# Order

**Michigan Supreme Court**
**Lansing, Michigan**

July 14, 2023

164489

Elizabeth T. Clement,
Chief Justice

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Megan K. Cavanagh
Elizabeth M. Welch
Kyra H. Bolden,
Justices

*In re* HOLBROOK, Minor.

SC: 164489
COA: 359504
Oakland CC Family Division:
2020-882579-NA

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On April 5, 2023, the Court heard oral argument on the application for leave to appeal the May 19, 2022 judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.305(H)(1). In lieu of granting leave to appeal, while retaining jurisdiction, we REMAND this case to the Oakland Circuit Court Family Division for a hearing to determine whether the case has become moot.

The trial court assumed jurisdiction over JJH under MCL 712A.2(b)(1) (providing jurisdiction over a child "[w]hose parent . . . , 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 . . . , or who is without proper custody or guardianship"). However, JJH has since been returned to respondent, and the trial court has terminated jurisdiction. Therefore, the question is whether there remain collateral consequences from the adjudication, which would render the case not moot.

"A case is not moot . . . 'where a court's adverse judgment may have collateral legal consequences' for at least one of the parties." *In re Smith*, 324 Mich App 28, 41 (2018) (citation and brackets omitted). "[T]he burden of demonstrating mootness is a 'heavy one.' " *MGM Grand Detroit, LLC v Community Coalition for Empowerment, Inc*, 465 Mich 303, 306 (2001), quoting *Los Angeles v Davis*, 440 US 625, 631 (1979). "This means to get an appeal dismissed as moot, thus depriving a party seeking redress of a day in court, the party urging mootness on the court must make a very convincing showing that the opportunity for an appellate court to review the matter should be denied." *MGM Grand*, 465 Mich at 306.

Respondent's status on Michigan's child abuse and neglect Central Registry has received the bulk of this Court's attention as a potential reason why the case is not moot. If respondent has been placed on the Central Registry, that would likely have various collateral consequences for her, including for her employment and for her ability to engage

in certain school or extracurricular activities, among other things.[1] Nevertheless, no definitive proof was offered to this Court showing that respondent is or is not on the Central Registry.[2] It is possible that respondent was not placed on the Central Registry because she has not "committed serious abuse or neglect, sexual abuse, or sexual exploitation of a child, or allowed a child to be exposed to or have contact with methamphetamine production." MCL 722.622(d). It is also possible though that respondent was placed on the Central Registry because, while the current statute requires the perpetrator to have committed "serious abuse or neglect" in order to be placed on the Central Registry, the statutes in place at the time of the adjudication required only, *inter alia*, that there be evidence of child abuse or neglect.[3] The instant case arguably would have involved child neglect because the adjudication was under MCL 712A.2(b)(1).

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[1] Employers and volunteer agencies as well as childcare organizations can request a Central Registry clearance for a potential employee or volunteer. See Michigan Department of Health and Human Services, *Central Registry Clearance Requests* <https://www.michigan.gov/mdhhs/adult-child-serv/abuse-neglect/accordion/forms/central-registry-clearance-requests#Section_4> (accessed July 14, 2023) [https://perma.cc/3LKY-33CS]. See also Michigan Department of Health and Human Services, *Central Registry Reform Frequently Asked Questions—January 2023*, p 3 ("There can be repercussions for placement on central registry, including limitations around placement of children, foster care licensing and volunteer and employment opportunities."), available at <https://www.michigan.gov/mdhhs/-/media/Project/Websites/mdhhs/Adult-and-Childrens-Services/Abuse-and-Neglect/Central-Registry/Central_Registry_Reform_FAQ.pdf?rev=e3ff7e5d5dd8430ca39c94c684bf5d0e&hash=7B0E1AF4BA78D41CB1599BF151A8FBDA> (accessed July 14, 2023) [https://perma.cc/K4Z4-YKY5].

[2] At oral argument, respondent said she had requested documentation that she had been placed on the Central Registry but had not received any confirmation. Petitioner said that he spoke to a caseworker at the Department of Health and Human Services (DHHS) who searched the registry and found that respondent was not on it, but no record of that search was provided to us.

[3] See MCL 722.622(d), as amended by 2018 PA 59 (defining "central registry case" as one "that the [DHHS] classifies . . . as category I or category II"); MCL 722.628d(d), as amended by 2014 PA 30 (defining Category II as one in which the "[DHHS] determines that there is evidence of child abuse or child neglect, and the structured decision-making tool indicates a high or intensive risk of future harm to the child"); MCL 722.628d(e), as amended by 2014 PA 30 (defining Category I as one in which the "[DHHS] determines that there is evidence of child abuse or child neglect" and at least one of four conditions is met, including that "[a] court petition is required under another provision of this act" and that "[t]he child is not safe and a petition for removal is needed").

Even if respondent is on the Central Registry, she has an avenue to be expunged from it under MCL 722.627*l*.[4] If the record on the Central Registry were, in fact, expunged, likely no collateral consequences would result from respondent's placement on the Central Registry, and the case might well be moot. But there remains a question whether only the existence of a possible avenue for expungement renders the case moot. Cf. *Greene v Howard Univ*, 134 US App DC 81, 83-84 (1969) (conditioning the grant of a motion to dismiss as moot on the university's actual expungement of the students' records rather than relying on only the possibility of expungement).

In addition to respondent's potential record on the Central Registry, there were several other arguments raised as to other possible collateral consequences respondent has suffered as a result of the adjudication. First, respondent would have been placed at least in the DHHS's electronic case management system. MCL 722.628(11) ("The department must enter each report made under this act that is the subject of a field investigation into the electronic case management system."). It appears that a record there could also cause collateral consequences for respondent. For example, if there were another case involving respondent and her children, Child Protective Services (CPS) could then use that record to score various assessments concerning the child's risk of harm, and the scores for those assessments would in turn affect the actions CPS would choose to take in relation to the case.[5]

Second, respondent also claims that the adjudication has affected her ability to get work in the healthcare field and to have a foster-care placement. That is possibly true. While DHHS reports are generally deemed "confidential and . . . not subject to the

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[4] MCL 722.627*l*(1) ("An individual who is listed on the central registry before the effective date of the amendatory act that added this section may submit a request to the department for an administrative review for the expungement of the individual's name from the statewide electronic case management system created under section 7j. Within 180 days of receipt of the request for an administrative review under this subsection, the department shall complete the review and notify the individual in writing of the final decision to expunge the individual from the central registry under the statewide electronic case management system created under section 7j or to classify the individual's case as a confirmed case of methamphetamine production, confirmed serious abuse or serious neglect, confirmed sexual abuse, or confirmed sexual exploitation and keep the individual on the central registry in the statewide electronic case management system.").

[5] DHHS, *Children's Protective Services Policy Manual*, p 1 ("These assessments assist caseworkers with decision making and provision of services with goals for promoting safety and well-being of children and their families."), available at <https://dhhs.michigan.gov/OLMWEB/EX/PS/Public/PSM/713-11.pdf> (accessed July 14, 2023) [https://perma.cc/CYT7-LNQF]. See, e.g., *id*. at 19 (taking into account the "[n]umber of prior assigned abuse complaints and/or findings" when scoring the "Abuse Scale") (boldface omitted).

disclosure requirements of the freedom of information act," MCL 722.628(11), there are at least 28 statutory exceptions to this general rule, and several of those exceptions are to provide review of foster-care applicants.[6] Courts have also previously recognized that adjudications can affect employment prospects. See *In re Smith*, 324 Mich App at 43 ("[G]iven the facts of this case, the termination may affect respondent's ability to obtain future employment, especially in the medical or childcare sectors.").

Third, respondent claims that in her divorce case the trial court has already used the instant adjudication as a reason to grant full custody of JJH's half-sibling to respondent's ex-husband. It is possible that a court would be able to consider the adjudication in order to determine respondent's suitability as a guardian. MCL 722.627(1)(g) (stating that confidential records are available to "[a] court for the purposes of determining the suitability of a person as a minor's guardian or that otherwise determines that the information is necessary to decide an issue before the court"). Such a determination would likely constitute a collateral consequence.

In sum, there is a possibility that respondent's record is on the Central Registry, and if it is, there is a question whether an avenue for expungement is sufficient to nullify any collateral consequences arising from that record. Additionally, there were several other arguments raised as to whether respondent continues to suffer collateral consequences from the adjudication. These claims were neither definitively supported nor refuted with records in our Court. But in any case, our Court is not the most appropriate forum for fact-finding. Rather, the trial court is the better forum to make factual determinations. *Kratochvil v Grayling*, 367 Mich 682, 687 (1962) ("Before plaintiff may recover, that finding of fact must be made. *That is not the proper function of this Court. It must be made, if at all, by the trial court*.") (emphasis added). See also *Ellis v Spaulding*, 39 Mich 366, 367 (1878) ("[T]he facts in the case are not found by the circuit judge, and *this court does not draw conclusions of fact from evidence*[.]") (emphasis added). Therefore, while retaining jurisdiction, we remand this case to the Oakland Circuit Court Family Division for a hearing to determine whether the respondent will suffer collateral consequences as a result of the adjudication and whether this case has become moot. Following the hearing, the circuit judge shall issue a written opinion setting forth findings of fact and conclusions of

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[6] See, e.g., MCL 722.627(1)(k) (allowing records to be accessed and used by "[a] child placing agency licensed . . . for the purpose of investigating an applicant for . . . a foster care applicant"); MCL 722.627(1)(*l*) (allowing the circuit court staff investigating foster care applicants to access the records); MCL 722.627(1)(r) (allowing a child care regulatory agency to access the records); MCL 722.627(1)(s) (allowing a foster-care review board to access the records); MCL 722.627(1)(t) (allowing a local friend of the court office to access the records); MCL 722.627(1)(y) (allowing a child caring institution to access the records in order to investigate an applicant for employment). See also 42 USC 5106a(b)(2)(B)(xii) ("[N]othing in this section shall prevent State child protective services agencies from keeping information on unsubstantiated reports in their casework files to assist in future risk and safety assessment[.]").

law, which shall be forwarded to the Clerk of this Court within 60 days of the date of this order.

We retain jurisdiction.

VIVIANO, J. (*concurring*).

I concur in the Court's remand order for the trial court to determine whether the case is moot. I write because I believe a strong argument can be made that the case is moot.

As the Court's order notes, the primary argument that the case is moot stems from the assertion by the lawyer-guardian ad litem (LGAL) that respondent has been placed on Michigan's Child Abuse and Neglect Central Registry. If so, that might constitute a collateral consequence sufficient to make this a live case and controversy. See *In re Smith*, 324 Mich App 28, 41 (2018). I question, however, whether this is enough. For starters, respondent herself never asserted that she was on the registry. In its brief to dismiss the case as moot, petitioner, the Department of Health and Human Services, argued that this case was not a registry case because it did not involve serious abuse or neglect. See MCL 722.622(d) (" 'Central registry case' means the department confirmed that a person responsible for the child's health or welfare committed serious abuse or neglect, sexual abuse, or sexual exploitation of a child, or allowed a child to be exposed to or have contact with methamphetamine production."). Respondent did not claim, in response, that she was in fact already on the registry or that it was possible she could be placed there. She did not mention the registry at all. This is significant because, if she were on it, she would have received written notice of that fact. MCL 722.627j(6).

Nor did the initial brief by the LGAL, responding to the motion to dismiss, discuss the registry. The only assertion that respondent is on the registry came in the LGAL's supplemental brief. It stated that "[respondent] was already on Central Registry even prior to her adjudication as she was substantiated for abuse and neglect by the filing of the petition. To our knowledge, she remains on Central Registry to this day." The brief provides no evidentiary basis for this assertion. And it seems possible that the LGAL's arguments proceed from an incomplete understanding of the statutes.[7] It is true that, when the trial court issued its ruling, a central registry case was defined as one involving "an allegation of child abuse or child neglect," not *serious* abuse or neglect. MCL 722.622(d), as amended by 2018 PA 59. The statute was amended in 2022 to limit registry cases to "serious" abuse or neglect. 2022 PA 67. Under a plain reading of the statute, the state may "maintain" records of a child protective proceeding only in cases of "serious abuse or neglect." MCL 722.627j(1) ("The department must maintain a statewide, electronic case management system to carry out the intent of this act."); MCL 722.627j(2) ("The department must classify a confirmed case of methamphetamine production, confirmed serious abuse or neglect, confirmed sexual abuse, or confirmed sexual exploitation, as a

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[7] It is also unclear to me whether the LGAL even has standing to raise this issue.

central registry case."); see also MCL 722.627j(10) (explaining that if a case is proven to not be a serious case of abuse or neglect, the case cannot be maintained on the registry but "must be expunged").

What the LGAL misses, however, is that even assuming respondent is on the registry, the 2022 amendments expressly provide a means for her expungement. MCL 722.627*l*(1) states:

> An individual who is listed on the central registry before the effective date of the amendatory act that added this section may submit a request to the department for an administrative review for the expungement of the individual's name from the statewide electronic case management system created under section 7j. Within 180 days of receipt of the request for an administrative review under this subsection, the department shall complete the review and notify the individual in writing of the final decision to expunge the individual from the central registry under the statewide electronic case management system created under section 7j or to classify the individual's case as a confirmed case of methamphetamine production, confirmed serious abuse or serious neglect, confirmed sexual abuse, or confirmed sexual exploitation and keep the individual on the central registry in the statewide electronic case management system.

This provision appears designed for people in respondent's situation, i.e., those who might have fallen within the earlier version of the statute but not the more restrictive version in the 2022 amendments. In its briefing here, petitioner has already conceded that this is not a case of serious neglect or abuse. If this position is accepted, then petitioner would appear to be estopped from arguing, in a future proceeding, that respondent's case involves serious neglect or abuse. See *Spohn v Van Dyke Pub Schs*, 296 Mich App 470, 480 (2012) ("Under the 'prior success model' of judicial estoppel, 'a party who has successfully and unequivocally asserted a position in a prior proceeding is estopped from asserting an inconsistent position in a subsequent proceeding.' ") (citation and emphasis omitted).

Because respondent is either not on the registry (and, keep in mind, she has never claimed to be) or is entitled to expungement, the case is arguably moot. The status quo is that respondent either is not on or is legally entitled to removal from the registry. Any decision by our Court will not change the situation. See *League of Women Voters of Mich v Secretary of State*, 506 Mich 561, 580 (2020) (noting that a case is moot when a court cannot have a practical effect on a controversy).[8]

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[8] While I would not now decide whether a path to expungement renders the case moot, I question whether *Greene v Howard Univ*, 134 US App DC 81, 83-84 (1969), a case cited by the majority, is distinguishable. *Greene* involved a university's investigation into a disturbance among various students and faculty. *Id*. The university failed to accord either group a hearing and terminated its connection with both the students and faculty. *Id*. The

When a case is declared moot on appeal, we normally vacate the lower court judgments. *Id*. at 588-589. The decision to vacate is equitable, "turn[ing] on 'the conditions and circumstances of the particular case.' " *Id*. at 589 (citation omitted). Vacatur arguably would be appropriate in this matter. In this analysis, it is relevant that respondent seems to have worked to improve her child's condition and that she was apparently successful. Respondent does not appear entirely culpable for the unfortunate situation involving her minor child. And I would note that, if the lower court decisions are vacated, then respondent will of course not be subject to the registry.

The Court's order proffers several other potential collateral consequences, all of which seem questionable to me. First, the majority speculates that respondent might have been placed into respondent's electronic case management system and then further speculates that collateral consequences might arise from this placement. As the lone example, the majority order hypothesizes that "if there were another case involving respondent and her children, Child Protective Services (CPS) could then use that record to score various assessments concerning the child's risk of harm, and the scores for those assessments would in turn affect the actions CPS would choose to take in relation to the case." But these seem to be the sort of contingent future events that are too conjectural to base a real collateral consequence upon. Indeed, the United States Supreme Court appeared to reject this approach in *Lane v Williams*, 455 US 624, 632-633 (1982), when it held that a parole revocation was moot despite the fact that it could, potentially, be used to enhance

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students and faculty sought to restrain the University. The court found that the case was moot, conditioned upon the university's actual expungement of the discipline from the students' records. *Id*. There is a significant distinction between *Greene* and the present case. In *Greene*, the expungement was a discretionary action the university would otherwise be under no obligation to undertake. Here, it appears plain that respondent is entitled to expungement and that the government would be estopped from contesting expungement. In these circumstances, the fact that expungement might not have occurred seems less significant if not entirely irrelevant.

a sentence in the future. The Court rejected the argument the parole revocation could be used in a future parole hearing by noting that such an event would require the party to "again violate state law, . . . return[] to prison, and become eligible for parole." *Id*. at 633 n 13. See also *Commodity Futures v Chicago*, 701 F2d 653, 656 (CA 7, 1983) ("[O]ne can never be certain that findings made in a decision concluding one lawsuit will not some day . . . control the outcome of another suit. But if that were enough to avoid mootness, no case would ever be moot."). Therefore, I question whether this ground can constitute a collateral consequence.

Second, the Court's order proposes that the adjudication below might pose collateral consequences by impeding respondent's efforts to obtain employment. Of course, if the adjudication were vacated, it seems clear that no such consequences could exist. On the question of whether effects on employment can constitute a collateral consequence, the majority cites *In re Smith*, 324 Mich App at 43, which suggested that they can be. But *In re Smith* did not offer any support for its apparent conclusion. And the United States Supreme Court has refused to recognize "the discretionary decisions that are made by an employer" as a sufficient basis to defeat mootness. *Lane*, 455 US at 632-633. Further, it is entirely speculative at this point whether any possible future actions by an employer would be derived entirely from the disposition of the proceedings, rather than the facts underlying the proceedings themselves or the initiation of the proceedings to begin with. I therefore am dubious of whether this ground prevents the case from becoming moot.

Third, the Court's order notes that the trial court in respondent's divorce action relied on the instant adjudication to grant custody of another of respondent's children to her ex-husband. It is difficult to see how the *past* use of the adjudication renders the present case a live controversy, as it is unclear whether anything would change in the divorce case if the adjudication were wiped away. Further, the Court observes that "[i]t is possible that a court would be able to consider the adjudication in order to determine respondent's suitability as a guardian." Again, however, this appears to be entirely speculative—if courts regularly indulged such speculation, it is hard to see how any case could be moot. See *Commodity Futures*, 701 F2d at 656.

For these reasons, while I concur in the remand order to determine mootness in the first instance, I believe compelling arguments can be made that this case is moot.

ZAHRA, J., joins the statement of VIVIANO, J.

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I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

July 14, 2023

Clerk