S. 174, 187, 108 S.Ct. 513, 520, 98 L.Ed.2d 512 (1988). The Court said: "ultimate review remains available in this Court for truly intractable jurisdictional deadlocks."

20 The majority states:

"For the first time at oral argument, the DeBoers asserted that the order was not made consistently with the PKPA. As they contended regarding the UCCJA, they think an order is not made consistently with the statute if a best interests of the child test is not used." Op., p. 661.

In stating that the DeBoers made that assertion for the first time at oral argument, the majority fails to mention that while there was some passing mention of the PKPA in the briefs, neither the DeBoers nor the Schmidts relied in their briefs on the PKPA. They relied, rather, on the UCCJA. It was this Court that has moved the focus from the UCCJA to the PKPA during questioning in oral argument.

21 Professor Clark states that some commentators still express concern regarding the constitutionality of the PKPA and the UCCJA in light of *May v. Anderson,* 345 U.S. 528, 73 S.Ct. 840, 97 L.Ed. 1221 (1953), but that the case law "now overwhelmingly assumes or proclaims the constitutionality of the UCCJA," and that he is of the opinion that there is "increased likelihood, but not yet assurance, that the UCCJA and the federal act may withstand constitutional attack." *Id.,* pocket part, § 15.41, p. 63, adding insert for p. 524 of the original text.

22 1 Clark, Domestic Relations, § 13.5, p. 825.

23 Op., p. 657, n. 22 and accompanying text.

24 The "general purposes" of the PKPA are stated as follows:

"(1) promote cooperation between State courts to the end that a *determination of custody and visitation is rendered in the State which can best decide the case in the interest of the child;*

"(2) promote and expand the exchange of information and other forms of mutual assistance between States which are concerned with the same child;

"(3) facilitate the enforcement of custody and visitation decrees of sister States;

"(4) discourage continuing interstate controversies over child custody *in the interest of greater stability of home environment and of secure family relationships for the child;*

"(5) avoid jurisdictional competition and conflict between State courts in matters of child custody and visitation which have in the past resulted in the shifting of children from State to State with *harmful effects on their well-being;* and

"(6) deter interstate abductions and other unilateral removals of children undertaken to obtain custody and visitation awards." Parental Kidnapping Prevention Act of 1980; PL 96–611, § 7(c); 94 Stat. 3568. (Emphasis added.)

25 "The Congress finds that—

* * * * * *

"(4) among the results of those conditions and activities are the failure of the courts of such jurisdictions to give full faith and credit to the judicial proceedings of the other jurisdictions, the deprivation of rights of liberty and property without due process of law, burdens on commerce among such jurisdictions and with foreign nations, and *harm to the welfare of children and their parents and other custodians.*" *Id.,* § 7(a). (Emphasis added.)

26 P.L. 96–611, § 7(c)(4); 94 Stat. 3568.

27 *Id.,* § 7(c)(1).

28 Section (c) of the PKPA provides:

"(c) A child custody determination made by a court of a State is consistent with the provisions of this section only if—

"(1) such court has jurisdiction under the law of such State; and

"(2) one of the following conditions is met

"(A) such State (i) is the home State of the child on the date of the commencement of the proceeding, or (ii) had been the child's home State within six months before the date of the commencement of the proceeding and the child is absent from such State because of his removal or retention by a contestant or for other reasons, and a contestant continues to live in such State;

"(B)(i) it appears that no other State would have jurisdiction under subparagraph (A), and (ii) it is in the best interest of the child that a court of such State assume jurisdiction because (I) the child and his parents, or the child and at least one contestant, have a significant connection with such State, and (II) there is available in such State substantial evidence concerning the child's present or future care, protection, training, and personal relationships...." 28 U.S.C. § 1738A(c).

29 28 U.S.C. § 1738A(b)(4).

30 The term "person acting as a parent" is defined in the PKPA as meaning: "a person, other than a parent, who has physical custody of a child and who has either been awarded custody by a court or claims a right to custody." "Physical custody" is there defined as meaning: "actual possession and control of a child." 28 U.S.C. § 1738A(b)(6), (7).

The DeBoers have had "actual possession and control" of the child since February 1991; they were "awarded custody by a court" and also qualify as persons acting as parents because they "claim a right to custody." They are persons acting as parents within the meaning of the PKPA.

31 The prefatory note to the UCCJA, on which the PKPA was based, states that it "*limits* custody jurisdiction to the state where the child has his home or where there are other strong contacts with the child and his family. See Section 3." 9 ULA 118. (Emphasis added.)

The commentary to § 3 states that the UCCJA establishes "two major bases for jurisdiction. In the first place, a court in the child's home state has jurisdiction, and secondly, if there is no home state or the child and his family have equal or stronger ties with another state, a court in that state has jurisdiction." 9 ULA 144.

The commentary continues that a "6–month period has been selected in order to have a definite and certain test which is at the same time based on a reasonable assumption of fact. [Citation omitted:] 'Most American children are integrated into an American community after living there six months; consequently this period of residence would seem to provide a reasonable criterion for identifying the *established home.*' " *Id.* (Emphasis added.)

32 28 U.S.C. § 1738A(c)(2)(B). See n. 28 for text.

The child has not been "physically present" in Iowa since February 1991. The child and the DeBoers, who are contestants —defined by the PKPA to mean a "person, including a parent, who claims a right to custody or visitation of a child" (28 U.S.C. § 1738A[b][2])—are physically present in Michigan and "have a significant connection" with Michigan "other than mere physical presence" in Michigan, and there is available in Michigan "substantial evidence concerning the child's present or future care, protection, training, and personal relationships."

The significant connection test shows why Congress selected as the state where the child has resided with a parent or a person acting as a parent for more than six months—the home state—as the state that has jurisdiction with priority before any other state. The home state would ordinarily meet all the criteria of a state qualifying under the alternative; the child and a parent, or the child and a contestant, would necessarily have a significant connection, other than mere physical presence, with the home state, and there would there be available substantial evidence concerning the child's present or future care, protection, training, and personal relationships.

In contrast with a state qualifying under the alternative, it is presumed that it is in the best interests of the child for the home state to assume jurisdiction. Under the alternative, that presumption appears to be rebuttable because, under the alternative, there must be a finding that it is in the best interests of the child that the court of that state assume jurisdiction.

33 Op., p. 658.

34 Op., p. 658 (emphasis added); 28 U.S.C. § 1738A(c).

35 "At the time of commencement of both the termination and adoption proceedings, Iowa unquestionably had jurisdiction under its own laws and *Iowa was unquestionably the home state* of the child. Thus, the child custody determination made by the Iowa court was made consistently with the provisions of the PKPA." Op., p. 658. (Emphasis added.)

36 Ns. 28–31 and accompanying text.

37 The Iowa proceedings commenced as adoption proceedings, and were transformed into parental rights termination proceedings after Daniel Schmidt intervened in the adoption proceedings. See part II.

38 The home state of a child less than six months old is the state in which the child "lived from birth" with a parent or a person acting as a parent. 28 U.S.C. § 1738A(b)(4). The child in the instant case did not live from birth with either a parent or a person acting as a parent. See text following n. 29.

39 Op., p. 660.

40 Comment to § 3, UCCJA, 9 ULA, part I, pp. 144–145.

41 *Id.*

42 See n. 37.

43 9 ULA, part I, p. 145, quoted in text preceding n. 40.

44 Commentary, 9 ULA, part I, p. 145.

45 Uniform Child Custody Jurisdiction Act (1968 act), § 1(2), (3); commentary, 9 ULA, part I, pp. 124, 143–144; M.C.L. § 600.651(1)(b), (c); M.S.A. § 27A.651(1)(b), (c). See ns. 24 and 28 for PKPA text.

46 28 U.S.C. § 1738A(c)(2)(B). See n. 28 for text.

47 See n. 24 for text.

48 94 Stat. 3569, § 7(c)(5).

49 The PKPA and UCCJA were directed primarily to custody determinations that resolve disputes between parents, following divorce or separation. The well-established standard is the best interests of the child. See n. 7.

Those acts are being relied on in custody disputes between parents and third parties, e.g., grandparents and prospective adoptive parents. The underlying criteria and theses of the PKPA must be given force and effect in these disputes, namely, that to be enforceable under the PKPA, a child custody determination must have been made in the child's home state or alternatively in the state where the child has significant connections.

50 If the PKPA does not apply to adoption proceedings, then the majority errs in ruling that the PKPA requires enforcement of the Iowa decree.

51 2 Clark, Domestic Relations, 2d ed., § 21.3, p. 596.

52 *Id.,* p. 598.

53 *Id.,* p. 595. (Emphasis added.)

54 *Id.,* § 21.3, p. 596.

55 *Id.,* p. 596.

56 "When an issue of fact or law is *actually litigated* and determined by a valid and final judgment, *and* the determination is *essential* to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." 1 Restatement, Judgments, 2d, § 27, p. 250. (Emphasis added.)

57 If the Iowa Supreme Court had granted the DeBoers' petition seeking a rehearing and a determination of the child's best interests, and Iowa courts had decided that the best interests of the child required that custody of the child be transferred to the Schmidts, such a determination would have been res judicata, and the Iowa decree would have been a judgment to which Michigan must accord full faith and credit. See Wright, Federal Courts, 4th ed., § 16, p. 84 ff.

There was, however, no hearing in Iowa adjudicating the best interests of the child. That issue is not precluded under the doctrine of res judicata.

58 The PKPA modification provision reads as follows:

> "A court of a State may modify a determination of custody of the same child made by a court of another State, if—
>
> "(1) it has jurisdiction to make such a child custody determination; and
>
> "(2) the court of the other State no longer has jurisdiction, or it has declined to exercise such jurisdiction to modify such determination." 28 U.S.C. § 1738A(f).

This section provides two bases for modification: if Iowa no longer has jurisdiction or if Iowa has declined to exercise jurisdiction.

59 Op., pp. 658–659.

60 "The jurisdiction of a court of a State which has made a child custody determination consistently with the provisions of this section continues as long as the requirement of subsection (c)(1) of this section continues to be met and such State remains the residence of the child or of any contestant." 28 U.S.C. § 1738A(d).

61 § 1738A(g).

62 § 1738A(f)(2).

63 The natural parents signed consent to adoption forms three days after the birth of their daughter in October 1978. The mother appeared one week after signing the forms at the Ohio welfare department and orally revoked her surrender of the child. The department did not inform the Ohio juvenile court of the revocation, and the court approved the surrender and transfer of custody to the adoptive parents. Approximately two months later, in December 1978, the mother commenced a habeas corpus proceeding to obtain custody of her child.

After litigation in the lower courts of Ohio completed its course, the matter was taken up by the Ohio Supreme Court. That court concluded that the natural mother had timely revoked her surrender of the child. The adoptive parents filed a motion for rehearing, asserting that the court should have required a best interests hearing—as the adoptive parents had requested in the lower courts in Ohio—before deciding whether to order the child returned to the biological mother. The Ohio Supreme Court denied the motion.

The adoptive parents, who had moved to New Jersey during the course of the proceedings in Ohio, commenced a custody action in New Jersey on September 29, 1980. The New Jersey court assumed jurisdiction, conducted a best interests hearing, and ruled that it was in the child's best interests to remain with her adoptive parents. The biological mother appealed.

The New Jersey Supreme Court held:

> "To the extent jurisdiction continued in Ohio, if at all, the Ohio courts declined to exercise it by refusing to hold a best interest hearing. Because the child and adoptive parents resided in New Jersey for almost a year before commencing the New Jersey action, New Jersey was both the home state and the state with the most significant contacts to the controversy. Thus, under both the PKPA and UCCJA, New Jersey could modify the Ohio writ." *E.E.B., supra,* p. 611, 446 A.2d 871.

64 The biological mother voided her consent to an adoption. After the Ohio Supreme Court affirmed the lower court orders voiding the adoption, the biological mother brought an action in a West Virginia circuit court to compel the adoptive parents to turn the child over to her. The West Virginia Supreme Court ultimately ordered the West Virginia circuit court to enforce the Ohio decision.

On petition for rehearing brought by the adoptive parents, the West Virginia Supreme Court reaffirmed its earlier decision to accord full faith and credit to the Ohio judgment setting aside the adoption, but concluded "[w]e are not convinced, however, that it is in the best interests of Ryan Barr that his physical custody be changed at this time." The court remanded for proceedings in the circuit court to determine the child's best interests. *Lemley, supra,* 176 W.Va. p. 382, 343 S.E.2d 101. No Ohio court had conducted a best interest hearing.

The court noted that the adoptive parents had "used all possible legal stratagems to avoid an unfavorable ruling in the Ohio courts, but at no time did they resort to self-help by fleeing or by refusing to follow a lawful court order." *Id.,* p. 385, 343 S.E.2d 101.

65 *Lemley* differs from *E.E.B.* in that the parents in *Lemley* did not ask the Ohio courts to conduct a best interests hearing.

66 *Id.*

67 183 W.Va. 113, 394 S.E.2d 515 (1990). A Florida court had previously terminated the mother's rights.

The child was born in July 1982. The parents separated in September 1983, and, after 1985, the father had virtually no communication with the child until he was contacted by the state regarding the termination proceedings brought against the mother in September 1987.

A Florida court gave the maternal grandmother temporary physical custody. The Florida court subsequently ruled in December 1988 that the father was a fit custodian and awarded him legal and physical custody. This decision, the *Brandon L.E.* court noted, was reached although the father had shown little interest in the child. 183 W.Va. p. 115, 394 S.E.2d 515.

The grandmother, who by that time had moved to West Virginia, refused to recognize the Florida custody decree and filed for a writ of habeas corpus in a West Virginia circuit court.

The West Virginia Supreme Court held that it had jurisdiction to modify the Florida custody decree and remanded to the circuit court to determine whether the child's best interests required that the maternal grandmother retain custody.

68 *Id.,* 183 W.Va. p. 121, 394 S.E.2d 515.

69 See also *Application of Felix,* 116 Misc.2d 300, 455 N.Y.S.2d 234 (1982).

70 See *Van Houten v. Van Houten,* 156 A.D.2d 694, 549 N.Y.S.2d 452 (1989). A Florida court had awarded custody of the parties' two-year-old daughter to the mother in July, 1981. Shortly after the decree, the father snatched the child. For the next eight years, the mother attempted unsuccessfully to find her daughter. Upon tracking her down in New York, the mother filed a petition in New York, seeking enforcement of the Florida decree. The father petitioned for modification of the Florida decree, claiming that it was in the best interests of his daughter, who had been living with him for eight years, that custody be awarded to him.

The court wrote that even though state law forbids modification of a custody decree in child snatching cases: "We conclude that this is one of those rare instances where this imperative must be subordinated to the best interests of the child, and that the courts of this State should assume jurisdiction over the dispute."

In *Owens, by and through, Mosley v. Huffman,* 481 So.2d 231 (Miss.1985), the maternal grandmother challenged Mississippi's jurisdiction over a custody dispute. The grandmother had snatched the child, Christeen, from the child's mother, Huffman. The grandmother procured a custody decision in her favor in Texas.

The mother tracked the grandmother down after three years, but then stipulated to the grandmother's custody in an Arizona court, apparently because the mother's attorneys had misinformed her that if she contested custody she would never see her child again. When her daughter came to visit her in Mississippi, pursuant to the Arizona custody agreement, the mother filed for custody in Mississippi.

The Mississippi court assumed jurisdiction despite the Texas and Arizona decrees. The Mississippi court said:

> "We are not concerned with whether Mrs. Huffman as an individual might be precluded from relief, but whether her child is barred from any relief by a Mississippi court. Considerations of fairness and equity would impel us to say that the Chancery Court of Clay County should be able to proceed, because in the entire pathetic history of this child, the first opportunity she has ever had for a full-blown hearing for her own best interest is in that court." *Id.,* p. 238.

71 Op., p. 658.

72 Op., p. 657, n. 23.

73 28 U.S.C. § 1738A(c). See n. 28 for text.

74 See n. 20.

75 441 Mich. 23, 490 N.W.2d 568 (1992).

76 Op., pp. 660–664.

77 Op., p. 657, n. 22.

78 The UCCJA, §§ 2(5) and 3(a)(1), (2), contains these same tests. 9 ULA, part I, pp. 124, 143–144.

79 28 U.S.C. § 1738A(b)(4).

80 PKPA, 28 U.S.C. § 1738A(b)(6).

81 PKPA, 28 U.S.C. § 1738A(c)(2)(B)(ii).

82 PKPA, 28 U.S.C. § 1738A(b)(2).

83 Op., p. 664.

84 M.C.L. § 722.21 *et seq.;* M.S.A. § 25.312(1) *et seq.*

85 Op., p. 657, n. 22.

86 *Bowie, supra,* 441 Mich. p. 45, 490 N.W.2d 568.

87 Op., p. 662.

88 The Child Custody Act provides:

> "When the dispute is between the parents, between agencies or between third persons the best interests of the child shall control. When the dispute is between the parent or parents and an agency or a third person, it is presumed that the best interests of the child are served by awarding custody to the parent or parents, unless the contrary is established by clear and convincing evidence." Child Custody Act, M.C.L. § 722.25; M.S.A. § 25.312(5).

The Adoption Code provides:

> "In an adoption proceeding, the court shall direct a full investigation by an employee or agent of the court, a child placing agency, or the department. The following shall be considered in the investigation:
> "(a) The best interests of the adoptee." M.C.L. § 710.46(1)(a); M.S.A. § 27.3178(555.46)(1)(a).

The Probate Code provides that in foster care permanency planning decisions:

> "If the court determines at a permanency planning hearing that the child should not be returned to his or her parent, the agency shall initiate proceedings to terminate parental rights to the child not later than 42 days after the permanency planning hearing, unless the agency demonstrates to the court that initiating the termination of parental rights to the child is clearly not in the child's best interests." M.C.L. § 712A.19(a)(5); M.S.A. § 27.3178(598.19a)(5).

89 M.C.L. § 710.39; M.S.A. § 27.3178(555.39).

90 1974 P.A. 296, M.C.L. § 710.21 *et seq.;* M.S.A. § 27.3178(555.21) *et seq.*

91 This concept was in the 1974 act. The language was modified by subsequent legislation, but the meaning is essentially the same. Subsequent legislation also added a definition of "best interests":

> "(b) 'Best interests of the adoptee' or 'best interests of the child' means the sum total of the following factors to be considered, evaluated, and determined by the court to be applied to give the adoptee permanence at the earliest possible date:
> "(i) The love, affection, and other emotional ties existing between the adopting person or persons or the putative father, and the adoptee.
> "(ii) The capacity and disposition of the adopting person or persons or the putative father to give the adoptee love, affection, and guidance, and to educate and create a milieu that fosters the religion, racial identity, and culture of the adoptee.
> "(iii) The capacity and disposition of the adopting person or persons or the putative father to provide the adoptee with food, clothing, education, permanence, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.
> "(iv) The length of time the adoptee has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.
> "(v) The permanence as a family unit of the proposed adoptive home, or the home of the putative father.
> "(vi) The moral fitness of the adopting person or persons or of the putative father.
> "(vii) The mental and physical health of the adopting person or persons or of the putative father, and of the adoptee.
> "(viii) The home, school, and community record of the adoptee.
> "(ix) The reasonable preference of the adoptee, if the adoptee is 14 years of age or less and if the court deems the adoptee to be of sufficient age to express a preference.
> "(x) The ability and willingness of the adopting person or persons to adopt the adoptee's siblings.
> "(xi) Any other factor considered by the court to be relevant to a particular adoption proceeding, or to a putative father's request for child custody." M.C.L. § 710.22; M.S.A. § 27.3178(555.22).

92 The majority's comment (Op., p. 661) on subsection (2) ignores the difference between a decision recognizing parental rights and a decision awarding custody.

93 The Iowa Supreme Court said:

> "Daniel has had a poor performance record as a parent. He fathered two children prior to this child, a son, age fourteen, and a daughter born out of wedlock, now age twelve. The record shows that Daniel has largely failed to support these children financially and has failed to maintain meaningful contact with either of them."

94 His opinion was as follows:

> "I respectfully dissent.

> "The evidence is sufficient to show abandonment of the baby by Daniel. The record shows he has previously failed to raise or support his other two children. He quit supporting his son, born in 1976, after two years. From 1978 to 1990 he saw him three times. He has another daughter whom he has never seen and has failed to support. He stated he just never took any interest in her. In every meaningful way, he abandoned them.
>
> "Daniel knew that Cara was pregnant in December 1990. He saw her in the building where they worked for the same employer. The child was born in February 1991. Having knowledge of the facts that support the likelihood that he was the biological father, nevertheless, he did nothing to protect his rights. The mother, Cara, who knew better than anyone who the father was, named Scott as the father. The legal proceedings logically and reasonably were based on these representations. The termination of parental rights as known to exist at the time were legally completed and an adoption process was commenced.
>
> "Daniel's sudden desire to assume parental responsibilities is a late claim to assumed rights that he forfeited by his indifferent conduct to the fate of Cara and her child. The specter of newly named genetic fathers, upsetting adoptions, perhaps years later, is an unconscionable result. Such a consequence is not driven by the language of our statutes, due process concerns or the facts of this case.
>
> "I would remand for termination of Daniel's parental rights based on abandonment and denial of Cara's motions. The intervention petition of Daniel in the adoption case should be dismissed on remand and the adoption proceed."

95 Op., p. 668.

96 Op., p. 651.

97 This was not decided on remand. Instead of deciding that question, it was decided on remand from the Iowa Supreme Court that Cara Schmidt's parental rights should be restored because Daniel Schmidt's rights had been recognized and they had married.

98 Recording statutes require persons claiming an interest in real property to provide notice of their interest—by a proper recording—or take subject to the interest of third persons who purchase in good faith and without notice of the prior interest. Similarly, the Uniform Commercial Code, e.g., §§ 9–301, 9–302, in cases involving personal property, requires secured creditors to give proper notice or to take subject to the rights of bona fide purchasers.

The law thus requires a person claiming an interest in property to assert it in a way that is plain and simple for the rest of the world to ascertain.

The DeBoers were misled by Cara Schmidt's fraudulent warranty. She identified to the DeBoers as the father of the child a person whom she knew was not the father. She allowed the DeBoers to take custody of the child knowing that the DeBoers, relying on her misrepresentation, had obtained a waiver of parental rights from the wrong person.

Daniel Schmidt, the real father—and thus the true owner for purposes of this property law analysis—enabled Cara Schmidt to perpetrate her fraud.

> Under another property law analysis, estoppel, the law again places the loss on the least cost risk avoider, that is, the person who was in the best position to avoid the loss in the first place.
>
> Under the doctrine of voidable title (see, e.g., UCC § 2–403), the true owner enables another to appear to be the true owner with the result that the rights of the true owner are subordinated to those of a bona fide purchaser who takes without actual notice of the prior interest. Daniel Schmidt enabled Cara Schmidt to appear to be the true owner of the child because he took no steps to assert his rights. He gave Cara Schmidt a voidable title, which, in the hands of an innocent purchaser, ripens into full title good against the world including the true owner.

99 The Court reversed an award of temporary custody to the child's grandparents, despite a finding that this would be in the child's best interests. The Court held that the circuit court lacks authority to enter an order granting custody to a third party over the parents' objection where the child is living with the parents, no divorce or separate maintenance proceedings have been instituted, and there has been no finding of parental unfitness.

100 The Court held that third parties do not have standing to petition for custody on the basis that the child resides or has resided with the third party, unless they are guardians or limited guardians or have a substantive right to custody.

101 Senate substitute for HB 4064, passed Senate June 10, 1993.

102 See, e.g., *In re Ryman,* 394 Mich. 637, 232 N.W.2d 178 (1975); *In re Seitz,* 441 Mich. 590, 495 N.W.2d 559 (1993).

103 *Michael H. v. Gerald D.,* 491 U.S. 110, 109 S.Ct. 2333, 105 L.Ed.2d 91 (1989); *Stanley v. Illinois,* 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972); *Quilloin v. Walcott,* 434 U.S. 246, 98 S.Ct. 549, 54 L.Ed.2d 511 (1978); *Caban v. Mohammed,* 441 U.S. 380, 99 S.Ct. 1760, 60 L.Ed.2d 297 (1979); *Lehr v. Robertson,* 463 U.S. 248, 103 S.Ct. 2985, 77 L.Ed.2d 614 (1983).

Cf. *Reno v. Flores,* 507 U.S. 292, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993).

104 Op., p. 652.

105 M.C.L. § 722.24; M.S.A. § 25.312(4).

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248 Mich.App. 1
Court of Appeals of Michigan.

Charles Lee HELTZEL, Plaintiff,
v.
Crystal S. HELTZEL, a/k/a Crystal S. Tapia, Defendant–Appellant,
and
John Yonkers and Robin Yonkers, Intervenors–Appellees.

Docket No. 232736.
|
Submitted Sept. 11, 2001, at Grand Rapids.
|
Decided Oct. 23, 2001, at 9:00 a.m.
|
Released for Publication Jan. 10, 2002.

Synopsis
In child custody dispute, mother, who sought change in custody, filed objections to referee's recommendation that custody of child remain with grandparents and that mother have the right to reasonable parenting time. The Cass Circuit Court, Family Division, Susan L. Dobrich, J., concluded mother failed to satisfy her burden of proof that child should have been removed from grandparents' custody and entered order denying mother's motion for change of custody. Mother appealed as of right. The Court of Appeals, Gage, J., held that: (1) placing on mother ultimate burden of proving that change of child's custody from established custodial environment with grandparents would have served child's best interests infringed on mother's fundamental liberty interest in raising her child; (2) unconstitutional allocation of burden of proof to mother was not harmless error; (3) grandparents, as proper third-party custodians under modified judgment of divorce, had standing to respond to mother's request to change custody; and (4) mother was not entitled to change in child custody solely on basis that child's placement with grandparents was intended to be temporary.

Reversed and remanded.

West Headnotes (13)

[1] **Child Custody** Decisions reviewable

Although trial court did not address issue of whether trial court's requiring mother to proving that a change of child's custody would have served child's best interests infringed on mother's fundamental liberty interest in raising her child, the Court of Appeals would consider argument, which was raised below and involved a significant constitutional issue. U.S.C.A. Const.Amend. 14; M.C.L.A. §§ 722.25(1), 722.27(1).

3 Cases that cite this headnote

[2] **Child Custody** Burden of proof
Child Custody Degree of proof
Constitutional Law Child custody, visitation, and support

Trial court's placing on fit natural mother the ultimate burden of proving that change of child's custody from established custodial environment with maternal grandparents to mother would have served child's best interests infringed on mother's fundamental liberty interest in raising her child and its application of simple preponderance of the evidence standard for reaching decision regarding child's best interests unconstitutionally invited court to enforce its own judicial opinion regarding what custody situation best would have served child's interests, irrespective of mother's wishes. U.S.C.A. Const.Amend. 14; M.C.L.A. §§ 722.25(1), 722.27(1).

6 Cases that cite this headnote

[3] **Child Custody** Modification

Requiring fit natural mother, who was seeking change of her child's custody from established custodial environment with grandparents, to show that change in custody was in child's best interests, in violation of mother's fundamental liberty interest in raising her children, was not harmless error, where evidence presented at

hearing did not weigh strongly against award of custody to mother. U.S.C.A. Const.Amend. 14; M.C.L.A. §§ 722.25(1), 722.27(1).

3 Cases that cite this headnote

[4] **Child Custody** Presumptions

Child Custody Degree of proof

While the established custodial environment is to be favored unless there is clear and convincing evidence that a change is in the best interests of the child, it is presumed that the best interests of the child are served by granting custody to the natural parent. M.C.L.A. §§ 722.25(1), 722.27(1).

21 Cases that cite this headnote

[5] **Child Custody** Presumption in favor of parent

Child Custody Degree of proof

The presumption that the best interests of the child would be served by granting custody to the natural parent remains a presumption of the strongest order and it must be seriously considered and heavily weighted in favor of the parent; nevertheless, if the clear and convincing evidence establishes that the best interest of the child is served by awarding custody to the third party, the presumption is rebutted. M.C.L.A. §§ 722.25(1), 722.27(1).

20 Cases that cite this headnote

[6] **Child Custody** Presumption in favor of parent

Child Custody Degree of proof

A showing that a parent is unfit is not required to overcome presumption that the best interests of a child are served by placing custody with the natural parent, unless otherwise shown by clear and convincing evidence. M.C.L.A. §§ 722.25.

3 Cases that cite this headnote

[7] **Child Custody** Presumptions

Child Custody Degree of proof

To overcome the natural parent presumption, the trial judge was required to find that, when all of the statutory factors were collectively considered, the third party providing an established custodial environment clearly and convincingly established that the best interests of the children required maintaining custody with the third party; it is not sufficient that the third party may have established by clear and convincing evidence that a marginal, though distinct, benefit would be gained if the children were maintained with him. M.C.L.A. §§ 722.23, 722.25(1), 722.27(1).

19 Cases that cite this headnote

[8] **Child Custody** Grandparents

Child Custody Parties

While grandparents had no substantive right to custody of child, as proper third-party custodians under modified judgment of divorce, grandparents had standing to respond to mother's request to change custody, on behalf of the child in their custody, that child's best interests would have been served by continuing to reside in established custodial environment with grandparents. M.C.L.A. § 722.27(1).

5 Cases that cite this headnote

[9] **Appeal and Error** Standing

Whether a party has legal standing to assert a claim constitutes a question of law that the Court of Appeals reviews de novo.

26 Cases that cite this headnote

[10] **Child Custody** Right of biological parent as to third persons in general

A third party, including a grandparent, generally cannot create a custody dispute by simply filing a complaint in circuit court alleging that giving legal custody to the third party is in the best interests of the child.

5 Cases that cite this headnote

[11] **Child Custody** Right of biological parent as to third persons in general

A third party does not attain a legal right to a child's custody merely on the basis of the fact that the child has resided with the third party.

2 Cases that cite this headnote

[12] **Child Custody** Incidents of custody in general

Mother was not entitled to change in child custody solely on the basis that child's placement with the grandparents was intended to be a temporary arrangement.

[13] **Child Custody** Incidents of custody in general

A finding of an established custodial environment does not depend on the manner in which such an environment became established.

1 Cases that cite this headnote

West Codenotes

Unconstitutional as Applied
M.C.L.A. §§ 722.25, 722.27.

Attorneys and Law Firms

****125** ***3** Lois Jewell and John H. Vetne, Niles, Salisbury, MA, for Crystal S. Heltzel.

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Ann L. Routt, Ann Arbor, for Domestic Violence Project, Inc./ Safe House.

****126** Before: GRIFFIN, P.J., and GAGE and METER, JJ.

Opinion

GAGE, J.

In this child custody dispute, defendant appeals as of right a trial court order awarding John and Robin Yonkers physical custody of the minor child and granting defendant and the Yonkerses joint legal custody of the minor. The trial court concluded that defendant, the biological mother of the minor, failed to make the showing necessary to overcome the statutory presumption favoring the minor's continued placement in the established custody of the Yonkerses, who are defendant's parents and the minor's maternal grandparents. We reverse and remand.

I

Plaintiff and defendant married on July 1, 1995, and resided in Cass County. On May 2, 1996, defendant ***4** gave birth to a daughter, the minor involved in this case. The marriage did not endure, however. By the time plaintiff filed for divorce on April 30, 1997, defendant had left the marital home and moved with the child to the grandparents' Elkhart, Indiana, home. Defendant's mother cared for the child while defendant worked full time. Both plaintiff and defendant sought physical custody of the child.

On August 29, 1997, the trial court entered a stipulated order for the child's temporary custody and support. With respect to custody, the order provided that the parties would share legal custody of the child, but that defendant "shall have temporary physical custody of the minor ... until they [sic] reach the age of eighteen years, or graduates from high school, whichever occurs last." Plaintiff would enjoy "reasonable and liberal" parenting time and had to make $60 weekly child support payments.[1]

A divorce judgment, dated November 21, 1997, was entered on December 1, 1997. The judgment incorporated the custody, parenting time, and child support provisions contained in the August 29 order.[2]

On November 26, 1997, pursuant to the parties' stipulation, the trial court entered an order modifying the divorce judgment.[3] Relevant to this appeal, the ***5** November 26 order stated as follows regarding the child's physical custody:

> Physical custody of the minor child shall be with the maternal grandparents, JOHN AND ROBYN [sic] YONKERS, who [sic] the minor child, along with the Defendant, have been residing with since the commencement of this action. Mr. and Mrs. Yonkers shall retain physical custody of the minor child until such time as both Defendant and Mr. and Mrs. Yonkers have notified the Cass County Friend of the Court, in writing, that Defendant is prepared to assume the physical custody of the minor child. ****127** Upon receipt of said notice by the Cass County Friend of the Court, physical custody of the minor child shall revert back to Defendant and said child will remain with Defendant until she reaches the age of eighteen (18) years or graduates from high school, whichever occurs last, or until further order of this Court.
>
> The November 26 order granted plaintiff and defendant "reasonable and liberal" parenting time.[4] Plaintiff and defendant and their attorneys signed the modification order, but the grandparents did not, and the order did not denote the grandparents as parties to the action. The grandparents never formally moved to intervene in the action.

On February 28, 2000, defendant moved for entry of an order that the grandparents show cause why they had thwarted defendant's reasonable visitation with the child. The motion asserted that defendant's mother permitted defendant only supervised visitations. On March 2, 2000, defendant filed a "petition to reinstate original divorce judgment dated 21 November ***6** 1997," thus attempting to eliminate the November 26, 1997, modification order's grant of the child's temporary physical custody to the grandparents. In an affidavit accompanying her petition, defendant stated that she had signed the stipulated order modifying the divorce judgment "[a]t my mother's insistence ... so that [the child] would be covered under my parents' insurance policy," and that "[m]y mother made the arrangements directly with my attorney." According to defendant's affidavit, the grandparents never allowed defendant, who had remarried and had another child, an unsupervised visit with the child. Defendant averred that she loved her child and felt prepared to assume the child's physical custody, but that the grandparents refused to permit the child's removal from their custody.

On March 10, 2000, the grandparents responded to defendant's petition. The grandparents asserted that for over two years the child had resided with them in an established custodial environment, and that the child's best interests were served by her current placement. The grandparents' response also mentioned that defendant had not visited overnight with the child since September 1997, and that "the present husband of the Defendant ... is a known child molester." The grandparents also accused two sons of plaintiff's girlfriend of molesting the child while the child visited plaintiff.[5] The grandparents suggested that the trial court order psychological evaluations of ***7** plaintiff and defendant and their current significant others, as well as the grandparents themselves; otherwise investigate the current circumstances relevant to the issue of the child's custody; and restrict plaintiff and defendant to supervised visitations with the child.

On March 23, 2000, pursuant to plaintiff's and defendant's stipulation, the trial court ordered the restoration of the child's physical custody with defendant, that plaintiff and defendant share legal custody of the child, and that plaintiff have liberal, reasonable visitation with the child. On ****128** the same day, the trial court entered an "Order reinstating original divorce judgment dated 21 November 1997."

Shortly thereafter, however, on April 3, 2000, the trial court ordered that the friend of the court perform a custody investigation and make a recommendation, that a hearing regarding custody and visitation be scheduled, and that pending the investigation plaintiff and defendant have only supervised visitation with the child.[6] Pursuant to stipulation by plaintiff, defendant, and the grandparents, the trial court on April 26, 2000, ordered that plaintiff and defendant could visit the child on one day every other weekend, but that the child have no contact with either plaintiff's girlfriend's children or defendant's husband.[7]

At the July 26, 2000, hearing before a referee, defendant testified that during her divorce proceedings from plaintiff she and the child moved in with the grandparents, intending to remain there only until defendant located alternate suitable housing. By ***8** approximately August or September 1997, defendant's relationship with Oscar Tapia, her current husband, had become serious. Defendant obtained employment in Plymouth, Indiana, where Tapia lived, and moved in with Tapia at his parents' home. Defendant explained that although she had prepared to bring the child to her new residence for a weekend visitation, the grandparents suggested that the child should remain with them because defendant had just begun her relationship with Tapia and the child should not so soon be placed in another new environment. Defendant agreed to leave the child with the grandparents.

Defendant indicated that she subsequently acceded to the grandparents' repeated suggestions that she sign the stipulation entered on November 26, 1997, granting the grandparents temporary physical custody of the child, to make the child eligible for the grandfather's medical insurance coverage. According to defendant, the grandparents and her divorce attorney, whom the grandparents had retained for defendant, prepared the stipulation.

Defendant estimated that within the next two to three months, she had obtained insurance through her employer and informed the grandparents that she felt prepared to assume physical custody of the child. The grandparents informed defendant, however, that they would not permit her to have custody of the child because the grandmother had spoken with Tapia's former spouse regarding allegations of child sexual abuse against Tapia, and the grandparents viewed Tapia as a child molester. Documentation from an Indiana court reflected that Tapia had been charged with two counts of child molestation and one count of battery involving a child of his former wife. ***9** Pursuant to a plea bargain, Tapia had pleaded guilty of battery, and the child molestation charges were dismissed. Tapia denied that he had ever engaged in sexual contact with a child, but admitted that he had spanked his former wife's unruly daughter, in the former wife's presence and as the former wife herself had done. Tapia averred that his former wife fabricated the molestation charges during their divorce proceedings, and explained that on his counsel's advice he opted to avoid a trial on the charges ****129** because he already owed his attorney approximately $7,000 and had no money with which to go to trial. Tapia opined that to some extent the grandparents' disapproval of him was race related, but indicated his understanding of the grandparents' concern owing to the molestation allegations. Other than the court documentation of the charges against him, the record contained no specific evidence of any sexual abuse by Tapia.

Because of their concerns regarding Tapia, the grandparents, contrary to the court order providing for liberal and reasonable parenting time, advised defendant that she could visit the child only in the grandparents' home and under their supervision. The next court order addressing visitation, filed April 26, 2000, stated that defendant would have visitation from 9:00 a.m. until 7:00 p.m. every other Sunday, but that the child could have no contact with Tapia. Although the April 26 order contained no further restrictions, the grandparents acknowledged that beginning in May 2000 they nonetheless refused to permit defendant to visit the child outside their home because they suspected that defendant had allowed Tapia to have contact with the child and they were informed that a warrant existed for defendant's arrest ***10** and did not want the child in defendant's presence outside their home because they feared that the child might witness defendant's arrest.[8] For the same reasons, the grandparents subsequently advised defendant when she arrived for a scheduled 9:00 a.m. visitation to leave and return at approximately 1:00 p.m., after the grandparents and the child would have returned from church.

Although the grandparents criticized defendant's visitation with the minor as inconsistent, the record does not specifically reflect more than a few missed appointments. Defendant testified that during the first year the child resided with the grandparents she visited the child on at least three occasions each month at the grandparents' home, that during the second year she visited the child at least two to three times each month,[9] and that during the third year she had missed only three Sunday visits since March 2000. Defendant and the grandparents agreed that one visit did not occur because defendant encountered vehicle problems, another failed to happen because Jaylund, defendant's son with Tapia, had been hospitalized, and another was missed when defendant took Tapia's parents on a trip to a Texas church. The fourth time no visit happened had occurred when defendant arrived timely at 9:00 a.m., but the grandfather suggested that defendant leave and return at 1:00 p.m., ***11** when the grandparents and the child would have returned home from church.

Defendant proclaimed that, although she had not provided the grandparents money or clothes for the child while the child resided with the grandparents, she loved the child, and her parents, and wanted to provide the child a home.[10] Tapia and two ****130** friends of defendant and Tapia all characterized defendant as a loving mother. The grandparents denied witnessing defendant engage in any abusive or neglectful treatment of the child, and none of the other witnesses had reason to believe that defendant lacked the ability to provide the child proper care. The grandparents explained, however, that they did not wish to place the child in defendant's care because of the following concerns: defendant's irregular visitation; defendant had not maintained a stable lifestyle, as reflected by the facts that defendant moved several times since her divorce and did not maintain steady employment; and defendant's relationship with Tapia, which the grandparents viewed as their primary source of concern. The grandparents hoped the court would award them permanent physical custody of the child.

A psychotherapist testified concerning her investigation of the parties and recommendation regarding the child's custody. The therapist interviewed defendant, the child, and the grandparents. The therapist did not, however, speak with Tapia, his former spouse, or the alleged victim. Although the therapist uncovered no indication that defendant ever harmed ***12** or threatened to harm the child, she recommended that the child remain in her established custodial environment with the grandparents in light of the charges against Tapia, defendant's frequent relocations, defendant's inconsistent visitation, and unspecified "additional concerns that were initiated through an interview with the minor child."

On August 11, 2000, the referee issued his report and recommendation. The referee initially noted that because defendant challenged the propriety of the child's custody in her established custodial environment with the grandparents, defendant had the burden of proving by a preponderance of the evidence that a change of custody would serve the child's best interests. After reviewing the statutory factors, the referee recommended that custody of the child remain with the grandparents, and that defendant have the right to reasonable parenting time.[11] The referee noted that he did not believe that Tapia posed a threat to the child.

***13** Pursuant to MCR 3.215(E)(3), defendant filed objections to the referee's recommendation. Defendant argued that the referee incorrectly, and in violation of her constitutional due process rights, placed on her the burden of proving that she should have custody of her child. Defendant sought a circuit court review hearing de novo, which ****131** occurred on October 25, 2000, although no transcript appears in the record. Plaintiff, defendant, and the grandparents stipulated that a transcript of the July 26, 2000, hearing before the referee would constitute the evidentiary record, and were permitted to file briefs stating their positions. Plaintiff agreed with defendant that she should have physical custody of their child. In addition to raising their constitutional argument, plaintiff and defendant claimed that absent any indication of defendant's parental unfitness the referee should have placed significant weight in both their original intent that the child remain with the grandparents temporarily and their desire as the child's parents that she return to defendant's custody. Plaintiff and defendant also challenged the grandparents' standing to claim custody. The grandparents countered that the referee's recommendation served the child's best interests.

On December 29, 2000, the trial court issued its opinion. The court agreed with the referee that because an established custodial environment existed with the grandparents, defendant had to prove by a preponderance of evidence that the child's placement with her was in the child's best interests. The court further agreed with the referee that the grandparents prevailed with regard to best interests elements a, b, c, and d, and that neither the grandparents nor defendant prevailed with respect to elements e, f, g, i, and ***14** k. Unlike the referee, the court opined that element h, the child's home, school, and community record, favored neither party because the child had not entered school. The court also disagreed with the referee that element j, willingness of the parties to facilitate a continuing relationship with the child, favored defendant, instead finding that no one prevailed because the grandparents justifiably restricted defendant's visitation with the child when they discovered the child molestation charges against Tapia. While the referee had noted no other relevant factors pursuant to element l, the court noted several weighing against defendant: defendant's "sporadic history of visitation ... indicat[ing] a lack of ... emotional commitment on the part of the mother"; the grandmother's hearing testimony that in December 1999 defendant left Tapia and Jaylund reflected some instability in defendant's marriage; and that defendant "allowed her parents to handle the responsibility of support." The court concluded that defendant failed to satisfy her burden of proof that the child should be removed from the grandparents' custody. On January 29, 2001, the court entered an order denying defendant's motion for change of custody and providing defendant reasonable visitation as long as Tapia had no contact with the child.[12]

II

[1] Defendant first contends that the trial court's placement on her of the burden of proving that a change of the child's custody would serve the child's best interests ***15** infringed on defendant's fundamental liberty interest in raising her child. When faced with a legal challenge to a trial court's decision regarding a child custody dispute, we must determine whether the trial court committed "clear legal error on a major issue." M.C.L. 722. 28. Although the trial court did not address the constitutional issue, we nonetheless consider defendant's argument because it was raised ****132** below and involves a significant constitutional issue for which all necessary facts are before this Court. *In re PAP,* 247 Mich.App. 148, 640N. W.2d 880 (2001).

A

The trial court required that defendant show that a change in custody would be in the child's best interests, citing *Rummelt v. Anderson,* 196 Mich.App. 491, 493 N.W.2d 434 (1992). In *Rummelt,* the petitioner sought custody of his daughter, who was being raised by the respondent, a maternal aunt. *Id.* at 493, 493 N.W.2d 434. This Court affirmed the trial court's order that the child remain in the maternal aunt's custody. After finding that the trial court correctly determined that the aunt had provided the child an established custodial environment, *id.* at 495–496, 493 N.W.2d 434, this Court considered the father's claim that the trial court erroneously required that he prove that the child's removal from the established custodial environment served the child's best interests. This Court observed that prior panels of the Court had reached different results in cases involving noncustodial parents who sought to obtain custody of their children from established custodial environments with third parties. The Court noted that one line of cases decided that the presumption favoring ***16** the child's natural parent, M.C.L. § 722.25(1),[13] weighed more heavily than the established custodial environment presumption favoring the third party, M.C.L. § 722.27(1)(c),[14] and therefore required that the third party bore the burden of rebutting by clear and convincing evidence the statutory presumption favoring the child's natural parents. *Rummelt, supra* at 496, 493 N.W.2d 434. This Court in *Rummelt,* however, declined to follow this line of cases, instead opting to endorse a different resolution to the apparent tension between subsections 5(1) and 7(1)(c). The Court explained that "[f]or the reasons stated [ ]in" *Glover v. McRipley,* 159 Mich.App. 130, 144–148, 406 N.W.2d 246 (1987), "the existence of the two presumptions reduces the burden of persuasion from clear and convincing to a preponderance ***17** of the evidence, and that the burden of persuasion rests with the parent challenging an established custodial environment in the home of a third party." *Rummelt, supra* at 496, 493 N.W.2d 434.

This Court in *Glover* had reasoned that the clear and convincing evidence standards within subsections 5(1) and 7(1)(c) ****133** could not literally apply against each other because "[s]uch a conclusion would only lead trial courts into a logical paradox." *Glover, supra* at 146, 406 N.W.2d 246. The Court therefore believed that "it is obvious that each party bears the burden of proof vis-à-vis his own presumption" by a preponderance of the evidence. *Id.* at 147, 406 N.W.2d 246. The Court opined, however, that the ultimate burden of persuasion rested with the parent challenging an established custodial environment with a third party because "placing the burden of persuasion on the parent ... is better calculated to elicit the quality of testimony and evidence required by a trial court in its determination of the best interest of the child," and because "as indicated by the expert testimony in this and other cases, the importance of residence with a biological parent pales beside the importance of stability and continuity in the life of a child." *Id.* at 147, 406 N.W.2d 246. The Court qualified that the trial court remained free to accord the parental relationship more weight if the court found "more than a mere biological relationship." *Id.* This Court has continued to apply the *Rummelt* panel's solution, premised on the *Glover* panel's logic, to cases involving noncustodial natural parents seeking custody from a third party who has provided an established custodial environment. See *LaFleche v. Ybarra,* 242 Mich.App. 692, 696–698, 619 N.W.2d 738 (2000).

***18** B

The United States Supreme Court recently decided a visitation dispute between a child's natural mother and the paternal grandparents that we find significantly diminishes the prevailing line of Michigan cases resolving custody disputes between noncustodial natural parents and third parties who have provided established custodial environments. In *Troxel v. Granville,* 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000), the petitioners, paternal grandparents, sought to obtain more frequent visitation with the involved child than the respondent, the child's mother, wished to offer the grandparents. *Id.* at 60–61, 120 S.Ct. 2054 (opinion by O'Connor, J.). The Washington Superior Court that initially entertained the grandparents' request concluded that, pursuant to the governing Washington statute permitting " '[a]ny person' to petition a superior court for visitation rights 'at any time,' and authoriz [ing] that court to grant such visitation rights whenever 'visitation may serve the best interest of the child,' " *id.* at 60, 120 S.Ct. 2054, the grandparents' visitation with the child at least one weekend a month served the child's best interests. *Id.* at 61–62, 120 S.Ct. 2054. When the case progressed to the Washington Supreme Court, that court declared the visitation statute at issue unconstitutional because it permitted the state to infringe the parents' right to raise their children without any threshold showing of harm and permitted judicial overriding of parental decisions regarding visitation merely on a court's finding

that a different decision better would serve the child's best interests. *Id.* at 63, 120 S.Ct. 2054.

The United States Supreme Court affirmed the Washington Supreme Court's reversal of the trial court's order granting the grandparents visitation that ***19** exceeded what the child's mother had offered. The Supreme Court initially stated that "[i]n light of [its] extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Id.* at 66, 120 S.Ct. 2054 (opinion by O'Connor, J.). The Court characterized the Washington visitation statute as "breathtakingly broad" in that it gave a parent's decision ****134** regarding appropriate visitation for his child no deference, instead permitting "a court [to] disregard and overturn *any* decision by a fit custodial parent concerning visitation whenever a third party affected by the decision files a visitation petition, based solely on the judge's determination of the child's best interests." *Id.* at 67, 120 S.Ct. 2054. The Court concluded that the Washington visitation statute, as applied in that case, violated the mother's fundamental right to make decisions regarding her child's upbringing, explaining as follows:

> First, the [grandparents] did not allege, and no court has found, that [the mother] 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. As this Court explained in *Parham* [*v. J.R.*, 442 U.S. 584, 99 S.Ct. 2493, 61 L.Ed.2d 101 (1979)]:
>
> "[O]ur 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.... 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 ***20** children." 442 U.S. at 602, 99 S.Ct. 2493 (alteration in original) (internal quotation marks and citations omitted).
>
> Accordingly, so long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children....
>
> The problem here is not that the Washington Superior Court intervened, but that when it did so, it gave no special weight at all to [the mother's] determination of her daughters' best interests....
>
> The judge's comments suggest that he presumed the grandparents' request should be granted unless the children would be "impact[ed] adversely." In effect, the judge placed on [the mother], the fit custodial parent, the burden of *disproving* that visitation would be in the best interest of her daughters....
>
> The decisional framework employed by the Superior Court directly contravened the traditional presumption that a fit parent will act in the best interest of his or her child.... In that respect, the court's presumption failed to provide any protection for [the mother's] fundamental constitutional right to make decisions concerning the rearing of her own daughters.... In an ideal world, parents might always seek to cultivate the bonds between grandparents and their grandchildren. Needless to say, however, our world is far from perfect, and in it the decision whether such an intergenerational relationship would be beneficial in any specific case is for the parent to make in the first instance. And, if a fit parent's decision of the kind at issue here becomes subject to judicial review, the court must accord at least some special weight to the parent's own determination. [*Troxel, supra* at 68–70, 120 S.Ct. 2054 (opinion by O'Connor, J.) (emphasis in original).]

Accordingly, because the trial court announced few findings supporting its decision, presumed that the grandparents' visitation would serve the child's best interests, ****135** and accorded little weight to the fact that ***21** before the suit the mother voluntarily provided the grandparents meaningful visitation with the child, the Supreme Court held that the trial court's order improperly infringed the mother's fundamental due process right as a parent to make childrearing decisions. *Id.* at 72–73, 120 S.Ct. 2054.[15]

C

[2] In light of the recent Supreme Court decision emphasizing the fundamental constitutional right of parents to raise their children and make decisions regarding visitation, and necessarily custody, we find the instant trial court's determination of the child's custody, premised on *Rummelt,*

supra, constitutionally infirm. Even though the trial court did not view defendant as an abusive or neglectful parent or a threat to the child, the court nonetheless in its analysis failed to accord defendant's fundamental interest in raising the child any special weight. According to the *Rummelt* panel's analysis of the interplay between the natural parent presumption, subsection 5(1), and the established custodial environment factor, subsection ***22** 7(1)(c), and as the Supreme Court in *Troxel* found constitutionally offensive, *id.* at 68–70, 120 S.Ct. 2054, the trial court placed on defendant the ultimate burden of persuading the court that the child belonged in the custody of her natural mother. Furthermore, the trial court's application of the simple preponderance of the evidence standard set forth in *Rummelt* for reaching a decision regarding the child's best interests plainly and unconstitutionally invited the court to enforce its own judicial opinion regarding what custody situation best would serve the child's interests, irrespective of the natural mother's wishes. The Supreme Court in *Troxel* explicitly found unacceptable such enabling of a court, in a case involving "nothing more than a simple disagreement between the ... Court and [the parent] concerning [t]he[ ] children's best interests," to "make childrearing decisions simply because [the] state judge believes a 'better' decision could be made." *Troxel, supra* at 72, 73, 120 S.Ct. 2054.

"[I]f a fit parent's decision of the kind at issue here becomes subject to judicial review, the court must accord at least some special weight to the parent's own determination." *Troxel, supra* at 70, 120 S.Ct. 2054. We reject the *Rummelt* solution in this case because that Court's analysis of the interplay between subsections 5(1) and 7(1)(c) accords the fit parent's custody determination absolutely no deference whatsoever. To the contrary, the *Rummelt* solution unconstitutionally places on the natural parent the ultimate burden of persuasion that an award of custody to the parent would serve the child's best interests. *Rummelt, LaFleche,* and *Glover,* the ****136** case on which the *Rummelt* Court premised its analysis, did not acknowledge or address any constitutional implications when applying both subsection 5(1) and 7(1)(c). Because *Rummelt* ***23** did not consider the United States Supreme Court's recent reminder of the importance of the fundamental parental liberty interest, we note that we are not bound to follow *Rummelt.* MCR 7.215(I)(1).[16]

[3] We therefore conclude that in this case involving a fit natural mother seeking a change of her child's custody from an established custodial environment with third persons, the trial court's application of the test set forth in *Rummelt,* for resolving cases involving tension between the natural parent and established custodial environment presumptions, constituted clear legal error because it violated defendant's fundamental liberty interest in raising her children. *Troxel, supra* at 72–73, 120 S.Ct. 2054. In light of the fact that the evidence presented at the hearing did not weigh strongly against an award of custody to defendant, the trial court's unconstitutional application of an incorrect burden of proof cannot be considered harmless. Consequently, we must remand this case for the trial ***24** court's reconsideration. The trial court on remand must give defendant's fundamental liberty interest in childrearing appropriate consideration and should consider up-to-date information. *Fletcher v. Fletcher,* 447 Mich. 871, 889 (Brickley, J), 900, 526 N.W.2d 889 (Griffin, J.); 447 Mich. 871, 526 N.W.2d 889 (1994).

D

[4] **[5]** **[6]** **[7]** Because we must reverse the trial court's unconstitutional custody determination, we also must provide some guidance for the court on remand when attempting to reapply subsections 5(1) and 7(1)(c). We note that several panels of this Court, although not speaking in constitutional terms, addressed the concurrent application of subsections 5(1) and 7(1)(c) in a manner that we find more properly deferential to the fundamental nature of the parent's interest in childrearing when determining whether to grant the natural parent custody, thus changing the child's established custodial environment with a third party.

> This Court has struggled with the interaction between these two presumptions on many occasions, most recently in *Glover v. McRipley,* 159 Mich.App. 130, 406 N.W.2d 246 (1987). But see also *Deel v. Deel* [113 Mich.App. 556, 317 N.W.2d 685 (1982)]; ****137** *Stevens v. Stevens,* 86 Mich.App. 258, 273 N.W.2d 490 (1978); *Siwik v. Siwik,* 89 Mich.App. 603, 280 N.W.2d 610 (1979); *Bahr v. Bahr,* 60 Mich.App. 354, 230 N.W.2d 430 (1975). Having examined these cases, we agree with the *Deel* panel's recognition that the two presumptions are not to be considered equally.
>
> "[T]he language used in the statutes suggest[s] that the presumptions are not, in fact, of equal weight. While the established custodial environment is to be favored unless there is clear and convincing evidence that a change is in the best interests of the child, it is presumed that the best ***25** interests of the child are served by granting custody to the natural parent." [*Deel, supra,* p. 561, 317 N.W.2d 685.]

We also agree with the following language cited favorably in both *Deel* and *Bahr, supra:*

"*[The presumption that the best interests of the child would be served by granting custody to the natural parent] remains a presumption of the strongest order and it must be seriously considered and heavily weighted in favor of the parent. Nevertheless, if the 'clear and convincing' evidence establishes that the best interest of the child is served by awarding custody to the third party, the presumption is rebutted.*" [*Deel, supra,* pp. 561–562, 317 N.W.2d 685.]

* * *

While it is true that in any child custody dispute the overriding concern is for the best interests of the child, it is also presumed that the best interests of a child are served by placing custody with the natural parent, unless otherwise shown by clear and convincing evidence. M.C.L. 722.25.... We agree that a showing that a parent is unfit is not required to overcome this presumption. *Stevens v. Stevens, supra,* and *Bahr v. Bahr, supra.* Nonetheless, we construe the "clear and convincing evidence" standard to be a substantive standard rather than just an evidentiary standard.... *Consequently, in order to overcome the natural parent presumption, the trial judge was required to find that, when all of the factors in M.C.L. § 722.23 ... were collectively considered, defendant [the third party providing an established custodial environment] clearly and convincingly established that the best interests of the children required maintaining custody with defendant. It is not sufficient that defendant may have established by clear and convincing evidence that a marginal, though distinct, benefit would be gained if the children were maintained with him.* [*Henrikson v. Gable,* 162 Mich.App. 248, 252–253, 412 N.W.2d 702 (1987) (emphasis added).]

See also *Deel, supra* at 562, 317 N.W.2d 685 (explaining that "[r]ecognition of both presumptions does not ... remove the third party's burden to show that custody ***26** in his or her favor is in the child's best interests"); *Stevens, supra* at 267, 273 N.W.2d 490 ("The presumption in favor of the natural parent is rebutted if clear and convincing evidence establishes that the best interests of the child are served by awarding custody to the third party."); *Bahr, supra* at 359, 230 N.W.2d 430 (recognizing that the Child Custody Act required that the natural parent presumption "must be seriously considered and heavily weighted in favor of the parent," but that the presumption is rebutted "if the 'clear and convincing evidence' establishes that the best interest of the child is served by awarding custody to the third party").

We agree with the foregoing analysis of the appropriate interplay between subsections ****138** 5(1) and 7(1)(c). In enacting the Child Custody Act, the Legislature plainly recognized the fundamental constitutional nature of a parent's interest in childrearing when it enacted the presumption that in all custody disputes involving natural parents and third persons, absent clear and convincing evidence to the contrary, parental custody served the child's best interests. Subsection 5(1). The Legislature also clearly recognized the importance of an established custodial environment to the development of children. Subsection 7(1)(c). We do not believe, however, that the Legislature intended that in every custody dispute between a noncustodial natural parent and a third-person custodian, the third-person custodian could eliminate the fundamental constitutional presumption favoring custody with the natural parent, and thus arrive on equal footing with the parent with respect to their claim of custody to the parent's child, merely by showing that the child had an established custodial environment in the third person's custody. This interpretation, employed in *Rummelt,* fails to take into proper ***27** account the parents' fundamental due process liberty interest in childrearing.

The Legislature has decreed that in any custodial dispute the child's best interests, described within M.C.L. § 722.23, must prevail. *Eldred v. Ziny,* 246 Mich.App. 142, 150, 631 N.W.2d 748 (2001). In every custody dispute involving the natural parent of a child and a third-person custodian, the strong presumption exists, however, that parental custody serves the child's best interests. We hold that, to properly recognize the fundamental constitutional nature of the parental liberty interest while at the same time maintaining the statutory focus on the decisive nature of an involved child's best interests, custody of a child should be awarded to a third-party custodian instead of the child's natural parent only when the third person proves that all relevant factors, including the existence of an established custodial environment and all legislatively mandated best interest concerns within § 3, taken together clearly and convincingly demonstrate that the child's best interests require placement with the third person.[17] Only when such a clear and convincing showing is made should a trial court infringe the parent's fundamental constitutional rights by awarding custody of the parent's child to a third ***28** person.[18] We reiterate the Supreme Court's warning that " the 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," *Troxel, supra* at 72–73, 120 S.Ct. 2054, and remind trial courts considering competing custody claims of a noncustodial natural parent and a third-person custodian that it is not sufficient that the third person may have established ****139** by clear and convincing evidence that a marginal, though distinct, benefit would be gained if the children were maintained with him. *Henrikson, supra* at 253, 412 N.W.2d 702.

III

[8] **[9]** Defendant also argues that the grandparents lacked standing to participate in a custody dispute over the minor. Whether a party has legal standing to assert a claim constitutes a question of law that we review de novo. *Terry v. Affum,* 233 Mich.App. 498, 501, 592 N.W.2d 791 (1999) (hereinafter *Terry I*), aff'd. in part and vacated in part on other grounds 460 Mich. 856, 599 N.W.2d 100 (1999).

[10] **[11]** We initially note that defendant correctly cites *Bowie v. Arder,* 441 Mich. 23, 48–49, 490 N.W.2d 568 (1992), for the proposition that a third party, including a grandparent, generally "cannot create a custody dispute by simply filing a complaint in circuit court alleging that giving legal custody to the third party is ***29** in the best interests of the child."[19] Defendant also correctly states that a third party does not attain a legal right to a child's custody merely on the basis of the fact that the child has resided with the third party. *Bowie, supra* at 45, 490 N.W.2d 568; *Sirovey v. Campbell,* 223 Mich.App. 59, 69, 565 N.W.2d 857 (1997).

As defendant seems to acknowledge, however, the instant case is distinguishable from the consolidated cases the Supreme Court addressed in *Bowie, supra.* While *Bowie* involved a grandparent who initiated an original custody proceeding against the minor's father, *Bowie, supra* at 28–29, 490 N.W.2d 568, and an attempted voluntary transfer of legal custody from a child's parents to third parties outside the context of a custody dispute, *id.* at 29–30, 55, 490 N.W.2d 568, the instant custody dispute stemmed from a circuit court order during a divorce proceeding. Our Supreme Court specifically has recognized that while generally no authority permits "a nonparent to create a child custody 'dispute' by simply filing a complaint in the circuit court alleging that giving custody to the third party is in the 'best interests of the child,' custody may be awarded to grandparents or other third parties according to the best interests of the child in an appropriate case (typically involving divorce)." *Ruppel v. Lesner,* 421 Mich. 559, 565–566, 364 N.W.2d 665 (1984). The Supreme Court in *Bowie* later explained that a circuit court award of custody to a third party during a divorce proceeding "is based not on the third party's legal ***30** right to custody of the child, but on the court's determination of the child's best interests." *Bowie, supra* at 49, n. 22, 490 N.W.2d 568.

The circuit court had jurisdiction of the custody dispute between defendant and the grandparents pursuant to M.C.L. § 722.27(1), which explains that "[i]f a child custody dispute ... has arisen incidentally from another action in the circuit court or an order or judgment of the circuit court," the circuit court may take various specific actions affecting the child's custody. Subsection 7(1) contains the threshold requirement that an existing custody dispute is properly before the circuit court. ****140** *Terry v. Affum (On Remand),* 237 Mich.App. 522, 533, 603 N.W.2d 788 (1999) (*Terry II*). "The term 'child custody dispute' is generally used broadly throughout the Child Custody Act 'to mean any action or situation involving the placement of a child.' " *Sirovey, supra* at 68, 565 N.W.2d 857, quoting *Frame v. Nehls,* 452 Mich. 171, 179, 550 N.W.2d 739 (1996). Defendant's March 2000 petition to change the child's custody from the grandparents clearly created an "action or situation involving the placement of a child." *Sirovey, supra* at 68, 565 N.W.2d 857. Once obtained pursuant to divorce proceedings, circuit court jurisdiction over child custody issues continues until the child turns eighteen years of age. M.C.L. 552.17a(1).

The grandparents' standing is not at issue in this case, however, because the grandparents at no time during the instant litigation ever filed a pleading requesting permanent custody of the child or otherwise sought to originate a custody proceeding. *Terry II, supra* at 533, 603 N.W.2d 788. To the extent that the grandparents obtained custody of the child during the divorce proceedings, the trial court properly granted the grandparents custody pursuant to the parties' stipulated ***31** order modifying the judgment of divorce. "[U]nder § 17(1) of the divorce act, the circuit court may enter postjudgment custody orders only 'on the petition of either of the parents.' M.C.L. 552.17(1).... In making such order, the circuit court has jurisdiction under § 17a(1) of the divorce act to award custody to a third person."[20] *Sirovey, supra* at 77, 565 N.W.2d 857. "Viewing plaintiff's and defendant's custody stipulation as analogous to a postjudgment petition to modify custody, the court ... had jurisdiction under the divorce act to award custody of [the child] to [the grandparents] if it then

determined such award to be in [the child]'s best interests." *Id.* at 83, 565 N.W.2d 857.

Accordingly, while the grandparents had no substantive right to custody of the minor, *Bowie, supra,* we find that as proper third-party custodians under the modified judgment of divorce the grandparents properly responded to defendant's request to change custody, on behalf of the child in their custody, that the child's best interests would be served by continuing to reside in the established custodial environment with the grandparents. An observation of this Court in *Terry II, supra,* relates to a similar situation that illustrates this point. In *Terry I,* a natural father obtained a court order establishing his paternity and sole legal and physical custody of his child, while also reflecting the father's and the deceased mother's family's stipulation that the mother's family would have parenting time with the child. *Terry I, supra* at 499–500, 592 N.W.2d 791. The father shortly thereafter moved to amend the court order to terminate the mother's family's right to parenting time, but the trial court denied the motion ***32** and revised the mother's family's parenting time schedule. *Id.* at 500–501, 592 N.W.2d 791. This Court in *Terry I* found that the mother's family lacked standing to initiate a proceeding seeking parenting time pursuant to M.C.L. § 722.26c. *Terry I, supra* at 502, 592 N.W.2d 791. On remand from the Supreme Court, this Court in *Terry II* considered whether pursuant to M.C.L. § 722.27(1)(b) parenting time with the mother's family was appropriate on the basis that it would serve the children's best interests. *Terry II, supra* at 525–526, n. 2, 603 N.W.2d 788. This Court found that "*while without standing to initiate a proceeding seeking parenting time,* ****141** *by virtue of [the father's] various actions [the mother's family members] are parties to a child custody dispute properly before the circuit court.*" *Terry II, supra* at 534, 603 N.W.2d 788 (emphasis added). The Court concluded that as long as visitation with the mother's family served the children's best interests, the mother's family would be entitled to visitation incidental to the child custody dispute. *Id.* at 533–537, 603 N.W.2d 788.[21]

***33** Consequently, we reject defendant's standing argument. We further note that because we do not detect within the trial court record, nor within defendant's brief on appeal, any specific argument that the grandparents could not participate in the action because they never filed a motion to intervene in the proceedings, we need not consider this issue. *Tucker v. Clare Bros. Ltd.,* 196 Mich.App. 513, 517, 493 N.W.2d 918 (1992).

IV

[12] **[13]** Lastly, defendant asserts that the trial court improperly failed to weigh in its analysis of the custody situation the fact that she, plaintiff, and the grandparents all contemplated that the grandparents would maintain custody of the child only temporarily until defendant found a new home and job. This Court many times has recognized the "good public policy to encourage parents to transfer custody of their children to others temporarily when they are in difficulty by returning custody when they have solved their difficulty." *Straub v. Straub,* 209 Mich.App. 77, 81, 530 N.W.2d 125 (1995). Our review of the trial court's opinion reflects that the court did indeed consider the voluntary and temporary initial nature of defendant's placement of the child in the grandparents' custody.[22] ***34** To the extent that defendant suggests that the trial court should have granted her custody solely on the basis that the child's placement with the grandparents was intended to be a temporary arrangement, we do not agree. See *Straub, supra* (applying this public policy as a factor that "here tips an otherwise equal scale" in the mother's favor).

****142** Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

All Citations

248 Mich.App. 1, 638 N.W.2d 123

Footnotes

1 The order also divided the parties' property, granting plaintiff the exclusive right to reside in the marital home and permitting defendant to "remove all of her and the minor child's belongings from the marital home."

2 With respect to property, the divorce judgment likewise incorporated the provision of the August 29 order granting plaintiff the exclusive right to inhabit the marital home. The judgment also ordered that, except for several specific awards of personal property, "each party is to receive the property in their own possession."

3 While it appears that the court erred to the extent that it "blindly accept[ed] the stipulation of the parents" without "independently determin [ing] what is in the best interests of the child," *Phillips v. Jordan,* 241 Mich.App. 17, 21, 614 N.W.2d 183 (2000), the parties do not argue that the court's action constituted error requiring reversal.

4 The modification order further stated "that the parties, including JOHN AND ROBIN YONKERS, must promptly notify the Cass County Friend of the Court in writing, when their address changes."

5 At the July 2000 custody hearing, the grandmother testified that in February 2000 she took the child to the hospital after she had visited plaintiff's home. Those who examined the child found that her vagina appeared red. Apparently an investigation into the charges was ongoing at the time of the custody hearing, and the child was participating in counseling.

6 It appears that the court properly rethought its entry of the March 23 order, concluding that it needed to determine itself whether a custody modification served the child's best interests. *Phillips, supra.*

7 As a further condition of plaintiff's visits with the minor, plaintiff's mother had to supervise them.

8 Defendant explained that the warrant for her arrest stemmed from an unpaid vehicle loan that she and plaintiff had taken to purchase a vehicle, which plaintiff received pursuant to the judgment of divorce. Defendant testified that she was arrested because of the warrant, but that the charges subsequently were dismissed.

9 Although the testimony varied concerning the extent to which the grandparents permitted defendant to visit with the child outside the grandparents' home, undisputed testimony reflected that on at least one occasion defendant was permitted to take the child to a shopping mall.

10 Defendant's and the grandparents' testimony also diverged with respect to the frequency with which defendant requested custody of the child. Defendant alleged that she inquired monthly whether the grandparents would return the child to defendant's custody.

11 In applying the statutory factors to determine the child's best interests, M.C.L. § 722.23, the referee found that stronger love and emotional ties existed between the grandparents and the child than between defendant and the child, subsection a; because defendant "has made some bad decisions in her life and still shows a level of immaturity" the grandparents prevailed with respect to capacity to provide the child love and guidance, subsection b; the grandparents showed greater capacity to provide for the child's basic needs because defendant had only part-time employment, subsection c; the child had resided in a stable and satisfactory environment with the grandparents for most of her life, subsection d. The referee found that defendant prevailed regarding willingness and ability to facilitate and encourage a close and continuing relationship, subsection j, because while the grandparents' concerns regarding Tapia "to a certain extent were justified ... there is no reason why there should not be parenting time ... with [defendant] under normal situations." The referee found that the remaining statutory factors either did not apply or that neither party prevailed with regard to these factors. The referee concluded that defendant "has failed to meet the burden of persuasion that a change in custody would be in the best interests of the child."

12 The referee denied defendant's subsequent motion to permit visitation in Tapia's presence.

13 The statutory parental presumption states as follows:

> If a child custody dispute is between the parents, between agencies, or between third persons, the best interests of the child control. If the child custody dispute is between the parent or parents and an agency or a third person, the court shall presume that the best interests of the child are served by awarding custody to the parent or parents, unless the contrary is established by clear and convincing evidence. [M.C.L. 722.25(1).]

14 The relevant statutory language concerning an established custodial environment states as follows:

> (1) If a child custody dispute has been submitted to the circuit court as an original action under this act or has arisen incidentally from another action in the circuit court or an order or judgment of the circuit court, for the best interests of the child the court may do 1 or more of the following:
>
> * * *
>
> (c) Modify or amend its previous judgments or orders for proper cause shown or because of change of circumstances until the child reaches 18 years of age.... The court shall not modify or amend its previous judgments or orders or issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child. [M.C.L. 722.27(1)(c).]

15 Four justices joined the lead opinion in *Troxel,* while two more justices concurred. Concurring Justice Souter agreed that a parent possessed a fundamental right to raise his children, but opined that "because the state statute authorizes any person at any time to request (and a judge to award) visitation rights, subject only to the State's particular best-interests standard, the statute sweeps too broadly and is unconstitutional on its face," and "there is no need to decide whether harm is required or to consider the precise scope of the parent's right or its necessary protections." *Id.* at 76, 77, 120 S.Ct. 2054. Justice Thomas also concurred, agreeing "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, 120 S.Ct. 2054. Justice Thomas expressed his opinion that strict scrutiny review applied to the state's interference with this fundamental right, and that in this case the state "lacks even a legitimate governmental interest—to say nothing of a compelling one—in second-guessing a fit parent's decision regarding visitation with third parties." *Id.*

16 While this Court has long recognized a parent's fundamental constitutional liberty interest in childrearing, *Terry v. Affum,* 233 Mich.App. 498, 504, 592 N.W.2d 791 (1999), aff'd. in part and vacated in part on other grounds 460 Mich. 856, 599 N.W.2d 100 (1999); *In re LaFlure,* 48 Mich.App. 377, 385, 210 N.W.2d 482 (1973), the constitutional issue was not addressed in *Rummelt, supra.* We note that our Supreme Court recently has directed a trial court to reconsider *Rummelt* in light of *Troxel:*

> In lieu of granting leave to appeal, the June 24, 1999 order of the Macomb Circuit Court is vacated, and the case is remanded to the Macomb Circuit Court for a hearing *by the circuit judge* on the defendant's petition for custody of her child.... In deciding whether to grant the petition, the circuit court is to address the interplay of the presumptions stated in M.C.L. § 722.27(1)(c) ... and M.C.L. § 722.25(1) ... and whether the construction supplied in *LaFleche v. Ybarra,* 242 Mich.App. 692, 619 N.W.2d 738 (2000), *Rummelt v. Anderson,* 196 Mich.App. 491, 496, 493 N.W.2d 434 (1992), and *Straub v. Straub,* 209 Mich.App. 77, 79–80, 530 N.W.2d 125 (1995), gives to fit parents the degree of deference required by the U.S. Constitution. See *Troxel v. Granville,* 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000). [*Zulkowski v. Zulkowski,* 463 Mich. 933, 622 N.W.2d 65 (2000) (emphasis in original).]

17 The existence of an established custodial environment should be considered, subsection 7(1)(c), but should not itself eliminate the third person's burden to overcome the parental presumption by clear and convincing evidence. We note, however, that when a child custody dispute involves the child's fit natural parents, who possess equal constitutional liberty interests in raising their children, and agencies, or third persons, the simple best interests of the child analysis applies, subsection 5(1), and the party seeking a change in the child's custody from an established custodial environment must demonstrate clearly and convincingly that the change will serve the child's best interests. Subsection 7(1)(c).

18 We note for clarification that the provisions of the Child Custody Act clearly are not themselves facially unconstitutional, *Council of Organizations & Others for Ed. About Parochiaid, Inc. v. Governor,* 455 Mich. 557, 568, 566 N.W.2d 208 (1997), but that the trial court's application of subsections 5(1) and 7(1)(c) violated defendant's constitutional rights.

19 Certain limited standing exceptions, inapplicable in this case, do exist within the Child Custody Act. See subsection 6b, M.C.L. § 722.26b, involving guardianships, and 6c(1), M.C.L. § 722.26c(1), describing limited circumstances under which third persons may bring a custody action. Section 7b, M.C.L. § 722.27b, also inapplicable here, authorizes grandparents to seek orders for grandparenting time under certain circumstances.

20 The Child Custody Act defines a "third person" as "any individual other than a parent." M.C.L. 722.22(g).

21 See also *Terry II, supra* at 529–533, 603 N.W.2d 788, describing the following similarities between that third-person case and *Deel, supra, Siwik, supra, Stevens, supra,* and *Bahr, supra:*

> Notwithstanding the fact that custody did not ultimately remain with the third parties in all these cases, at some stage of the proceedings in each case the circuit court determined that at least for that time awarding custody to third parties was in the children's best interests. Though the four decisions are not equally clear concerning how the third parties became involved, two common threads can be gleaned. Critically, none of the third parties had *initiated* the action that resulted in the circuit court's award of custody to them. This fact comports with what is clearly the threshold requirement of M.C.L. § 722.27(1) ... that an existing custody dispute is properly before the circuit court. The second element common to the four examined cases is the fact that the circuit court's decisions regarding the award of custody were made after *hearings to determine the child's best interests.* [*Terry II, supra* at 533, 603 N.W.2d 788 (emphasis in original).]

22 We note that the trial court correctly observed that a finding of an established custodial environment does not depend on the manner in which such an environment became established. See *Hayes v. Hayes,* 209 Mich.App. 385, 388, 532 N.W.2d 190 (1995) ("In determining whether an established custodial environment exists, it makes no difference whether the environment was created by a court order, without a court order, in violation of a court order, or by a court order that was subsequently reversed."); *Treutle v. Treutle,* 197 Mich.App. 690, 693, 495 N.W.2d 836 (1992) ("In determining whether a custodial environment exists, the court's concern is not with the reasons behind the custodial environment, but with the existence of such an environment.").

469 Mich. 320
Supreme Court of Michigan.

Theresa O'Day DEROSE, also known as Theresa Seymour, Plaintiff Third–Party Defendant–Appellee,
v.
Joseph Allen DEROSE, Defendant–Appellee,
and
Catherine DeRose, Third–Party Plaintiff–Appellant.

Docket No. 121246.
|
Calendar No. 10.
|
Argued March 13, 2003.
|
Decided July 31, 2003.

Synopsis

Paternal grandmother filed petition, as third-party plaintiff in dissolution proceedings, for visitation with grandchild. The Circuit Court, Wayne County, Mary M. Waterstone, J., granted petition. Mother appealed. The Court of Appeals, 249 Mich.App. 388, 643 N.W.2d 259, reversed. Grandmother appealed. The Supreme Court, Clifford W. Taylor, J., held that grandparent visitation statute violated parents' liberty interests that are protected by due process guarantees, and was thus unconstitutional.

Affirmed.

Elizabeth A. Weaver, J., filed opinion concurring in result.

Marilyn J. Kelly J., filed dissenting opinion.

West Headnotes (3)

[1] **Appeal and Error** Statutory or legislative law

The constitutionality of a statute is reviewed de novo.

10 Cases that cite this headnote

[2] **Constitutional Law** Clearly, positively, or unmistakably unconstitutional

Statutes are presumed constitutional unless the unconstitutionality is clearly apparent.

7 Cases that cite this headnote

[3] **Child Custody** Validity
Child Custody Objections of parent
Constitutional Law Child custody, visitation, and support

Grandparent visitation statute violated parents' liberty interests protected by due process guarantees, and thus statute was unconstitutional, as statute did not require deference of any sort be paid by trial court to decisions fit parents make for their children regarding grandparent visitation. U.S.C.A. Const.Amend. 14; M.C.L.A. § 722.27b.

19 Cases that cite this headnote

West Codenotes

Held Unconstitutional
M.C.L. § 722.27b

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OPINION

TAYLOR, J.

This case presents a dispute under the grandparent visitation statute, M.C.L. § 722.27b, between a mother, Theresa Seymour,[1] and a paternal grandmother, Catherine DeRose, who sought visitation with her granddaughter. The trial court ordered limited visitation, and the mother appealed. The Court of Appeals held that this statute was unconstitutional. We affirm.

I. Facts

The child at issue in this case was born during the marriage of Theresa and Joseph DeRose. In 1997, Joseph DeRose was sentenced to twelve to twenty years in prison after pleading guilty of first-degree criminal sexual conduct (CSC–I) involving his stepdaughter. Theresa filed for divorce, and a default ***323** judgment of divorce was entered the following year. Theresa was awarded sole legal and physical custody of the child.

While the divorce was pending, Catherine DeRose filed a petition for visitation under the grandparent visitation statute, M.C.L. § 722.27b.[2] Theresa DeRose opposed ****638** visitation because the grandmother denied that her son was guilty of the crimes he admitted committing and, thus, in Theresa's view, contact with the child was not in the child's best interest.

***324** The Friend of the Court, after investigation, concluded that Catherine DeRose lacked standing to bring this petition for visitation. After the grandmother objected, another Friend of the Court investigation took place resulting in a recommendation that the grandmother have two hours of supervised visitation with the child on alternate Saturdays, increasing to four hours after an eight-month period.

The mother objected to the recommendation, and the case proceeded to a hearing in the Wayne Circuit Court. No testimony or evidence was taken at the hearing. The trial court granted the grandmother's petition, stating:

> But it doesn't strike me that there is any reason here that a child should be deprived of a grandmother. Grandmothers are very important. Grandmothers are very important. [sic] I don't say that just because I am one, but I do believe they are important. I have a niece who doesn't have any and she borrows grandparents and I realize this is difficult, a very difficult time for the 12–year–old, but the 12–year–old is not going to be required to see this lady. Not that it necessarily would be terrible, but I'm not saying it would be good. She is not going to see her. That's not the point.
>
> This is not a motion for custody so that [the child] would be taken away from her sisters for the rest of her life or for a long period of time, even a weekend. This is like two hours of supervised visitation and I know that mom—now, I'm sure mom feels, well, I made a bad choice, I wasn't aware—this, that and the other thing. So now she wants to overcorrect.
>
> It makes no sense to me that this grandmother can't have two hours of supervised visitation and even four hours of supervised visitation as recommended by the Friend of the Court and that's plenty of time to evaluate whether anything bad or wrong happens.
>
> It's very troubling that the concept that somehow this whole incident can just be erased by keeping the child's ***325** actual grandmother away from her. It can't be, and everybody is going to have to learn to deal with it which is not happy, it's not good.
>
> * * *
>
> ****639** It doesn't strike me that a supervised visitation is wrong, so I would affirm the recommendation.

The mother sought relief in the Court of Appeals, arguing that the grandparent visitation statute was unconstitutional.

The Court of Appeals, in a split decision, reversed the decision of the trial court. 249 Mich.App. 388, 643 N.W.2d 259 (2002). The panel concluded the grandparent visitation statute was unconstitutional on the basis of the United States

Supreme Court decision in *Troxel v. Granville,* 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000), which dealt with a somewhat similar third-party visitation statute in Washington that the Court ruled was unconstitutional. The Court of Appeals approach in deciding this matter was to compare the Washington statute to the Michigan statute to determine if the defects found by the Supreme Court in the Washington statute were mirrored in the Michigan act. Having done that, the Court of Appeals concluded that the Michigan statute was fatally similar to the Washington statute and, thus, it was unconstitutional pursuant to the *Troxel* analysis. As the panel said, "Simply put, if a court in Washington cannot constitutionally be vested with the discretion to grant visitation to a nonparent on the basis of a finding that it is in the child's best interests to do so, then a court in Michigan cannot be obligated under statute to do so based upon the same finding." 249 Mich.App at 394, 643 N.W.2d 259.

***326** The Court of Appeals also addressed whether, by means of reading " requirements that go beyond the text of the statute," 249 Mich.App at 395, 643 N.W.2d 259, into the statute, it could cure the constitutional deficiencies. The panel declined to do this because it believed such actions to be the responsibility of the Legislature and beyond the authority of a court.

Catherine DeRose sought relief in this Court, and we granted leave to appeal.[3]

II. Standard of Review

[1] **[2]** The constitutionality of a statute is reviewed de novo. *Tolksdorf v. Griffith,* 464 Mich. 1, 5, 626 N.W.2d 163 (2001). Statutes are presumed constitutional unless the unconstitutionality is clearly apparent. *McDougall v. Schanz,* 461 Mich. 15, 24, 597 N.W.2d 148 (1999).

III. Analysis

[3] In 2000, the United States Supreme Court heard and decided the *Troxel* case concerning the constitutionality of third-party visitation. At issue was the state of Washington's third-party visitation statute, Wash. Rev. Code 26.10.160(3), which was as expansive in granting third parties visitation privileges as can readily be envisioned. It stated:

> Any person may petition the court for visitation rights at any time including, but not limited to, custody proceedings. The court may order visitation rights for any person when visitation may serve the best interest of the child whether ***327** or not there has been a change of [sic, "in"] circumstances. [*Troxel, supra* at 61, 120 S.Ct. 2054.]

Operating under this statute, grandparents Jenifer and Gary Troxel sought greater visitation with their grandchildren than the children's mother would allow. The trial court granted visitation under the act, but the Washington Court of Appeals reversed for lack of standing. *Troxel, supra* at 62, 120 S.Ct. 2054; *In re Visitation of Troxel,* 87 Wash.App. 131, 137, 940 P.2d 698 (1997). The grandparents appealed, and the Washington Supreme Court, resting ****640** its decision on the United States Constitution, held that the statute was unconstitutional because it interfered with the right of parents, pursuant to substantive due process, to raise their children. *Troxel, supra* at 62–63, 120 S.Ct. 2054; *In re Smith,* 137 Wash.2d 1, 13–14, 969 P.2d 21 (1998). The statute did this, the court opined, because, contrary to relevant, constitutional doctrines on substantive due process, the court could order visitation over the parents' objection without first determining that court intervention was required to prevent harm or potential harm to the child. Moreover, the Washington Supreme Court held that the statute, by allowing any person to petition for visitation at any time subject only to a judge's unguided determination of the best interests of the child, was so overbroad that it violated constitutional requirements of due process. *Id.* at 30, 969 P.2d 21. Accordingly, it was unconstitutional for the additional reason that, as applied, it operated to deprive parents of their constitutionally protected rights to due process.

On appeal the United States Supreme Court also found the statute unconstitutional. The Supreme Court's holding, while clear regarding the outcome, is, unfortunately, written in so many voices that a unifying ***328** rationale is difficult to discern. Initially, in reviewing the decision it is important to note that the Court did not, unlike the Washington Supreme Court, analyze the case on the basis of theories implicating facial invalidities such as a violation of substantive due process would entail. In fact, only Justices Souter, Stevens, and Scalia, with three different positions as it developed, used that approach to decide the matter. Moreover, the plurality of four justices for whom Justice O'Connor wrote[4] seemed to deal with what were facial-challenge issues while not fully acknowledging that such was the case. Yet, notwithstanding

these difficulties, the Washington statute, when the smoke cleared, was held to be unconstitutional. It falls to us, as it has to other state supreme courts post-*Troxel,* to attempt to determine what at least five of the six justices who came to their conclusion did agree upon. We believe, guardedly, that a majority can be found in the Court's handling of the second issue that the Washington Supreme Court discussed, namely, the statute's overbreadth that caused it to violate parental liberty interests that are protected by the due-process guarantees of the United States Constitution.

The effort to discern where at least five justices agreed must begin with Justice O'Connor's plurality opinion. Its discussion of the law began by restating that, pursuant to established constitutional law, the Fourteenth Amendment's Due Process Clause includes a substantive component that " 'provides heightened protection against government interference ***329** with certain fundamental rights and liberty interests.' " *Troxel, supra* at 65, 120 S.Ct. 2054, quoting *Washington v. Glucksberg,* 521 U.S. 702, 720, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997). One of the liberty interests the Court identified, after characterizing it as perhaps the oldest such interest, is " the interest of parents in the care, custody, and control of their children...." *Troxel, supra* at 65, 120 S.Ct. 2054, quoting *Meyer v. Nebraska,* 262 U.S. 390, 399, 401, 43 S.Ct. 625, 67 L.Ed. 1042 (1923), and *Pierce v. Society of Sisters,* 268 U.S. 510, 534–535, 45 S.Ct. 571, 69 L.Ed. 1070 (1925). Further, the opinion reaffirmed that it is presumed that "so long as a parent adequately ****641** cares for his or her children (*i.e.,* is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's child." *Troxel, supra* at 68–69, 120 S.Ct. 2054. See *Reno v. Flores,* 507 U.S. 292, 304, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993).

With this discussion of the rights of parents to substantive due process behind her, Justice O'Connor apparently decided not to resolve the case on that basis. Rather, she continued her discussion by concluding that the Washington statute was an unconstitutional infringement of parental rights because the statute failed to require that a trial court accord deference to the decisions of fit parents regarding third-party visitation. According to Justice O'Connor, in order for a nonparental visitation statute to allow for such deference, it must articulate a presumption that parents act in their children's best interests. Additionally, the statute must place the burden of proof on the petitioner. *Troxel, supra* at 67–70, 120 S.Ct. 2054. Moreover, Justice O'Connor asserted that the statute was overbroad ***330** because anyone, at any time, could petition for visitation.[5] Thus, her opinion affirmed the Washington Supreme Court decision, but, we emphasize, did not hold that *all* nonparental visitation statutes were facially unconstitutional. *Troxel, supra* at 73, 120 S.Ct. 2054.

Justice Souter, in his concurrence, began by asserting that he would affirm the Washington Supreme Court on the basis that its analysis of the issues relating to substantive due process was consistent with the United States Supreme Court jurisprudence in this area. He continued by saying that he saw "no error" in the Washington Supreme Court's second justification that the "statute's authorization of 'any person' at 'any time' to petition and to receive visitation rights subject only to a free-ranging best-interest-of-the-child standard" because it swept "too broadly and is unconstitutional on its face." ***331** *Id.* at 76–77, 120 S.Ct. 2054.[6] As he saw it, this meant that the Washington Supreme ****642** Court had said " [c]onsequently, there is no need to decide whether harm is required or to consider the precise scope of the parent's right or its necessary protections." *Id.*

Justice Thomas also concurred that the issues concerning substantive due process were not addressed and that he agreed with the O'Connor plurality in its "recognition of a fundamental right of parents to direct the upbringing of their children...." *Id.* at 80, 120 S.Ct. 2054. He then concluded that he would apply strict scrutiny to the "infringements of fundamental rights" by the state of Washington and that the statute failed this test because Washington "lacks even a legitimate governmental interest—to saying nothing of a compelling one—in second-guessing a fit parent's decision regarding visitation with third parties." *Id.*

Accordingly, it is from the O'Connor plurality, as well as the opinions of Justices Souter and Thomas, that we must discern the principles that caused them to conclude that the Washington statute was unconstitutional.[7] Once accomplished, we then apply those principles to the Michigan statute to determine if our ***332** statute is sufficiently different from the Washington statute at issue in *Troxel* to pass constitutional muster.

First, to isolate the agreed-upon matters between the opinion of Justice O'Connor and those of Justices Souter and Thomas, it appears to us that all six justices agreed that parents have what they described as a " fundamental right" to raise their children.[8] Further, on the basis of this "fundamental right,"

both Justice O'Connor and Justice Souter found that parents have the right to make decisions for children, and such decisions must be accorded "deference" or "weight." *Troxel, supra* at 67, 78 n. 2, 120 S.Ct. 2054. Therefore, a visitation statute of the sort at issue here must, as we read *Troxel,* require that a trial court accord deference to the decisions of fit parents regarding third-party visitation. That is, it is not enough that the trial court simply disagrees with decisions the parents have made regarding third-party visitation. *Troxel, supra* at 67, 77–78, 120 S.Ct. 2054.

The Michigan statute states, in relevant part

> (1) Except as provided in this subsection, a grandparent of the child may seek an order for grandparenting time in the manner set forth in this section only if a child custody dispute with respect to that child is pending before the court....
>
> (2) As used in this section, "child custody dispute" includes a proceeding in which any of the following occurs:
>
> (a) The marriage of the child's parents is declared invalid or is dissolved by the court, or a court enters a decree of legal separation with regard to the marriage.
>
> * * *
>
> ***333** (3) A grandparent seeking a grandparenting time order may commence an action for grandparenting time, by complaint or complaint and motion for an order to show cause, in the circuit court in the county in which the grandchild resides. If a child custody dispute is ****643** pending, the order shall be sought by motion for an order to show cause. The complaint or motion shall be accompanied by an affidavit setting forth facts supporting the requested order. The grandparent shall give notice of the filing to each party who has legal custody of the grandchild. A party having legal custody may file an opposing affidavit. A hearing shall be held by the court on its own motion or if a party so requests. At the hearing, parties submitting affidavits shall be allowed an opportunity to be heard. At the conclusion of the hearing, if the court finds that it is in the best interests of the child to enter a grandparenting time order, the court shall enter an order providing for reasonable grandparenting time of the child by the grandparent by general or specific terms and conditions. If a hearing is not held, the court shall enter a grandparenting time order only upon a finding that grandparenting time is in the best interests of the child....
>
> The court shall make a record of the reasons for a denial of a requested grandparenting time order.

There is no indication that the statute requires deference of any sort be paid by a trial court to the decisions fit parents make for their children.[9] Thus, like the Washington statute at issue in *Troxel,* it is for this reason, the fact that our statute fails to require that a trial court accord deference to the decisions of fit ***334** parents regarding grandparent visitation, that we find our statute is constitutionally deficient.[10]

IV. Conclusion

Aware of the statute's constitutional infirmities, we must declare it constitutionally invalid. We have not, unlike Justice Kelly's opinion, addressed the "substantive due process" argument, i.e., whether a predicate of any such intervention into the parent-child relationship is a showing of harm or potential harm to the child, because it is not necessary to resolve this case under *Troxel.* Moreover, after *Troxel* it appears that federal constitutional law in this area is now not as predictable as it was before *Troxel.* One cannot read the many opinions in *Troxel* without concluding that an equilibrium has not been reached, and that the Supreme Court may be moving in the direction of rethinking its "substantive due process" jurisprudence so as to make it easier, or more difficult, for the state to intervene by ordering visitation ****644** in the parent-child relationship. Because we can decide this case without ***335** endeavoring to read the portents on that matter, we prudentially decline to do so.

In conclusion, bound as we are by the decision in *Troxel,* we are compelled to affirm the judgment of the Court of Appeals and find the Michigan grandparent visitation statute unconstitutional as written.

Affirmed and remanded to the trial court for proceedings consistent with this opinion.

CORRIGAN, C.J., and MICHAEL F. CAVANAGH, YOUNG, JR. and MARKMAN, JJ., concur.

WEAVER, J. concurring in the result.

I concur in the result only of the majority opinion that Michigan's grandparent visitation statute, M.C.L. § 722.27b, is unconstitutional on its face.

I write separately because I recognize the importance of the grandparent visitation statute and wish to emphasize that grandparent visitation statutes per se are not unconstitutional. The statutes may be written in such a way that they comply with constitutional requirements. See *Troxel v. Granville,* 530 U.S. 57, 73, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000). Therefore, I urge the Legislature to amend Michigan's statute to alleviate the constitutional flaws in the statute.

While Michigan's statute is narrower than the statute at issue in *Troxel,*[1] the statute is, nonetheless, ***336** flawed for the following reasons: (1) the statute does not provide a presumption that fit parents act in the best interests of their children, (2) the statute fails to accord the fit parent's decision concerning visitation any "special weight," and (3) the statute fails to clearly place the burden in the proceedings on the petitioners, rather than the parents. See *Troxel, supra* at 67–71, 120 S.Ct. 2054 (O'Connor, J., plurality opinion). However, as addressed below, each of these constitutional problems can be cured with revisions to the statute and, in fact, many other state statutes include provisions that may alleviate some or all these concerns.

These concerns have been addressed by states such as Utah, where the visitation statute provides, "[t]here is a rebuttable presumption that a parent's decision with regard to grandparent visitation is in the ****645** grandchild's best interests...." Utah Code Ann. 30–5–2(2). In Nevada, the visitation statute addresses these requirements by providing in pertinent part:

> ***337** If a parent of the child has denied or unreasonably restricted visits with the child, there is a rebuttable presumption that the granting of a right to visitation to a party seeking visitation is not in the best interests of the child. To rebut this presumption, the party seeking visitation must prove by clear and convincing evidence that it is in the best interests of the child to grant visitation. [Nev. Rev. Stat. 125C.050(4).]

The Nevada statute explicitly requires the party seeking visitation to rebut the presumption that visitation is not in the child's best interests and to prove that it is in the best interests of the child to grant visitation. In Georgia, "there shall be no presumption in favor of visitation by any grandparent." Ga. Code Ann. 19–7–3(c). Thus, the burden is on the grandparent seeking visitation to prove an entitlement to visitation under the standards articulated in the Georgia statute. In New Jersey, the burden in the proceedings is explicitly placed on the petitioner. New Jersey's statute states, "It shall be the burden of the applicant to prove by a preponderance of the evidence that the granting of visitation is in the best interests of the child." N.J. Stat. Ann. 9:2–7.1(a).[2] Some states also require the grandparent to demonstrate some sort of preexisting relationship between the grandparent and the child or an effort to establish one as a requisite ***338** for seeking visitation. Me. Rev. Stat. Ann. tit. 19–A, 1803 (1); Miss Code Ann. 93–16–3(2)(a); Neb. Rev. Stat. 43–1802(2); N.C. Gen. Stat. 50–13.2A; Tenn. Code Ann. 36–6–306(b)(1).[3]

Also, several states address the concerns of *Troxel* by requiring consideration of the effect of a visitation order on the child-parent relationship.[4] See *Troxel, supra* at 70, 120 S.Ct. 2054. Several states specifically require the trial court to determine that visitation will not adversely affect, interfere with, or substantially interfere with the parent-child relationship. Neb. Rev. Stat. 43–1802(2); N.H. Rev. Stat. Ann. 458:17–d(II)(b); N.J. Stat. Ann. 9:2–7.1(b)(4); N.D. Cent. Code 14–09–05.1; ****646** W. Va. Code. 48–10–501, 48–10–502(5).[5]

***339** Additionally, some state grandparent visitation statutes contain a separate list of best-interest factors to consider when deciding whether to award grandparent visitation. See Nev. Rev. Stat. Ann. 125C.050; Tenn. Code Ann. 36–6–307. I do not gather from *Troxel* that a separate list is required; however, it may be something the Legislature would wish to consider.[6]

***340** The various state provisions cited suggest that it is possible to draft a statute that would address the constitutional concerns expressed in *Troxel.*[7] I urge the ****647** Legislature to revise Michigan's grandparent visitation ***341** statute to alleviate the constitutional flaws in the statute.[8]

MARILYN J. KELLY, J. (dissenting).

The issue in this case is whether Michigan's grandparent visitation statute[1] is constitutional, either as written or as applied by the trial court. The Court of Appeals held the statute unconstitutional as written, relying on the United States Supreme Court opinion in *Troxel v. Granville,* 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000). 249 Mich.App. 388, 643 N.W.2d 259 (2002).

Today, the majority affirms that decision. However, it bases its analysis on an interpretation of *Troxel* that is inaccurate

and it operates from the premise that Justice O'Connor, who authored the *Troxel* plurality opinion, misunderstood her own opinion. Moreover, in interpreting Michigan's grandparent visitation statute, the majority invokes fundamental methods of statutory construction, but in application abandons those principles.

While not joining the majority, I do agree that the trial court's visitation order impermissibly infringed Mrs. Seymour's privacy and liberty interests in raising her children. Accordingly, I would affirm the Court of Appeals vacation of the trial court's order granting visitation. However, I would reverse the Court of Appeals holding that the grandparent visitation statute is unconstitutional. Rather, I would hold that it is ***342** the trial court's *application* of the statute that is unconstitutional.

I. The Troxel Decision

The resolution of this case requires a careful examination of the United States Supreme Court opinions in *Troxel v. Granville, supra.* The Washington Supreme Court held Washington's nonparental visitation statute unconstitutional. On review, a plurality of the members of the United States Supreme Court ruled that the trial court's application of the statute was unconstitutional. "We ... hold that the application of [the Washington statute] to Granville and her family violated her due process right to make decisions concerning the care, custody, and control of her ****648** daughters." It did not hold that the statute was unconstitutional. *Troxel,* 530 U.S. at 75, 120 S.Ct. 2054.

Thus, the Court left unresolved whether the Washington statute, or similar statutes in other states, could survive in light of the Constitution's protections of the parent-child relationship. Because the Washington Supreme Court's interpretation of the Washington statute was the subject of the *Troxel* decision, it is important to review that statute and understand how it was applied.

A. The Washington statute and the opinion of the Washington Supreme Court

Section 26.10.160 of the Revised Code of Washington provides, in relevant part:

> (3) Any person may petition the court for visitation rights at any time including, but not limited to, custody proceedings. The court may order visitation rights for any person ***343** when visitation may serve the best interest of the child whether or not there has been any change of circumstances.

The facts in *Troxel* were that Tommie Granville and Brad Troxel, although never married, had two daughters. After their relationship ended, Brad lived with his parents and frequently brought his daughters to their home for weekend visitations. Two years after Tommie and Brad separated, Brad committed suicide. After his death, Tommie Granville allowed Brad's parents extended visitation with the children. Later, however, she informed them that the visitation would be limited to one short visit each month.

The grandparents, the Troxels, brought an action in Washington state court for visitation rights pursuant to Wash. Rev. Code 26.10.160(3), Washington's nonparent visitation statute. They requested two weekends of overnight visitation per month and two weeks of visitation every summer. Although Granville did not oppose visitation altogether, she asked the court to limit it to one day a month with no overnight visitation. *In re Troxel,* 87 Wash.App. 131, 133–134, 940 P.2d 698 (1997). The trial court entered an order permitting visitation on one weekend a month, one week each summer, and four hours on each of the grandparents' birthdays. *In re Smith,* 137 Wash.2d 1, 6, 969 P.2d 21 (1998).

Granville appealed from this decision, and the Washington Court of Appeals remanded for findings of fact and conclusions of law. *In re Smith, supra.* On remand, the trial court, applying the state's best interests test, concluded that visitation was in the best interests of the children.

***344** Granville again appealed. This time, the Washington Court of Appeals reversed the trial court order and dismissed the petition. It held that nonparents lack standing under Washington's nonparental visitation statute, unless a custody action is pending. Having resolved the matter on the basis of standing, the court had no need to address Granville's constitutional challenge to the statute.[2] *In re Troxel,* 87 Wash.App. at 138, 940 P.2d 698.

The Washington Supreme Court granted the Troxels' petition for review and consolidated their case with similar cases. It then affirmed the Washington Court of Appeals decision on a separate basis. It ****649** held that the Troxels had standing to

petition for visitation under the Washington act. However, the act was unconstitutional because it impermissibly infringed the fundamental rights of parents to raise their children.

In reaching this conclusion, the Washington Supreme Court stated that the act had at least two fatal flaws: (1) it was not limited to situations where there was actual or potential harm to the child, which the Washington Supreme Court held were the limits of legitimate state interference with parental rights, and (2) because the statute allowed "any person" to petition for visitation rights at "any time," it swept too broadly. *In re Smith,* 137 Wash.2d at 15–21, 969 P.2d 21.

The Troxels brought a petition for certiorari to the United States Supreme Court. The Court granted it ***345** and affirmed the Washington Supreme Court in a plurality opinion authored by Justice O'Connor.[3]

B. The United States Supreme Court decision

A review of the various opinions of the justices is helpful for the purpose of determining the consistent rule among them, if any.

1. The opinion of the Court

Justice O'Connor began the substantive portion of her opinion by noting that demographic changes over the past century have altered traditional notions of the family. Consequently, child rearing responsibilities frequently extend beyond immediate family members to grandparents. In recognition of this change, she noted, every state has adopted a measure protecting the relationship between grandparents as nontraditional caregivers and the children whose lives they shape. *Troxel,* 530 U.S. at 63–65, 120 S.Ct. 2054.

While acknowledging that "third-party" relationships are often beneficial to children, Justice O'Connor also recognized that nonparental visitation statutes place a substantial burden on the parent-child relationship. *Id.* at 64, 120 S.Ct. 2054. Because parents have a constitutionally protected interest in the care, custody, and control of their children, these statutes risk violating the Due Process Clause of the Fourteenth Amendment. *Washington v. Glucksberg,* 521 U.S. 702, 719–720, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997); *Reno* ***346** *v. Flores,* 507 U.S. 292, 301–302, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993).

Justice O'Connor relied on the Court's rich history of protecting the parent-child relationship[4] and concluded that the trial court's application of the Washington nonparental visitation statute was unconstitutional. *Troxel,* 530 U.S. at 75, 120 S.Ct. 2054. She emphasized that the statute is broad in scope and that, when applying it, the trial court had gone to the full extent of the its language in entering the visitation order. *Id.* at 73–75, 120 S.Ct. 2054. She noted concern that the order gave visitation that exceeded Granville's wishes even though (1) Granville had allowed limited ****650** visitation to the Troxels, (2) there was no indication that Granville was an unfit parent, and (3) Granville had made her own legitimate determination of the child's best interests. *Id.* at 68–72, 120 S.Ct. 2054.

2. The concurring opinions

Justice Souter concurred in the result and in a portion of Justice O'Connor's reasoning. He opined that the Washington Supreme Court's invalidation of the statute was consistent with the Court's jurisprudence on substantive due process. *Troxel,* 530 U.S. at 75–76, 120 S.Ct. 2054. He relied on the fact that the Washington Supreme Court had construed the statute to allow any person to petition for visitation at any time, subject only to a court's unfettered discretion. Justice Souter differed ***347** from Justice O'Connor in that he would have held that the Washington Supreme Court's interpretation of the statute was conclusive. Thus, the statute was overbroad because it did not limit the discretion of the lower courts. As a consequence, it was invalid in all its applications. *Id.* at 77–79, 120 S.Ct. 2054, citing *Chicago v. Morales,* 527 U.S. 41, 71, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999).

Justice Thomas concurred only in the result of the plurality opinion. He stated that, because the Court had found a fundamental interest, strict scrutiny must apply and, under that standard, the statute was invalid. *Troxel,* 530 U.S. at 80, 120 S.Ct. 2054.

3. The dissenting opinions

With one exception, the dissenting justices did not argue that a different result was warranted. Rather, Justices Stevens and Kennedy would have vacated the Washington Supreme Court decision because the opinion itself was too broad.

Common to both these opinions is a focus on arbitrariness. Justice Stevens and Justice Kennedy agreed that the Due Process Clause forbids unreasonable state intrusion into the parent-child relationship. Both justices agreed that, at some point, a parental decision might become so arbitrary that judicial intrusion is warranted.

The question for these justices was whether the best interests test, standing alone, is a sufficient indicator of arbitrariness. Because the Washington ***348** Supreme Court failed to address this issue, Justices Stevens and Kennedy would have vacated the Washington Supreme Court decision and remanded the case for further findings.

Justice Scalia took a different approach. He argued that, while a parent's interest in directing a child's upbringing is among the unalienable rights retained by the people,[5] the right is not enumerated in the Constitution. Accordingly, while a state may have no legitimate power to curtail the right, the Court has no power to enforce it. Justice Scalia would have reversed the Washington Supreme Court decision to the extent that it relied on the Due Process Clause of the Fourteenth Amendment in holding the Washington statute invalid.

4. The composite opinion

The *Troxel* plurality decision is capable of reconciliation in, at least, one respect. With one justice dissenting and one concurring in the result only, the Court held that the Due Process Clause of the Fourteenth Amendment protects parents' fundamental interest in raising their children. Thus, a state may not unduly interfere in the parent-child relationship. At a minimum, state interference in the relationship is not permitted unless a parent has made ****651** a decision regarding visitation that is not in the child's' best interests.

II. Application

Determining whether the Michigan grandparent visitation statute is constitutional requires the following analysis: First, the fundamental interest at stake ***349** should be defined. Second, the statute should not infringe this interest. Third, if it infringes, a strict scrutiny test must be applied to it. In applying this analysis, we attempt to give effect to legislative intent. *Omelenchuk v. City of Warren,* 466 Mich. 524, 528, 647 N.W.2d 493 (2002).

When we review a statute on the basis of a constitutional challenge, we begin with a presumption that it is constitutional. *Taylor v. Gate Pharmaceuticals,* 468 Mich. 1, 6, 658 N.W.2d 127 (2003). To overcome the presumption of constitutionality, the party challenging the facial constitutionality of the act "must establish that no set of circumstances exists under which the act would be valid. The fact that the ... act might operate unconstitutionally under some conceivable set of circumstances is insufficient...." *Straus v. Governor,* 459 Mich. 526, 543, 592 N.W.2d 53 (1999), quoting *United States v. Salerno,* 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987).

Moreover, we have a duty to construe a statute as constitutional, unless its unconstitutionality is clearly apparent. *Taylor, supra.* Beyond the question of constitutionality, it is not our province to inquire into the wisdom of the legislation. *Id.,* citing *Council of Organizations & Others for Ed. About Parochiaid, Inc. v. Governor,* 455 Mich. 557, 570, 566 N.W.2d 208 (1997).

A. The nature of the right involved

The fundamental interest at stake in this case is the parent-child relationship. There can be

> no doubt that parents have a fundamental liberty interest in caring for and guiding their children, and a corresponding privacy interest—absent exceptional circumstances—in ***350** doing so without the undue interference of strangers to them and to their child. [*Troxel,* 530 U.S. at 87, 120 S.Ct. 2054 (opinion of Stevens, J.).]

"It is cardinal ... that the custody, care and nurture of the child reside first in the parents...." *Prince v. Massachusetts,* 321 U.S. 158, 166, 64 S.Ct. 438, 88 L.Ed. 645 (1944). Thus,

> [i]t is plain that the interest of a parent in the companionship, care, custody, and management of his or her children "come[s] ... with a momentum for respect lacking when appeal is made to the liberties which derive merely from shifting economic arrangements." [*Stanley v. Illinois,* 405 U.S. 645, 651, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972), citing *Kovacs v. Cooper,* 336 U.S. 77, 95, 69 S.Ct. 448, 93 L.Ed. 513 (1949) (Frankfurter, J, concurring).]

Because the Constitution recognizes this fundamental interest, a presumption has been created that the "natural bonds of affection lead parents to act in the best interests

of their children." *Parham v. J.R.,* 442 U.S. 584, 602, 99 S.Ct. 2493, 61 L.Ed.2d 101 (1979). Consequently, a state interest will rarely be sufficiently compelling to override parents' legitimate decisions regarding the care, custody, or management of their children.

B. Michigan's Grandparent Visitation Statute

Michigan's grandparent visitation statute states:

> (1) Except as provided in this subsection, a grandparent of the child may seek an order for grandparenting time in the manner set forth in this section only if a child custody dispute with respect ****652** to that child is pending before the court. If a natural parent of an unmarried child is deceased, a parent of the deceased person may commence an action ***351** for grandparenting time. Adoption of the child by a stepparent under [MCL 710.21 to 710.70] does not terminate the right of a parent of the deceased person to commence an action for grandparenting time.
>
> (2) As used in this section, "child custody dispute" includes a proceeding in which any of the following occurs:
>
> (a) The marriage of the child's parents is declared invalid or is dissolved by the court, or a court enters a decree of legal separation with regard to the marriage.
>
> (b) Legal custody of the child is given to a party other than the child's parent, or the child is placed outside of and does not reside in the home of a parent, excluding any child who has been placed for adoption with other than a stepparent, or whose adoption by other than a stepparent has been legally finalized.
>
> (3) A grandparent seeking a grandparenting time order may commence an action for grandparenting time, by complaint or complaint and motion for an order to show cause, in the circuit court in the county in which the grandchild resides. If a child custody dispute is pending, the order shall be sought by motion for an order to show cause. The complaint or motion shall be accompanied by an affidavit setting forth facts supporting the requested order. The grandparent shall give notice of the filing to each party who has legal custody of the grandchild. A party having legal custody may file an opposing affidavit. A hearing shall be held by the court on its own motion or if a party so requests. At the hearing, parties submitting affidavits shall be allowed an opportunity to be heard. At the conclusion of the hearing, if the court finds that it is in the best interests of the child to enter a grandparenting time order, the court shall enter an order providing for reasonable grandparenting time of the child by the grandparent by general or specific terms and conditions. If a hearing is not held, the court shall enter a grandparenting time order only upon a finding that grandparenting time is in the best interests of the child. A grandparenting time order shall not be entered for the parents of a putative father unless the father has acknowledged paternity in writing, has been adjudicated to be the father by a court of competent jurisdiction, or has contributed ***352** regularly to the support of the child or children. The court shall make a record of the reasons for a denial of a requested grandparenting time order.
>
> (4) A grandparent may not file more than once every 2 years, absent a showing of good cause, a complaint or motion seeking a grandparenting time order. If the court finds there is good cause to allow a grandparent to file more than 1 complaint or motion under this section in a 2–year period, the court shall allow the filing and shall consider the complaint or motion. The court may order reasonable attorney fees to the prevailing party.
>
> (5) The court shall not enter an order restricting the movement of the grandchild if the restriction is solely for the purpose of allowing the grandparent to exercise the rights conferred in a grandparenting time order.
>
> (6) A grandparenting time order entered in accordance with this section shall not be considered to have created parental rights in the person or persons to whom grandparenting time rights are granted. The entry of a grandparenting ****653** time order shall not prevent a court of competent jurisdiction from acting upon the custody of the child, the parental rights of the child, or the adoption of the child.
>
> (7) The court may enter an order modifying or terminating a grandparenting time order whenever such a modification or termination is in the best interests of the child. [MCL 722.27b.]

It is evident that, like the Washington statute, Michigan's grandparent visitation statute infringes the parents' liberty interest in directing the upbringing of their children. It does this by allowing third parties to insert themselves into the relationship over a parent's objection. Thus, if the statute is allowed to stand, it must pass the strict scrutiny test.

***353** C. Application of strict scrutiny to the statute

In order to meet strict scrutiny, a statute must be narrowly tailored to serve a compelling governmental interest. In the realm of fundamental rights, this test takes on substantial weight. The very concept of a liberty interest presumes that there are few, if any, governmental interests that will meet this burden. Moreover, a court's application of an otherwise valid statute is invalid if it extends beyond the limits of constitutional authority.

The majority holds that our grandparent visitation statute cannot withstand constitutional scrutiny. Specifically, it rules that the unconstitutionality lies in its failure to "accord deference to the decisions of fit parents regarding third-party visitation." *Ante* at 643.

It is apparent to me that this conclusion rests on an unnecessarily strict interpretation of the statute. It violates the principle that " '[a] text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably to contain all that it fairly means.' " Corrigan & Thomas, ''Dice Loading" Rules of statutory interpretation, 59 N.Y.U. Ann. Surv. Am. L. 231, 231–232 (2003), quoting Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton, N.J.: Princeton University Press, 1997), p. 23.

1. Facial validity

a. Compelling government interest

"A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens...." *Prince v.* ***354** *Massachusetts,* 321 U.S. 158, 168, 64 S.Ct. 438, 88 L.Ed. 645 (1944). Accordingly, "[i]t is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.' " *New York v. Ferber,* 458 U.S. 747, 756–757, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982), quoting *Globe Newspaper Co. v. Superior Court,* 457 U.S. 596, 607, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982). Therefore, we may sustain legislation aimed at protecting the physical and emotional well-being of youth even when the legislation impinges on constitutionally protected rights. *Ferber, supra* at 757, 102 S.Ct. 3348.

Our grandparent visitation statute is meant to protect children's well-being by providing for visitation when it is in their best interests. Thus, the statute must be upheld if it is narrowly tailored to address this compelling interest.

b. Narrowly tailored

By its terms, the Michigan grandparent visitation statute is substantially more narrow than the Washington statute. For instance, the Washington statute allowed any person the ability to bring a petition for visitation at any time. By contrast, the Michigan statute allows only grandparents to petition for visitation and only under circumstances where a prior disturbance in ****654** the parent-child relationship limits the effect of the intrusion. The Legislature allows court-ordered nonparental visitation only where (1) the relationship between the child and the petitioner is that of grandchild-grandparent, and (2) the petition for visitation is made during the pendency of a child custody dispute or the natural parent of the unmarried child is deceased.

***355** The crucial fact in this case is that the Michigan statute, like the Washington statute, employs a best-interests-of-the-child standard to determine whether a court should issue a visitation order. The inclusion of this standard constituted the ultimate flaw in the Washington statute; once a petition was properly before a Washington court, the act gave the judge unfettered discretion to determine whether to award visitation.[6] Thus, I would agree with the majority that, unless our Legislature has otherwise limited our trial courts' discretion in awarding visitation to grandparents, we must hold the statute unconstitutional.

The majority is apparently persuaded by the argument that the statute includes a presumption in favor of awarding grandparent visitation. *Ante,* at 643, n. 10. However, this interpretation runs afoul of the basic tenet that a statute is presumed constitutional. The majority incorrectly states that the statute does not require a trial court to justify its decision to award grandparent visitation with any factual findings or analysis. To the contrary, the statute forbids a court from entering a grandparent visitation order unless it "finds that it is in the best interests of the child...." M.C.L. § 722.27b(3). Under our court rules, the court must place its findings of fact and conclusions of law on the record. MCR 3.210(D) and 2.517(A)(1).

The Michigan statute does not include the most restrictive terms possible, but it need not do so to pass constitutional muster. Indeed, a statute may be constitutional even though it lacks provisions that meet constitutional requirements. As long as it has ***356** terms not excluding such requirements, a court is justified in finding that constitutional requirements are embodied in the statute. *Council of Organizations,* 455 Mich. at 569, 566 N.W.2d 208, quoting 16 Am. Jur. 2d, Constitutional Law, § 225, p. 659.

Moreover, the grandparent visitation statute does not exist in a vacuum. It is part of an extensive statutory scheme, the Child Custody Act of 1970,[7] that guides the resolution of disputes regarding custody and visitation rights. The grandparent visitation statute cannot properly be interpreted without reference to applicable provisions of the Child Custody Act. Cf. *Arrowhead Dev. Co. v. Livingston Co. Rd. Comm.,* 413 Mich. 505, 516, 322 N.W.2d 702 (1982). Specifically, the grandparent visitation statute must be read in conjunction with M.C.L. § 722.23 and M.C.L. § 722.25, which contain the state's best interests standard.

Of particular importance is M.C.L. § 722.23(*l*), which requires that courts take into account any unnamed factor relevant to a dispute. One such factor always present in grandparent visitation disputes must be the constitutional rights of the ****655** parents.[8]

Additionally, M.C.L. § 722.25 works collectively with M.C.L. § 722.23 to protect parents' constitutional rights. MCL 722.25(1) provides that

> [i]f a child custody dispute is between the parents, between agencies, or between third persons, the best interests of the child control. If the child custody dispute is between the parent or parents and an agency or a third person, the court ***357** shall presume that the best interests of the child are served by awarding custody to the parent or parents, unless the contrary is established by clear and convincing evidence.

This analysis supports the conclusion that our grandparent visitation statute is drawn more narrowly than the statute at issue in *Troxel.* It also demonstrates that, in drafting the statute, our Legislature was concerned with protecting parents' fundamental interest in raising their children.

Accordingly, when the Legislature enacted the grandparent visitation statute, it saw fit to explicitly require that trial courts give deference to a fit parent's decisions regarding grandparent visitation. The majority's argument that the provisions requiring deference are inapplicable in the context of grandparent visitation are untenable. The Legislature resolved this issue by including grandparent visitation within the gamut of custody disputes.[9] Therefore, because it is narrowly tailored to serve a compelling governmental interest, the statute is constitutional.

2. The trial court's application of the statute

Although I believe that the grandparent visitation statute is valid, the visitation order must be overturned ***358** because it unduly infringes Mrs. Seymour's constitutionally protected interest in raising her children. The record indicates that the order far exceeded the discretion that the Legislature gave the trial court. The basis for the order was the court's conclusion that "grandmothers are very important." This statement shows that the trial court's decision involved "nothing more than a simple disagreement between the [trial court and Theresa DeRose] concerning her children's best interests." *Troxel,* 530 U.S. at 72, 120 S.Ct. 2054 (opinion of O'Connor, J.); *Parham,* 442 U.S. at 603, 99 S.Ct. 2493.[10]

****656** Moreover, this case is less difficult than was *Troxel.* Here, Mrs. Seymour not only made a legitimate decision concerning her child, she demonstrated that she made the decision to protect the integrity of her family. Had Mrs. DeRose been allowed to continue visitation with Mrs. Seymour's daughter, she could have continued to tell the child that Mrs. Seymour's ex-husband was not guilty of sexually abusing the child's sister. ***359** The potential harm to both children is a legitimate concern.

Mrs. DeRose has failed to demonstrate that Mrs. Seymour's decision was not in the best interests of her children. The evidence demonstrated that Mrs. Seymour's concern for the integrity of her family motivated her decision. This concern is the basis of the liberty interest at stake in this case. See *Caban v. Mohammed,* 441 U.S. 380, 397, 99 S.Ct. 1760, 60 L.Ed.2d 297 (1979); *Lehr v. Robertson,* 463 U.S. 248, 260–261, 103 S.Ct. 2985, 77 L.Ed.2d 614 (1983); *Michael H. v. Gerald D.,* 491 U.S. 110, 123, 109 S.Ct. 2333, 105 L.Ed.2d 91 (1989). Accordingly, I would hold that the visitation order is an unconstitutional abuse of the discretion granted to the trial court by the Michigan grandparent visitation statute.

Conclusion

Parents' fundamental right to control the upbringing of their children is protected by the Due Process Clause of the Fourteenth Amendment. The state may not interfere with this right unless the means of interference are narrowly tailored to serve a compelling governmental interest.

It is beyond dispute that our grandparent visitation statute serves a compelling governmental interest. It promotes the well-being of our children by allowing visitation between children and grandparents when visitation is in the best interests of the children. Thus, the statute must be upheld if it is narrowly tailored to serve this interest.

I believe that the Michigan grandparent visitation statute is sufficiently narrow in scope to meet this ***360** standard. As opposed to the statute under scrutiny in *Troxel,* the Michigan statute allows only grandparents to petition our courts for nonparental visitation. Also, the only occasions when grandparents may be granted visitation against a parent's wishes are during the pendency of a child custody dispute or after the death of a natural parent.

Moreover, the Child Custody Act is written to protect parents' fundamental interest in raising their children. Under it, grandparents obtain visitation only if they can prove, by clear and convincing evidence, that a parent's decision regarding visitation is not in the best interests of the children. Additionally, the act limits the discretion a court can exercise in determining the children's best interests. Therefore, it is narrowly tailored.

However, the trial court's finding that grandmothers are important is insufficient to support the order issued in this case. "[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." *Id.* at 72–73, 120 S.Ct. 2054.

In this case, the trial court substituted its opinion concerning the value of grandparent visitation for that of Mrs. Seymour. The trial court overrode Mrs. Seymour's legitimate decision concerning the upbringing of her children without finding clear ****657** and convincing evidence on the basis of the best interest factors. Consequently, the visitation order was an undue burden on the relationship between Mrs. Seymour and her daughters.

In the end, I differ significantly with the majority in my interpretation of the grandparent visitation statute. ***361** In my opinion the majority has ignored the text of the Child Custody Act. It has chosen instead to follow the example of the Washington Supreme Court by needlessly illegitimizing our grandparent visitation statute. Moreover, it has failed to provide the Legislature with guidance in drafting a statute that the Court could find constitutional.

Because it is clear to me that the visitation order was unconstitutional, I would affirm the decision of the Court of Appeals to vacate it. *Troxel,* 530 U.S. at 75, 120 S.Ct. 2054. However, I would not find the grandparent visitation statute unconstitutional. I would find, merely, that the trial court's *application* of the statute was unconstitutional in this instance.

All Citations

469 Mich. 320, 666 N.W.2d 636

Footnotes

1 Formerly Theresa DeRose.

2 (1) Except as provided in this subsection, a grandparent of the child may seek an order for grandparenting time in the manner set forth in this section only if a child custody dispute with respect to that child is pending before the court....
(2) As used in this section, "child custody dispute" includes a proceeding in which any of the following occurs:
(a) The marriage of the child's parents is declared invalid or is dissolved by the court, or a court enters a decree of legal separation with regard to the marriage.
* * *
(3) A grandparent seeking a grandparenting time order may commence an action for grandparenting time, by complaint or complaint and motion for an order to show cause, in the circuit court in the county in which the grandchild resides. If a child custody dispute is pending, the order shall be sought by motion for an order to show cause. The complaint or motion shall be accompanied by an affidavit setting forth facts supporting the requested order. The grandparent shall give notice of the filing to each party who has legal custody of the grandchild. A party having legal custody may file an

> opposing affidavit. A hearing shall be held by the court on its own motion or if a party so requests. At the hearing, parties submitting affidavits shall be allowed an opportunity to be heard. At the conclusion of the hearing, if the court finds that it is in the best interests of the child to enter a grandparenting time order, the court shall enter an order providing for reasonable grandparenting time of the child by the grandparent by general or specific terms and conditions. If a hearing is not held, the court shall enter a grandparenting time order only upon a finding that grandparenting time is in the best interests of the child....

3 467 Mich. 884, 653 N.W.2d 403 (2002).

4 Justice O'Connor's opinion was joined by Chief Justice Rehnquist, Justice Ginsburg, and Justice Breyer.

5 Under the statute, as she described it, should the trial judge disagree with the parent's determination, the judge's determination of what would be in the child's best interests would prevail. Indeed, she concluded that the reasons offered in this case by the trial court in granting visitation indicated nothing more than a simple disagreement with the mother's decision regarding visitation:

> [T]he Superior Court made only two formal findings in support of its visitation order. First, the Troxels "are part of a large, central, loving family, all located in this area, and the [Troxels] can provide opportunities for the children in the areas of cousins and music." Second, "the children would be benefitted from spending quality time with the [Troxels], provided that that time is balanced with time with the childrens' [sic] nuclear family." These slender findings, in combination with the court's announced presumption in favor of grandparent visitation and its failure to accord significant weight to Granville's already having offered meaningful visitation to the Troxels, show that this case involves nothing more than a simple disagreement between the Washington Superior Court and Granville concerning her children's best interests. [*Troxel, supra* at 72, 120 S.Ct. 2054 (citations omitted).]

6 Justice Souter agreed with the plurality that the statute was unconstitutional because it failed to require a trial court to accord any deference to a fit parent's decision regarding third-party visitation. *Troxel, supra* at 78 n. 2, 120 S.Ct. 2054 (Souter, J., concurring), quoting the plurality:

> As Justice O'Connor points out, the best-interests provision "contains no requirement that a court accord the parent's decision any presumption of validity or any weight whatsoever. Instead, the Washington statute places the best-interest determination solely in the hands of the judge." [Citation omitted.]

7 We do not review the remaining three opinions by Justices Scalia, Kennedy, or Stevens because of the lack of any relevant shared conclusions by these justices with the O'Connor, Souter, or Thomas positions.

8 While the plurality and Justice Thomas, concurring, described this as a "fundamental right," *Troxel, supra* at 66, 80, 120 S.Ct. 2054, Justice Souter described it as a "substantive interest[ ]." *Id.,* at 75, 120 S.Ct. 2054 (Souter, J., concurring).

9 Moreover, the clear language of M.C.L. § 722.27b(3) indicates that the court is only required to make a record of the reasons for its decision in a grandparenting visitation case if visitation is *denied.* Apparently, if visitation is granted, the trial court need not justify its decision with any factual findings or analysis. Thus, rather than giving any "special weight" to the determination of a fit parent, the thrust of this provision appears to favor grandparent visitation in the face of a contrary preference by a fit parent.

10 It should be noted, however, that the Michigan statute is much narrower than Washington's in conferring standing to pursue visitation. It, thus, appears to us to meet the *Troxel* tests in this regard. Rather than applying to any person at any time, it applies only to grandparents, and only in two situations: where there is a child-custody dispute before the court, or where the unmarried parent is deceased. MCL 722.27b(1) and (2). Further, a grandparent may only file once every two years, absent a showing of good cause, M.C.L. § 722.27b(4), under procedures articulated at M.C.L. § 722.27b(3). Moreover, Michigan's courts cannot restrict the movement of the child solely to allow the grandparent to exercise the rights in the statute. MCL 722.27b(5). Noteworthy also is that the statute carefully sets out that a grandparenting-time order does not confer parental rights in those to whom the visitation is granted, M.C.L. § 722.27b(6), and that any orders granted under the act may be modified or terminated when in the best interests of the child, M.C.L. § 722.27b(7).

1 Michigan's statute is narrower because it only allows grandparents to petition for visitation, rather than any party. Moreover, the statute, M.C.L. § 722.27b, limits when a grandparent may petition for visitation, providing in part:

> (1) Except as provided in this subsection, a grandparent of the child may seek an order for grandparenting time in the manner set forth in this section only if a child custody dispute with respect to that child is pending before the court. If a natural parent of an unmarried child is deceased, a parent of the deceased person may commence an action for grandparenting time. Adoption of the child by a stepparent under [MCL 710.21 to 710.70] does not terminate the right of a parent of the deceased person to commence an action for grandparenting time.
>
> (2) As used in this section, "child custody dispute" includes a proceeding in which any of the following occurs:

(a) The marriage of the child's parents is declared invalid or is dissolved by the court, or a court enters a degree of legal separation with regard to the marriage.

(b) Legal custody of the child is given to a party other than the child's parent, or the child is placed outside of and does not reside in the home of a parent, excluding any child who has been placed for adoption with other than a stepparent, or whose adoption by other than a stepparent has been legally finalized.

Under the statute, a grandparent may not file more than once every two years, absent a showing of good cause. MCL 722.27b(4).

2 The New Jersey Superior Court, Appellate Division, rejected a party's constitutional challenge, although there was substance in support of the complaint that this statute was facially unconstitutional, but it did conclude that the statute was unconstitutional as applied in the case before it. *Wilde v. Wilde,* 341 N.J.Super. 381, 386, 775 A.2d 535 (2001). Recently, the New Jersey Supreme Court concluded that "grandparents seeking visitation under the statute must prove by a preponderance of the evidence that denial of the visitation they seek would result in harm to the child. That burden is constitutionally required to safeguard the due process rights of fit parents." *Moriarty v. Bradt,* 177 N.J. 84, 88, 827 A.2d 203 (2003).

3 In *Rideout v. Riendeau,* 761 A.2d 291, 294 (2000), the Supreme Judicial Court of Maine concluded that Maine's Grandparents Visitation Act, Me. Rev. Stat. Ann. tit. 19–A, 1801–1805, "as applied to the facts presented to us, is narrowly tailored to serve a compelling state interest, and thus does not violate the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution."

The Mississippi Supreme Court rejected challenges to the constitutionality of Miss. Code Ann. 93–16–3(1) and 93–16–3(2), respectively, in *Zeman v. Stanford,* 789 So.2d 798, 803 (2001), and *Stacy v. Ross,* 798 So.2d 1275, 1279 (2001).

4 MCL 722.23(j) does require the court to consider "[t]he willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents." However, this language does not explicitly require the trial court to assess the effect of visitation on the parent-child relationship.

5 In 1993, the North Dakota Supreme Court declared the 1993 amendment of N.D. Cent. Code 14–09–05.1 unconstitutional "to the extent that it require[d] courts to grant grandparents visitation rights with an unmarried minor unless visitation is found not to be in the child's best interests, and presume[d] visitation rights of grandparents [were] in a child's best interests...." *Hoff v. Berg,* 595 N.W.2d 285, 291 (1999). The Court further declared that the 1983 version of the statute was left intact until its valid repeal or amendment. *Id.* at 292. The current version of North Dakota's statute, which does not include a presumption in favor of grandparent visitation, took effect on August 1, 2001.

The Supreme Court of Appeals of West Virginia held that its grandparent act was constitutional in *State ex rel Brandon L. v. Moats,* 209 W.Va. 752, 754, 762–764, 551 S.E.2d 674 (2001). The Court noted that the Legislature recodified the grandparent visitation act but that it did not alter the language of the statutory provisions it was addressing. *Id.* at 754, n. 2, 551 S.E.2d 674. The citations in this opinion are to the recodified act.

6 Michigan's best-interest statute, M.C.L. § 722.23, lists the following factors to consider:

(a) The love, affection, and other emotional ties existing between the parties involved and the child.

(b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.

(c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.

(d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.

(e) The permanence, as a family unit, of the existing or proposed custodial home or homes.

(f) The moral fitness of the parties involved.

(g) The mental and physical health of the parties involved.

(h) The home, school, and community record of the child.

(i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.

(j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents.

(k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.

(*l*) Any other factor considered by the court to be relevant to a particular child custody dispute.

These factors are applicable in the grandparent visitation context. MCL 722.23 states, "As used in *this act,* "best interests of the child" means the sum total of the following factors...." (Emphasis added.) "This act" refers to the Michigan Child Custody Act of 1970. The grandparent visitation statute, M.C.L. § 722.27b, is part of "this act."

7 The *Troxel* Court declined to address "whether the Due Process Clause requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation." *Troxel, supra* at 73, 120 S.Ct. 2054. Because the *Troxel* Court did not indicate whether it was necessary to demonstrate that the child would be harmed if grandparent visitation were not granted, I express no opinion regarding whether a statute must require such a showing before it can be found constitutional. I do note that some states have built such a requirement into their statutes. In Tennessee, for example, the statute states:

> In considering a petition for grandparent visitation, the court shall first determine the presence of a danger of substantial harm to the child. Such a finding of substantial harm may be based upon cessation of the relationship between an unmarried minor child and the child's grandparent if the court determines, upon proper proof, that:
>
> (A) The child had such a significant existing relationship with the grandparent that loss of the relationship is likely to occasion severe emotional harm to the child;
>
> (B) The grandparent functioned as a primary caregiver such that cessation of the relationship could interrupt provision of the daily needs of the child and thus occasion physical or emotional harm; or
>
> (C) The child had a significant existing relationship with the grandparent and loss of the relationship presents the danger of other direct and substantial harm to the child. [Tenn. Code Ann. 36–6–306(b)(1).]

See also Ga. Code Ann. 19–7–3(c). As stated in n 2, the New Jersey Supreme Court read this requirement into its statute. Again, I note that *Troxel* declined to state that such a showing of harm to the child was required per se to alleviate concerns of substantive due process. I cite these statutes requiring a finding of harm for informational purposes only.

8 I note that two House bills were introduced on January 29, 2003, to amend provisions relating to grandparent visitation: House Bill 4104 and House Bill 4105. See "Michigan Legislature," www.michiganlegislature.org., July 22, 2003. However, these amendments do not address the constitutional concerns discussed in this opinion.

1 MCL 722.27b.

2 The court did state that this limitation on nonparental visitation is "consistent with the constitutional restrictions on state interference with parents' fundamental liberty interest in the 'care, custody, and management' of their children." *In re Troxel,* 87 Wash.App. at 135, 940 P.2d 698, quoting *Santosky v. Kramer,* 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982).

3 Justice O'Connor was joined in the opinion by Chief Justice Rehnquist and Justices Ginsburg and Breyer. Justices Souter and Thomas concurred on alternative bases. Justices Stevens, Scalia, and Kennedy each authored dissents.

4 See, e.g., *Meyer v. Nebraska,* 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923); *Pierce v. Society of Sisters,* 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925); *Prince v. Massachusetts,* 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944); *Stanley v. Illinois,* 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972); *Wisconsin v. Yoder,* 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972); *Quilloin v. Walcott,* 434 U.S. 246, 98 S.Ct. 549, 54 L.Ed.2d 511 (1978); *Parham v. J.R.,* 442 U.S. 584, 99 S.Ct. 2493, 61 L.Ed.2d 101 (1979); *Santosky, supra.*

5 See U.S. Const., Am. IX.

6 Unlike the Michigan grandparent visitation statute, the Washington statute never defined the factors to consider before a court could find that a visitation order is in the "best interests of the child."

7 MCL 722.21 *et seq.*

8 See *Winekoff v. Pospisil,* 384 Mich. 260, 267–268, 181 N.W.2d 897 (1970), *quoting Lake Shore & M.S.R. Co. v. Miller,* 25 Mich. 274, 291–292 (1872)("[C]ourts are bound judicially to know and apply such laws and principles as part of the law of the land.").

9 MCL 722.27(1) provides in pertinent part:

> If a child custody dispute has been submitted to the circuit court as an original action under this act or has arisen incidentally from another action in the circuit court or an order or judgment of the circuit court, for the best interests of the child the court may do 1 or more of the following:
>
> * * *
>
> (f) Upon petition consider the reasonable grandparenting time of maternal or paternal grandparents as provided in section 7b....

10 Compare this statement with those made by the trial court in *Troxel:*

> The burden is to show that it is in the best interest of the children to have some visitation and some quality time with their grandparents. I think in most situations a commonsensical approach [is that] it is normally in the best interest of the

children to spend quality time with the grandparent, unless the grandparent, [sic] there are some issues or problems involved wherein the grandparents, their lifestyles are going to impact adversely upon the children. That certainly isn't the case here from what I can tell.

* * *

I look back on some personal experiences.... We always spent as kids a week with one set of grandparents and another set of grandparents, [and] it happened to work out in our family that [it] turned out to be an enjoyable experience. Maybe that can, in this family, if that is how it works out. [*Troxel,* 530 U.S. at 69, 72, 120 S.Ct. 2054.]

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KeyCite Yellow Flag - Negative Treatment
Distinguished by Schaiberger v. Peiffer, Mich.App., October 22, 2019

484 Mich. 247
Supreme Court of Michigan.

Robert HUNTER and Lorie Hunter, Plaintiffs–Appellees,
v.
Tammy Jo HUNTER, Defendant–Appellant,
and
Jeffrey Hunter, Defendant.

Docket No. 136310.
|
Calendar No. 2.
|
Argued March 3, 2009.
|
Decided July 31, 2009.

Synopsis

Background: Paternal aunt and uncle, as third parties who had provided the children a custodial environment upon parents' collapse into drug addiction and incarceration, filed petition seeking legal and physical custody of the children, despite mother's apparent rehabilitation and compliance with court visitation orders. The Circuit Court, Oakland County, Family Division, Linda S. Hallmark, J., entered judgment in favor of aunt and uncle, awarding them physical and legal custody of children. The Court of Appeals affirmed the custody determination. Mother appealed.

Holdings: The Supreme Court, Kelly, C.J., held that:

[1] parental presumption in child custody disputes controlled over conflicting presumption favoring an established custodial environment;

[2] parental presumption could be rebutted only by clear and convincing evidence that custody with mother was not in the best interests of the children; and

[3] applicability of parental presumption was not dependent upon finding of parental fitness, overruling *Mason v. Simmons*, 267 Mich.App. 188, 704 N.W.2d 104.

Reversed and remanded for further proceedings.

Weaver, J., concurred in part and dissented in part and issued opinion.

Corrigan, J., concurred in part and dissented in part and issued opinion.

West Headnotes (22)

[1] **Appeal and Error** Statutory or legislative law

Questions of law involving statutory interpretation and questions concerning the constitutionality of a statute are reviewed de novo.

27 Cases that cite this headnote

[2] **Child Custody** Questions of Fact and Findings of Court

Findings of fact in child custody cases are reviewed under the great weight of the evidence standard.

1 Cases that cite this headnote

[3] **Constitutional Law** Parent and Child Relationship

The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State; therefore, to satisfy constitutional due process standards, the state must provide the parents with fundamentally fair procedures in proceedings affecting the parent-child relationship. U.S.C.A. Const.Amend. 14.

16 Cases that cite this headnote

[4] **Constitutional Law** Child custody, visitation, and support

Child custody cases involving natural parents inherently implicate the parents' fundamental liberty interest in the care, custody, and management of their children.

13 Cases that cite this headnote

[5] **Child Custody** Presumption in favor of parent

In child custody dispute between mother, a natural parent, and children's paternal aunt and uncle, as third parties who had provided children a custodial environment upon parents' collapse into drug addiction and incarceration, in order to protect rehabilitated mother's fundamental constitutional rights, statute within Child Custody Act (CCA) that recognized a parental presumption over third parties in child custody disputes controlled over conflicting statute within CCA that recognized a third-party presumption favoring an established custodial environment; unlike the parental presumption, the custodial environment presumption was rooted in no constitutional protections. M.C.L.A. §§ 722.25(1), 722.27(1)(c).

13 Cases that cite this headnote

[6] **Child Custody** Presumption in favor of parent

The parental presumption under section within Child Custody Act (CCA), which affords a natural parent a presumption over third parties in child custody disputes, can be rebutted only by clear and convincing evidence that custody with the natural parent is not in the best interests of the child. M.C.L.A. §§ 722.25(1), 722.27(1)(c).

27 Cases that cite this headnote

[7] **Parent and Child** Rights, Duties, and Liabilities Concerning Relation

A natural parent's fitness to parent is the touchstone for invoking the constitutional protections of fundamental parental rights.

[8] **Child Custody** Right of biological parent as to third persons in general

Child Custody Parties; intervention

No constitutional or statutory basis exists for third parties to have standing to seek child custody solely because they have an established custodial relationship with the child.

2 Cases that cite this headnote

[9] **Constitutional Law** Presumptions and Construction as to Constitutionality

As between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, a court's plain duty is to adopt that which will save the act.

1 Cases that cite this headnote

[10] **Child Custody** Welfare and best interest of child

The primary goal of the Child Custody Act (CCA) is to secure custody decisions that are in the best interests of the child. M.C.L.A. § 722.21 et seq.

2 Cases that cite this headnote

[11] **Evidence** Degree of Proof in General

The clear and convincing evidence standard is the most demanding standard applied in civil cases; this showing must produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable the factfinder to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue.

26 Cases that cite this headnote

[12] **Child Custody** Disputes between parent and non-parent, in general

Given the unique constitutional considerations in child custody disputes involving natural parents,

it is not sufficient that a third person may have established by clear and convincing evidence that a marginal, though distinct, benefit would be gained if the children were maintained with him; a third party seeking custody must meet a higher threshold by establishing by clear and convincing evidence that it is not in the child's best interests under the factors specified in Child Custody Act (CCA) for the parent to have custody. M.C.L.A. §§ 722.25(1), 722.27(1)(c).

26 Cases that cite this headnote

[13] **Child Custody** Presumption in favor of parent

In child custody disputes between a fit natural parent and a third party, although a fit parent is presumed to act in his or her child's best interests, a court need give the parent's decision only a presumption of validity or some weight; the section within Child Custody Act (CCA) that recognizes a parental presumption with respect to the best interests of the children accomplishes this when it requires clear and convincing evidence to rebut the presumption. M.C.L.A. §§ 722.25(1), 722.27(1)(c).

11 Cases that cite this headnote

[14] **Child Custody** Right of biological parent as to third persons in general

Infants Dependency, Permanency, and Termination Factors; Children in Need of Aid

When compared to child custody cases in which a third party seeks custody over objection of a natural parent, parental rights termination cases introduce a significantly heightened intrusion upon a parent's fundamental right to parent because they involve an all-or-nothing proposition: whether a parent's right to be a parent and make decisions regarding his or her child's upbringing is permanently severed.

2 Cases that cite this headnote

[15] **Child Custody** Right of biological parent as to third persons in general

Infants Dependency, Permanency, and Termination Factors; Children in Need of Aid

When compared to a parental rights termination proceeding, a custody award to a third party represents a lesser intrusion into the family sphere in that it does not result in an irrevocable severance of parental rights or a unique kind of deprivation that forces parents to confront the state.

3 Cases that cite this headnote

[16] **Infants** Parents and relatives

Infants Other particular persons

Infants Dependency, permanency, and rights termination in general

Infants Fitness of parent

In parental rights termination cases, the natural parent and the state are the parties to the action, and the state must show that the natural parent is unfit.

1 Cases that cite this headnote

[17] **Child Custody** Nature of child custody proceedings

Child Custody Parties; intervention

Infants Dependency, Permanency, and Termination Factors; Children in Need of Aid

In child custody cases, the state does not initiate the proceedings in which the natural parent's rights are at stake; unlike parental rights termination actions, custody determinations merely give recognition to a family unit already in existence.

3 Cases that cite this headnote

[18] **Child Custody** Welfare and best interest of child

A natural parent's fitness is an intrinsic component of a trial court's evaluation of the best interest factors under child custody statute. M.C.L.A. § 722.23.

2 Cases that cite this headnote

[19] **Child Custody** Presumption in favor of parent

Child Custody Decision and findings by court

Applicability of statute within Child Custody Act (CCA), under which mother, the natural parent, was afforded a parental presumption over paternal aunt and uncle in child custody dispute, was not dependent upon a preliminary finding of parental fitness, in that nothing in the statute explicitly or implicitly suggested that the presumption applied only in cases involving a parent adjudged to be a fit parent, and thus, aunt and uncle were required to rebut presumption by showing, by clear and convincing evidence, that mother's custody would not serve children's best interests; overruling *Mason v. Simmons*, 267 Mich.App. 188, 704 N.W.2d 104. M.C.L.A. §§ 722.23, 722.25(1).

1 Cases that cite this headnote

[20] **Child Custody** Presumption in favor of parent

Statutory presumption under the Child Custody Act (CCA), under which natural parents are afforded a parental presumption over third parties for purposes of determining the best interests of the children in child custody disputes, is a presumption of the strongest order, and one that does not turn solely on the question of parental fitness. M.C.L.A. § 722.25(1).

4 Cases that cite this headnote

[21] **Child Custody** Collateral estoppel and issue preclusion

Child Custody Proceedings

Natural parents may not bring actions under the Child Custody Act (CCA) and invoke the parental presumption favoring natural parents over third parties in child custody disputes as an end run around previous custody determinations; principles of collateral estoppel generally prevent a party from relitigating an issue already established in the first proceeding. M.C.L.A. § 722.25(1).

2 Cases that cite this headnote

[22] **Infants** Res judicata and conclusiveness

Infants Appeal and Review

A parent whose rights have been terminated or suspended cannot initiate an action for custody under the Child Custody Act (CCA), as it would amount to a collateral attack on the earlier proceedings; a termination order, by its nature, finds that custody with the natural parent is not in the child's best interests, and the parent's only recourse in such cases is to appeal the order. M.C.L.A. § 722.21 et seq.

3 Cases that cite this headnote

Attorneys and Law Firms

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Saraphoena B. Koffron for Tammy Jo Hunter.

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Michigan Poverty Law Program (by Rebecca E. Shiemke), Legal Services of South Central Michigan (by Susan L. Hartman and Elizabeth E. Rios), and Family Law Project (by Rebecca K. Ellis) for amicus curiae the Michigan Coalition Against Domestic and Sexual Violence.

Deana Pollard Sacks and Karen E. Groenhout for amicus curiae the Center for Effective Discipline, the National Coalition to Abolish Corporal Punishment in Schools, and End Physical Punishment of Children.

Carlo Martina and Anne Argiroff, Plymouth, for amicus curiae the Family Law Section of the State Bar of Michigan.

Ashley E. Lowe, Robert A. Sedler, Michael J. Steinberg, and Kary L. Moss, for amicus curiae the American Civil Liberties Union Fund of Michigan.

Opinion

MARILYN J. KELLY, C.J.

***251** This child custody case requires us to examine (1) the scope of the constitutional rights of natural parents in raising their children, (2) how provisions of Michigan's Child Custody Act (CCA)[1] interact with those rights, and (3) whether the circuit court in this case applied the correct legal standards (a) in finding defendant,[2] the children's biological mother, to be an unfit parent and (b) in awarding legal and physical custody of her four children to the children's paternal uncle and his wife.

We conclude that the circuit court did not apply the correct legal standards. We also overrule *Mason v. Simmons,*[3] which the lower courts relied on, because its holding is inconsistent with the statutory language of the CCA and inconsistent with longstanding principles of Michigan custody jurisprudence. Therefore, we reverse the judgment of the Court of Appeals and remand the case to the circuit court for further proceedings.

I. Facts and Procedural History

In 2002, Tammy Hunter and her husband, Jeff Hunter, lived in Indiana with their four young children, who ranged in age from two to nine years. There is no evidence in the record that Indiana child welfare authorities ever investigated or sought jurisdiction over ***252** the family. Tammy and Jeff began using crack cocaine. In August 2002, Tammy left her four children in Jeff's care at home and did not return for six days. During her absence, Jeff contacted his brother and sister-in-law in Michigan, plaintiffs Robert and Lorie Hunter, and requested their assistance. Robert drove to Indiana, collected the children, and returned to Michigan.

Two months later, Tammy and Jeff came to Michigan and retrieved their children, claiming that they had successfully overcome their drug addictions. A short time later, however, plaintiffs learned that Tammy and Jeff had relapsed. Plaintiffs again drove to Indiana and brought the children to Michigan. Robert testified that he and Lorie told Tammy and Jeff that "we were taking the kids ... and told them they had to give us the kids and sign these guardianship papers." Tammy signed papers establishing a limited guardianship with plaintiffs.

****699** Seven months later, in May 2003, Tammy and Jeff petitioned the Oakland Circuit Court to terminate plaintiffs' guardianship. However, they failed to appear at a June 2003 hearing because they were again using cocaine. On July 1, 2003, the circuit court dissolved the limited guardianship and appointed plaintiffs full guardians of the children.

Tammy's life further deteriorated when she was incarcerated in August 2004. She was released from prison in April 2005 and, three months later, filed a petition in the Oakland Circuit Court seeking an opportunity to visit her children.[4] The circuit court required her to verify her drug-free status since her release from prison. She was required to undergo biweekly drug ***253** testing, attend Alcoholics Anonymous or Narcotics Anonymous meetings, and maintain weekly telephone contact with her children. She complied with each of these requirements.

On November 9, 2005, the circuit court ordered Tammy to begin paying child support and allowed supervised visits with the children. At a review hearing conducted six months later, the circuit court noted that Tammy's visitation had gone well and that she regularly paid child support. The circuit court expanded her parenting time, awarding her unsupervised weekend visits in Michigan during May and June 2006 and overnight, unsupervised visits in Indiana beginning in July 2006. The court also continued her child support obligation and ordered her to submit to weekly drug screens. She again met each of the court's requirements. By the time this case was filed, Tammy was having monthly unsupervised weekend visits with the children at her Indiana home and in Michigan.

In May 2006, plaintiffs filed this action seeking legal and physical custody of the children. The parties stipulated that the Friend of the Court (FOC) referee would make a preliminary finding regarding the children's established custodial environment and whether Tammy was a "fit parent," using *Mason v. Simmons* "as its guide."

The referee determined that the children had an established custodial environment with plaintiffs and that Tammy was an unfit parent. Tammy filed objections to the referee's report and requested a hearing de novo. Ten days after receiving the referee's report, the circuit court entered another order. It required Tammy to attend parenting classes, submit to random drug screens, participate in substance abuse counseling, and attend family counseling sessions with her children

and her live-in boyfriend. Tammy again complied with all requirements.

***254** At the evidentiary hearing, several witnesses testified regarding the circumstances in 2002 and 2003 that led to the establishment of plaintiffs' guardianship of the children. Tammy testified that she had remained drug-free since August 2004 and supplied the court with a compendium of negative drug screen reports. She also testified that she earned $10.50 an hour as an assistant sales manager and lived with her boyfriend in a four-bedroom home in Indiana. A family therapist who had evaluated the children pursuant to a circuit court order reported that the children were "attached" to Tammy and "have a preference to move [in] with her full time."

The circuit court concluded that Tammy was not a fit parent. In its bench ruling, the court gave its reasons:

> Now, as to the issue of mom's fitness.
>
> ****700** I believe that mom is a very nice person.
>
> That she loves these children very dearly and I think they love her.
>
> And I'm impressed by the progress that she has made.
>
> But I don't believe that her love for the children is equivalent to being a fit parent.
>
> When we look at the definition of fitness, it's not about whether she's a nice person, it is not about whether today she has made progress—and, again, she has made progress—it is about what happened in conjunction with these kids.
>
> And in 2002 the parents were drug addicted.
>
> They could not provide a home for the children and the family intervened and rather than having [Children's Protective Services] involvement and have these children go to foster care the family took over and stepped in and provided a stable and loving home for these four kids, it doesn't happen very often and it's wonderful when that ***255** does happen and I think, again, these kids are doing as well as they are today because of that intervention.
>
> And mom has made progress but there are still numerous questions and numerous issues.
>
> These kids have never really lived with her for the last five years.
>
> And in Dr. [Jerome] Price's report he talks about that, that they regard going to mom's as vacation time.
>
> They have not had to do the grueling, day to day, sort of parenting and be tested that way so we can make some determination about what the current situation is.
>
> And mom lives with a man, who seems like a very nice individual also, a hard working person, but they live in an out of wedlock relationship and exposing the children to an out of wedlock relationship, given all of the other instability of their lives at this point is questionable judgment.
>
> I heard his testimony that he's listed her as a beneficiary on his life insurance and he expects that he will leave her his assets should he pass away.
>
> But the truth of the matter is she has no legal rights as a live together person.
>
> There is a reason that we have marriage in this society and marriage protects her.
>
> The relationship she is in gives her no protection and if at any time Mr. McConnell wants to tear up the letter, change the beneficiary, move out, he, of course is free to do so, as she is, and there are no legal ramifications to that.
>
> So she is not really very well protected and without his assistance she cannot maintain the children.
>
> She's been in a home for six months; that's a lease home and she admitted herself that she could not possibly maintain the children financially without Mr. McConnell being there and without his financial assistance.
>
> ***256** So I think she has made terrific strides but I don't think she's at a point yet where we can say she is able to provide a stable and secure home for these four children, who have been out of her care for five years.
>
> So I don't believe that's the definition of fitness.

The court then held a best interests hearing. After considering the testimony, the court agreed with the referee's findings. The court determined that 9 of the 12 best interest factors[5] favored plaintiffs ****701** and that the parties were equal with respect to 2 of the factors.[6] The court also stated on the record that it had "taken into consideration" the remaining factor, the reasonable preference of the children,[7] in reaching its decision. The court held that it was in the children's best

interests to remain with plaintiffs and granted them physical and legal custody. It also ordered Tammy to pay child support and $4,000 of plaintiffs' attorney fees. The court later denied Tammy's motion for reconsideration.

Tammy filed an application for leave to appeal in the Court of Appeals. In a split, unpublished decision, the Court of Appeals majority affirmed the custody determination, but reversed the award of attorney fees.[8] Judge Gleicher dissented. She would have reversed the custody determination because the circuit court's decision regarding parental fitness was unconstitutional and against the great weight of the evidence. We granted leave to appeal.[9]

***257** II. Legal Background

[1] **[2]** We review de novo questions of law involving statutory interpretation and questions concerning the constitutionality of a statute.[10] Findings of fact in child custody cases are reviewed under the great weight of the evidence standard.[11]

The central issues in this case are (1) what is the proper application of MCL 722.25(1) and MCL 722.27(1)(c); and (2) do the federal constitutional standards concerning the fundamental rights of parents to raise their children control our answer to the first question?

A. United States Supreme Court Precedent

[3] The importance of the family and the "essential," "basic," and "precious" right of parents to raise their children are well-established in United States Supreme Court jurisprudence.[12] This right is not easily relinquished. "The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State."[13] Therefore, to satisfy constitutional due process standards, the state "must provide the parents with fundamentally fair procedures."[14]

***258** In 2000, in the case of *Troxel v. Granville,*[15] the United States Supreme Court delivered its most relevant pronouncement in this area of the law. In a plurality opinion, the Court struck down the state of Washington's "breathtakingly broad" visitation statute as an unconstitutional infringement ****702** on the fundamental right of parents to rear their children.[16] The statute authorized " 'any person' " to petition for visitation rights and authorized state courts to grant such visitation whenever it " 'may serve the best interest of the child.' "[17]

B. Applicable Michigan Law

In 1970, the Michigan Legislature enacted the CCA. Among its provisions are statutory presumptions that apply in custody disputes. The presumptions pertinent to this case are found in MCL 722.25(1) and MCL 722.27(1)(c). MCL 722.25(1) states:

> If a child custody dispute is between the parents, between agencies, or between third persons, the best interests of the child control. If the child custody dispute is between the parent or parents and an agency or a third person, the court shall presume that the best interests of the child are served by awarding custody to the parent or parents, unless the contrary is shown by clear and convincing evidence.

MCL 722.27(1)(c), by contrast, provides in part:

> ***259** If a child custody dispute has been submitted to the circuit court as an original action under this act or has arisen incidentally from another action in the circuit court or an order or judgment of the circuit court, for the best interests of the child the court may do 1 or more of the following:
>
> * * *
>
> (c) Modify or amend its previous judgments or orders for proper cause shown or because of change of circumstances until the child reaches 18 years of age.... The court shall not modify or amend its previous judgments or orders or issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child. The custodial environment of a child is established if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort. The age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship shall also be considered.

Thus, a conflict arises between these sections when a court hears a custody dispute between a child's natural parent and a third party with whom the child has an "established custodial environment." This Court has not addressed the proper application of these sections of the CCA in such cases.

On numerous occasions before *Troxel* was decided, the Court of Appeals considered the interplay of these two presumptions. Panels of the Court came to conflicting conclusions about how to reconcile them.[18] However, ***260** after *Troxel,* in *Heltzel* ****703** *v. Heltzel,* the Court recognized that, to properly protect a parent's fundamental liberty interest, the presumption of MCL 722.25(1) in favor of the natural parent must control.[19]

Heltzel further concluded that it was imperative that trial courts balance the two significant interests. First, the lower courts must adequately safeguard the fundamental constitutional nature of the parental liberty interest. Second, they must simultaneously maintain the statutory focus of the CCA on the best interests of the child. To achieve this balance, *Heltzel* held:

> [C]ustody of a child should be awarded to a third-party custodian instead of the child's natural parent only when the third person proves that all relevant factors, including the existence of an established custodial environment and all legislatively mandated best interest concerns within [MCL 722.23], taken together clearly and convincingly demonstrate that the child's best interests require placement with the third person.[20]

***261** The Court of Appeals thoroughly considered *Heltzel's* analysis when it decided *Mason.* It noted that no published Court of Appeals case had addressed the applicability of *Heltzel* in cases in which a natural parent was unfit or had neglected or abandoned a child.[21]

Without citing authority to support its conclusion, *Mason* then distinguished *Heltzel,* saying that it applies only to custody disputes involving fit parents. It held that when "a parent's conduct is inconsistent with the protected parental interest, that is, the parent is not fit, or has neglected or abandoned a child, the reasoning and holding of *Heltzel* do not govern."[22] *Mason* thus affirmed the trial court's determination that the defendant was not entitled to the constitutional deference afforded a fit parent under *Heltzel* and *Troxel.* It extended that reasoning to justify denying the natural parent the benefit of the statutory presumption in MCL 722.25(1).

III. The CCA's Protections

[4] Custody cases involving natural parents inherently implicate the parents' fundamental liberty interest in the care, custody, and management of their children.[23] Thus, they implicate the constitutional protections identified in the United States Supreme Court cases previously discussed. The threshold question this Court must address is whether the relevant provisions of the CCA adequately protect a fit parent's fundamental rights under existing United States Supreme Court precedent.

****704** ***262** A. Under *Troxel,* Mcl 722.25(1) Must Control Over Mcl 722.27(1)(c) In Order To Adequately Protect Fit Parents' Fundamental Rights

[5] **[6]** *Troxel* established a floor or minimum protection against state intrusion into the parenting decisions of fit parents. It invalidated the state of Washington's third-party visitation statute as a violation of a natural parent's fundamental rights. It reasoned that the Washington statute was flawed because it afforded no deference to a fit parent's decision about his or her children's best interests.[24] Rather, the statute allowed "any third party seeking visitation to subject any decision by a parent concerning visitation of the parent's children to state-court review."[25] *Troxel* also forbade courts from overturning decisions by a fit custodial parent based "solely on the judge's determination of the child's best interests."[26] Rather, it held that courts must give some "special weight" to the parents' determination of their children's best interests.[27]

[7] The constitutional protection in *Troxel* centers on the "traditional presumption that a fit parent will act in the best interest of his or her child."[28] The Washington statute's lack of deference to a fit parent's decision was inconsistent with the presumption that fit parents act in the best interests of their children. Hence, it was constitutionally infirm. Using that reasoning, *Troxel* established that a natural parent's fitness to parent is the touchstone for invoking the constitutional protections of fundamental parental rights. The application of the statutory presumption in MCL 722.25(1) must ***263**

therefore be considered specifically in the context of a fit parent to determine whether it satisfies constitutional scrutiny under *Troxel*.

In *Heltzel,* our Court of Appeals recognized *Troxel's* mandate: In order to protect a fit natural parent's fundamental constitutional rights, the parental presumption in MCL 722.25(1) must control over the presumption in favor of an established custodial environment in MCL 722.27(1)(c). We agree.

Several considerations compel this conclusion. First, *Troxel* explicitly requires courts to give some deference to a parent's decision to pursue custody because it is inherently central to the parent's control over his or her child.

[8] By contrast, unlike the parental presumption in MCL 722.25(1), no constitutional protections for third persons underlie the established custodial environment presumption in MCL 722.27(1)(c). This Court has held that no constitutional or statutory basis exists for third parties to have standing to seek child custody solely because they have an established custodial relationship with the child.[29]

[9] **[10]** ***264** Finally, we note that the vast majority of Michigan cases interpreting ****705** the CCA support the conclusion that these presumptions were not meant to be given equal weight.[30] This conclusion is also in accord with Michigan's longstanding history of affording great respect to parental authority while consistently recognizing that the best interests of the child control the analysis.[31] For these reasons, we conclude that, when these presumptions conflict, the presumption in MCL 722.27(1)(c) must yield to the presumption in MCL 722.25(1).[32]

A remaining constitutional question involves the amount of deference due under *Troxel* to fit parents. We conclude that the statute provides sufficient deference to a fit natural parent's fundamental rights to the "care, custody, and management of their child...."[33] ***265** We so hold because the statute requires, in order to rebut the parental presumption, clear and convincing evidence that custody by the natural parent is not in a child's best interests.

[11] The clear and convincing evidence standard is "the most demanding standard applied in civil cases...."[34] This showing must " 'produce [ ] in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable [the fact-finder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue.' "[35]

[12] **[13]** We agree with the Court of Appeals in *Heltzel* that, given the unique constitutional considerations in custody disputes involving natural parents, "it is not sufficient that the third person may have established by clear and convincing evidence that a marginal, though distinct, benefit would be gained if the children were maintained with him."[36] A third party seeking custody must meet a higher ****706** threshold. He or she must establish by clear and convincing evidence that it is not in the child's best interests under the factors specified in MCL 722.23 for the parent to have custody. This is entirely consistent with *Troxel's* holding. Although a fit parent is presumed to act in his or her child's best interests, a court need give the parent's decision only a "presumption of validity" or "some weight." That is precisely what MCL 722.25(1) does when it requires clear and convincing evidence to rebut the presumption.

Given our determination that (1) the parental presumption in MCL 722.25(1) prevails over the presumption ***266** in favor of an established custodial environment in MCL 722.27(1)(c) and that (2) the parental presumption can be rebutted only by clear and convincing evidence that custody with the natural parent is not in the best interests of the child, we conclude that MCL 722.25(1) satisfies constitutional scrutiny under *Troxel*.[37]

****707** ***267** B. *Troxel* Does Not Require A Threshold Determination Of Parental Fitness In Custody Cases If No Statutory Requirement Exists

Defendant and some of the amici curiae argue that this Court must read into the statute an implicit requirement for a fitness determination in order to protect parents' fundamental rights. Even if the presumption in MCL 722.25(1) supersedes the presumption in MCL 722.27(1)(c), defendant argues that the court must make a preliminary determination whether a natural parent is a fit parent. Thus, defendant insists, *Troxel* prevents courts from allowing a third party to rebut the presumption using a best interests analysis because it would insufficiently protect the parent's rights.

Defendant relies on *In re JK* in support of her argument. In that case, this Court stated that "[a] ***268** due-process violation occurs when a state-required breakup of a natural family is founded solely on a 'best interests' analysis that is not supported by the requisite proof of parental unfitness."[38] Defendant urged us to examine the Probate Code, the juvenile code, and other sections of Michigan law to adopt a test for evaluating parental fitness. She claims that, to satisfy constitutional scrutiny, such a test must be based on objective factors similar or identical to those listed in those statutes.

We reject defendant's arguments as beyond the scope of the holdings of *Troxel* and *In re JK*. As noted previously, *Troxel* carefully limited the constitutional scope of the parental presumption to the extent that a court need give decisions by fit custodial parents only a "presumption of validity."[39] Since MCL 722.25(1) applies a substantial presumption of the validity of decisions by all parents, including fit custodial parents, the constitutional underpinnings of *Troxel* are satisfied.[40]

****708** **[14]** ***269** *In re JK* is distinguishable from the case before us. It was a case involving termination of parental rights. Termination cases introduce a significantly heightened intrusion upon a parent's fundamental right to parent because they involve an all-or-nothing proposition: whether a parent's right to be a parent and make decisions regarding his or her child's upbringing is permanently severed. It follows logically that under circumstances where the parental interest is most in jeopardy, due process concerns are most heightened.

[15] A custody award to a third party, by contrast, represents a lesser intrusion into the family sphere. It does not result in an irrevocable severance of parental rights or " 'a unique kind of deprivation' " that forces parents to confront the state.[41] The Legislature has addressed these concerns by requiring the state to prove parental unfitness by "clear and convincing evidence" in termination cases. It has listed specific statutory factors that it has determined make a parent per se unfit and warrant terminating his or her rights to a child.[42]

[16] ***270** The quoted language from *In re JK* is inapplicable in custody cases such as this because it does not involve the "state-required breakup" of a family. In termination cases, the natural parent and the state are the parties to the action. To protect the parental interest from improper state intrusion, the Legislature requires the state to prove by clear and convincing evidence that at least one statutory ground for termination exists. Hence, the state must show that the natural parent is unfit.

[17] In custody cases, by contrast, the state does not initiate the proceedings in which the natural parent's rights are at stake. Rather, custody determinations in cases such as this merely give "recognition to a family unit already in existence...."[43] Under such circumstances, "[w]hatever might be required in other situations, we cannot say that the State was required in this situation to find anything more than that [its decision was] in the 'best interests of the child.' "[44]

[18] Finally, we note that a natural parent's fitness is an intrinsic component of a trial court's evaluation of the best interest factors in MCL 722.23.[45] Therefore, although we hold that due process does not require a fitness determination where the statute does not mandate it, we observe that fitness is an inextricable component of the court's inquiry.

For example, MCL 722.23(f) to (g) require the trial court to compare the "moral fitness" and the "mental and physical health" of the parties. These factors reflect ***271** the legislative determination that concerns about parental fitness are of paramount ****709** importance in custody determinations. Therefore, MCL 722.25(1) uses the clear and convincing evidence standard to safeguard the constitutionally protected fundamental rights of fit custodial parents, as identified in *Troxel*. MCL 722.23, on the other hand, simultaneously fulfills the legislative purpose of maintaining the focus of the inquiry on the best interests of the child.

C. *Mason* Erroneously Interpreted Mcl 722.25(1) By Adding A Determination Of Fitness

[19] We again note, as a preliminary observation, that MCL 722.25(1) does not refer to fitness of the natural parent as a prerequisite for applying the statutory presumption in the parent's favor. MCL 722.25(1) applies to all natural parents who are parties in custody disputes with third persons, not merely fit natural parents. Nothing in the statute explicitly or implicitly suggests that the presumption applies only in cases involving a parent adjudged to be a fit parent. Rather, we believe that, in enacting the CCA, the Legislature set forth clear best interest factors in MCL 722.23 that constitute a de facto evaluation of each individual's fitness to raise a child.[46] In doing so, the Legislature rejected the amorphous

fitness/neglect/abandonment standard outlined in *Mason* by not including any reference to that standard.[47]

[20] *Mason* erred by holding that the statutory presumption ***272** in the natural parent's favor applies only to fit parents. This was an improper interpretation of *Heltzel, Troxel*, and the CCA generally. The statutory presumption in MCL 722.25(1) is " 'a presumption of the strongest order [,]' "[48] and one that "does not turn solely on the question of fitness."[49] Numerous cases decided since the CCA was enacted have agreed: the parental presumption controls unless the third party shows by clear and convincing evidence that custody with the natural parent is not in the best interests of the child.[50]

As discussed earlier in this opinion, the parental presumption has some constitutional provenance, whereas the custodial environment presumption has none. This persuades us that the parental presumption should properly control over the established custodial environment presumption.

Mason held that the parental presumption controls with regard to fit parents only because they alone are constitutionally protected. *Mason* further held that unfit parents have the burden "to show, by a preponderance of the evidence, that a change in the established custodial environment with the guardian was in the child's best interests."[51]

****710** However, *Mason* and its predecessors created this new standard out of thin air.[52] In the case before us, the ***273** Legislature has provided us with two standards that irreconcilably conflict. Rather than resolve the conflict by divining a new standard, as *Mason* did, we believe that the better course is to decide which of the two presumptions controls.

We are convinced that the parental presumption must control. We are persuaded of this (1) by the fact that, whereas the parental presumption has some constitutional provenance, the established custodial environment presumption does not; (2) by caselaw interpreting the tension between MCL 722.25(1) and MCL 722.27(1)(c); and (3) by the lack of reference to fitness in the CCA. The Court is unwilling to restrict the parental presumption absent clear evidence from the Legislature that a restriction was intended. Moreover, the CCA's notable silence regarding fitness, abandonment, or neglect of children suggests these words should not be read into the statute.

The statutory presumption favoring natural parents is not contravened merely because the statute provides greater protection for parental rights than *Troxel* mandated as a constitutional matter. *Mason's* contrary holding is contradictory to the weight traditionally afforded to the parental presumption.[53]

****711** ***274** Because the parental presumption in MCL 722.25(1) satisfies the constitutional standards mandated for fit parents, no justification existed for *Mason* to restrict that presumption only to fit parents. Nothing in *Troxel* can be interpreted as precluding states from offering *greater* protection to the fundamental parenting rights of natural parents, regardless of whether the natural parents are fit. This rule applies here.

Defendant also argues that *Mason's* arbitrary and subjective fitness standard, and the trial court's equally ***275** subjective application of that standard in this case, violated her Fourteenth Amendment[54] due process rights. She claims that, because the *Mason* standard does not utilize objective criteria for evaluating parental fitness, it lacks procedural protections sufficient to protect her due process rights. Given our holding that *Mason* improperly limited the parental presumption in MCL 722.25(1), we find it unnecessary to reach defendant's constitutional argument.

We conclude that *Mason* erred by reading a fitness requirement into the parental presumption in MCL 722.25(1). The statute is entirely silent on the issue of a parent's fitness.[55] Nothing in the statute or the CCA generally[56] suggests that parental fitness is a prerequisite to entitlement to the parental presumption in MCL 722.25(1). Because *Mason's* holding was neither constitutionally mandated nor consistent with the statute, *Mason* is hereby overruled.

D. Additional Concerns

Justice Corrigan's concurrence raises a number of issues that we believe deserve a response regarding the ***276** scope of this opinion. We offer the following observations to more explicitly address what this opinion does *not* do:

(1) This case deals with custody actions initiated under the CCA involving both the parental presumption in MCL 722.25(1) and the established custodial environment presumption in MCL 722.27(1)(c). This opinion should not

be read to extend beyond CCA cases that involve conflicting presumptions or to cases that involve parental rights generally but are outside the scope of the CCA.

(2) This opinion does not create any new rights for parents. The United States Supreme Court decisions regarding the constitutional rights of parents previously discussed in this opinion provide guidance that informs our analysis. This opinion does not magically grant parents additional ****712** rights or a constitutional presumption in their favor. It does not grant unfit parents constitutional rights to their children other than due process rights.

[21] (3) Parents may not bring actions under the CCA and invoke the parental presumption in MCL 722.25(1) as an end run around previous custody determinations. We agree with Justice Corrigan's conclusion that [p]rinciples of collateral estoppel generally prevent a party from relitigating an issue already established in the first proceeding.[57] This Court has long recognized the applicability of these principles to probate court orders such as the guardianship orders in this case.[58] Subsequently, we reiterated that "orders of probate courts have the force and effect of judgments and are *res judicata* of the matters involved and cannot be attacked collaterally."[59]

[22] ***277** Therefore, a parent whose rights have been terminated or suspended cannot initiate an action for custody under the CCA because it would amount to a collateral attack on the earlier proceedings. A termination order, by its nature, finds that custody with the natural parent is not in the child's best interests. A parent's only recourse in such cases is to appeal the order. A guardianship order, similarly, suspends a parent's parental rights and grants those rights in the child, including a right to physical and legal custody, to the guardian under MCL 700.5215. Thus, defendant in this case would have been collaterally estopped from initiating a custody action under the CCA. A parent's recourse under these circumstances is to file a motion to terminate the guardianship.[60]

In sum, collateral estoppel principles provide a sufficient basis to preclude parents from initiating an action for custody under the CCA in order to circumvent valid court orders affecting custody.[61]

****713** ***278** IV. Plaintiff's Burden of Proof on Remand

Given our conclusion that *Mason* incorrectly interpreted MCL 722.25(1), we remand this case for reevaluation under the correct legal standards.[62] On remand, the circuit court shall conduct a new best interests ***279** hearing in which it must consider all relevant, up-to-date information.[63] At that hearing, the court shall apply MCL 722.25(1) in defendant's favor. The court shall not grant custody to plaintiffs unless plaintiffs demonstrate by clear and convincing evidence that custody with defendant does not serve the children's best interests.[64] In order to make this showing, plaintiffs must prove that "all relevant factors, including the existence of an established custodial environment and all legislatively mandated best interest concerns within [MCL 722.23], taken together clearly and convincingly demonstrate that the child's best interests require placement with the third person."[65]

V. Conclusion

We hold that the established custodial environment presumption in MCL 722.27(1)(c) must yield to the parental presumption in MCL 722.25(1). The parental presumption can be rebutted only by clear and convincing evidence that custody with ****714** the natural parent is not ***280** in the best interests of the child. We also hold that MCL 722.25(1) satisfies constitutional scrutiny under *Troxel*. Due process does not require a threshold determination of parental fitness in custody cases. The Court of Appeals decision in *Mason v. Simmons* is overruled. We reverse the judgment of the Court of Appeals and remand this case to the circuit court for a new best interests hearing. We do not retain jurisdiction. Finally, defendant's motion to preserve the confidentiality of the psychiatric evaluation report is granted. The report shall be removed from the copies of the plaintiffs' appendix and placed under seal.

MICHAEL F. CAVANAGH, ROBERT P. YOUNG, JR., STEPHEN J. MARKMAN, and DIANE M. HATHAWAY, JJ., concur.

WEAVER, J. (*concurring in part and dissenting in part*).
I join in the reversal of the Court of Appeals result and in the remand of this case to the trial court for a new best interests

hearing for the reasons stated in the following parts of Chief Justice Kelly's majority opinion and Justice Corrigan's partially concurring and partially dissenting opinion, which are as follows:

With respect to Chief Justice Kelly's majority opinion, I join in parts I, II, III(B), and III(D).

With respect to Justice Corrigan's partially concurring and partially dissenting opinion, I join in part III, with the exception of footnote 12.

CORRIGAN, J. (*concurring in part and dissenting in part*). I concur in parts I, II, III(B), and III(D) of the majority opinion. I agree with the majority's conclusion that "fit" parents benefit from a constitutional presumption that they will "act in the best interests of their children." *Troxel v. Granville,* 530 U.S. 57, 68, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000) (plurality opinion of ***281** O'Connor, J.); see *ante* at 703–04. I further agree that, when prior court proceedings govern child custody—such as child protective proceedings under the juvenile code, MCL 712A.1 *et seq.,* or, as in this case, guardianship proceedings under part 2 of article V of the Estates and Protected Individuals Code (EPIC), MCL 700.5201 *et seq.*—these proceedings generally have preclusive effect and the prior court has superior jurisdiction. A parent cannot circumvent these proceedings by seeking custody under the Child Custody Act (CCA), MCL 722.21 *et seq.* See *ante* at 703–04.

I do not agree with the majority that the constitutional presumption in favor of *fit* parents imbues the presumption in MCL 722.25(1) of the CCA—which applies to *all* parents, not just fit ones—with heightened constitutional meaning so that it always prevails over the mandate concerning established custodial environments in MCL 722.27(1)(c). I do agree that constitutional considerations require the presumption in § 5(1) to predominate in the case of a fit parent. However, when a parent's lack of fitness has been previously established or admitted *and* a third party has an established custodial environment with the child, that parent should not benefit from the presumption in § 5(1). Section 7(1)(c) governs instead.

I. Procedural Background

As the majority explains in part, *ante* at 698–702, this case began in 2002 when defendant and her husband—who were drug-addicted, unemployed, and unable to care for their four young children—voluntarily relinquished custody of the children ****715** to plaintiffs. Plaintiffs, who are the children's aunt and uncle, had already been caring for the children intermittently. In November ***282** 2002, defendant and her husband petitioned the court[1] to appoint plaintiffs as limited guardians for the children, stating: "We are currently in active addiction to crack cocaine and are unable to care for our children until we seek treatment." Accordingly, they voluntarily suspended their parental rights and the court established a limited guardianship with plaintiffs. Plaintiffs thus gained rights and responsibilities akin to those of a parent with regard to the children under MCL 700.5215, which states, in most pertinent part: "A minor's guardian has the powers and responsibilities of a parent who is not deprived of custody of the parent's minor and unemancipated child...." See MCL 700.5206(4).[2]

***283** Defendant could have regained custody of the children by substantially complying with her placement plan, in which she promised to seek drug treatment and provide a drug-free household for the children. Instead, she and her husband continued their drug use and became involved in crime. Although they petitioned to terminate the limited guardianship in May 2003, the court denied their petition and, instead, ordered them to continue drug treatment, verify their employment, and maintain more regular visitation with the children. Nonetheless, they returned to crime. They were arrested. After being released on bail, they stole a car and fled the police.

In June 2003, plaintiffs petitioned the court to appoint them full guardians.[3] Plaintiffs cited their fear for the children's safety and stated that the police advised them to seek a full guardianship and suspension ****716** of parental visits. The court-appointed guardian ad litem for the children investigated and confirmed that defendant and her husband were still using drugs, had lost their jobs, were not paying rent, and had fled the police. On June 17, 2003, the court conducted a hearing on plaintiffs' petition. Neither parent appeared and their whereabouts were unknown. The court suspended their visitation rights until further order. On July 16, 2003, the court appointed plaintiffs full guardians of the children.

Defendant and her husband were subsequently rearrested and incarcerated. Defendant apparently skipped bail again after her second release. She was ultimately ***284** convicted and

imprisoned in August 2004. In July 2005, after her release from prison, defendant sought visitation with her children. By this time she had not seen them in over two years. The court restored her visitation rights in November 2005 and defendant began paying a small amount of child support. After several months of successful visits and regular child support payments, the court ordered expanded, unsupervised parenting time to begin in May 2006, with overnight visits at defendant's home in Indiana to begin in July 2006. By this time, the children had been living with plaintiffs in Michigan for about four years.

In May 2006, apparently prompted by the order increasing defendant's visitation rights, plaintiffs exercised their rights under MCL 722.26b to seek custody under the CCA and to stay the guardianship proceedings. MCL 722.26b(4). Defendant counterclaimed for custody under the CCA. The court employed the now-outdated rubric in *Mason v. Simmons,* 267 Mich.App. 188, 704 N.W.2d 104 (2005), to declare defendant unfit and award custody to plaintiffs.[4]

II. Superior Jurisdiction Of Prior Proceedings

First, I agree that the guardianship proceedings here precluded defendant from separately seeking custody under the CCA. *Ante* at 711–12. Generally, when two courts have concurrent jurisdiction, the first court that acquired jurisdiction retains it until the matter is fully resolved. See *Schell v. Schell,* 257 Mich. 85, 88, 241 N.W. 223 (1932).[5] Accordingly, if a parent's fitness or custody ***285** rights are governed by an ongoing proceeding—such as the guardianship proceeding here or a child protective proceeding under the juvenile code—the parent may not separately invoke the circuit court's jurisdiction by filing a simultaneous custody action under the CCA.

****717** Because this holding is a crucial element of the majority opinion, I offer an example to illustrate the importance of this jurisdictional rule. Child protective proceedings under the juvenile code are designed to protect children from abuse and neglect—often by temporarily removing them from their parents' custody under emergency conditions—while aiding parents to rectify unfit conditions and regain custody of their children. The purposes of these proceedings would be nullified if a parent could avoid them by regaining custody in a separate proceeding under the CCA.

The juvenile code protects children who, among other things, are subjected to abuse, neglect, or unfit living conditions. MCL 712A.2(b).[6] The code empowers ***286** the Department of Human Services (DHS) to petition for temporary removal of a child from his parent's home for these reasons. The court may authorize the petition "upon a showing of probable cause that 1 or more of the allegations in the petition are true and fall within the provisions of section 2(b)...." MCL 712A.13a(2). If the court orders the child's removal from the parent's custody and orders the child into court or state custody, a process begins during which the DHS works with the parent, if possible, to restore custody with the parent.[7] As I will explain further, this process is statutorily designed to take up to one year. See MCL 712A.19a(1). Within 30 days of the child's removal, and every 90 days thereafter, the DHS must provide service plans detailing its efforts and the services provided to prevent removal or to rectify the conditions that caused removal, as well as the efforts to be made and services to be offered to facilitate the child's return to his parent, if appropriate. MCL 712A.18f. The court generally reviews the case within 182 days of the child's removal and every 91 days thereafter. MCL 712A.19(3). At each ***287** review hearing, the court must evaluate the parent's compliance with the service plan, MCL 712A.19(6) and (7), and may order additional services or actions. MCL 712A.19(7)(a).

If a child remains outside his home, the court must conduct a permanency planning hearing within one year of the child's removal. MCL 712A.19a(1). At that hearing, if the court determines that the "return of the child to his or her parent would not cause a substantial risk of harm to the child's life, physical health, or mental well-being, the court shall order the child returned ****718** to his or her parent." MCL 712A.19a(5). If the court determines that the parent poses a substantial risk to the child, it may order the DHS to initiate proceedings to terminate parental rights. MCL 712A.19a(6). If termination is not in the child's best interests, the court may also consider alternative placement plans, including a guardianship. MCL 712A.19a(7). Crucially, the burden of proof is elevated to clear and convincing evidence only at this final stage, the termination of parental rights proceeding. MCL 712A.19b(3).

Because of the different evidentiary standards in the CCA and the juvenile code, a parent could subvert child protective proceedings if the *Schell* rule did not mandate superior jurisdiction in the child protective proceedings. This is because, as noted, the requisite conditions for removal of a child from his parent's custody under MCL 712A.2(b) of the

juvenile code must be proved by "a showing of probable cause," MCL 712A.13a(2). But, particularly under the majority's interpretation of the CCA, the DHS or a third party custodian can prevent a parent from regaining custody under the CCA only by rebutting the parental presumption *by clear and convincing evidence.* MCL 722.25(1). ***288** Because the CCA creates a higher burden for a third party seeking custody, the parent could regain custody under the CCA; while the initial conditions warranting emergency removal may have been supported by *probable cause,* the DHS may not yet have gathered enough evidence to meet the heightened *clear and convincing* evidence standard of the statutory presumption in MCL 722.25(1), as would be necessary to prevent the parent from immediately regaining custody. Thus, if the parent could seek custody under the CCA, the Legislature's carefully crafted child protective process—which both protects children *and* ultimately benefits willing parents—could be nullified.

A related problem involving guardianships would arise if a parent could invoke the court's jurisdiction under the CCA although the parent's rights were eligible for termination under the juvenile code. Indeed, although the court may conclude that a child should not be returned to his parent because the parent poses an ongoing substantial risk of harm, the court may place the child with a permanent guardian in lieu of terminating the parent's rights. MCL 712A.19a(6) and (7)(c). That guardianship may continue until the child is emancipated, MCL 712A.19a(7)(c), and the guardian gains all the traditional parent-like rights and duties inherent in a guardianship established under the EPIC, MCL 712A.19a(8). If the natural parent could nonetheless obtain custody under the CCA, the purposes and terms of these pre-termination guardianships would be obviated. Particularly under the majority's rule, the parent could file under the CCA to shift the burden to the guardian, thereby requiring the guardian to prove by clear and convincing evidence that placement with the parent is not in the child's best interests. The court's determination during the child protective proceedings that the parent posed a significant harm to his ***289** child would become irrelevant and the guardian would be forced to litigate in defense of his appointment. In addition to subverting the statutory scheme in favor of pre-termination guardianships, this result likely would cause voluntary guardians to decide against accepting guardianship appointments.[8]

****719** In sum, important, practical reasons undergird the *Schell* rule and the principles of collateral estoppel addressed by the majority. Once a court attains jurisdiction of a child's custody under the juvenile code or the EPIC, as the first court to attain jurisdiction over these matters, it retains jurisdiction until the proceeding is closed. *Schell,* 257 Mich. at 88, 241 N.W. 223. A parent cannot simply file separately for custody under the CCA and regain custody by invoking the parental presumption. Permitting a parent to do so would undermine the very purposes of the other statutory schemes addressing custody and child welfare, not to mention the havoc and confusion in courts attempting to properly protect children and adjudicate parental rights under the correct statutes.

Finally, the CCA itself confirms this result by providing a single, explicit exception to the normal application of the *Schell* rule. MCL 722.26b, which grants a guardian standing to seek custody under the CCA, provides the only apparent context in which a CCA action may override decisions of another court with ongoing jurisdiction over the parties' rights to the children.[9] ***290** MCL 722.26b(4) explicitly states that, when a guardian seeks custody, "guardianship proceedings concerning that child in the probate court are stayed until disposition of the child custody action" and permits an ensuing circuit court order to supersede probate court orders concerning the guardianship of the child. The CCA does not, in turn, permit a parent with the limited rights inherent in guardianship proceedings to sue for custody or stay the guardianship proceedings. Rather, as the majority notes, a parent's recourse would lie in his explicit right to petition the probate court to terminate the guardianship under MCL 700.5208.

III. Sections 5(1) And 7(1)(c) Of The Child Custody Act

Although I agree with the majority on the point just discussed, I disagree with the majority's resolution of the apparent conflict between MCL 722.25(1) and MCL 722.27(1)(c) as it applies here, where the guardians invoked MCL 722.26b. I certainly agree with the majority, *ante* at 701–02, that the "fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State." *Santosky v. Kramer,* 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982). And thus, to satisfy constitutional due process standards, the state "must provide the parents with fundamentally fair procedures." *Id.* at 754, 102 S.Ct. 1388; and see *ante* at 701–02. But, when a parent's unfitness has been established, as it was here, fundamentally fair procedures do not require the court to give that parent the full

benefit of the parental presumption. Rather, a parent's rights to a child are limited when he has failed in his duties to that child. In the majority's own words, neither *Troxel* nor the majority opinion "grant[s] *unfit* parents constitutional ***291** rights to their children other than due process rights." *Ante* at 711–12 (emphasis added).

Thus, the presumption that a parent will act in his child's best interests is a *conditional* ****720** *presumption* that applies *only* "so long as a parent adequately cares for" his child. *Troxel,* 530 U.S. at 68, 120 S.Ct. 2054 (O'Connor, J.). Indeed, the parental right derives from a parent's " 'high duty' " to care for his children. *Id.* (citation omitted).[10] Accordingly, when a parent fails to care adequately for his child—and particularly when third parties carry out ***292** the parent's high duty in his stead—the automatic presumption in favor of the parent no longer strictly applies. Therefore, although fit parents benefit from a constitutional presumption that they will "act in the best interests of their children," *Troxel,* 530 U.S. at 68, 120 S.Ct. 2054 *ante* at 704, the constitutional presumption in favor of *fit* parents does not imbue the presumption in § 5(1) of the CCA with heightened constitutional meaning so that it always prevails over the mandate concerning established custodial environments in § 7(1)(c) without regard to a parent's fitness.

MCL 722.25(1) states that if a child custody dispute "is between the parent or parents and an agency or a third person, the court shall presume that the best interests of the child are served by awarding custody to the parent or parents, unless the contrary is established by clear and convincing evidence." But the powers of the circuit court in any action under the ****721** CCA are also governed by MCL 722.27, which circumscribes the orders a court may enter regarding a complaint for custody. MCL 722.27(1) states, in pertinent part:

> ***293** If a child custody dispute has been submitted to the circuit court as an original action under this act or has arisen incidentally from another action in the circuit court or an order or judgment of the circuit court, for the best interests of the child the court may do 1 or more of the following:
>
> (a) Award the custody of the child to 1 or more of the parties involved or to others and provide for payment of support for the child, until the child reaches 18 years of age....
>
> (b) Provide for reasonable parenting time of the child by the parties involved, by the maternal or paternal grandparents, or by others, by general or specific terms and conditions....
>
> (c) Modify or amend its previous judgments or orders for proper cause shown or because of change of circumstances.... The court shall not modify or amend its previous judgments or orders or issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child. The custodial environment of a child is established if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort. The age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship shall also be considered....
>
> (d) Utilize a guardian ad litem or the community resources in behavioral sciences and other professions in the investigation and study of custody disputes and consider their recommendations for the resolution of the disputes.
>
> (e) Take any other action considered to be necessary in a particular child custody dispute.

MCL 722.27(1)(c) clearly mandates that the court "*shall not* modify or amend its previous judgments or orders or issue a new order so as to *change the established custodial environment of a child unless there is* ***294** *presented clear and convincing evidence that it is in the best interest of the child.*"[11] (Emphasis added.) Thus, § (7)(1)(c) expressly *deprives the court of the power* to change the established custodial ****722** environment absent the requisite showing by clear and convincing evidence that such a change is in the child's best interest.[12] Yet the majority directs circuit courts to ignore this mandate ***295** in *all* cases where *any* natural parent—except one whose parental rights were previously terminated or suspended, *ante* at 712—seeks custody from a third party with an established custodial environment.

But in light of the strong mandate expressed in § 7(1)(c), and because the constitutional parental presumption applies only to *fit* parents, I would hold that the presumption in § 5(1) prevails over the mandate in § 7(1)(c) by necessity *only* when a *fit* parent seeks custody from a third person with an established custodial environment. Where an unfit parent is concerned, no statutory or constitutional reason exists to simply ignore § 7(1)(c) if a third person has an established custodial environment.

Further, because the constitutional parental presumption applies *only* to *fit* parents, a parent's fitness remains relevant.

I acknowledge that the CCA does not refer to fitness. See *ante* at 710. But this bare observation does not adequately consider the various proceedings at which a parent's fitness may be questioned—indeed, it does not consider the very proceedings that likely led to a custodial environment being established with a third party custodian in the first place.

Troxel equated a fit parent with one who "adequately cares for his or her children." *Troxel, supra,* 530 U.S. at 68, 120 S.Ct. 2054 (O'Connor, J.). It illustrated the presumption in favor of fit parents as "a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions." *Id.* at 68 (internal quotation marks and citation omitted). ***296** Various proceedings call upon courts to make findings, or call upon parents to make admissions, *counter* to these presumptions in order to fulfill the state's duties to protect its children. The child protective proceedings described above and guardianship proceedings like this case are good examples of proceedings that, by their nature, may establish a parent's unfitness. Principles of collateral estoppel generally prevent a party from relitigating an issue already established in a ****723** prior proceeding. See *Storey v. Meijer, Inc.,* 431 Mich. 368, 373 n. 3, 429 N.W.2d 169 (1988). Indeed, as the majority observes, this Court has "long recognized" the applicability of collateral estoppel, including to "probate courts orders such as the guardianship orders in this case." *Ante* at 712, citing *Chapin v. Chapin,* 229 Mich. 515, 201 N.W. 530 (1924). Such orders "are *res judicata* of the matters involved and cannot be attacked collaterally." *In re Ives,* 314 Mich. 690, 696, 23 N.W.2d 131 (1946). Further, permitting a parent to avoid past findings or admissions of unfitness *and nonetheless gain a constitutional advantage despite unfitness* clearly runs the risk of endangering the child and compromising state laws aimed at upholding the state's duties to its child citizens. Most significant to our purposes, if a parent's lack of fitness has been established, there is no longer a constitutional reason to ignore the mandate in MCL 722.27(1)(c) in favor of MCL 722.25(1). Accordingly, I conclude that in cases where a parent's lack of fitness was either determined or admitted in a prior proceeding, the parent cannot later claim fitness and benefit from the presumption in § 5(1) in a proceeding under the CCA.[13]

****724** ***298** Here, defendant and her husband admitted unfitness in 2002 when they sought the limited guardianship because they were jobless, addicted to crack, and unable to care for their children. They could have regained custody of the children by substantially complying with their placement plan. Instead, they relapsed, continued their involvement with crime, and failed to appear at the hearing on plaintiffs' petition to establish a full guardianship.[14] Under these circumstances, defendant's unfitness was clearly established at prior proceedings. Indeed, defendant admitted her unfitness and willfully forewent her statutorily granted right to regain custody despite the admission. Defendant further could have challenged the results of the guardianship proceedings by appealing, but she did not do so. The court should not now be directed to sweep such findings and admissions under the rug by applying a constitutional presumption in favor of *fit* parents in an action involving the very people who cared for defendant's children in the face of her parenting failures. For these reasons I conclude that when, as here, a third party establishes a custodial environment after proof of a parent's unfitness, the procedure for changing an established custodial environment mandated by MCL 722.27(1)(c) controls.

***299** IV. Conclusion

In conclusion, I agree with the majority that a *fit* parent who properly seeks custody under the CCA benefits from the parental presumption in MCL 722.25(1). But, contrary to the majority, I would conclude that, where a parent's lack of fitness is established, MCL 722.27(1)(c) controls if a third party has an established custodial environment for the children.

Further, if parental or custody rights are governed by other proceedings, a parent is precluded from using the CCA as an end run around such proceedings; rather, the first court to gain jurisdiction over these matters retains jurisdiction. The CCA provides a single exception to this rule in MCL 722.26b, which plaintiffs properly invoked in this case and which permits guardians to seek custody although guardianship proceedings are ongoing. But, finally, I agree with the majority that even when a custody action is properly filed under § 6b as here, the circuit court is not bound to award custody to any party. Instead, it has broad discretion to act "for the best interests of the child...." MCL 722.27(1). Accordingly, the court in its discretion may dismiss plaintiffs' custody action in light of plaintiffs' apparent attempt to subvert the ongoing guardianship proceedings in which defendant was fulfilling increasing duties to her children and gaining increased visitation time.

All Citations

484 Mich. 247, 771 N.W.2d 694

Footnotes

1 MCL 722.21 *et seq.*

2 "Defendant" herein refers to appellant Tammy Jo Hunter.

3 *Mason v. Simmons,* 267 Mich.App. 188, 704 N.W.2d 104 (2005).

4 Tammy obtained a divorce from Jeff while he was incarcerated in Indiana. Jeff has been incarcerated on and off since 2003 and was never a party to this appeal.

5 MCL 722.23(b), (c), (d), (e), (f), (g), (h), (j), and (*l*).

6 MCL 722.23(a) and (k).

7 MCL 722.23(i).

8 *Hunter v. Hunter,* unpublished opinion per curiam of the Court of Appeals, issued March 20, 2008 (Docket No. 279862), 2008 WL 747126.

9 *Hunter v. Hunter,* 482 Mich. 981, 755 N.W.2d 626 (2008).

10 *Taylor v. Gate Pharmaceuticals,* 468 Mich. 1, 5, 658 N.W.2d 127 (2003).

11 MCL 722.28; *Fletcher v. Fletcher,* 447 Mich. 871, 877, 526 N.W.2d 889 (1994).

12 *Stanley v. Illinois,* 405 U.S. 645, 651, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972), quoting *Meyer v. Nebraska,* 262 U.S. 390, 399, 43 S.Ct. 625, 67 L.Ed. 1042 (1923), *Skinner v. Oklahoma,* 316 U.S. 535, 541, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942), and *May v. Anderson,* 345 U.S. 528, 533, 73 S.Ct. 840, 97 L.Ed. 1221 (1953).

13 *Santosky v. Kramer,* 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982).

14 *Id.* at 753–754, 102 S.Ct. 1388.

15 *Troxel v. Granville,* 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000).

16 *Id.* at 67, 120 S.Ct. 2054. *Troxel* also included forceful language describing the significance of parents' fundamental liberty interest in the care, custody, and control of their children. It noted that this interest "is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Id.* at 65, 120 S.Ct. 2054 citing *Meyer,* 262 U.S. at 399, 401, 43 S.Ct. 625.

17 *Troxel,* 530 U.S. at 67, 120 S.Ct. 2054.

18 Compare *Rummelt v. Anderson,* 196 Mich.App. 491, 493 N.W.2d 434 (1992), and *Glover v. McRipley,* 159 Mich.App. 130, 406 N.W.2d 246 (1987) (cases in where both presumptions were applicable holding that the natural parent has the burden and that he or she must prove by a preponderance of the evidence that the best interests of the child are served by placement with the parent), with *Deel v. Deel,* 113 Mich.App. 556, 317 N.W.2d 685 (1982), *Siwik v. Siwik,* 89 Mich.App. 603, 280 N.W.2d 610 (1979), *Stevens v. Stevens,* 86 Mich.App. 258, 273 N.W.2d 490 (1978), and *Bahr v. Bahr,* 60 Mich.App. 354, 230 N.W.2d 430 (1975) (holding that the parental presumption controls unless the third party shows by clear and convincing evidence that custody with the natural parent is not in the best interests of the child).

19 *Heltzel v. Heltzel,* 248 Mich.App. 1, 26–27, 638 N.W.2d 123 (2001) ("We do not believe, however, that the Legislature intended that in every custody dispute between a noncustodial natural parent and a third-person custodian, the third-person custodian could eliminate the fundamental constitutional presumption favoring custody with the natural parent, and thus arrive on equal footing with the parent with respect to their claim of custody to the parent's child, merely by showing that the child had an established custodial environment in the third person's custody. This interpretation ... fails to take into proper account the parents' fundamental due process liberty interest in childrearing.").

20 *Id.* at 27, 638 N.W.2d 123.

21 *Mason,* 267 Mich.App. at 198, 704 N.W.2d 104.

22 *Id.* at 206, 704 N.W.2d 104.

23 *Santosky,* 455 U.S. at 753, 102 S.Ct. 1388.

24 *Troxel,* 530 U.S. at 67, 120 S.Ct. 2054.

25 *Id.*

26 *Id.*

27 *Id.* at 70, 120 S.Ct. 2054.

28 *Id.* at 69, 120 S.Ct. 2054.

29 *Bowie v. Arder,* 441 Mich. 23, 43, 490 N.W.2d 568 (1992) (rejecting the argument that the CCA created a substantive right of a third party to seek custody of a child with whom the third party has an established custodial relationship and observing that that "[t]here is simply no provision of the [CCA] that can be read to give a third party ... a right to legal custody of a child on the basis of the fact that the child either resides with or has resided with that party"); *In re Clausen,* 442 Mich. 648, 682–684, 502 N.W.2d 649 (1993) (rejecting the argument that United States Supreme Court precedent established a federal constitutional right of a third party to seek custody of a child with whom the third party has an established custodial relationship).

We note that plaintiffs have standing to pursue this custody action by virtue of their status as the children's legal guardians. MCL 722.26b(1).

30 *Bowie,* 441 Mich. at 43, 490 N.W.2d 568 (holding that an established custodial environment does not establish a substantive basis on which to sue for custody under the CCA); *Deel,* 113 Mich.App. at 561, 317 N.W.2d 685 ("*Stevens* holds that the presumptions should be *recognized* equally, not *weighted* equally, and the language used in the statutes suggests that the presumptions are not, in fact, of equal weight.") (emphasis in original). The few cases that have held otherwise have since been rejected as unconstitutional under *Troxel.* E.g., *Heltzel,* 248 Mich.App. at 21–23, 638 N.W.2d 123 ("reject[ing]" *Rummelt* and declining to follow its "unconstitutional[ ]" application of the CCA). *Rummelt* and its predecessors had resolved the conflict in the statutory presumptions. They said that the natural parent must show by a preponderance of the evidence that removing the child from an established custodial environment was in the child's best interests.

31 *Fletcher,* 447 Mich. at 889, 526 N.W.2d 889 ("[T]he primary goal of the Child Custody Act ... is to secure custody decisions that are in the best interests of the child."); *Greene v. Walker,* 227 Mich. 672, 677–681, 199 N.W. 695 (1924) (citing cases).

32 " '[A]s between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act.' " *Bowerman v. Sheehan,* 242 Mich. 95, 99, 219 N.W. 69 (1928), quoting Justice Holmes in *Blodgett v. Holden,* 275 U.S. 142, 148, 48 S.Ct. 105, 72 L.Ed. 206 (1927).

33 *Santosky,* 455 U.S. at 753, 102 S.Ct. 1388.

34 *In re Martin,* 450 Mich. 204, 227, 538 N.W.2d 399 (1995).

35 *Id.* (citations omitted).

36 *Heltzel,* 248 Mich.App. at 28, 638 N.W.2d 123.

37 Our constitutional analysis is further supported by a comparison with similar statutes in other states. The CCA's provisions governing custody disputes between a natural parent and a third party are more deferential to the natural parent than some, but less deferential than others. Michigan appears to fall near the middle of the spectrum. At one end are the strict "parental rights" jurisdictions, which base a parent's right to custody on the fitness of the parent. At the opposite end are the "best interests" jurisdictions, which base custody exclusively on the child's needs and welfare. The standards in between usually give preference to the biological parent through a rebuttable presumption that the best interests of the child are served by giving custody to the natural parent. See, generally, Anno: *Award of custody where contest is between child's parents and grandparents,* 31 A.L.R.3d 1187, 1197–1198; *In re Guardianship of Jane Doe,* 93 Hawai'i 374, 384–385, 4 P.3d 508 (Hawai'i App., 2000).

Under the doctrine most deferential to natural parents, the parents are entitled to the custody of their children unless (1) it clearly appears that they are unfit, (2) they have abandoned their right to custody, or (3) "extraordinary circumstances" exist that require they be deprived of custody. *Id.; Ex parte G.C.,* 924 So.2d 651, 656 (Ala., 2005) (requiring "clear and convincing evidence" of parental unfitness to rebut the presumption in favor of the natural parent) (citations omitted); *State ex rel. K.F.,* 2009 UT 4, 67, 201 P.3d 985, 1000 (2009) (requiring evidence of three factors establishing unfitness in order to rebut the presumption in favor of the natural parent). Most courts using this standard rarely evaluate the best interests of the child when resolving the issue. Rebutting the parental presumption in the states using this standard typically hinges on a determination of unfitness. Hence, this standard undoubtedly provides sufficient deference to a natural parent's decisions regarding the care, custody, and maintenance of his or her child to satisfy *Troxel.*

Michigan, along with many other states, applies an intermediate parental presumption standard that favors the biological parent. It is rooted in the *Troxel* rationale that custody with the natural parent serves the best interests of the child. Usually nonparents may rebut the presumption favoring the parent only by a showing of clear and convincing evidence that custody with the natural parent is not in the child's best interests. MCL 722.25(1); *In re Guardianship of Doe,* 93 Hawai'i at 385, 4 P.3d 508.

The standard least deferential to the natural parent's wishes is often referred to simply as the "best interests of the child standard." It focuses on the interests of the child and defines the relative benefits to the child of being with one or the

other party. It requires the court to compare the totality of the circumstances of the two potential custodians, usually on the basis of statutory considerations similar to those embodied in MCL 722.23. Courts using this standard typically grant custody by determining, by a preponderance of the evidence, which placement is in the best interests of the child.

The states that use this best interests of the child standard often give some deference to the natural parent. But they are less deferential to the natural parent's wishes than Michigan is in MCL 722.25(1). For example, Or. Rev. Stat. 109.119 (2007) provides a parental presumption. But it allows a third party having an established parent-child relationship with the child to rebut it. The third party need produce a mere preponderance of the evidence that granting custody to the third party is in the best interests of the child. The Oregon Supreme Court upheld the statute in the face of a due process challenge based on *Troxel. In re Marriage of O'Donnell–Lamont,* 337 Or. 86, 91 P.3d 721 (2004).

38 *In re JK,* 468 Mich. 202, 210, 661 N.W.2d 216 (2003), citing *Quilloin v. Walcott,* 434 U.S. 246, 255, 98 S.Ct. 549, 54 L.Ed.2d 511 (1978).

39 Other jurisdictions whose courts have considered the proper application of *Troxel* in similar legal contexts have also rejected the idea that *Troxel* mandates a determination of parental fitness. Rather, in the context of motions to terminate a guardianship or to modify custody in favor of a natural parent, many courts have distinguished *Troxel* because it "was concerned with judicial interference in the day-to-day child-rearing decisions of fit, custodial parents.... It did not address situations in which the parent no longer has custody." *In re MJK,* 200 P.3d 1106, 1109 (Colo.App., 2008), citing *In re Guardianship of L.V.,* 136 Cal.App.4th 481, 493, 38 Cal.Rptr.3d 894 (2006); see also *In re MNG,* 113 S.W.3d 27, 33 (Tex.App., 2003).

40 Defendant would have the Court require a demonstration of parental unfitness before allowing the parental presumption to be rebutted where no such demonstration is required by the statute. That would in effect, give unlimited deference to all parenting decisions of parents deemed to be fit. However, "[a] determination that an individual has a fundamental right does not foreclose the State from ever limiting it." *In re RA,* 153 N.H. 82, 102, 891 A.2d 564 (2005). Such a determination is not constitutionally mandated. To hold that parental unfitness is a mandatory prerequisite to rebutting the parental presumption would be inconsistent with the CCA's emphasis on best interests and lack of reference to fitness.

We note that our interpretation of the relevant provisions of the CCA is similar to that of the courts in many jurisdictions that also utilize an intermediate parental presumption standard. *In re Guardianship of Doe,* 93 Hawai'i at 385, 4 P.3d 508 ("Because the preference for parents established in [Hawaii Rev. Stat.] 571–46(1) is coupled with the best interest standard, we believe our jurisdiction is similar to the majority of jurisdictions which adopt a custody presumption in favor of parents subject to rebuttal."); *Evans v. McTaggart,* 88 P.3d 1078, 1085 (Alaska, 2004) ("We thus hold that in order to overcome the parental preference a non-parent must show by clear and convincing evidence that ... the welfare of the child requires the child to be in the custody of the non-parent.").

41 *Santosky,* 455 U.S. at 759, 102 S.Ct. 1388 (citation omitted).

42 MCL 712A.19b(3).

43 *Quilloin,* 434 U.S. at 255, 98 S.Ct. 549.

44 *Id.*

45 Anno, 31 A.L.R.3d 1187, 1196 (noting that the probable reason courts have often used the fitness and best interest inquiries interchangeably is because of "the fact that both doctrines seek the same basic objective from two different approaches").

46 It is difficult to conceive of a scenario where an unfit parent would prevail on the best interest factors.

47 *Bahr,* 60 Mich.App. at 359, 230 N.W.2d 430 ("Since the Legislature is presumed to be aware of the long-standing judicial precedent affecting an area in which an exhaustive codification of the law is undertaken and enacted, we must conclude the omission was intentional."); compare MCL 712A.19b(3) (specifically providing for termination of parental rights in cases of neglect or abandonment, among other reasons).

48 *Deel,* 113 Mich.App. at 561–562, 317 N.W.2d 685, quoting *Bahr,* 60 Mich.App. at 359, 230 N.W.2d 430.

49 *In re Weldon,* 397 Mich. 225, 276–277, 244 N.W.2d 827 (1976) (opinion of Coleman, J.), overruled on other grounds in *Bowie, supra.*

50 *Henrikson v. Gable,* 162 Mich.App. 248, 253, 412 N.W.2d 702 (1987); *Stevens,* 86 Mich.App. at 267, 273 N.W.2d 490; *Bahr,* Mich.App. at 360, 230 N.W.2d 430.

51 *Mason,* 267 Mich.App. at 207, 704 N.W.2d 104.

52 *Glover,* 159 Mich.App. at 147, 406 N.W.2d 246 ("We believe that placing the burden of persuasion on the parent challenging an established custodial environment is better calculated to elicit the quality of testimony and evidence required by a trial court in its determination of the best interest of the child."). What remains unanswered in *Glover* is on what basis the Court rests this questionable proposition and why, in any event, that determination justified the invention

of a new standard. See Rummelt, 196 Mich.App. at 496, 493 N.W.2d 434 ("For the reasons stated therein, we agree with this Court's decision in *Glover.*").

53 *Mason's* holding altered the burden of proof in that it essentially applied the best interests of the child standard to disputes between unfit natural parents and third-party custodians, in contravention of the language of MCL 722.25(1). *Mason,* 267 Mich.App. at 207, 704 N.W.2d 104; see footnote 37 of this opinion.

Five years after the enactment of the CCA, the Court of Appeals in *Bahr,* rejected the exact argument accepted by *Mason. Bahr* first noted that, before the enactment of the CCA, the best interests of the child were served by awarding custody to the natural parent over a third party "unless it could be affirmatively proven that the parent was unfit to have custody or had neglected or abandoned the child." *Bahr,* 60 Mich.App. at 359, 230 N.W.2d 430. After concluding that the Legislature had deliberately omitted from the CCA any fitness determination in such cases, *Bahr* plainly stated that "[r]ebuttal of the presumption in favor of parental custody no longer requires proof of parental unfitness, neglect or abandonment." *Id.* at 360, 230 N.W.2d 430.

Numerous Court of Appeals cases decided after *Bahr* cited it favorably for the proposition that, in custody cases between a natural parent and a third party, the CCA requires no fitness determination. *Stevens,* 86 Mich.App. at 267, 273 N.W.2d 490; *Henrikson,* 162 Mich.App. at 253, 412 N.W.2d 702 (1987). Oddly, *Mason* quoted the same language from *Bahr* concerning the lack of need for a fitness determination under the CCA. *Mason* noted that "some jurisdictions, including Michigan, have moved away from using the 'parental unfitness' or 'extraordinary circumstances' standards and focus on a placement's detriment to the child." *Mason,* 267 Mich.App. at 201, 704 N.W.2d 104. The Court also noted that the parental presumption in MCL 722.25(1) applies "in *all* custody disputes between parents and an agency or a third person." *Id.* (emphasis in original). Yet immediately after this discussion, *Mason* ignored its own correct statement of law about the statutory presumption in MCL 722.25(1). Instead, it denied the parental presumption favoring the natural father on the basis of the fact that he was not entitled to the fundamental constitutional right to raise his child. *Id.* at 203, 704 N.W.2d 104.

We recognize that *Mason* was not bound by *Bahr* and its progeny under MCR 7.215(J)(1) because it was decided before 1990. However, we refer to *Bahr* here because it correctly stated Michigan custody law after the enactment of the CCA; *Mason* did not. We agree with the interpretation of the CCA promulgated by the *Bahr* line of cases. We further agree that the *Rummelt* line of cases must be rejected on the basis of *Heltzel's* reasoning and for the reasons discussed herein.

54 U.S. Const., Am. XIV.

55 Justice Corrigan acknowledges as much, *post* at 722, but brushes this "bare observation" aside. We disagree with Justice Corrigan's contention that we fail to "adequately consider the various proceedings at which a parent's fitness may be questioned[.]" *Post* at 722. To the contrary, we explicitly address such proceedings by holding that a natural parent whose parental rights were previously terminated or are suspended cannot initiate an action under the CCA. See pp. 30–31 of this opinion.

56 Only one provision in the CCA refers to parental fitness at all. MCL 722.27b requires a court considering whether to grant visitation time to grandparents to give deference to a fit parent's decision to deny such time. This provision was amended in 2004 in response to our decision in *DeRose v. DeRose,* 469 Mich. 320, 666 N.W.2d 636 (2003). *DeRose* held that the former version of MCL 722.27b was unconstitutional under *Troxel.*

57 *Post* at 722–23.

58 *Chapin v. Chapin,* 229 Mich. 515, 201 N.W. 530 (1924).

59 *In re Ives,* 314 Mich. 690, 696, 23 N.W.2d 131(1946).

60 MCL 700.5208.

61 Given this limitation, we reject Justice Corrigan's assertion that we are allowing a court to sweep "findings and admissions [of unfitness] under the rug...." *Post* at 724. Under Justice Corrigan's approach, a parent who is deemed unfit by a court or admits being unfit at any time is never entitled to benefit from the parental presumption in MCL 722.25(1). Thus, defendant in this case is not entitled to the presumption in her favor because "defendant's unfitness was clearly established at prior proceedings." *Post* at 724. Justice Corrigan's approach is contrary to *Fletcher's* mandate that a court consider up-to-date information "and any other changes in circumstances" when making custody determinations. *Fletcher,* 447 Mich. at 889, 526 N.W.2d 889.

Our position is not that *Fletcher* precludes a circuit court from taking into account a past finding of parental unfitness. *Post* at 723–24 n. 13. Surely, when a court evaluates the best interest factors in MCL 722.23, a past finding may still be considered. Determinations of past, admitted unfitness are inevitably reconsidered when there are ongoing proceedings before the court. Indeed, as Justice Corrigan observes, "a parent's fitness or custody rights are governed by an ongoing proceeding—such as the guardianship proceeding here...." *Post* at 717. We do not ourselves opine on whether

"defendant's lack of fitness here diminished...." *Post* at 723–27 n. 13. We simply observe that the judge overseeing the guardianship proceedings acknowledged such a progression in his increasingly generous visitation orders.

Thus, our main disagreement with Justice Corrigan's conclusion is the extent to which she would make a prior finding of unfitness largely dispositive in resolving the conflicting presumptions in the CCA. Here, plaintiffs relied primarily on defendant's past conduct as a basis for opposing her requests for increased visitation. Nevertheless, the court overseeing the guardianship proceedings repeatedly ruled in defendant's favor. During those proceedings, defendant was fulfilling increasing duties to her children and gaining increased visitation time. By complying with what the court required of her, defendant properly attempted to overcome the prior finding of unfitness that plaintiffs rely on heavily in this custody action. Indeed, had defendant filed a motion to terminate the guardianship under MCL 700.5208, her admission of unfitness would have been relevant. But the relevance would have been only to the extent that it still affected the best interests of the children. Justice Corrigan states that defendant's current fitness may certainly be given weight during the best interests analysis. *Post* at 724 n. 14. Yet she would make the initial admission of unfitness dispositive of which presumption controls when an established custodial environment has been established and "when a parent's lack of fitness continues over time...." *Post* at 723–24 n. 13. This case is an apt illustration of how such an analysis begs the question. Is the establishment of the established custodial environment due to the parent's unfitness sufficient in itself? It would appear not, because the parent's lack of fitness must also "continue [ ] over time." In this case, has defendant's "lack of fitness," diminished as the probate court found it to be, extended over a long enough time? How much time must a parent be unfit, and how unfit must he or she be?

62 Defendant's remaining arguments claim that the circuit court abused its discretion by finding her to be an unfit parent and in evaluating the best interests factors in MCL 722.23. Given that we are remanding this case for a new best interests hearing, we decline to address these arguments.

63 *Fletcher,* 447 Mich. at 889, 526 N.W.2d 889.

64 Under the CCA, the court is not required to award custody to *either* party. Thus, if the plaintiffs do not meet the requisite burden of proof in this custody action, the court has the authority to keep the guardianship intact without awarding custody to either party. That is, on remand, the court could do a number of different things, including, but not limited to: (a) "[a]ward the custody of the child[ren] to 1 or more of the parties involved or to others," MCL 722.27(1)(a); (b) maintain the status quo; or (c) "[t]ake any other action considered to be necessary," MCL 722.27(1)(e). As noted earlier in this opinion, the defendant-mother cannot circumvent the existing guardianship order by initiating a custody action. Rather, the only action she may initiate is to terminate the guardianship under MCL 700.5208.

65 *Heltzel,* 248 Mich.App. at 27, 638 N.W.2d 123. In this way, the established custodial environment is still given weight in the court's analysis and ultimate decision. Therefore, we do not believe this holding "minimize[s] the importance that the CCA's terms place on the established custodial environment." *Post* at 722 n. 11.

1 The majority observes that all proceedings in this case took place in the Oakland Circuit Court although there were two separate cases: the probate court guardianship case and the circuit court CCA case. It is helpful to note that the Family Division of the Oakland Circuit Court and the Oakland County Probate Court share jurisdiction over selected matters pursuant to a concurrent jurisdiction plan authorized by MCL 600.406. Thus, although probate courts generally have jurisdiction over guardianship proceedings and circuit courts have jurisdiction over CCA proceedings, all the proceedings between the parties in this case effectively took place before the same court. Even absent a concurrent jurisdiction plan, the probate judge assigned to a guardianship matter must be assigned to serve as the circuit court judge in a subsequent CCA case brought by the guardians. MCL 722.26b(5). Here Judge Eugene A. Moore presided over the guardianship proceedings but later disqualified himself in the CCA matter. The CCA proceedings were ultimately presided over by Judge Linda S. Hallmark. Judges Moore and Hallmark are both Oakland County Probate Court judges assigned to the Family Division of the Oakland Circuit Court.

2 By design, limited guardianships give parents the opportunity to correct whatever conditions led them to give up custody of their children and to regain custody upon proof of compliance with a limited guardianship placement plan. MCL 700.5205(2). A parent has the right to petition to terminate the limited guardianship under MCL 700.5208 and, if the parent has "substantially complied" with the placement plan, the court must terminate the guardianship. MCL 700.5209(1). A limited guardian also may not seek full custody of a child under the CCA if the parent substantially complies with the placement plan. MCL 722.26b(2). Before establishing a limited guardianship, however, the parent must also be informed that, if he fails without good cause to comply with the placement plan, his parental rights may be terminated under the juvenile code. MCL 700.5205(2).

3 MCL 700.5204(3) empowers a limited guardian to seek appointment as a full guardian as long as the petition is not based merely on the suspension of parental rights incident to the limited guardianship petition.

4 I concur in the majority's conclusion that *Mason* improperly created a preponderance of the evidence standard "out of thin air," *ante* at 710, where the text of the CCA includes no such standard.

5 The longstanding rule concerning concurrent jurisdiction was aptly described in *Schell* where, as here, the circuit court was called upon to decide a custody issue. Significantly, in *Schell,* prior probate court proceedings concerning the child appear to have been abandoned and effectively closed. Accordingly, this Court held:

> As stated by Mr. Justice Cooley in [*Maclean*] v. Wayne Circuit Judge, 52 Mich. 257 [259, 18 N.W. 396]:
>
> "It is a familiar principle that when a court of competent jurisdiction has become possessed of a case, its authority continues, subject only to appellate authority, until the matter is finally and completely disposed of; and no court of co-ordinate authority is at liberty to interfere with its action."
>
> *The circuit court and the probate court, juvenile division, had concurrent jurisdiction. The former court having acquired it first, retained it.* [*Schell,* 257 Mich. at 88, 241 N.W. 223 (emphasis added).]

6 The most relevant provisions of MCL 712A.2(b) confer court jurisdiction over a child:

> (1) Whose parent or other person legally responsible for the care and maintenance of the juvenile, when able to do so, neglects or refuses to provide proper or necessary support, education, medical, surgical, or other care necessary for his or her health or morals, who is subject to a substantial risk of harm to his or her mental well-being, who is abandoned by his or her parents, guardian, or other custodian, or who is without proper custody or guardianship....
>
> (2) [Or, w]hose home or environment, by reason of neglect, cruelty, drunkenness, criminality, or depravity on the part of a parent, guardian, nonparent adult, or other custodian, is an unfit place for the juvenile to live in.

7 Various protections address the parent's due process rights throughout the proceedings, including rights to notice, to participate in all proceedings, see MCL 712A.19(5)(c), MCL 712A.19a(4)(c), and MCL 712A.19b(2)(c), and to an attorney at each stage of the proceedings, MCL 712A.17c(4) and (5).

8 Indeed, the EPIC's guardianship schemes could be effectively nullified, generally, if a parent could avoid ongoing guardianship proceedings by simply filing for custody under the CCA.

9 To be clear, although the CCA generally cannot be used to override other proceedings, the CCA is often properly employed *incident to* other proceedings when appropriate. For example, custody actions may "arise [ ] incidentally from another action in the circuit court or an order or judgment of the circuit court," MCL 722.27(1), including a divorce action.

10 In accord, historically this Court has recognized that parental rights do not derive from mere biology or exist independently from parental duties. As we explained in *In re Gould,* 174 Mich. 663, 669–670, 140 N.W. 1013 (1913):

> The law recognizes the rights of the father *because it recognizes the natural duties and obligations of the father.* The father's right to and authority over his child are secure and inviolable *so long as he properly discharges the correlative duties.*
>
> But the absolute power of the father over his infant children, to treat them as property and dispose of them as he sees fit because they are his, which was once recognized under the Roman law of *patria potestas* and in the codes of early nations, no longer obtains. Paternal authority is subordinate to the supreme power of the State. *Every child born in the United States has, from the time it comes into existence, a birthright of citizenship which vests it with rights and privileges, entitling it to governmental protection—*
>
> "And such government is obligated by its duty of protection, to consult the welfare, comfort, and interests of such child in regulating its custody during the period of its minority." *Mercein v. People,* 25 Wend. (N.Y.) 64 (35 Am. Dec. 653).
>
> *The power of parental control, though recognized as a natural right and protected when properly exercised, is by no means an inalienable one.* When the "right of custody" is involved between respective claimants for a child, the courts, though in the first instance recognizing *prima facie* rights of relationship, in the final test are not strictly bound by demands founded upon purely technical claims or naked legal rights, but may and should, in making the award, be governed by the paramount consideration of what is really demanded by the best interests of the child. [Emphasis added.]

Thus *Gould* emphasized that a child's rights to be protected from abuse and neglect inform and limit a parent's rights. As we reiterated 50 years later in *Herbstman v. Shiftan,* 363 Mich. 64, 67–68, 108 N.W.2d 869 (1961):

> *A child also has rights,* which include the right to proper and necessary support; education as required by law; medical, surgical and other care necessary for his health, morals, or well-being; the right to proper custody by his parents, guardian, or other custodian; and the right to live in a suitable place free from neglect, cruelty, drunkenness, criminality, or depravity on the part of his parents, guardian, or other custodian. It is only when these rights of the child are violated by the parents themselves that the child becomes subject to judicial control. *A parent having violated the rights of a child forfeits his right to the custody, control and upbringing of that child; and when the safety and best interests of the child demand it, the rights of the child must be protected by the court.* [Emphasis added.]

11 The majority opines that "no constitutional protections for third persons underlie the established custodial environment presumption in MCL 722.27(1)(c)." *Ante* at 703. This may be so. But we should not minimize the importance that the CCA's terms place on the established custodial environment, which serves a *child's* needs. Indeed, an "established custodial environment" is defined in terms similar to those used to describe a child's "rights and privileges entitling it to governmental protection," which obligate the government "to consult the welfare, comfort, and interests of such child in regulating its custody during the period of its minority." *Gould, supra,* 174 Mich. at 670, 140 N.W. 1013 (quotation marks and citation omitted). An established custodial environment exists under § 7(1)(c) "if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort." Compare the rights of a child listed by *Herbstman,* 363 Mich. at 67, 108 N.W.2d 869: "proper and necessary support; education as required by law; medical, surgical, and other care necessary for his health, morals, or well-being; the right to proper custody by his parents, guardian, or other custodian...."

12 My conclusions here stem from my willingness to agree, for purposes of this analysis, with the majority's assumption that MCL 722.25(1) and MCL 722.27(1)(c) "irreconcilably conflict" when a parent seeks custody from a third party with an established custodial environment, *ante* at 709; both provisions appear to mandate action from the court, stating respectively that "the court *shall* presume that the best interests of the child are served by awarding custody to the parent," § 5(1), and that "[t]he court *shall not* ... change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child," § 7(1)(c). (Emphasis added.) Yet because § 7 broadly circumscribes the circuit court's power in *all* cases under the CCA, I would be more inclined to hold that the prohibition on changing an established custodial environment in § 7(1)(c) clearly controls, as a textual matter, whenever the terms of both § 5(1) and § 7(1)(c) apply in a given case. I do not agree with the majority that, through § 5(1), the Legislature clearly intended to "offer[ ] *greater* protection [than is required by the constitution] to the fundamental parenting rights of natural parents, regardless of whether the natural parents are fit." *Ante* at 711. Nevertheless, my observations concerning the textual dominance of 7(1)(c) are largely inapposite to my overall conclusion; I am persuaded that, if a *fit* parent's custody interests are opposed to those of a third party with an established custodial environment, the parent should benefit from a parental presumption as a matter of *constitutional* right.

13 The majority states that my approach is contrary to *Fletcher v. Fletcher,* 447 Mich. 871, 889, 526 N.W.2d 889 (1994), which required the trial court on remand to consider "up-to-date information" and "(any other changes in circumstances)" when awarding custody. See *ante* at 712–13 n. 61. I have no objection to the *Fletcher* Court's requirement, which applied to the trial court's consideration of the best interests factors in MCL 722.23. But I disagree with the majority's assertion that *Fletcher* precludes a trial court from taking into account a past finding of unfitness when determining whether the presumption in MCL 722.25(1) must prevail over the mandate in MCL 722.27(1)(c) as a constitutional matter. *Fletcher* addressed *only* the best interests determination on remand in light of the fact that circumstances may change during the appellate process. See *Fletcher,* 447 Mich. at 888–889, 526 N.W.2d 889. Indeed, it expressly prohibited reconsideration of the threshold question whether any party had an established custodial environment for purposes of applying § 7(1)(c). *Id.* at 889 n. 10 ("We do not suggest that the events which have taken place during the appellate process give rise to an 'established custodial environment' that ... alters the burden of proof in favor of the party who has enjoyed custody during the appeal."). In no way did *Fletcher* suggest that the threshold issue of a parent's past, admitted unfitness should be reconsidered over time in order to alter the burden of proof.

The majority further states that I would "make the initial admission of unfitness dispositive" although defendant "was fulfilling increasing duties to her children and gaining increased visitation time." *Ante* at 712–13 n. 61. First, I would note that—just as the majority asserts that the established custodial environment may be given weight when the court considers the best interests factors, *ante* at 713 n. 65—defendant's current, apparently increasing ability to care for her children should certainly be given weight during this process. Second, to the extent that the majority suggests that a past admission of unfitness should not be dispositive because defendant's lack of fitness here diminished and should be reconsidered over time, I note that defendant admitted her unfitness in 2002, had no contact with her children at all for approximately two years during 2003–2005, was released from prison in July 2005 and had been back in contact with her children for only about six months when plaintiffs filed their complaint for custody in May 2006. By this time, the children had been living with plaintiffs in Michigan for about four years. Accordingly, I emphasize my conclusion that a past admission of unfitness is not dispositive *in itself.* Rather, by its terms the mandate in § 7(1)(c)—which circumscribes the court's power to "[m]odify or amend its previous judgments or orders" and specifically to "modify or amend its previous judgments or orders or issue a new order so as to change the established custodial environment"—controls *only* when a prior admission of unfitness led to additional circumstances and court orders creating an established custodial environment with a third party. Indeed, by definition, the prohibition on changing the established custodial environment

in § 7(1)(c) applies only when a parent's lack of fitness continues over time so that third parties take on the parental role and establish a custodial environment—such an environment is established only if "*over an appreciable time* the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort." MCL 722.7(1)(c) (emphasis added).

14 Plaintiffs aptly observe that defendant's lack of fitness was the direct cause of their appointment as guardians—a status that bestows rights akin to parental rights. MCL 700.5215. They further note that defendant's absence from her children's lives thus created the very established custodial environment with plaintiffs that defendant now seeks to delegitimize by applying the constitutional presumption in favor of *fit* parents.

495 Mich. 394
Supreme Court of Michigan.

In re SANDERS.

Docket No. 146680.
|
Calendar No. 6.
|
Argued Nov. 7, 2013.
|
Decided June 2, 2014.

Synopsis

Background: Department of Human Services (DHS) filed abuse and neglect petitions against parents. The Circuit Court, Jackson County, Richard N. LaFlamme, J., adjudicated mother as unfit, but dismissed the allegations of abuse and neglect against father and restricted father's contact with children to supervised parenting time. Father appealed.

Holdings: The Supreme Court, McCormack, J., held that:

[1] due process requires that every parent receive an adjudication hearing before the state can interfere with his or her parental rights, and dispositional hearings are constitutionally inadequate, and

[2] due process requires a specific adjudication of a parent's unfitness before the state can infringe the constitutionally protected parent-child relationship, and the one-parent doctrine is unconstitutional; overruling *In re CR*, 250 Mich.App. 185, 646 N.W.2d 506.

Vacated and remanded.

Markman, J., dissented and filed opinion in which Viviano, J., joined.

West Headnotes (27)

[1] **Infants** Trial or review de novo

Whether child protective proceedings complied with a parent's right to procedural due process presents a question of constitutional law, which Supreme Court reviews de novo. U.S.C.A. Const.Amend. 14.

45 Cases that cite this headnote

[2] **Appeal and Error** Statutory or legislative law

Appeal and Error Rules of court in general

Interpretation and application of statutes and court rules are reviewed de novo.

36 Cases that cite this headnote

[3] **Constitutional Law** Presumptions and Construction as to Constitutionality

Constitutional Law Clearly, positively, or unmistakably unconstitutional

Statutes are presumed to be constitutional, and Supreme Court has a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent.

12 Cases that cite this headnote

[4] **Courts** Construction and application of rules in general

Supreme Court interprets court rules using the same principles that govern statutory interpretation.

7 Cases that cite this headnote

[5] **Infants** Nature, Form, and Purpose

Child protective proceedings comprise two phases, namely the adjudicative phase and the dispositional phase, and generally, a court determines whether it can take jurisdiction over the child in the first place during the adjudicative

phase, and once the court has jurisdiction, it determines during the dispositional phase what course of action will ensure the child's safety and well-being.

89 Cases that cite this headnote

[6] **Infants** Deprivation, Neglect, or Abuse

When the petition contains allegations of abuse or neglect against a parent, and those allegations are proved by a plea or at the trial, the adjudicated parent is unfit. M.C.L.A. § 712A.2(b)(1).

19 Cases that cite this headnote

[7] **Infants** Nature, Form, and Purpose

While the adjudicative phase is only the first step in child protective proceedings, it is of critical importance because procedures used in adjudicative hearings protect the parents from the risk of erroneous deprivation of their parental rights.

40 Cases that cite this headnote

[8] **Infants** Disposition proceedings

Infants Application of rules of evidence in general

Jury Dependent, neglected, or delinquent children, proceedings involving

Once a court assumes jurisdiction over a child in child protective proceedings, the parties enter the dispositional phase, and unlike the adjudicative phase, in dispositional phase, the rules of evidence do not apply, and the respondent is not entitled to a jury determination of facts. MCR 3.911(A), 3.973(E).

88 Cases that cite this headnote

[9] **Infants** Nature and Scope of Disposition

Infants Scope, Standards, and Questions on Review

Court has broad authority in effectuating dispositional orders once a child is within its jurisdiction, and while the court's dispositional orders must be appropriate for the welfare of the juvenile and society in view of the facts proven and ascertained, the orders are afforded considerable deference on appellate review. M.C.L.A. § 712A.18(1).

10 Cases that cite this headnote

[10] **Infants** Disposition proceedings

Infants Nature and Scope of Disposition

Dispositional phase ends with a permanency planning hearing, which results in either the dismissal of the original petition and family reunification or the court's ordering the Department of Human Services (DHS) to file a petition for the termination of parental rights.

5 Cases that cite this headnote

[11] **Constitutional Law** Levels of scrutiny; strict or heightened scrutiny

Constitutional Law Parent and Child Relationship

Included in the Fourteenth Amendment's promise of due process is a substantive component that provides heightened protection against government interference with certain fundamental rights and liberty interests, and among these fundamental rights is the right of parents to make decisions concerning the care, custody, and control of their children. U.S.C.A. Const.Amend. 14.

23 Cases that cite this headnote

[12] **Constitutional Law** Parent and Child Relationship

Parent and Child Care, Custody, and Control of Child; Child Raising

Parents have a significant interest in the companionship, care, custody, and management of their children, and the interest is an element of liberty protected by due process. U.S.C.A. Const.Amend. 14.

21 Cases that cite this headnote

[13] **Infants** Welfare and best interest of child in general

Infants Deprivation, Neglect, or Abuse

Parent and Child Care, Custody, and Control of Child; Child Raising

Parent's right to control the custody and care of her children is not absolute, as the state has a legitimate interest in protecting the moral, emotional, mental, and physical welfare of the minor and, in some circumstances, neglectful parents may be separated from their children.

47 Cases that cite this headnote

[14] **Constitutional Law** Presumptions and Construction as to Constitutionality

Supreme Court has a duty to interpret statutes as being constitutional whenever possible.

7 Cases that cite this headnote

[15] **Constitutional Law** Parent and Child Relationship

Infants Determination and findings

Due process requires a specific adjudication of a parent's unfitness before the state can infringe the constitutionally protected parent-child relationship, and the one-parent doctrine, which permits a court to interfere with unadjudicated parent's right to direct the care, custody, and control of the children solely because the other parent is unfit, without any determination that the unadjudicated parent is also unfit, is unconstitutional because it deprives unadjudicated parents of this right; overruling *In re CR*, 250 Mich.App. 185, 646 N.W.2d 506. U.S.C.A. Const.Amend. 14.

53 Cases that cite this headnote

[16] **Infants** Necessity; right to hearing

Parent and Child Care, Custody, and Control of Child; Child Raising

Father's right to direct the care, custody, and control of his children was a fundamental right that could not be infringed without some type of fitness hearing.

23 Cases that cite this headnote

[17] **Constitutional Law** Parent and Child Relationship

Infants Disposition proceedings

Due process requires that every parent receive an adjudication hearing before the state can interfere with his or her parental rights, and dispositional hearings are constitutionally inadequate for this purpose because, in the dispositional phase, the court is concerned only with what services and requirements will be in the best interests of the children and there is no presumption of fitness in favor of the unadjudicated parent; procedures afforded parents during the dispositional phase are not related to the allegations of unfitness because the question a court is answering at a dispositional hearing assumes a previous finding of parental unfitness. U.S.C.A. Const.Amend. 14.; M.C.L.A. § 712A.18f.

16 Cases that cite this headnote

[18] **Infants** Endangerment

When a minor faces an imminent threat of harm, the state's interest in the welfare of the child is paramount, and in the case of an imminent threat of harm, the state may take the child into custody without prior court authorization or parental consent. M.C.L.A. § 712A.14a(1).

[19] **Infants** Necessity; right to hearing

Jury Dependent, neglected, or delinquent children, proceedings involving

In abuse and neglect case, father was constitutionally entitled to a fitness hearing, and the provision of Juvenile Code, stating that in a hearing other than a criminal trial under this chapter, a person interested in the hearing may demand a jury of 6 individuals, afforded him the statutory right to demand a jury because a parental-fitness hearing qualified as

a noncriminal hearing under the Juvenile Code. M.C.L.A. § 712A.17(2).

5 Cases that cite this headnote

[20] **Infants** Parents and relatives

Unadjudicated parent is not entitled to contest any allegations made against him or her at the other parent's adjudication hearing in abuse and neglect proceeding because the unadjudicated parent is not a party to that proceeding.

8 Cases that cite this headnote

[21] **Infants** Necessity; right to hearing

State must adjudicate a parent's fitness before interfering with his or her parental rights.

34 Cases that cite this headnote

[22] **Infants** Necessity; right to hearing

State cannot deprive an unadjudicated parent of his or her constitutional parental rights in abuse and neglect case simply because those rights may be restored at some future date.

2 Cases that cite this headnote

[23] **Infants** Commission of crime and incarceration

Incarcerated parent can exercise the constitutional right to direct the care of his or her children while incarcerated.

9 Cases that cite this headnote

[24] **Infants** Commission of crime and incarceration

Incarcerated parent can choose who will care for his children while he is imprisoned.

5 Cases that cite this headnote

[25] **Infants** Dismissal and mootness

Fact that father was currently incarcerated for violating federal drug-trafficking laws did not moot his appeal from trial court's decision, denying father's motion for his children to be placed with him, even though father was never adjudicated as unfit.

2 Cases that cite this headnote

[26] **Infants** Parents and relatives

When the state is concerned that neither parent should be entrusted with the care and custody of their children, the state has the authority—and the responsibility—to protect the children's safety and well-being by seeking an adjudication against both parents; in contrast, when the state seeks only to deprive one parent of the right to care, custody and control, the state is only required to adjudicate that parent.

35 Cases that cite this headnote

[27] **Infants** Fitness of parent

In abuse and neglect proceedings, Constitution does not permit the state to presume, rather than prove, a parent's unfitness solely because it is more convenient to presume than to prove.

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Opinion of the Court

McCORMACK, J.

***400** At issue in this case is the constitutionality of Michigan's one-parent doctrine. The one-parent doctrine permits a court to interfere with a parent's right to direct the care, custody, and control of the children solely because the other parent is unfit, without any determination that he or she is also unfit. ***401** In other words, the one-parent doctrine essentially imposes joint and several liability on both parents, potentially divesting either of custody, on the basis of the unfitness of one. Merely describing the doctrine foreshadows its constitutional weakness.

In the case before us, upon petition by the Department of Human Services (DHS), the trial court adjudicated respondent-mother, Tammy Sanders, as unfit but dismissed the allegations of abuse and neglect against respondent-appellant-father, Lance Laird. Laird moved for his children to be placed with him. Although Laird was never adjudicated as unfit, the trial court denied Laird's motion, limited his contact with his children, and ordered him to comply with a service plan. In justifying its orders, the court relied on the one-parent doctrine and the Court of Appeals' decision in *In re CR,* 250 Mich.App. 185, 646 N.W.2d 506 (2002), from which that doctrine derives.

Laird believes that the one-parent doctrine violates his fundamental right to direct the care, custody, and control of his children because it permits the court to enter dispositional orders affecting that right without first determining that he is an unfit parent. We agree. Because application of the one-parent doctrine impermissibly infringes the fundamental rights of unadjudicated parents without providing adequate process, we hold that it is unconstitutional under the Due Process Clause of the Fourteenth Amendment.

I. FACTUAL AND PROCEDURAL BACKGROUND

Laird is the father of two boys: P, born in 2010, and C, born in 2011. Sanders is the boys' mother. Four days after C was born drug positive, the Jackson Circuit Court, acting on a petition filed by the ****528** DHS, removed C ***402** from Sanders's custody and placed the child with Laird. At that time, P was also in Laird's custody.

Several weeks later, the DHS filed an amended petition alleging that Laird had tested positive for cocaine, that Sanders had admitted "getting high" with Laird, and that Sanders had spent the night at Laird's home despite a court order that prohibited her from having unsupervised contact with the children. At a November 16, 2011 preliminary hearing, the court removed the children from Laird's custody and placed them in the custody of the DHS.[1] Laird contested the allegations in the amended petition and requested an adjudication with respect to his fitness as a parent.

On February 7, 2012, Sanders pleaded no contest to the allegations of neglect and abuse in the amended petition. Laird declined to enter a plea and instead repeated his demand for an adjudication. Laird also moved to change the children's temporary placement from their paternal aunt to the children's paternal grandmother, with whom Laird then resided. The court conducted a placement hearing at which several witnesses, including Laird, testified. Laird admitted that he had allowed Sanders to spend one night at his house after the court removed the children from her custody. Laird claimed, however, that the children never saw Sanders that night. Laird also testified that he was on probation stemming from a domestic violence conviction. The court took the placement motion under advisement ***403** and maintained placement of the children with their aunt pending Laird's adjudication, which was scheduled for May 1, 2012.

A few weeks later, on April 18, 2012, the DHS dismissed the remaining allegations against Laird, and Laird's adjudication was cancelled. At a May 2, 2012 review hearing, the court ordered Laird to comply with services, including parenting classes, a substance-abuse assessment, counseling, and a psychological evaluation. Laird's contact with his children was restricted to supervised parenting time, and placement of the children continued with their aunt. On August 22, 2012, Laird moved for immediate placement of the children with him. Laird argued that the court had no legal authority to condition the placement of his children on his compliance

with a service plan because he had not been adjudicated as unfit. The court, relying on the Court of Appeals' decision in *CR*, denied the motion.

Laird's application for interlocutory leave to appeal in the Court of Appeals was denied for lack of merit. *In re Sanders Minors,* unpublished order of the Court of Appeals, entered January 18, 2013 (Docket No. 313385). This Court granted leave to appeal to address "whether the application of the one-parent doctrine violates the due process or equal protection rights of unadjudicated parents." *In re Sanders,* 493 Mich. 959, 828 N.W.2d 391 (2013).[2]

II. LEGAL BACKGROUND

A. STANDARD OF REVIEW

[1] **[2]** **[3]** **[4]** Whether child protective proceedings complied with a parent's right to ****529** procedural due process presents a ***404** question of constitutional law, which we review de novo. *In re Rood,* 483 Mich. 73, 91, 763 N.W.2d 587 (2009) (opinion by Corrigan, J.). The interpretation and application of statutes and court rules are also reviewed de novo. *In re Mason,* 486 Mich. 142, 152, 782 N.W.2d 747 (2010). Statutes are presumed to be constitutional, and we have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent. *Taylor v. Gate Pharm.,* 468 Mich. 1, 6, 658 N.W.2d 127 (2003). We interpret court rules using the same principles that govern statutory interpretation. *Haliw v. Sterling Hts.,* 471 Mich. 700, 704, 691 N.W.2d 753 (2005).

B. CHILD PROTECTIVE PROCEEDINGS IN MICHIGAN

[5] A brief review of the court rules and statutes governing child protective proceedings is helpful here. The juvenile code, MCL 712A.1 *et seq.,* establishes procedures by which the state can exercise its *parens patriae* authority over minors. These procedures are reflected in Subchapter 3.900 of the Michigan Court Rules. In Michigan, child protective proceedings comprise two phases: the adjudicative phase and the dispositional phase. See *In re Brock,* 442 Mich. 101, 108, 499 N.W.2d 752 (1993). Generally, a court determines whether it can take jurisdiction over the child in the first place during the adjudicative phase. *Id.* Once the court has jurisdiction, it determines during the dispositional phase what course of action will ensure the child's safety and well-being. *Id.*

[6] **[7]** The court's authority to conduct those proceedings is found at MCL 712A.2(b), which encompasses child protective proceedings generally. The first subsection of that statute provides the court with jurisdiction over a child in cases of parental abuse or neglect. MCL 712A.2(b)(1) (providing for jurisdiction over a juvenile ***405** whose parent "neglects or refuses to provide proper or necessary support, education, medical, surgical, or other care necessary for his or her health or morals"). To initiate a child protective proceeding, the state must file in the family division of the circuit court a petition containing facts that constitute an offense against the child under the juvenile code (i.e., MCL 712A.2(b)). MCL 712A.13a(2); MCR 3.961.[3] If the court authorizes the petition, the court may release the child to a parent, MCR 3.965(B)(12)(a), or, if the court finds that returning the child to the home would be contrary to the child's welfare, order that the child be temporarily placed in foster care, MCR 3.965(B)(12)(b) and (C). The respondent parent can either admit the allegations in the petition or plead no contest to them. MCR 3.971. Alternatively, the respondent may demand a trial (i.e., an adjudication) and contest the merits of the petition. MCR 3.972. If a trial is held, the respondent is entitled to a jury, MCR 3.911(A), the rules of evidence generally apply, MCR 3.972(C), and the petitioner has the burden of proving by ****530** a preponderance of the evidence one or more of the statutory grounds for jurisdiction alleged in the petition, MCR 3.972(E). When the petition contains allegations of abuse or neglect against a parent, MCL 712A.2(b)(1), and those allegations are proved by a plea or at the trial, the adjudicated parent is unfit. While the ***406** adjudicative phase is only the first step in child protective proceedings, it is of critical importance because "[t]he procedures used in adjudicative hearings protect the parents from the risk of erroneous deprivation" of their parental rights. *Brock,* 442 Mich. at 111, 499 N.W.2d 752.

[8] Once a court assumes jurisdiction over a child, the parties enter the dispositional phase. Unlike the adjudicative phase, here the rules of evidence do not apply, MCR 3.973(E), and the respondent is not entitled to a jury determination of facts, MCR 3.911(A). The purpose of the dispositional phase is to determine "what measures the court will take with respect to a child properly within its jurisdiction and, when applicable, against *any* adult...." MCR 3.973(A) (emphasis added). The court's authority to enter these orders is found in MCL 712A.6.

[9] The court has broad authority in effectuating dispositional orders once a child is within its jurisdiction. *In re Macomber,* 436 Mich. 386, 393–399, 461 N.W.2d 671 (1990). And while the court's dispositional orders must be "appropriate for the welfare of the juvenile and society in view of the facts proven and ascertained," MCL 712A.18(1), the orders are afforded considerable deference on appellate review, see *In re Cornet,* 422 Mich. 274, 278–279, 373 N.W.2d 536 (1985) (adopting the clear-error standard of review for dispositional orders).

If certain requirements are met, the court can terminate parental rights at the initial dispositional hearing, MCR 3.977(E);[4] otherwise, the court continues to conduct periodic review hearings and may enter orders that ***407** provide for services, direct the child's placement, and govern visitation, MCR 3.973(F); MCR 3.974; MCR 3.975. Before the court enters any order of disposition, however, the DHS must prepare a case service plan that includes a "[s]chedule of services to be provided to the parent ... to facilitate the child's return to his or her home...." MCL 712A.18f(3)(d).[5] That case service plan must also "provide for placing the child in the most family-like setting available and in as close proximity to the child's parents' home as is consistent with the child's interests and special needs." MCL 712A.18f(3). The court examines the case service plan pursuant to MCL 712A.18f(4) and MCR 3.973(F)(2), and frequently adopts the DHS's case service plan and orders compliance with the services contained in the plan.

[10] Ultimately, the dispositional phase ends with a permanency planning hearing, which results in either the dismissal of the original petition and family reunification or the court's ordering the DHS to file a petition for the termination of parental rights.

C. THE ONE–PARENT DOCTRINE

Because the jurisdictional inquiry is focused on the child, once there has been *an* ****531** adjudication, either by trial or by plea, the court has jurisdiction over the child regardless of whether one or both parents have been adjudicated unfit. MCL 712A.2(b). In cases in which jurisdiction has been established by adjudication of only *one* parent, the one-parent doctrine allows the court to then enter dispositional orders affecting the parental rights of *both* parents. The one-parent doctrine is the ***408** result of the Court of Appeals' interpretation of Subchapter 3.900[6] of the Michigan Court Rules in *CR*:

> [O]nce the family court acquires jurisdiction over the children, [MCR 3.973(A)] authorizes the family court to hold a dispositional hearing "to determine [what] measures [the court will take] ... *against any adult*...." [MCR 3.973(F)(2)] then allows the family court to "order compliance with all or part of the case service plan and [...] *enter such orders as it considers necessary in the interest of the child.*" Consequently, after the family court found that *the children* involved in this case came within its jurisdiction on the basis of [the adjudicated parent's] no-contest plea and supporting testimony at the adjudication, the family court was able to order [the unadjudicated parent] to submit to drug testing and to comply with other conditions necessary to ensure that the children would be safe with him even though he was not a respondent in the proceedings. This process eliminated the [petitioner's] obligation to allege and demonstrate by a preponderance of legally admissible evidence that [the unadjudicated parent] was abusive or neglectful within the meaning of MCL 712A.2(b) before the family court could enter a dispositional order that would control or affect his conduct. [*CR,* 250 Mich.App. at 202–203, 646 N.W.2d 506.]
>
> In simpler terms, the one-parent doctrine permits courts to obtain jurisdiction over a child on the basis of the adjudication of either parent and then proceed to the dispositional phase with respect to both parents. The doctrine thus eliminates the petitioner's obligation to prove that the unadjudicated parent is unfit before that parent is subject to the dispositional authority of the court.

***409** D. CONSTITUTIONAL PARENTAL RIGHTS

[11] **[12]** The Fourteenth Amendment of the United States Constitution provides that "[n]o State shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., Am. XIV, § 1. Included in the Fourteenth Amendment's promise of due process is a substantive component that "provides heightened protection against government interference with certain fundamental rights and liberty interests." *Washington v. Glucksberg,* 521 U.S. 702, 720, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997). Among these fundamental rights is the right of parents to make decisions concerning the care, custody, and control of their children. See *Meyer v. Nebraska,* 262 U.S. 390,

399–400, 43 S.Ct. 625, 67 L.Ed. 1042 (1923). In the words of this Court, "[p]arents have a significant interest in the companionship, care, custody, and management of their children, and the interest is an element of liberty protected by due process." ****532** *In re JK,* 468 Mich. 202, 210, 661 N.W.2d 216 (2003), citing *Brock,* 442 Mich. at 109, 499 N.W.2d 752.

The right to parent one's children is "essential to the orderly pursuit of happiness by free men," *Meyer,* 262 U.S. at 399, 43 S.Ct. 625, and "is perhaps the oldest of the fundamental liberty interests," *Troxel v. Granville,* 530 U.S. 57, 65, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000) (opinion by O'Connor, J.). The right is an expression of the importance of the familial relationship and "stems from the emotional attachments that derive from the intimacy of daily association" between child and parent. *Smith v. Org. of Foster Families for Equality & Reform,* 431 U.S. 816, 844, 97 S.Ct. 2094, 53 L.Ed.2d 14 (1977).

[13] A parent's right to control the custody and care of her children is not absolute, as the state has a legitimate interest in protecting "the moral, emotional, mental, ***410** and physical welfare of the minor" and in some circumstances "neglectful parents may be separated from their children." *Stanley v. Illinois,* 405 U.S. 645, 652, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972) (quotation marks and citation omitted). The United States Constitution, however, recognizes "a presumption that fit parents act in the best interest of their children" and that "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 [fit parents] to make the best decisions concerning the rearing of [their] children." *Troxel,* 530 U.S. at 68–69, 120 S.Ct. 2054 (opinion by O'Connor, J.). Further, the right is so deeply rooted that "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents...." *Santosky v. Kramer,* 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982).

The United States Supreme Court has also recognized that due process demands that minimal procedural protections be afforded an individual before the state can burden a fundamental right. In *Mathews v. Eldridge,* the Supreme Court famously articulated a three-part balancing test to determine "what process is due" when the state seeks to curtail or infringe an individual right:

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural ***411** requirement would entail. [*Mathews v. Eldridge,* 424 U.S. 319, 333, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).]

In essence, the *Eldridge* test balances the costs of certain procedural safeguards—here, an adjudication—against the risks of not adopting such procedures. The Supreme Court has regularly employed the *Eldridge* test to determine the nature of the process due in child protective proceedings in related contexts. See *Santosky,* 455 U.S. at 758, 102 S.Ct. 1388 ("Evaluation of the three *Eldridge* factors compels the conclusion that use of a 'fair preponderance of the evidence' standard in [parental rights termination] proceedings is inconsistent with due process."); *Smith,* 431 U.S. at 848–852, 97 S.Ct. 2094 (addressing New York City's procedures for removing a minor from a foster home).

Our due process inquiry is also informed by *Stanley v. Illinois,* a pre-*Eldridge* case in which the Supreme Court held that the ****533** Fourteenth Amendment demands that a parent be entitled to a hearing to determine the parent's fitness before the state can infringe the right to direct the care, custody, and control of his or her children. *Stanley,* 405 U.S. at 649, 92 S.Ct. 1208. *Stanley* addressed an Illinois statutory scheme that declared the children of unmarried fathers, upon the death of the mother, to be dependents (i.e., wards of the state) without a fitness hearing at which neglect was proved.[7] The *Stanley* Court found this scheme to be ***412** constitutionally infirm because it allowed the state to deprive Stanley of custody without first determining that he was unfit at a hearing:

> 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.
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> * * *
>
> ... The State's interest in caring for Stanley's children is *de minimis* if Stanley is shown to be a fit father.

> [It] insists on presuming rather than proving Stanley's unfitness solely because it is more convenient to presume than to prove. Under the Due Process Clause that advantage is insufficient to justify refusing a father a hearing when the issue at stake is the dismemberment of his family. [*Id.* at 656–658, 92 S.Ct. 1208.]
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> The rule from *Stanley* is plain: all parents "are constitutionally entitled to a hearing on their fitness before their children are removed from their custody." *Id.* at 658, 92 S.Ct. 1208.

III. ANALYSIS

[14] At the onset, we note that the Court of Appeals' interpretation in *CR* of MCL 712A.6 and MCR 3.973(A) would seemingly grant trial courts unfettered authority to enter dispositional orders, as long as the court finds them to be in the child's best interests.[8] This Court, ***413** however, has a duty to interpret statutes as being constitutional whenever possible. ****534** *Taylor,* 468 Mich. at 6, 658 N.W.2d 127. Thus, if the Court of Appeals' interpretation permits trial courts to exercise their jurisdiction in a manner that impermissibly interferes with a parent's constitutional right to direct the care and custody of his or her child, as Laird argues, we are duty-bound to reject it.

A. THE ONE–PARENT PROBLEM

[15] Laird's primary argument is that the one-parent doctrine is unconstitutional because it allows courts to infringe the rights of unadjudicated parents to direct the care, custody, and control of their children without an adjudication that those parents are unfit. According to Laird, the facts of this case well illustrate the flaws inherent in the one-parent doctrine in practice. After the DHS filed the neglect petition, Sanders entered a no-contest plea to the allegations against her. This allowed the court to assume jurisdiction over Laird's children. The DHS did not pursue any allegations against Laird, despite his demand for a trial. His fitness was never the subject of any hearing, and he was never adjudicated as unfit. Nevertheless, the court refused to grant Laird custody of his children and instead ordered him to comply with services ordered as part of the dispositional plan.[9] Laird ***414** contends that this process —the one-parent doctrine at work—is forbidden by *Stanley.*

The DHS responds that Laird was afforded all the process that he was due by virtue of the dispositional proceedings. According to the DHS, the dispositional phase obviates an unadjudicated parent's right to a fitness hearing.

As the Court of Appeals explained in *CR*, its interpretation of MCR 3.973(A) permits the trial court to enter dispositional orders affecting the rights of "any adult," including the parental rights of unadjudicated parents, as long as the court has established jurisdiction over the child. *CR,* 250 Mich.App. at 202–203, 646 N.W.2d 506. Because we have a duty to interpret statutes and court rules as being constitutional whenever possible, we reject any interpretation of MCL 712A.6 and MCR 3.973(A) that fails to recognize the unique constitutional protections that must be afforded to unadjudicated parents, irrespective of the fact that they meet the definition of "any adult."[10]

[16] **[17]** *Stanley* is plain that Laird's right to direct the care, custody, and control of his children is a fundamental ***415** right that cannot be infringed without *some* type of fitness hearing. We therefore begin our analysis by testing the DHS's contention that a dispositional hearing is a constitutionally sufficient process in light of the *Eldridge* factors. We conclude ****535** that under *Eldridge,* dispositional hearings are constitutionally inadequate; due process requires that every parent receive an adjudication hearing before the state can interfere with his or her parental rights.

First, the importance of the private interest at stake here —a parent's fundamental right to direct the care, custody, and control of his or her child free from governmental interference—cannot be overstated.[11] It is a core liberty interest recognized by the Fourteenth Amendment. "Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life." *Santosky,* 455 U.S. at 753, 102 S.Ct. 1388.

[18] With respect to the second and third *Eldridge* factors, it is undisputed that the state has a legitimate and important interest in protecting the health and safety of minors and, in some circumstances, that the interest will require temporarily placing a child with a nonparent. *Stanley,* 405 U.S. at 652, 92 S.Ct. 1208. It is this interest that lies at the heart of the state's *parens* ***416** *patriae* power. But this interest runs parallel with the state's interest in maintaining the integrity of the family unit whenever possible. MCL 712A.1(3) ("This chapter 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 interest of

the state.") (emphasis added); *Stanley,* 405 U.S. at 652–653, 92 S.Ct. 1208 ("[I]f Stanley is a fit father, the State spites its own articulated goals when it needlessly separates him from his family."); *Troxel,* 530 U.S. at 68–69, 120 S.Ct. 2054 (opinion by O'Connor, J.) ("[S]o long as a parent adequately cares for ... [his or her] children, 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 or her] children."); *Santosky,* 455 U.S. at 766–767, 102 S.Ct. 1388 ("[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."). When a child is parented by a fit parent, the state's interest in the child's welfare is perfectly aligned with the parent's liberty interest. But when a father or mother is erroneously deprived of his or her fundamental right to parent a child, the state's interest is undermined as well: "[T]he State registers no gain towards its declared goals when it separates children from the custody of fit parents." *Stanley,* 405 U.S. at 652, 92 S.Ct. 1208. In other words, the state ordinarily[12] has an equally ****536** strong interest in ensuring ***417** that a parent's fitness, or lack thereof, is resolved before the state interferes with the parent-child relationship. Thus, the probable value of extending the right to an adjudication to each parent in a child protective proceeding benefits both public and private interests alike.

There is no doubt that requiring adjudication of each parent will increase the burden on the state in many cases. But there is also little doubt that an adjudication would significantly reduce any risk of a parent's erroneous deprivation of the parent's right to parent his or her children. The trial is the only fact-finding phase regarding parental fitness, and the procedures afforded respondent parents are tied to the allegations of unfitness contained in the petition. As this Court has stated, "The procedures used in adjudicative hearings protect the parents from the risk of erroneous deprivation" of their parental rights. *Brock,* 442 Mich. at 111, 499 N.W.2d 752.[13]

***418** Dispositional hearings simply do not serve this same function. At the dispositional phase, the court is concerned only with what services and requirements will be in the best interests of the children. There is no presumption of fitness in favor of the unadjudicated parent.[14] See MCL 712A.18f. The procedures afforded parents during the dispositional phase are *not* related to the allegations of unfitness because the question a court is answering at a dispositional hearing assumes a previous finding of parental unfitness.

[19] While extending the right to an adjudication[15] to all parents before depriving ****537** them of the right to direct the care, custody, and control of their children will impose additional burdens on the DHS, those burdens do not ***419** outweigh the risks associated with depriving a parent of that right without any determination that he or she is unfit, as the one-parent doctrine allows. Thus, consideration of the procedures afforded parents at the dispositional phase in light of the *Eldridge* factors requires us to reject the DHS's primary argument.

[20] We also find unpersuasive the DHS's position that adjudication of one parent offers sufficient process to the other parent. An unadjudicated parent is not entitled to contest any allegations made against him or her at the other parent's adjudication hearing because the unadjudicated parent is not a party to that proceeding. While an unadjudicated parent can hope that the respondent parent is willing to vigorously contest the allegations made in the petition, as the facts here demonstrate, the unadjudicated parent will often be disappointed. The respondent parent may enter a plea, as is his or her right, or may choose not to defend the allegations as vigorously as the unadjudicated parent would prefer. Moreover, as a nonparty to those proceedings, it is difficult to see how an unadjudicated parent could have standing to appeal any unfavorable ruling.

[21] **[22]** We find similarly unconvincing the argument that the state is relieved of its initial adjudication burden because unadjudicated parents *may* have the opportunity to have their parental rights restored during the dispositional phase, *if* the unadjudicated parents have complied with the case services plan or court orders, or both, during the dispositional phase.[16] The DHS's argument ***420** puts the plow before the mule. The possibility of a fix at the back end is not sufficient to justify a lack of process at the front end. Rather, the state must adjudicate a parent's fitness *before* interfering with his or her parental rights. *Stanley,* 405 U.S. at 658, 92 S.Ct. 1208. The arguments made by the DHS echo an argument the state of Illinois made in *Stanley:* because Stanley might have been able to regain custody of his children as a guardian or through adoption proceedings, no harm was done. *Id.* at 647, 92 S.Ct. 1208. The Court disagreed:

> This Court has not ... embraced the general proposition that a wrong may be done if it can be undone. Surely, in the case before us, if there is a delay between the doing and the undoing [Stanley] suffers from the deprivation of his children, and the children suffer from uncertainty and dislocation. [*Id.* (citation omitted).]
>
> ****538** The same is true here. The state cannot deprive an unadjudicated parent of his or her constitutional parental rights simply because those rights may be restored at some future date. The Constitution demands more.[17]

B. MOOTNESS

[23] **[24]** **[25]** Finally, we decline the DHS's invitation to dismiss this case as moot because Laird is currently incarcerated for violating federal drug-trafficking laws. An incarcerated parent *can* exercise the constitutional right to direct the care of his or her children while ***421** incarcerated, and Laird has tried to do just that.[18] For example, an incarcerated parent can choose who will care for his children while he is imprisoned. *In re Mason,* 486 Mich. at 161 n. 11, 782 N.W.2d 747 ("Michigan traditionally permits a parent to achieve proper care and custody through placement with a relative."). At several times during the proceedings below, Laird requested that the children be placed with his mother, the children's parental grandmother. As long as the children are provided adequate care, state interference with such decisions is not warranted. As a result, Laird's complaint is not moot.

IV. CONCLUSION

[26] We recognize that the state has a legitimate—and crucial—interest in protecting the health and safety of minor children. That interest must be balanced, however, against the fundamental rights of parents to parent their children. Often, these considerations are not in conflict because "there is a presumption that fit parents act in the best interests of their children." *Troxel,* 530 U.S. at 68, 120 S.Ct. 2054 (opinion by O'Connor, J.). When the state is concerned that *neither* parent should be entrusted with the care and custody of their children, the state has the authority—and the responsibility—to protect the children's safety and well-being by seeking ***422** an adjudication against *both* parents. In contrast, when the state seeks only to deprive *one* parent of the right to care, custody and control, the state is only required to adjudicate *that* parent. In this case, for example, there was no constitutional or jurisdictional impediment to disrupting the parental rights of Sanders, who was afforded the right to a determination of fitness.

[27] Adjudication protects the parents' fundamental right to direct the care, custody, and control of their children, while also ensuring that the state can protect the health and safety of the children. Admittedly, in some cases this process may impose a greater burden on the state than would application of the one-parent doctrine because "[p]rocedure by presumption is always cheaper and easier than individualized determination." *Stanley,* 405 U.S. at 656–657, 92 S.Ct. 1208. But as the United States Supreme Court made clear ****539** in *Eldridge,* constitutional rights do not always come cheap. The Constitution does not permit the state to presume rather than prove a parent's unfitness "solely because it is more convenient to presume than to prove." *Stanley,* 405 U.S. at 658, 92 S.Ct. 1208.

We accordingly hold that due process requires a specific adjudication of a parent's unfitness before the state can infringe the constitutionally protected parent-child relationship. In doing so, we announce no new constitutional right. Rather, we affirm that an old constitutional right—a parent's right to control the care, custody, and control of his or her children—applies to *everyone,* which is the very nature of constitutional rights. Because the one-parent doctrine allows the court to deprive a parent of this fundamental right without any finding that he or she is unfit, it is an unconstitutional violation of the Due Process Clause of the Fourteenth Amendment. We therefore overrule *In re CR,* ***423** vacate the order of the trial court, and remand this case to the trial court for further proceedings consistent with this opinion.

YOUNG, C.J., and MICHAEL F. CAVANAGH, MARY BETH KELLY, and ZAHRA, JJ., concurred with McCORMACK, J.

MARKMAN, J. (dissenting).

The issue here, as it generally is in constitutional cases, is whether the Legislature has acted in an unconstitutional manner by enacting statutes that for many years have provided the underpinnings for the so-called one-parent doctrine.[1] I do not believe that it has. For that reason, I respectfully dissent from the majority opinion's decision to vacate the order of the trial court, overrule *In re CR,* 250

Mich.App. 185, 646 N.W.2d 506 (2002), and hold that the one-parent doctrine, which has been a part of our statutory scheme for more than 70 years, is now unconstitutional under the Due Process Clause of the Fourteenth Amendment. Instead, I would affirm the trial court and conclude that *CR* correctly held that the one-parent doctrine, as well as the statutes and court rules on which the doctrine is grounded, remain constitutional. The Legislature has adequately protected the due process rights of a parent of an abused or neglected child (a child whose other parent has already been adjudicated unfit) by requiring a hearing on the parent's fitness before the state can interfere with this parent's parental rights, and appellant here has been reasonably determined to be unfit after several such hearings.

***424** I. FACTS AND HISTORY

Appellant Lance Laird and Tammy Sanders were never married, but are the parents of two young boys—P (born in 2010) and C (born in 2011). Soon after the youngest boy was born with drugs in his system, the DHS removed the child from Sanders's custody and placed him with Laird, where the other child was already living.[2] However, a few weeks later when Laird himself tested positive for cocaine, the DHS removed the children from his custody and placed them with their paternal aunt. Sanders entered a no-contest plea to allegations of abuse and neglect. ****540** The trial court applied the one-parent doctrine to continue the children's placement with their aunt and order Laird to comply with a service plan, including psychological evaluation, parenting classes, substance abuse assessment, random drug screens, maintenance of housing and employment, and terms of probation stemming from a previous domestic violence conviction.

Laird filed a motion seeking immediate placement of his children with him and challenging the one-parent doctrine. Following a hearing at which several witnesses, including Laird himself, testified, the trial court, relying on *CR*, denied this motion, and the Court of Appeals denied leave to appeal for lack of merit. *In re Sanders Minors,* unpublished order of the Court of Appeals, entered January 18, 2013 (Docket No. 313385). This Court granted leave to appeal and directed the parties to address "whether the application of the one-parent doctrine violates the due process or equal protection rights of unadjudicated parents." *In re Sanders,* 493 Mich. 959, 828 N.W.2d 391 (2013).

***425** II. STANDARD OF REVIEW

Questions involving the interpretation of statutes and court rules are reviewed de novo. *People v. Buie,* 491 Mich. 294, 304, 817 N.W.2d 33 (2012). Questions of constitutional law are also reviewed de novo. *Id.* It is well established that

> "[s]tatutes are presumed to be constitutional, and courts have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent." *Taylor v. Gate Pharm.,* 468 Mich. 1, 6, 658 N.W.2d 127 (2003). "We exercise the power to declare a law unconstitutional with extreme caution, and we never exercise it where serious doubt exists with regard to the conflict." *Phillips v. Mirac, Inc.,* 470 Mich. 415, 422, 685 N.W.2d 174 (2004). " 'Every reasonable presumption or intendment must be indulged in favor of the validity of an act, and it is only when invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the Constitution that a court will refuse to sustain its validity.' " *Id.* at 423 [685 N.W.2d 174], quoting *Cady v. Detroit,* 289 Mich. 499, 505, 286 N.W. 805 (1939). Therefore, "the burden of proving that a statute is unconstitutional rests with the party challenging it," *In re Request for Advisory Opinion Regarding Constitutionality of 2005 Pa. 71,* 479 Mich. 1, 11, 740 N.W.2d 444 (2007).... "[W]hen considering a claim that a statute is unconstitutional, the Court does not inquire into the wisdom of the legislation." *Taylor,* 468 Mich. at 6, 658 N.W.2d 127. [*In re Request for Advisory Opinion Regarding Constitutionality of 2011 Pa. 38,* 490 Mich. 295, 307–308, 806 N.W.2d 683 (2011) (second alteration in original).]

"[W]e interpret court rules using the 'same principles that govern the interpretation of statutes,' " *Buie,* 491 Mich. at 304, 817 N.W.2d 33, and therefore court rules, like statutes, are presumed to be constitutional.[3] (Citation omitted.)

****541** ***426** III. ANALYSIS

A. THE ONE–PARENT DOCTRINE

Child-protective proceedings typically begin with the state filing a petition in the trial court alleging that a parent has abused or neglected a child. MCL 712A.13a(2); MCR 3.961. Then comes the adjudicative phase, in which it is determined whether the parent abused or neglected the child

as alleged in the petition and thus whether the court has jurisdiction over the child. During this adjudicative phase, a parent can admit the allegations, plead no contest to the allegations, or demand a trial. MCR 3.971; MCR 3.972. Once a parent has admitted the allegations or pleaded no contest, or the fact-finder has found "evidence of abuse [or] neglect proved by a preponderance of the legally admissible evidence presented at the adjudication, [the court has jurisdiction over the child, and] it then proceeds to the dispositional phase of the protective proceedings." *CR,* 250 Mich.App. at 200–201, 646 N.W.2d 506. During the dispositional phase, the court will "determine what measures [it] will take with respect to a child," MCR 3.973(A), and in doing so, the court "may make orders affecting adults as in the opinion of the court are ***427** necessary for the physical, mental, or moral well-being of [the child] under its jurisdiction," MCL 712A.6. As this Court explained in *In re Brock,* 442 Mich. 101, 108, 499 N.W.2d 752 (1993):

> Child protective proceedings are generally divided into two phases: the adjudicative and the dispositional. The adjudicative phase determines whether the ... court may exercise jurisdiction over the child. If the court acquires jurisdiction, the dispositional phase determines what action, if any, will be taken on behalf of the child.

The so-called one-parent doctrine allows a trial court to exercise jurisdiction over a child on the basis of the adjudication of only one parent. In other words, after one parent has been adjudicated, the court does not have to adjudicate the other parent, but instead can proceed to the dispositional phase. It is undisputed that the Legislature incorporated the one-parent doctrine into its statutory scheme and that this Court similarly incorporated the doctrine into its court rules. Most notably, MCL 712A.2 provides, in pertinent part:

> The court has the following authority and jurisdiction:
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> * * *
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> (b) Jurisdiction in proceedings concerning a juvenile under 18 years of age found within the county:
>
> (1) Whose *parent* or other person legally responsible for the care and maintenance of the juvenile, when able to do so, neglects or refuses to provide proper or necessary support, education, medical, surgical, or other care necessary for his or her health or morals, who is subject to a substantial risk of harm to his or her mental well-being, who is abandoned by his or her parents, guardian, or other custodian, or who is without proper custody or guardianship....
>
> * * *
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> ***428** (2) Whose home or environment, by reason of neglect, cruelty, drunkenness, criminality, or depravity on the part of *a parent,* guardian, nonparent adult, or other custodian, is an unfit ****542** place for the juvenile to live in. [Emphasis added.] [4]

MCL 712A.2(b) employs the singular form of "parent" and thus does not require that both parents be adjudicated in order for the court to exercise jurisdiction over the child.[5] In addition, MCL 712A.6 provides:

> The court has jurisdiction *over adults* as provided in this chapter and as provided in chapter 10A of the revised judicature act of 1961, 1961 PA 236, MCL 600.1060 to 600.1082, and may make orders *affecting adults* as in the opinion of the court are necessary for the physical, mental, ***429** or moral well-being of a particular juvenile or juveniles under its jurisdiction. However, those orders shall be incidental to the jurisdiction of the court over the juvenile or juveniles. [Emphasis added.]

Accordingly, once the court adjudicates one *parent,* pursuant to MCL 712A.2(b) the court can exercise jurisdiction over the *child* and, pursuant to MCL 712A.6, in exercising that jurisdiction, the court can "make orders affecting adults as in the opinion of the court are necessary for the physical, mental, or moral well-being" of the child. This makes sense because if a child is being abused or neglected, it is imperative that a court have the power to immediately intervene and to intervene effectively. "[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." Sankaran, *Parens Patriae Run Amuck: The Child Welfare System's Disregard for the Constitutional Rights of Nonoffending Parents,* 82 Temp L Rev 55, 84 (2009).

The one-parent doctrine has similarly been incorporated into the Michigan Court Rules. For example, MCR 3.973(A) provides:

> A dispositional hearing is conducted to determine what measures the court will take with respect to a child properly within its jurisdiction and, when applicable,[6] ***430**

against any adult,[7] once the **543 court has determined following trial, plea of admission, or plea of no contest that one or more of the statutory grounds alleged in the petition are true. [Emphasis added.]

In addition, MCR 3.973(F)(2) provides:

> The court shall not enter an order of disposition until it has examined the case service plan as provided in MCL 712A.18f. The court may 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.

Accordingly, as the Court of Appeals explained in *CR,* 250 Mich.App. at 202–203, 205, 646 N.W.2d 506:

> [O]nce the family court acquires jurisdiction over the children, MCR [3.973(A)] authorizes the family court to hold a dispositional hearing "to determine [what] measures [the court will] take[ ] ... *against any adult*...." MCR [3.973(F)(2)] 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.*" Consequently, after the family court found that the children involved in this case came within its jurisdiction on the basis of [the adjudicated parent's] no-contest *431 plea and supporting testimony at the adjudication, the family court was able to order [the unadjudicated parent] to submit to drug testing and to comply with other conditions necessary to ensure that the children would be safe with him even though he was not a respondent in the proceedings. This process eliminated the [petitioner's] obligation to allege and demonstrate by a preponderance of legally admissible evidence that [the unadjudicated parent] was abusive or neglectful within the meaning of MCL 712A.2(b) before the family court could enter a dispositional order that would control or affect his conduct....
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> * * *
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> As we have explained, the court rules simply do not place a burden on a petitioner ... to file a petition and sustain the burden of proof at an adjudication with respect to every parent of the children involved in a protective proceeding before the family court can act in its dispositional capacity. The family court's jurisdiction is tied to the children, making it possible, under the proper circumstances, to terminate parental rights even of a parent who, for one reason or another, has not participated in the protective proceeding. [Some emphasis omitted.] [8]

**544 *432 Laird concedes and the majority opinion agrees that the court can exercise jurisdiction over a child on the basis of the adjudication of only one parent. Accordingly, Laird concedes and the majority opinion again agrees that the trial court had jurisdiction over the children at issue here because their mother had entered a no-contest plea to the allegations in the amended petition. See *ante* at 533 n.8 ("[T]he trial court properly assumed jurisdiction over the children based on Sanders's plea."). However, Laird argues and the majority opinion agrees that the court violated his due process rights by relying on the one-parent doctrine to enter an order taking away his children and directing him to comply with a service plan without first adjudicating him as unfit. Although the Court of Appeals has addressed this issue many times and has consistently held that the one-parent doctrine does not violate due process, this Court has not yet addressed the issue. See, e.g., *In re Slater/Weimer,* unpublished opinion of the Court of Appeals, issued March 25, 2014 (Docket No. 317132), p. 2, 2014 WL 1234206 (opinion by Markey, J.); *In re Farris,* unpublished opinion per curiam of the Court of Appeals, issued August 8, 2013 (Docket Nos. 311967, 312193, and 312194), pp 5–6, 2013 WL 4034353;[9] *In re Mays,* *433 unpublished opinion per curiam of the Court of Appeals, issued December 6, 2012 (Docket No. 309577), p. 4, 2012 WL 6097295 (*Mays II*);[10] *In re Rohmer,* unpublished opinion per curiam of the Court of Appeals, issued August 14, 2012 (Docket No. 308745), p. 3, 2012 WL 3321132; *In re Camp,* unpublished memorandum opinion of the Court of Appeals, issued May 9, 2006 (Docket No. 265301), 2006 WL 1237030, lv. den. 476 Mich. 853, 717 N.W.2d 872 (2006); *In re Church,* unpublished opinion per curiam of the Court of Appeals, issued April 11, 2006 (Docket Nos. 263541 and 265112), 2006 WL 933373, lv. den. 475 Mich. 899, 717 N.W.2d 855 (2006).[11] This Court expressed an interest **545 in addressing the constitutionality of the one-parent doctrine in *In re Mays,* 490 Mich. 993, 994 n. 1, 807 N.W.2d 307 (2012) (*Mays I*), stating:

> The constitutionality of the "one parent doctrine" is obviously a jurisprudentially significant issue and one which this Court will undoubtedly soon be required to address given the widespread application of this doctrine. However, this Court did not address the issue in *Mays I* because the appellant-father had failed to preserve the issue in the trial court or the Court of Appeals. *Id.*

B. DUE PROCESS

The Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law[.]" US Const, Am XIV, § 1. "It is well established that parents have a significant interest in the companionship, care, custody, and management of their children," and "[t]his interest has been characterized as an element of 'liberty' to be protected by due process." *Brock,* 442 Mich. at 109, 499 N.W.2d 752. Indeed, "[t]he liberty interest at issue in this case—the ***434** interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel v. Granville,* 530 U.S. 57, 65, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000) (opinion by O'Connor, J.).[12] And this interest "does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State." *Santosky v. Kramer,* 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982).

"Where procedural due process must be afforded because a 'liberty' or 'property' interest is within the Fourteenth Amendment's protection, there must be determined 'what process is due' in the particular context." *Smith v. Org. of Foster Families for Equality & Reform,* 431 U.S. 816, 847, 97 S.Ct. 2094, 53 L.Ed.2d 14 (1977). " ' "[D]ue process," unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.' " *Mathews v. Eldridge,* 424 U.S. 319, 334, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), quoting *Cafeteria & Restaurant Workers Union v. McElroy,* 367 U.S. 886, 895, 81 S.Ct. 1743, 6 L.Ed.2d 1230 (1961). Instead, " '[d]ue process is flexible and calls for such procedural protections as the particular situation demands.' " *Smith,* 431 U.S. at 848, 97 S.Ct. 2094, quoting *Morrissey v. Brewer,* 408 U.S. 471, 481, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). " '[T]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation'...." *Stanley v. Illinois,* 405 U.S. 645, 650, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972), quoting *Cafeteria Workers,* 367 U.S. at 895, 81 S.Ct. 1743. "It is true that '[b]efore a person is deprived of a protected ***435** interest, he must be afforded opportunity for some kind of a hearing, "except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." ' " *Smith,* 431 U.S. at 848, 97 S.Ct. 2094, ****546** quoting *Bd. of Regents of State Colleges v. Roth,* 408 U.S. 564, 570 n. 7, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972) (citation omitted). "But the hearing required is only one 'appropriate to the nature of the case.' " *Smith,* 431 U.S. at 848, 97 S.Ct. 2094, quoting *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 313, 70 S.Ct. 652, 94 L.Ed. 865 (1950). The following factors should generally be considered when determining "what process is due":

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. [*Mathews,* 424 U.S. at 335, 96 S.Ct. 893.]

C. THE ONE–PARENT DOCTRINE AND DUE PROCESS

1. PRIVATE INTEREST

The first factor to be considered is "the private interest that will be affected by the official action[.]" *Id.* "The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection." *Stanley,* 405 U.S. at 651, 92 S.Ct. 1208. "It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children 'come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.' " *Id.,* quoting *Kovacs* ***436** *v. Cooper,* 336 U.S. 77, 95, 69 S.Ct. 448, 93 L.Ed. 513 (1949) (Frankfurter, J., concurring) (alteration in original). "[T]here is a presumption that fit parents act in the best interests of their children." *Troxel,* 530 U.S. at 68, 120 S.Ct. 2054 (opinion by O'Connor, J.). "Accordingly, so long as a parent adequately cares for his or her children (*i.e.,* is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." *Id.* at 68–69, 120 S.Ct. 2054.

2. THE RISK OF ERRONEOUS DEPRIVATION OF AN INTEREST

The next factor to be considered is "the risk of an erroneous deprivation of such interest through the procedures used...." *Mathews,* 424 U.S. at 335, 96 S.Ct. 893. "The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be condemned to suffer grievous loss." *Santosky,* 455 U.S. at 758, 102 S.Ct. 1388 (citations and quotation marks omitted).[13] "[T]he degree of potential deprivation that may be created by a particular decision is a factor to be considered in assessing the validity of any administrative decisionmaking process." *Mathews,* 424 U.S. at 341, 96 S.Ct. 893. " '[T]he possible length of wrongful deprivation of ... benefits [also] is an important factor in assessing the impact of official action on the private interests.' " *Id.* (citation omitted) (alteration in original).

With regard to this factor, it is important to remember that the issue we address ****547** in the instant case concerns the propriety of a parent of an abused or ***437** neglected child (a child whose other parent has already been adjudicated as unfit) being deprived of the adjudicative phase of a child-protective proceeding. We are not addressing a criminal proceeding, and we are not addressing a termination-of-parental-rights proceeding. "Child protective proceedings are not criminal proceedings." *Brock,* 442 Mich. at 107, 499 N.W.2d 752. "The purpose of child protective proceedings is the protection of the child...." *Id.* "The juvenile code is intended to protect children from unfit homes rather than to punish their parents." *Id.* at 108, 499 N.W.2d 752. The adjudicative phase only determines whether the trial court has jurisdiction over the child. In *Brock,* 442 Mich. at 115, 499 N.W.2d 752, this Court described the adjudicative phase as the "initial phase wherein the court acquires jurisdiction in order to attempt to alleviate the problems in the home so that the children and the parents can be reunited...."

The degree of interference with the parent's rights over the child after a finding that jurisdiction exists is largely dependent on the circumstances. As this Court has recognized, "[u]pon a finding of jurisdiction, the [family] court has several options, one of which is to return the children to their parents. Not every adjudicative hearing results in removal of custody." *Id.* at 111, 499 N.W.2d 752.[14] Simply put, a finding of jurisdiction does not necessarily, or immediately, foreclose the parent's rights to his or her child. "Moreover, in order to permanently terminate respondents' parental rights, further hearings would be required, and the statutory elements for termination must be proven by clear and convincing evidence." *Id.* at 111–112, 499 N.W.2d 752.

***438** "[T]he fairness and reliability of the existing ... procedures" must also be considered. *Mathews,* 424 U.S. at 343, 96 S.Ct. 893. As the Court of Appeals explained in *Mays II,* unpub. op. at 3–5:

> The procedures outlined by the Juvenile Code and the court rules protect a parent's due process rights. They permit the court to issue an order to take a child into custody when a judge or referee finds from the evidence "reasonable grounds to believe that conditions or surroundings under which the child is found are such as would endanger the health, safety, or welfare of the child and that remaining in the home would be contrary to the welfare of the child." MCR 3.963(B)(1). Once the child is taken into custody, the parent must be notified and advised "of the date, time, and place of the preliminary hearing," which is to be held within 24 hours after the child has been taken into custody, and a petition is to be prepared and submitted to the court. MCR 3.921(B)(1); MCR 3.963(C); MCR 3.965(A)(1). If the child is in protective custody when the petition is filed, the procedures afforded at the preliminary hearing provide due process to the respondent-parents. They are informed of the charges against them and the court may either release the child to the respondent-parents or order alternative placement. MCR 3.965(B)(4) and (12)(b). Before ordering alternative placement, "the court shall receive evidence, unless waived, to establish that the criteria for placement ... are present. The respondent shall be given an opportunity to cross-examine witnesses, ****548** subpoena witnesses, and to offer proof to counter the admitted evidence." MCR 3.965(C)(1). Thus, the respondent-parents are given notice of the proceedings and an opportunity to be heard before the child can remain in protective custody.
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> For the court to continue the child in alternative placement and "exercise its full jurisdiction authority," it must hold an adjudicatory hearing at which the factfinder determines whether the child comes within the provisions of [MCL 712A.2(b)].... Once jurisdiction is obtained, the case proceeds to disposition "to determine what measures ***439** the court will take with respect to a child properly within its jurisdiction and, when applicable, against any adult...." MCR 3.973(A).
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> * * *
>
> The essence of respondent's argument on appeal is that the one parent doctrine violates the nonadjudicated parent's due process rights by depriving him of custody

of his children without a determination that he is an unfit custodian, as would be established at the adjudicatory hearing. Respondent's argument conflates the adjudicatory and dispositional phases of the proceedings. The adjudicatory phase determines whether a child requires the protection of the court because he or she comes within the parameters of [MCL 712A.2(b)]. If the child comes within the scope of [MCL 712A.2(b)], the trial court acquires jurisdiction and "can act in its dispositional capacity." It is at the dispositional hearing that the court determines "what measures [it] will take with respect to a child properly within its jurisdiction [.]" MCR 3.973(A). It can issue a warning to the parents and dismiss the petition, MCL 712A.18(1)(a), place the child in the home of a parent or a relative under court supervision, MCL 712A.18(1)(b), or commit the child to the DHS for placement, MCL 712A.18(1)(d) and (e). Before the court determines what action to take, the DHS must prepare a case service plan, MCL 712A.18f(2), and the court must "consider the case service plan and any written or oral information concerning the child from the child's parent, guardian, custodian, foster parent, child caring institution, relative with whom the child is placed, lawyer-guardian ad litem, attorney, or guardian ad litem; and any other evidence offered, including the appropriateness of parenting time, which information or evidence bears on the disposition." MCL 712A.18f(4). See, also, MCR 3.973(E)(2) and (F)(2). If the DHS recommends against placing the child with a parent, it must "report in writing what efforts were made to prevent removal, or to rectify conditions that caused removal, of the child from the home," MCR 3.973(E)(2), and identify the likely harm to the child if separated from or ***440** returned to the parent. MCL 712A.18f(1)(c) and (d). The parent is entitled to notice of the dispositional hearing, MCR 3.921(B)(1)(d), and the parties are entitled to an opportunity "to examine and controvert" any reports offered to the court and to "cross-examine individuals making the reports when those individuals are reasonably available." MCR 3.973(E)(3).

If the child is removed from the home and remains in alternative placement, the court must hold periodic review hearings to assess the parents' progress with services and the extent to which the child would be harmed if he or she remains separated from, or is returned to, the parents. MCL 712A.19(3) and (6); MCR 3.975(A) and (C). The court must "determine the continuing necessity and appropriateness of the child's ****549** placement" and may continue that placement, change the child's placement, or return the child to the parents. MCL 712A.19(8); MCR 3.975(G). Before making a decision, the court must "consider any written or oral information concerning the child from the child's parent, guardian, legal custodian, foster parent, child caring institution, or relative with whom a child is placed, in addition to any other relevant and material evidence at the hearing." MCR 3.975(E). If the child remains out of the home and parental rights have not been terminated, the court must hold a permanency planning hearing within 12 months from the time the child was removed from the home and at regular intervals thereafter. MCL 712A.19a(1); MCR 3.976(B)(2) and (3). The purpose of the hearing is to assess the child's status "and the progress being made toward the child's return home[.]" MCL 712A.19a(3). At the conclusion of the hearing, the court "must order the child returned home unless it determines that the return would cause a substantial risk of harm to the life, the physical health, or the mental well-being of the child." MCR 3.976(E)(2). See, also, MCL 712A.19a(5). In making its determination, "[t]he court must consider any written or oral information concerning the child from the child's parent, guardian, legal custodian, foster parent, child caring institution, or relative with whom a child is placed, in addition to any other relevant ***441** and material evidence at the hearing." MCR 3.976(D)(2). Further, "[t]he parties must be afforded an opportunity to examine and controvert written reports received by the court and may be allowed to cross-examine individuals who made the reports when those individuals are reasonably available." *Id.* As with the initial dispositional hearing, each parent is entitled to notice of the dispositional review and permanency planning hearings and an opportunity to participate therein. MCR 3.920(B)(2)(c); MCR 3.975(B); MCR 3.976(C).[15]

These provisions, taken together, satisfy the requirements of due process. The parent is entitled to notice of the dispositional hearing and an opportunity to be heard before the court makes its dispositional ruling. When it is recommended that the child not be placed with a parent, the court must consider whether the child is likely to be harmed if placed with the parent, which would necessarily entail a determination regarding that parent's fitness as a custodial parent. Once the court determines that the child should not be placed with the parents, it may continue the child in alternative placement or return the child to the parents depending on the circumstances of the parents and the child, again considering whether the child is likely to be harmed if placed with the parent, which would

> necessarily entail a determination regarding that parent's fitness as a custodial parent. Respondent does not contend that these procedures were not followed here. [Emphasis added; alterations in original except **550 those inserting citations.] [16]

*442 Given the protections afforded to parents by the provisions discussed above, "the risk of an erroneous deprivation" of a parent's interest, if any, is minimal.

As discussed more later, I believe that I reach a different result than the majority opinion partly because while the majority opinion only fleetingly acknowledges the interests of the children, I believe this to be the most important interest at issue here. The other reason we reach different results, in my opinion, is attributable to the majority opinion's erroneous assumptions *443 that "[t]he [adjudication] trial is the only fact-finding phase regarding parental fitness," "[t]he statutes and court rules governing the dispositional phase ... simply do not demand any fitness determination," and "[t]here is no presumption of fitness in favor of the unadjudicated parent." This is not accurate. As addressed earlier, the statutory provisions and court rules, as they should, presume that parents are fit and require the state to prove a parent's unfitness before the state can remove a child from a parent's custody. See, for example, MCL 712A.18f(1)(c) and (d) and (4) and MCR 3.973(F)(2), which only allow the court to remove a child from a parent's custody if doing so would be "necessary in the interest of the child," after considering the "[l]ikely harm to the child if the child were to be separated from his or her parent" and the "[l]ikely harm to the child if the child were to be returned to his or her parent," and even then requires the court to specify in the order what "reasonable efforts have been made to prevent the child's removal from his or her home...."[17] In addition, the state must prove that a *444 parent *remains* unfit **551 in order for the state to continue depriving a parent of his or her right to the custody of his or her child. See, for example, MCL 712A.19(6)(d) and (e) and (8), which requires the court to "determine the continuing necessity and appropriateness of the child's placement" after considering the "[l]ikely harm to the child if the child continues to be separated from the child's parent" and the "[l]ikely harm to the child if the child is returned to the child's parent." See also MCL 3.975. Finally, "[a] permanency planning hearing shall be conducted to review the status of the child and the progress being made toward the child's return home...." MCL 712A.19a(3). If "the court determines at a permanency planning hearing that the return of the child to his or her parent would not cause a substantial risk of harm to the child's life, physical health, or mental well-being, the court shall order the child returned to his or her parent." MCL 712A.19a(5); see also MCR 3.976(E)(2).[18]

*445 While I agree with the majority opinion that the state, absent exigent circumstances,[19] cannot remove a child from a parent's custody or otherwise interfere with a parent's parental rights without first finding that the parent is unfit, I do not believe that our current statutory scheme, encompassing as it does the one-parent doctrine, allows the state to do so.[20] **552 As discussed earlier, " '[s]tatutes are presumed to be constitutional, and courts have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent.' " *Advisory Opinion,* 490 Mich. at 307, 806 N.W.2d 683 (citation omitted). Accordingly, if it is possible to reasonably *446 construe statutes to avoid unconstitutionality, it is this Court's duty to do so. *Evans Prods. Co. v. State Bd. of Escheats,* 307 Mich. 506, 548, 12 N.W.2d 448 (1943) ("We are compelled to construe Act No. 170, in accordance with well-defined rules of statutory construction, in such manner as to avoid constitutional pitfalls, if this can be reasonably done within the legislative intent."). Because I believe it is possible to reasonably construe the statutes (as well as the court rules) at issue here to avoid unconstitutionality, it is our obligation to do this. See *Hooper v. California,* 155 U.S. 648, 657, 15 S.Ct. 207, 39 L.Ed. 297 (1895) ("The elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality."). It is entirely reasonable to construe the pertinent statutes and court rules as requiring a finding of unfitness before the state can interfere with parental rights.[21] Although these *447 statutes and court rules do not require this finding of unfitness to be made during the adjudicative phase of the proceedings, I **553 see nothing in the Constitution that would require such a finding to be made during that particular phase. Therefore, unlike the majority opinion, I do not find it necessary to strike down as unconstitutional any of the pertinent statutes and court rules. "In assessing what process is due in this case, substantial weight must be given to the good-faith judgments of the individuals charged" by "we the people" to adopt fair procedures—the Legislature—"that the procedures they have provided assure fair consideration...." *Mathews,* 424 U.S. at 349, 96 S.Ct. 893. The majority opinion, as far as I can see, does not accord any weight to the good-faith judgments of the Legislature, and instead of presuming that the statutes and court rules at issue are constitutional, it presumes from the

very beginning the opposite, which is yet another reason why I reach a different result.

The fairness of the procedures adopted by the Legislature is well demonstrated by the particular facts of this case. As Laird concedes, the court properly exercised jurisdiction over the children given the mother's no-contest plea. At this point, the children were placed with Laird and it was only after he tested positive for cocaine that the children were removed from his care. In other words, Laird was not presumed unfit. Instead, he was clearly presumed fit; otherwise the children would never have been placed with him to begin with.[22] ***448** However, Laird then *proved* himself to the DHS and the trial court as being unfit by testing positive for cocaine. See *Farris,* unpub. op. at 7 ("Though a trial court may not presume that a parent is unfit, Farris's conduct throughout the course of this case demonstrated that he was *not* a fit parent.") (citation omitted). It was only at this point that the decision to place the children with Laird was reevaluated—at the point at which the court became aware that Laird had tested positive for cocaine, had been arrested for distributing cocaine,[23] had stopped participating in random drug screens, had been getting high with the children's mother, and had allowed the children's mother to have contact with the children even though the DHS had told him not to allow her to have such contact.[24] Laird lived with his mother and there were concerns about her as well, including significant mental health issues, as well as a history of interaction with the DHS. There was also no available bedroom for the children at Laird's mother's house, the court was aware that Laird remained on probation for domestic violence, and the court knew that the psychologist who had conducted an evaluation of Laird had concluded that

> [i]t does not appear that Mr. Laird is a candidate for reunification with his young children based on his violent history, the fact that he denies his entire history of violence and takes absolutely no responsibility for it, his substance abuse issues and his severe psychopathology. He has no ***449** insight into his own functioning, and sees no need to change anything about himself as he believes he is good the way he is and ****554** that other people simply need to realize what he believes.

The court considered all this information, including Laird's own testimony, and decided that Laird was, at least temporarily, an unfit parent. Because this determination was made (a determination that Laird does not even contest), the trial court had the requisite authority to place the children with someone other than Laird and to order him to comply with a service plan in order to regain custody of his children.

Laird argues that the trial court had to "adjudicate" him in order to find him unfit, and the majority opinion agrees with him in this regard. Laird and the majority opinion rely heavily on *Stanley,* 405 U.S. at 649, 92 S.Ct. 1208, which held that "as a matter of due process of law, Stanley was entitled to a hearing on his fitness as a parent before his children were taken from him...." Stanley was an unwed father who cared for his children until the children's mother died, at which point the state took his children away from him on the basis of an Illinois law that provided that the children of unwed fathers become wards of the state upon the death of the mother. The United States Supreme Court held that this law violated Stanley's right to due process because parents are entitled to a hearing on their fitness before their children can be taken away. The state cannot simply presume that all unwed fathers are unfit parents. However, *Stanley* never specified what *type* of hearing must be convened. Therefore, Laird's reliance on *Stanley* for the proposition that he is constitutionally entitled to a jury trial during the adjudication phase of a child-protective proceeding is misplaced. *Stanley* merely held that a hearing is required, and in the instant case *multiple* hearings were held regarding the ***450** placement of Laird's children.[25] The children were initially placed with him because he was presumed to be a fit parent (unlike Stanley), but when his drug problems resurfaced, the children were removed from his care.[26] This removal, and whether this removal should continue, i.e., Laird's fitness as a parent, was the subject of multiple hearings—the November 16, 2011 preliminary hearing, the January 11, 2012 pretrial hearing, the February 7, 2012 adjudication hearing, the February 22, 2012 dispositional hearing, the May 2, 2012 dispositional ****555** review hearing, the August 22, 2012 dispositional review hearing, and the September 5, 2012 ***451** hearing on the motion for immediate placement. As explained by the trial court:

> Here, just as in *In re CR*, the father has been involved in all court proceedings since the inception of the petition. He has been provided with appointed counsel, he has been informed of the conditions that necessitated removal (including domestic violence and drug abuse) and he has been offered services to address these conditions. No action has been taken to terminate his parental rights, which would necessarily require that a supplemental or amended petition be filed. He most certainly would be entitled to a trial before his parental rights could be terminated. At that trial

his parental rights could be terminated only upon clear and convincing evidence that a statutory basis exists for termination.

3. THE BURDENS OF ADDITIONAL PROCEDURAL SAFEGUARDS

"[T]he final factor to be considered is the public interest." *Mathews,* 424 U.S. at 347, 96 S.Ct. 893. "[T]he interest of the state as *parens patriae* is for the welfare of the child." *Brock,* 442 Mich. at 112–113, 499 N.W.2d 752. "[T]he State has an urgent interest in the welfare of the child...." *Lassiter v. Dep't of Social Servs. of Durham Co.,* 452 U.S. 18, 27, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981).[27] "The state's interest in protecting the child is aligned with the child's interest to be free from an abusive environment." *Brock,* 442 Mich. at 113 n. 19, 499 N.W.2d 752. That is, the child's interest and the state's interest overlap and are both relevant considerations in the due process analysis. Given this overlap, it is difficult, if not impossible, to consider the state's interest without at the same time considering the child's interest. Therefore, both the ***452** state's interest and the child's interest must be taken into account when considering this final factor. See *Santosky,* 455 U.S. at 766, 102 S.Ct. 1388 ("Two state interests are at stake in parental rights termination proceedings—a *parens patriae* interest in preserving and promoting the welfare of the child and a fiscal and administrative interest in reducing the cost and burden of such proceedings.").

" 'The child has an interest in the outcome of the fact-finding hearing independent of that of the parent.' " *Brock,* 442 Mich. at 113 n. 19, 499 N.W.2d 752 (citation omitted).[28] Children have an interest in being protected from abusive and neglectful ****556** parents. And "the state has a legitimate interest in protecting children who are neglected or abused by their parents." *Mays II,* unpub. op. at 2. "[I]n child abuse proceedings, 'the rights of parents are a most essential consideration, but we further recognize that the best interests and welfare of the child outweigh all other considerations.' " *Brock,* 442 Mich. at 114, 499 N.W.2d 752 (citation omitted). Parents "have an important liberty interest in the management of their children that is protected by due process. However, the child's ***453** welfare is primary in child protective proceedings." *Id.* at 114–115, 499 N.W.2d 752. "[T]he paramount purpose of the juvenile section of the Probate Code is to provide for the well-being of children." *In re Macomber,* 436 Mich. 386, 390, 461 N.W.2d 671 (1990). "One significant feature common to all child custody cases, regardless of the procedural label, is this Court's insistence upon the child's best interest prevailing as the predominant, if not sole, judicial concern." *In re Ernst,* 373 Mich. 337, 361, 129 N.W.2d 430 (1964). " 'We recognize the long-established rule that the best interest of the child is of paramount importance and that it is our judicial duty to safeguard his welfare and care.' " *Id.* at 369, 129 N.W.2d 430 (citations omitted). "The paramount question under the law in all cases of this character is the welfare of the child. All other considerations must yield to this one." *Id.* at 370, 129 N.W.2d 430 (citations and quotation marks omitted).

Because "the risk of an erroneous deprivation" of a parent's interest is already minimal with the current procedures in place, the added or marginal value, if any, that would be served by requiring both parents to be adjudicated before the court could proceed to the dispositional phase is considerably outweighed by the added burdens that would be imposed on the state and children. As even the majority opinion recognizes, "[t]here is no doubt that requiring adjudication of each parent will increase the burden on the state...." See *Mathews,* 424 U.S. at 335, 96 S.Ct. 893 (stating that "the probable value, if any, of additional or substitute procedural safeguards" as well as the "fiscal and administrative burdens that the additional or substitute procedural requirement would entail" should be considered when determining what process is due). This is far less important, however, than the fact that any added or marginal value of the new safeguards would be considerably outweighed by the additional burdens on the ***454** children involved. See *id.* at 347, 96 S.Ct. 893 (stating that "the administrative burden and other *societal costs* that would be associated with requiring [the additional or substitute procedural requirement], as a matter of constitutional right," should also be considered) (emphasis added). Once it has been determined following a jury trial that a child has been abused or neglected by one parent, that child should not have to wait for a secure placement until it has been determined, following an additional jury trial, that the other parent—most particularly one who has actually resided in the same household as the abusing or neglecting parent—is implicated in the same abuse or neglect.

Abolishing the one-parent doctrine, as the majority opinion does today, will cost the state in terms of time, financial resources, and social-services manpower because it will now have to adjudicate both parents as unfit before it can even *exercise jurisdiction* over abused and neglected children.[29] However, this is the least of ****557** the burdens imposed by judicial abolition of the doctrine. Rather, it is the additional costs and burdens that will now be placed on abused and

neglected children themselves that is most troubling. These children, who are in the greatest need of expedited public protection, may eventually be afforded that protection, but considerably less quickly because a parent (again, most particularly a parent who has resided in the same household as the adjudicated and unfit parent) will for the first time ***455** become constitutionally entitled to a jury trial.[30] Because I do not believe the latter is required by our Constitution, and because it is obvious that this will ensure that a child will remain for a longer time with the unadjudicated parent who may have resided in close proximity with the adjudicated and unfit parent, I respectfully dissent.[31] Although I agree with the majority opinion that *all* parents are entitled to due process in the child-protective context, with the presumption of fitness and the burden of proof to the contrary resting on the state, I see no constitutional barriers to the long-established procedures in this state in guaranteeing that such a fitness determination is fairly made.[32]

***456** While the majority opinion recognizes that "requiring adjudication of each parent will increase the burden on the state," it does not acknowledge the greater risk that the formal adjudication it requires of each parent will increase the burdens on the abused or neglected child, who may remain in an unsecure position for a prolonged period. Just as the majority opinion's failure to recognize that the current procedural requirements adequately protect parents' rights has caused it to conclude that the risks of erroneously depriving parents of their rights are great, its failure to recognize that requiring adjudication of each parent will increase the burden on abused and neglected children has caused it to conclude that the additional burdens that will be imposed as a result of requiring ****558** adjudication of each parent are minimal. This in turn has caused the majority opinion to conclude that "those burdens do not outweigh the risks associated with depriving a parent of [his or her] right[s]...." When the risks and the burdens are calculated more realistically, I believe it is clear that the latter considerably outweigh the former. As explained earlier, the risks are low because the Legislature has already adequately afforded a range of protections for parental rights, while the burdens are high because abused and neglected children in many cases will be left for significantly longer periods of time than are necessary in the care of a parent who may ultimately be proved unfit. While I agree with the majority opinion that "constitutional rights do not always come cheap," I do not agree that there is any constitutional right to a jury trial in the instant context; ***457** while the parent of an abused or neglected child has an undeniable right to due process, this can take many reasonable forms.

4. SUMMARY

Given (a) the interest of children in being protected from abusive and neglectful parents, (b) the public's legitimate interest in protecting children from abusive and neglectful parents, (c) the fact that Laird was only deprived of a trial during the initial phase of the child-protective proceedings, which simply determines whether the trial court possesses jurisdiction over the children, (d) the fact that Laird's rights to his children were adequately protected during the child-protective proceedings, and (e) the significant costs that would be inflicted on abused and neglected children of this state by entitling both parents to a trial on their unfitness before allowing the state to intervene to protect these children, I do not believe that Laird's constitutional rights to due process were violated by depriving him of a trial at the adjudicative phase of the process.[33]

In summary, I *agree* with the majority opinion that (a) pursuant to MCL 712A.2(b), "once there has been *an* adjudication, either by trial or by plea, the court has jurisdiction over the child regardless of whether one or both parents have been adjudicated unfit"; (b) "[p]arents have a significant interest in the companionship, care, custody, and management of their children, and the interest is an element of liberty protected by due ***458** process"; (c) "there is a presumption that fit parents act in the best interests of their children"; (d) "all parents are constitutionally entitled to a hearing on their fitness before their children are removed from their custody," except that "[i]n the case of an imminent threat of harm, the state may take the child into custody without prior court authorization or parental consent"; (e) "the state has a legitimate and important interest in protecting the health and safety of minors"; (f) "requiring adjudication of each parent will increase the burden on the state"; (g) "constitutional rights do not always come cheap"; and (h) "Laird's complaint is not moot." (Citations and quotation marks omitted.) However, for the reasons set forth in this opinion, I respectfully *disagree* with the majority opinion's conclusion that both parents are constitutionally entitled to a jury trial on their fitness before children can be removed from their custody and placed within the protective jurisdiction of the court.

****559** 5. THE CRUX OF THE PROBLEM

Concerning due process, it is always possible to extend additional procedural rights and entitlements to persons who come into contact with the government, as criminal defendants, public employees, consumers of public services, regulated parties, recipients of social-services benefits, or parents of abused and neglected children. Additional hearings and additional appeals can always be convened, more protective rules of evidence can always be prescribed, and broader compliance with ever finer details of process can always be required. There is simply no end to the argument that "fairness" requires something more, and there is little specificity in the Due Process Clause that either sustains or refutes most such arguments.

***459** It is for this reason that the principle of deference to the constitutional judgments of the legislative and executive branches is of critical importance here. The threshold "presumption of constitutionality" of laws and rules enacted by the accountable branches of government is not a principle of jurisprudence deserving of mere passing reference, but, particularly in realms such as that of due process in which the constitutional text is so relatively open-ended and arguably compatible with alternative understandings of "fairness," it is a presumption necessary to ensuring that the judgments of the people and their elected representatives are not casually replaced by the contrary judgments of the judiciary.

What lies at the heart of the "presumption of constitutionality" is that the burden of persuasion rests heavily with the party seeking to upend the legal status quo to compellingly demonstrate that the people's elected representatives have erred in their understanding of the Constitution, and thus that the extraordinary power of judicial review should be exercised to strike down what has been enacted in the course of republican governance. As the breadth and open-endedness of a constitutional provision becomes increasingly pronounced, this does not become a warrant for the exercise of judicial discretion and intervention, but instead a warrant for the exercise of judicial deference-a respect for a broad range of judgments on the part of the legislative and executive branches. For when it is uncertain whether the people's representatives have acted within the purview of the Constitution, when people can reasonably disagree about whether a particular procedure is or is not required by due process, it is *then* that the "presumption of constitutionality" becomes most important. Otherwise, the presumption is little more than cant, mere formalism, as opposed to ***460** a genuine limitation on the exercise of judicial power within our constitutional architecture of separated powers.

The "presumption of constitutionality," if it means anything, signifies that the burden rests upon the *judiciary,* as a precondition to the invalidation of a law enacted through the representative process, to affirmatively demonstrate incompatibility of that law with the Constitution. It is not the people's obligation to demonstrate constitutionality, but the judiciary's obligation to demonstrate the contrary. It is simply not enough that a tribunal believes that it would be "better" to do things differently than the people have chosen. Rather, it is the court's obligation to establish that under no reasonable understanding of the Constitution could it countenance what the people have understood it to countenance.

What is further implicit in the "presumption of constitutionality" is that the legislative and executive branches must be viewed as no less committed than the judicial branch to upholding the Constitution, ****560** the principles of which include that citizens who interact with the government must be treated fairly and in accordance with the requirements of due process. Legislators, governors, and members of the cabinet each take an oath to support the Constitution, just as do judges. And it must be presumed that because the former are reasonably capable of *reading* the Constitution—a document never intended to be the exclusive province of lawyers and judges, but intended to be accessible to all citizens—legislators, governors, and members of the cabinet are also reasonably capable of *comprehending* their obligations under the Constitution, and reasonably capable of *acting* in accordance with these obligations. All of this is implied by the "presumption of constitutionality," and it is a presumption, if the separation ***461** of powers is to be maintained, that must be taken seriously when the representatives of the people act on behalf of those in whose name the Constitution was ratified.

And for at least 70 years, not only have the legislative and executive branches of this state acted to protect the interests of abused and neglected children through the enactment of laws that have *allowed* for the one-parent doctrine, but the judicial branch itself during this time has understood the laws underlying this doctrine to be fully constitutional, regularly reviewing and applying their provisions in countless numbers of cases involving abused and neglected children and their parents. No court of this state has previously understood these laws to run afoul of the supreme law of the land or of our state. At least not until today, when the people and their representatives have been newly informed that "fairness" now requires something considerably more.

What is it today that accounts for the nullification of the one-parent doctrine and (although it does not expressly say so) the laws that form this doctrine? What is it today that accounts for the conclusion that the accountable branches, as well as the judiciary, have for all these years erred by believing that the protections and guarantees conferred by our laws on the parents of abused and neglected children were sufficient under the Constitution? Is there some newly minted decision of the United States Supreme Court that has now compelled these conclusions? None that the majority opinion identifies. Are there new statutes or amendments that have been enacted by our Legislature that now warrant these results? Again, none that are cited. Are there new executive-branch policies or child-protective measures that have been introduced that now require these changes? None that are referred to. And is there ***462** any suggestion whatsoever that there has been some miscarriage of justice in the present case, or more generally that there have been injustices regarding our state's treatment of parents of abused and neglected children, or indeed even a *single* case indicative of serious shortcomings in this process? The majority opinion apprises us of none.

The majority opinion likely presages that this will be the first of many decisions of this Court elaborating ever more finely on what "fairness" requires in the context of the parents of abused and neglected children. There is no principled stopping point articulated that raises any barrier to future case-by-case-by-case expansions of due process. And as invariably tends to occur when matters that were once the subject of representative decision-making become "constitutionalized," there will be a long line of future decisions in which additional procedures, details, and hearings are successively layered on the child-protective process by the judiciary, ever more closely perhaps tracking the procedures, details, and hearings of the criminal justice process. As a result, the final disposition and ****561** placement of abused and neglected children will become increasingly delayed by trials and legal procedures, requiring, despite every justice's obvious solicitude for their interests, that abused and neglected children remain for extended periods in what child-protective workers might understandably view as a less-than-secure environment. And also as a result, the judgments of legislatures and governors, reached after committee and administrative hearings, the testimonies of witnesses of a wide variety of viewpoints, public debates inside and outside the chambers of government, and even occasionally after elections, will be replaced by the determinations of appellate judges, in which each new procedure, detail, and hearing becomes an issue of ***463** "constitutional right" and "entitlement." And thus once again, the realm of the lawyer and the judge expands, and the realm of ordinary citizens and those elected to represent them diminishes.

Our legislative and executive branches have adopted a broad array of procedures in support of the due process rights of the parents of the abused or neglected child. In the present case, Laird was afforded notice of multiple proceedings, an attorney to represent his interests at these proceedings, and an opportunity to be heard at these proceedings. Yes, more procedures, more details, more hearings, and more "constitutional" guarantees could doubtlessly be constructed by this Court, but again it is always possible to fill in the blanks of the Due Process Clause with more "rights" and "guarantees," albeit at some point only at a cost to other legitimate rights and interests, in this case those of the abused or neglected child. The majority opinion is quite correct in recognizing that constitutional rights "do not always come cheap." However, it is for precisely that reason—that there are, in fact, *costs* to the devising of new constitutional rights—that a Court should take the utmost care, and exercise the utmost judicial humility, in deferring to the judgments and expertise of those public actors best equipped to reasonably balance the interests of abused and neglected children and their parents coming from seriously dysfunctional homes. And it is for the same reason that this Court should exercise the utmost care, and exercise the utmost judicial humility, in ensuring that any new expression of "constitutional rights" is genuinely grounded in the text and history of the Constitution and that the contrary judgments of the Legislature and the Governor are equally genuinely incompatible with that Constitution. Precisely because constitutional rights "do not always come cheap," this Court should seek to ***464** ensure that the "presumption of constitutionality" is faithfully honored to the point at which it can be genuinely said that the costs incurred by a new "constitutional right" must be incurred because that is what the Constitution *compels,* and the Constitution compels nothing *less.*

IV. CONCLUSION

For these reasons, I would affirm the trial court and hold that *In re CR* correctly held that the one-parent doctrine, which has been a part of our statutory scheme for more than 70 years, is not unconstitutional under the Due Process Clause of the Fourteenth Amendment. The Legislature has adequately

protected the due process rights of a parent of an abused or neglected child (a child whose other parent has already been adjudicated unfit) by requiring a hearing on the parent's fitness before the state can interfere with his or her parental rights.

VIVIANO, J., concurred with MARKMAN, J.

All Citations

495 Mich. 394, 852 N.W.2d 524

Footnotes

1 Consistently with the court rule governing pretrial placement of children in child protective proceedings, the DHS temporarily placed the children with their aunt. See MCR 3.965(C)(2) ("If continuing the child's residence in the home is contrary to the welfare of the child, the court shall not return the child to the home, but shall order the child placed in the most family-like setting available consistent with the child's needs.").

2 After this Court granted leave to appeal, Laird was convicted in federal court of drug-trafficking charges. See 21 USC 841(a)(1) and (b)(1)(B).

3 While a petition is the ordinary route by which child protective proceedings begin, the juvenile code also recognizes that exigent circumstances can require immediate action. See MCL 712A.14a(1) (authorizing the immediate removal of a child without a court order "[i]f there is reasonable cause to believe that a child is at substantial risk of harm or is in surroundings that present an imminent risk of harm and the child's immediate removal from those surroundings is necessary to protect the child's health and safety"); see also MCL 712A.14b(1)(a) (allowing an ex parte order authorizing the DHS to immediately take a child into protective custody before any hearing if a petition alleges a similar "imminent risk of harm").

4 Among other things, the petition must contain a request for termination, there must be adequate grounds for the court's jurisdiction, and the court must find by clear and convincing legally admissible evidence that grounds exist for termination under MCL 712A.19b(3).

5 We note that the statute providing for case service plans, MCL 712A.18f, does not distinguish between adjudicated parents and unadjudicated parents.

6 *CR* was decided when the court rules governing child protective proceedings and other proceedings relating to minors were located in former Subchapter 5.900 of the Michigan Court Rules. References to and quotations of former Subchapter 5.900 in *CR* have been updated to reflect the rules currently found in Subchapter 3.900.

7 Under then-existing Illinois law, the state could take custody of a child in a dependency proceeding or in a neglect proceeding. "In a dependency proceeding [the state] may demonstrate that the children are wards of the State because they have no surviving parent or guardian. In a neglect proceeding it may show that children should be wards of the State because the present parent(s) or guardian does not provide suitable care." *Stanley,* 405 U.S. at 649, 92 S.Ct. 1208 (citations omitted). The statute defined "parents" as " 'the father and mother of a legitimate child, or the survivor of them, or the natural mother of an illegitimate child, and includes any adoptive parent,' " but did not include unmarried fathers. *Id.* at 650, 92 S.Ct. 1208. Thus, the statute did not recognize Stanley as a parent, and it did not require the state to prove that Stanley was unfit in a neglect proceeding in order to deprive him of custody of his children.

8 The dissent also emphasizes that MCL 712A.2(b)(1) refers singularly to "parent." This reference is consistent with the unremarkable idea that courts may assume jurisdiction over a child on the basis of the adjudication of one parent. Laird's challenge to the one-parent doctrine does not challenge this proposition because the one-parent doctrine is not concerned with the *assumption* of jurisdiction. In this case, for example, the trial court properly assumed jurisdiction over the children on the basis of Sanders's plea. See MCR 3.971. Rather than challenge the assumption of jurisdiction, Laird argues that the court's *exercise* of jurisdiction affecting *his* constitutional parental rights—that is, the one-parent doctrine at work—is an unconstitutional interference with those rights.

9 To be clear, Laird's parental rights were not and have not been terminated. Nevertheless, temporary deprivation of custody is an "intrusion into the family sphere," *Hunter v. Hunter,* 484 Mich. 247, 269, 771 N.W.2d 694 (2009), and plainly infringes on Laird's constitutional rights as a parent, see *Troxel,* 530 U.S. at 68, 120 S.Ct. 2054 (opinion by O'Connor, J.) (recognizing that parental rights are implicated in grandparent-visitation cases).

10 MCR 3.973(A) states that, at a dispositional hearing, the court determines what measures it will take regarding the child "and, when applicable, against any adult, once the court has determined following trial, plea of admission, or plea of no contest that one or more of the statutory grounds alleged in the petition are true." While the parties have focused on the

constitutional implications of interpreting the phrase "any adult" as the Court of Appeals did in *CR,* 250 Mich.App. at 202–203, 646 N.W.2d 506, we note that the phrase "when applicable" can reasonably—and constitutionally—be interpreted to mean that when the person meeting the definition of "any adult" is a presumptively fit parent, the court's authority during the dispositional phase is limited by the fact that the state must overcome the presumption of parental fitness by proving the allegations in the petition.

11 We agree with the dissent that there is, of course, a second private interest that is always relevant in child protective proceedings—the child's interest in his or her own welfare. If a parent is unfit, the child's interest aligns with the state's *parens patriae* interest. On the other hand, the child *also* has an interest in remaining in his or her natural family environment. In which direction the child's interest preponderates cannot be known without first a specific adjudication of a parent's unfitness, as "the State cannot presume that a child and his parents are adversaries." *Santosky,* 455 U.S. at 760, 102 S.Ct. 1388. Rather, only "[a]fter the State has established parental unfitness ... [may] the court ... assume at the *dispositional* stage that the interests of the child and the natural parents do diverge." *Id.*

12 Of course, when a minor faces an *imminent* threat of harm, the state's interest in the welfare of the child is paramount. In the case of an imminent threat of harm, the state may take the child into custody without prior court authorization or parental consent. See, e.g., *Tenenbaum v. Williams,* 193 F.3d 581, 593–594 (C.A.2, 1999). And as noted in footnote 3 of this opinion, Michigan law allows exactly that process. See MCL 712A.14a(1); MCL 712A.14b(1)(a). Requiring an imminent threat of harm for removal is constitutionally sound: as the Second Circuit recognized in *Tenenbaum,* " '[T]he mere "possibility" of danger is not enough.' " *Tenenbaum,* 193 F.3d at 594 (citation omitted; alteration in original). Similarly, upon the authorization of a child protective petition, the trial court may order *temporary* placement of the child into foster care pending adjudication if the court finds that placement in the family home would be contrary to the welfare of the child. MCR 3.965(B)(12)(b) and (C). Because our holding only reaches the court's exercise of its postadjudication dispositional authority, it should not be interpreted as preventing courts from ordering temporary foster-care placement pursuant to MCR 3.965(B)(12)(b) and (C).

13 The risk of error is not limited to the erroneous interference with a parent's right to parent. Oftentimes, pursuant to the one-parent doctrine, services will be ordered for the unadjudicated parent. Absent some fact-finding regarding that parent's alleged neglectful or abusive conduct, however, the DHS cannot reasonably be expected to formulate an individualized plan, resulting in unadjudicated parents being ordered to comply with potentially unnecessary and costly service plans.

14 Ideally, the removal of the child at the dispositional hearing would always involve a finding that the child's parents are unfit, as the dissent suggests. The statutes and court rules governing the dispositional phase, however, simply do not demand any fitness determination. And because the "[t]he court may 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," MCR 3.973(F)(2), the one-parent doctrine results in the unadjudicated parent's rights being subordinated to the court's best-interest determination.

15 The dissent suggests that we have found a constitutional right to a jury trial in child protective proceedings. This misunderstands our opinion, as we have found no such constitutional right. Rather, we simply hold that due process requires a specific adjudication of a parent's unfitness and that the one-parent doctrine is unconstitutional because it deprives unadjudicated parents of this right. The right to a jury is granted by statute. MCL 712A.17(2) ("Except as otherwise provided in this subsection, in a hearing other than a criminal trial under this chapter, a person interested in the hearing may demand a jury of 6 individuals, or the court, on its own motion, may order a jury of 6 individuals to try the case."). Because Laird is *constitutionally* entitled to a fitness hearing, MCL 712A.17(2) affords him the *statutory* right to demand a jury because a parental-fitness hearing qualifies as a noncriminal hearing under the juvenile code.
We express no opinion about whether the jury guarantee in MCL 712A.17(2) is constitutionally required.

16 For example, the trial court must order the child returned home at the permanency planning hearing unless the court determines that he or she is likely to be harmed if placed with the parent. MCL 712A.19a(1); MCR 3.976(E)(2). According to the dissent, a decision not to return the child to the parent's home necessarily entails a determination that the unadjudicated parent is unfit, thus ensuring that fit parents are not deprived of custody. What the dissent fails to recognize, however, is that there is no similar requirement during the earlier dispositional hearings, see MCR 3.975, and that the unadjudicated parent will have to wait up to a year after the child's removal before the permanency planning hearing takes place, see MCL 712A.19a(1); MCR 3.976(E)(2).

17 Because we hold that the one-parent doctrine violates the due process rights of unadjudicated parents, we need not consider Laird's argument that the doctrine also violates the Equal Protection Clause.

18 See, e.g., *In re Weldon,* 397 Mich. 225, 296, 244 N.W.2d 827 (1976) ("Some parents, however, because of illness, incarceration, employment or other reason, entrust the care of their children for extended periods of time to others. This they may do without interference by the state as long as the child is adequately cared for.") (opinion by Levin, J.), overruled

in part on other grounds by *Bowie v. Arder,* 441 Mich. 23, 47, 490 N.W.2d 568 (1992); *In re Curry,* 113 Mich.App. 821, 826–827, 318 N.W.2d 567 (1982) ("Until there is a demonstration that the person entrusted with the care of the child by that child's parent is either unwilling or incapable of providing for the health, maintenance, and well being of the child, the state should be unwilling to interfere.").

1 Even this threshold statement of the constitutional issue in this case separates the majority opinion and this opinion. The majority opinion concentrates almost exclusively on the Court of Appeals' decision in *In re CR,* 250 Mich.App. 185, 646 N.W.2d 506 (2002), and gives little attention to connecting this analysis to the statutes and court rules that underlie *CR*.

2 Laird and the children lived with Laird's mother.

3 The majority opinion makes only the most perfunctory reference to its threshold obligation to presume the constitutionality of statutes and court rules. Rather, it begins its analysis by presuming that the one-parent doctrine—a doctrine derived from both our statutes and court rules—is unconstitutional, as suggested by its initial observation that "[m]erely describing the doctrine foreshadows its constitutional weakness." The opinion treats the one-parent doctrine as if it had been created by the Court of Appeals out of whole cloth. *Ante* at 527 ("[T]he [trial] court relied on the one-parent doctrine and the Court of Appeals' decision in *In re CR,* 250 Mich.App. 185, 646 N.W.2d 506 (2002), from which that doctrine derives."). Nowhere, including in its ultimate holding, does the majority opinion give serious recognition to the fact that the one-parent doctrine is derived from statutes and court rules of this state, which explains in turn why it also gives little recognition to the fact that these must be presumed constitutional. The positive law of this state is largely a bystander in the majority opinion.

4 Indeed, the Legislature incorporated the one-parent doctrine into its statutory scheme as early as 1944 when it added Chapter XIIA to the Probate Code, now codified at MCL 712A.1 *et seq.* See 1944 (Ex. Sess.) PA 54, § 2(a)(6) (granting jurisdiction to the court over any child under 17 years of age "[w]hose *parent* or other person legally responsible for the care and maintenance of such child, when able to do so, neglects or refuses, to provide proper or necessary support, education as required by law, medical, surgical or other care necessary for his health, morals or well-being, or who is abandoned by his parents, guardian, or other custodian, or who is otherwise without proper custody or guardianship") (emphasis added).

5 The majority opinion agrees that the fact that "MCL 712A.2(b)(1) refers singularly to 'parent' ... is consistent with the *unremarkable* idea that courts may assume jurisdiction over a child on the basis of the adjudication of one parent." *Ante* at 533 n.8 (emphasis added); see also *ante* at 530–31. ("[O]nce there has been *an* adjudication, either by trial or by plea, the court has jurisdiction over the child regardless of whether one or both parents have been adjudicated unfit."). However, this assumption of jurisdiction over the child is not quite as "unremarkable" as the majority opinion seems to believe, at least for purposes of the instant case, since MCL 712A.6 provides that once the court has jurisdiction over the child, it *also* "has jurisdiction over adults ... and may make orders affecting adults as in the opinion of the court are necessary for the physical, mental, or moral well-being of a particular juvenile or juveniles under its jurisdiction." "Adults" presumably includes the *parents* of the child over whom jurisdiction has been assumed.

6 The majority opinion contends that

> the phrase "when applicable" [in MCR 3.973(A)] can reasonably—and constitutionally—be interpreted to mean that when the person meeting the definition of "any adult" is a presumptively fit parent, the court's authority during the dispositional phase is limited by the fact that the state must overcome the presumption of parental fitness by proving the allegations in the petition.

While I agree that the state must certainly overcome the presumption of parental fitness, I do not believe that the state must do this by "proving the allegations in the petition." Instead, as discussed more fully later, the state can overcome the presumption by proving that the parent abused or neglected the child regardless of whether such allegations were contained in the petition. I do not believe that the language "when applicable" suggests anything to the contrary. However, even if it did, the pertinent statute, MCL 712A.6, indisputably cannot be interpreted in this way because it does not contain the phrase "when applicable" and it very clearly states that "[t]he court has jurisdiction over adults ... and may make orders affecting adults as in the opinion of the court are necessary for the physical, mental, or moral well-being of a particular juvenile or juveniles under its jurisdiction."

7 We do not have to decide in this case the breadth of the language "any adult" because no one disputes that it applies to Laird.

8 The majority opinion "reject[s]" the Court of Appeals' interpretation of MCL 712A.6 because its interpretation "would seemingly grant trial courts unfettered authority to enter dispositional orders...." *Ante* at 533. I do not believe that MCL 712A.6, or the Court of Appeals' interpretation of it, grants courts any such authority. Rather, it grants courts the far more limited power to "make orders affecting adults as in the opinion of the court are *necessary* for the physical, mental, or moral well-being of a particular juvenile or juveniles under its jurisdiction." MCL 712A.6 (emphasis added). Contrary

to the majority opinion's contention, such an order can in no way be said to "impermissibly interfere [ ] with a parent's constitutional right to direct the care and custody of his or her child," *ante* at 534 as a parent's constitutional rights with respect to his or her child have never been regarded as absolute, in particular not with regard to abusive and neglectful parents, *Stanley v. Illinois,* 405 U.S. 645, 652, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972) ("Neglectful parents may be separated from their children."). As discussed in more detail later, it would never be "necessary" to enter an order that infringes on a parent's "rights" *unless* that parent has been determined to be unfit. Thus, in enacting MCL 712A.6, which only allows the court to enter orders that infringe on an unfit parent's "rights," the Legislature manifestly did not grant courts any "unfettered authority" to "impermissibly interfere[ ] with a parent's constitutional right[s]...." *Ante* at 534.

9 This Court is currently holding an application for leave to appeal in *Farris* in abeyance pending the decision in this case. *In re Farris,* 838 N.W.2d 147 (Mich., 2013).

10 In *In re Mays,* 493 Mich. 945, 827 N.W.2d 377 (2013) (*Mays III*), this Court denied leave to appeal on the basis of mootness because the parents had reached a consent agreement regarding joint custody of the children.

11 "Nearly every state" has adopted the one-parent doctrine, Sankaran, 82 Temp. L. Rev. at 57, and this "near-universal approach," *id.,* has been upheld against similar constitutional challenges in other states. See, for example, *In re AR,* 330 S.W.3d 858 (Mo.App., 2011); *In re CR,* 108 Ohio St.3d 369, 843 N.E.2d 1188 (2006); *In re Amber G.,* 250 Neb. 973, 554 N.W.2d 142 (1996).

12 In *Troxel,* 530 U.S. at 72–73, 120 S.Ct. 2054 (opinion by O'Connor, J.), the Court held that Washington's nonparental visitation statute was unconstitutional because it "infringe[d] on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better' decision could be made."

13 In *Santosky,* 455 U.S. at 768–769, 102 S.Ct. 1388, the Court held that while applying a "fair preponderance of the evidence" standard in a parental-rights termination proceeding does not satisfy due process, applying a "clear and convincing evidence" standard does.

14 In *Brock,* 442 Mich. at 110, 499 N.W.2d 752, this Court held that due process does not require that a parent be given the opportunity to cross-examine the child during the adjudicative phase.

15 As explained in *Camp,* unpub. op. at 2 n. 1:

> Respondent is additionally protected by the different standards of proof applicable at a dispositional hearing. "The parent who has been subject to an adjudication ... can have [his or] her parental rights terminated on the basis of all the relevant and material evidence on the record, including evidence that is not legally admissible. In contrast, the petitioner must provide legally admissible evidence in order to terminate the rights of the parent who was not subject to an adjudication." [Citation omitted; alteration in original.]

16 See also *Slater/Weimer,* unpub. op. at 3 (opinion by Markey, J.), which explained:

> [R]espondent cannot establish an erroneous deprivation of her liberty interest in caring for her children because before the trial court is authorized to take further action after adjudication, a respondent is entitled to receive additional procedural safeguards during the dispositional phase of the proceedings. For instance, and contrary to respondent's claims, the adjudication phase of the proceedings does not require the trial court to remove a child from the parent's home. See MCL 712A.18(1)(a), (b). And, during the dispositional phase of the proceedings, if petitioner recommends against placing the child with her parent, petitioner "shall report in writing what efforts were made to prevent removal, or to rectify conditions that caused removal, of the children from the home." MCR 3.973(E)(2). *Hence, the subsequent removal of a child from her parent's home during the dispositional phase involves a finding that the parent is unfit.* Further, before respondent's parental rights can be terminated, she is entitled to a number of additional procedural protections during the dispositional phase of the proceedings, such as dispositional review hearings, the implementation of a case services plan, parental visitation, and findings as to whether continued placement outside of the home is necessary to protect the children. *In re CR,* 250 Mich.App. at 201–202, 646 N.W.2d 506. See also MCR 3.973(F). And, a respondent is entitled to notice of all dispositional hearings, MCR 3.921(B)(1)(d), as well as an opportunity "to examine and controvert written reports" submitted to the trial court by petitioner and to "cross-examine individuals making the reports when those individuals are reasonably available," MCR 3.973(E)(3). *Further still, the trial court is not to presume during this time that the parent is unfit.* See *In re Mason,* 486 Mich. 142, 168, 782 N.W.2d 747 (2010). Therefore, because respondents are given notice and an opportunity to be heard before the children are placed outside of the home or parental rights are terminated, we find that the one-parent doctrine does not violate a respondent's right to procedural due process. [Emphasis added.]

17 Laird's counsel has authored a thoughtful article in which he proposes a "policy solution that balances the constitutional rights of the nonoffending parent with the interests of the child and the other parent." Sankaran, 82 Temp L Rev at 70. The following is his proposed 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. [*Id.* at 84.]

In my opinion, this proposed solution is fully consistent with existing Michigan law because under that law, as discussed earlier, the court is "afforded the flexibility to assume jurisdiction over a child based on findings of maltreatment against one parent," but "absent proof of parental unfitness, the court must grant custodial rights to the nonoffending parent to the satisfaction of that parent." *Id.* However, Sankaran then proceeds to argue that a finding of unfitness would first require "the filing of a petition against the nonoffending parent, which would then trigger all the procedural protections available under state law." *Id.* at 85. In other words, he argues that a finding of unfitness must occur during the adjudicative phase of the proceedings, rather than during the dispositional phase. However, neither Sankaran nor the majority opinion nor anyone else of whom I am aware has identified any support for this proposition—that is, the proposition that the Constitution demands that a finding of unfitness occur during the adjudicative phase. Once again, it is important to remember that the issue before this Court is not whether requiring a finding of unfitness to be made during the adjudicative phase would be a *wise* policy decision, only whether the *Constitution* requires that this finding be made during that phase.

18 The majority opinion, although it apparently recognizes that the permanency planning hearing statute, MCL 712A.19a(5), requires a finding of unfitness, proceeds to state "that there is no similar requirement during the earlier dispositional hearings...." Thus, in this regard, it fails to recognize that the statutes cited previously, MCL 712A.18f and MCL 712A.19, include "similar requirement[s] during the earlier dispositional hearings."

19 See MCL 712A.14a(1), which allows the state to immediately take a child into protective custody "[i]f there is reasonable cause to believe that a child is at substantial risk of harm or is in surroundings that present an imminent risk of harm and the child's removal from those surroundings is necessary to protect the child's health and safety...." See also MCL 712A.14b(1)(a).

20 The majority opinion also argues that "[a]bsent some fact-finding regarding that parent's alleged neglectful or abusive conduct, ... the DHS cannot reasonably be expected to formulate an individualized plan, resulting in unadjudicated parents being ordered to comply with potentially unnecessary and costly service plans." The majority opinion's concern is premised on its erroneous assumption that the court can order a parent to comply with a service plan without first considering what services are necessary. However, MCL 712A.6 expressly states that the court "may make orders affecting adults as in the opinion of the court are *necessary* for the physical, mental, or moral well-being of [the child] under its jurisdiction." (Emphasis added.) In addition, MCL 712A.18f(4) states that "[t]he court may order compliance with all or any part of the case service plan as the court considers *necessary.*" (Emphasis added.) Therefore, contrary to the majority opinion's suggestion, the trial court cannot order a parent to comply with "unnecessary" or arbitrary service plans. Instead, the service plan must be determined to be *necessary* to serve the best interests of the child, over whom jurisdiction has already been obtained by the court. Indeed, even Laird himself does not argue that he was ordered to comply with an "unnecessary" service plan.

21 While the majority opinion relies on its "duty to interpret [the law] as being constitutional whenever possible" to reject the Court of Appeals' interpretation of the law in *CR*, which the majority opinion views as "grant[ing] trial courts unfettered authority to enter dispositional orders," it fails to give any consideration to this same "duty to interpret [the law] as being constitutional whenever possible" when it rejects the Court of Appeals' interpretation of the law in *Mays II,* which requires a finding of unfitness before the state can interfere with parental rights. See *ante* at 536 n.14 ("The [law] governing the dispositional phase ... simply do[es] not demand any fitness determination."). If the majority opinion believes that it has such a "duty," is it truly not even reasonably *possible* to interpret the law as requiring a finding of unfitness when several Court of Appeals panels have been readily capable of doing so? If the majority opinion would apply its "duty" with consistent force, it would be far more likely to reach the same conclusion as the Court of Appeals that the law does not grant an "unfettered authority" to enter dispositional orders because those orders must be "*necessary* for the physical, mental, or moral well-being of [the child] under [the court's] jurisdiction," MCL 712A.6, and there must be a finding of unfitness before the state can intervene because MCL 712A.18f(1)(c) and (d) and (4) and MCR 3.973(F)(2) only allow the removal of a child from a parent's custody where doing so is "necessary in the interest of the child," after considering the "[l]ikely harm to the child if the child were to be separated from his or her parent" and the "[l]ikely harm to the child if the child were to be returned to his or her parent," and further require the court to specify what "reasonable efforts have been made to prevent the child's removal from his or her home...."

22 Indeed, at oral arguments, Laird's counsel conceded that "[t]he state did presume that he was fit."

23 More recently, Laird was convicted in federal court of conspiracy to distribute more than 500 grams of cocaine and thus is currently imprisoned and unable to take custody of the children. However, I agree with Laird and the majority opinion that this fact does not render this case moot because incarcerated parents still have a constitutionally protected interest in the "management of their children."

24 According to the mother, she was spending every night with Laird and the children.

25 Contrary to the suggestion of the majority opinion, *Stanley* did not hold that a parent is entitled to a jury trial on the issue of his or her fitness as a parent. Indeed, the United States Supreme Court has explicitly held that "trial by jury in the juvenile court's adjudicative stage is *not* a constitutional requirement." *McKeiver v. Pennsylvania,* 403 U.S. 528, 545, 91 S.Ct. 1976, 29 L.Ed.2d 647 (1971) (emphasis added). Furthermore, as explained earlier, although Laird did not have a right to a jury trial, he *did* have a right to a hearing in which he was allowed to introduce "[a]ll relevant and material evidence," including "any written or oral information concerning the child from the child's parents," MCR 3.973(E)(2), to "examine and controvert written reports" offered to the court, MCR 3.973(E)(3), and to "cross-examine individuals making the reports when those individuals [were] reasonably available," *id.*

26 As explained by the Court of Appeals in *Slater/Weimer,* unpub. op. at 3–4:

> The case at bar is distinguishable because unlike in *Stanley,* the one-parent doctrine does not presume that parents are unfit. Rather, the doctrine permits the trial court to exercise jurisdiction over children because petitioner established that the children were abused or neglected. Furthermore, before parents are declared unfit under the one-parent doctrine, they are ... afforded certain procedural protections during the dispositional phase of the proceedings. Thus, *Stanley* is inapposite.

Stanley merely held that a parent must be presumed to be a fit parent and that a parent is entitled to a hearing before being deemed unfit, and that is exactly what happened in the instant case.

27 In *Lassiter,* 452 U.S. at 31, 101 S.Ct. 2153, the United States Supreme Court held that the Constitution does not require the appointment of counsel in every proceeding to terminate parental rights.

28 Although the majority opinion addresses at length the *parental* interests involved in this case, it mentions in only the most peremptory way, in a footnote, that there is also the *child* 's interest, which is an indispensable part of the constitutional due process analysis in this case. These differing approaches go to the heart of our differing constitutional conclusions. That is, while the majority opinion believes the most important (if not the exclusive) constitutional interest involved is that of the parent, I respectfully believe the most important (albeit not the exclusive) constitutional interest involved is that of the child. In a perfect world, these interests would invariably be aligned. However, in the highly imperfect world from which child-protective cases tend to come—arising out of often highly dysfunctional households—this is not necessarily true, and in such cases, I believe the child's interests must be viewed as paramount, specifically the child's interest in the due process analysis required by *Mathews,* in which the child's interests are given consideration in *conjunction* with the interests of the parent.

29 Once again, this jurisdictional determination is altogether *distinct* from any actual termination of parental rights or even from any determination that a parent is not entitled to custody pending further proceedings.

30 The majority opinion disputes that it has "found a constitutional right to a jury trial in child protective proceedings." Instead, it "simply hold[s] that due process requires a specific adjudication of a parent's unfitness...." Never mind that the majority's "specific adjudication of a parent's unfitness" is necessarily and always a jury trial. Although the majority is correct that "[t]he right to a jury is granted by statute," *this* specific right only applies to the adjudication of the first parent, in the course of which the state may obtain jurisdiction over the abused or neglected child. By holding that the Due Process Clause of the Constitution requires that the *second* parent of the abused or neglected child is also entitled to a jury trial, rather than to any other form of due process, the majority has not only expanded a statutory "right," but transformed it into a constitutional right.

31 I am cognizant that the instant case does not involve two parents living in the same household with the children, but the majority's abolition of the one-parent doctrine will apply in that situation just as much as it applies to the instant situation. That reality is precisely what is signified by the regular inquiries of justices at oral argument about the legal rules and principles that attorneys would offer for the resolution of their cases that are equally appropriate in the next "one hundred" cases of the same kind.

32 I am cognizant that the state can immediately take a child into protective custody "[i]f there is reasonable cause to believe that a child is at *substantial* risk of harm or is in surroundings that present an *imminent* risk of harm and the child's removal from those surroundings is *necessary* to protect the child's health and safety...." MCL 712A.14a(1) (emphasis added).

See also MCL 712A.14b(1)(a). However, not all children who are in need of protection will be readily able to qualify for protection under these demanding standards, and it is *these* children about whom I am most concerned.

33 Laird also argues that his equal protection rights were violated. However, he failed to raise this issue at the trial court, and thus this issue is not properly before this Court. See *Walters v. Nadell,* 481 Mich. 377, 387, 751 N.W.2d 431 (2008) ("[A] litigant must preserve an issue for appellate review by raising it in the trial court.... [G]enerally a failure to timely raise an issue waives review of that issue on appeal.") (citation omitted).

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