STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

IN RE BATES MINORS,

Supreme Court no. 165815
Court of Appeals no. 361566
Grand Traverse County Circuit
Court no. 2018-004645-NA

AMENDED AMICUS CURIAE BRIEF OF THE STATE BAR OF MICHIGAN FAMILY LAW SECTION

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STATEMENT OF INTEREST OF AMICUS CURIAE[1]

The Family Law Section Council ("The Council") is the governing body of the Family Law Section of the State Bar of Michigan. The Family Law Section is comprised of over 2,500 lawyers in Michigan practicing in, and committed to, the area of family law. The Section members elect the members of the Council. The Council provides services to its membership in the form of educational seminars, monthly Family Law Journals (an academic and practical publication reporting new cases and analyzing decisions and trends in family law), advocating and commenting on proposed legislation relating to family law topics, and filing Amicus Curiae briefs in selected cases in the Michigan Courts. Because of its active and exclusive involvement in the field of family law, and as part of the State Bar of Michigan, the Council has an interest in the development of sound legal principles in the area of family law. The instant case pertains to the intersection of child custody orders and child protective proceedings. The Family Law Section presents its position on the issues as invited by this Court in its January 31, 2024 Order.

[1] Pursuant to MCR 7.312(H)(5), no party or counsel for a party made any monetary contributions intended to fund the preparation or submission of this brief.

ARGUMENT

I. Custody orders provide permanency and stability for children and should be considered a valid permanency option.

At oral argument on May 8, 2024, Justice Cavanagh questioned counsel for Petitioner regarding whether custody with the other parent is a valid permanency option under MCL 712A.19a(4). Counsel for Petitioner argued that it is not and further argued that custody is not actually permanent because it can be changed by court order. For the reasons stated in this brief, we respectfully disagree with Petitioner regarding the permanency of custody orders.

A. A legal parent is a relative for purposes of MCL 712A.19a(4).

We concede that custody orders are not explicitly listed as a permanency option in MCL 712A.19a(4). That does not mean that it does not fit into one of the existing options, though. Subsection (4)(d) allows for the child to be "permanently placed with a fit and willing relative." There is minimal case law discussing this specific provision, with the statute being cited in two unpublished opinions, neither on point to this specific case. So we must rely solely on the statutory language.

For purposes of MCL 712A.19a, "relative" is defined in MCL 712A.13a(1)(j)(*i*) as an individual who is at least 18 years old and is related to the child within the fifth degree by blood, marriage, or adoption. This would inherently include any legal parent who is at least 18 years old. Whether the parent by birth, adoption, or another legal process, a legal parent is related the child under the statutory definition and must be considered to be a relative when looking at MCL 712A.19a(4). Any argument to the contrary ignores the plain language of the Juvenile Code.

It is worth noting that the specific language of the statute ("*permanent* placement with a fit and willing relative") only truly allows for placement with a legal parent if the intention is to terminate jurisdiction of the juvenile court. While another relative, such as a grandparent or a cousin, could be a placement for a child during the course of a child protective proceeding, their legal authority to provide for the child derives from the court having placed the child with DHHS for care and custody *while the case is pending*. Once jurisdiction terminates, that legal authority evaporates absent some other type of order in place. One such option would be guardianship, but there is already a separate permanency goal for juvenile guardianship. The only other permanent placement that gives the placement legal authority to care for the child is custody with the non-respondent parent.

By the plain language of MCL 712A.19a(4), a legal parent must be a relative for purposes of placement, and that legal parent is the only person who can in fact be a permanent placement for the child. This statute should be interpreted as applying to a legal parent via a custody order, contra the arguments of DHHS at oral argument.

B. Case law supports a finding that custody is a permanency goal.

Existing case law demonstrates the overlap between custody cases and child protective proceedings. The Court of Appeals has specifically stated that the trial court may utilize the Child Custody Factors as provided in MCL 722.23 when making a determination regarding the best interests of the child at a termination hearing. *In re Medina*, 317 Mich App 219, 238 (2016) (quoting *In re McCarthy*, 497 Mich 1035

(2015)). This Court has stated that the primary beneficiary of the best interests analysis is intended to be the child (*In re Trejo*, 462 Mich 341, 356 (2000)), which is exactly the consideration which must be made in a custody determination. See *In re AP*, 283 Mich App 574, 592 (2009) (citation omitted). "These safeguards are in place for the stability of the child and are meant to protect against unwarranted and disruptive changes of custody." *Id* (citations omitted).

AP addressed the overlap between custody cases and child protective proceedings. In *AP*, the issue was whether a trial court presiding over a child protective proceeding had the authority to enter orders pursuant to the Child Custody Act. The Court of Appeals held that the juvenile court *does* have that ancillary jurisdiction to make custody determinations so long as it follows the relevant procedural and substantive requirements of the Child Custody Act. *Id* at 578. Similarly to this instant matter, one parent in *AP* was fit and the other was not at the time of the custody order. Under the rationale of *AP*, the trial court in this matter could have found that the children had permanency with the non-respondent parent via a custody order.

Another case of particular note is *In re Leach*, __ Mich App __ (2023) (Docket Nos. 362618 & 362621). In *Leach*, the father was charged with child abuse for violently shaking his infant and held in jail on a high bond. *Leach*, slip op at 1-2 DHHS filed petitions to terminate the father's rights in February 2022 and again in May, and the trial court dismissed both petitions because the children were safe with their mother while the father was incarcerated. *Id* at 2. The Court of Appeals upheld

the dismissals because, at the time the petition was filed, the children were safe with the mother and, importantly, there were no allegations that there was a substantial risk of harm to their mental well-being. *Id* at 4-5. Certainly, there are differences between what happens at the beginning of a case (petition) and the end of the case (termination), but *Leach* should provide some insight to courts on how to approach situations such as the Respondent-Mother's here. If a custody order and no allegations of mental harm are sufficient to protect a child at the beginning of a case, why are they insufficient at the end of the case?

The Court of Appeals briefly discussed the closure of child protective proceedings via custody order in *Jendrusik v Marine*, unpublished *per curiam* opinion of the Court of Appeals, issued October 20, 2022 (Docket No 359502). In *Jendrusik*, the respondent parent had custody at the time of removal. The non-respondent filed a motion to change custody, and that motion was granted. The Court wrote that "[o]nce AM was determined to be properly protected in the placement with a parent, the purpose of the child-protective proceeding was achieved and jurisdiction over AM was terminated. See *In re Brock*, 442 Mich 101, 119; 499 NW2d 752 (1993) ('the purpose of a child protective proceeding is to protect the welfare of the child')." *Jendrusik*, slip op at 3. While unpublished, *Jendrusik* further demonstrates that closure of a child protective proceeding via custody order is wholly appropriate so long as the child is safe with the non-respondent parent.

The relationship goes the other way as well. What happens in the child protective proceeding can and will impact what happens in the custody case. In

Shann v Shann, 293 Mich App 302 (2011), the Court found that the removal of a child from a respondent parent in a child protective proceeding is "in and of itself sufficient evidence of a change in circumstances to warrant a trial court to consider a change of custody." *Id* at 306. In other words, a situation such as the Respondent-Mother's in this case can itself be the material change in circumstances to allow the father to petition for a custody modification under *Vodvarka v Grasmeyer*, 256 Mich App 499 (2003).

This brief should not be read as advocating for dismissal of every termination request when the non-respondent parent has custody of the child. We agree with counsel for Respondent-Mother that there are circumstances in which termination may be in the best interests of the child despite a custody order, such as when there are allegations of sexual abuse, significant domestic violence, abandonment, or other situations in which the custody order may be insufficient to protect the child. If continuing the parent-child relationship will harm the child, it may be proper to terminate that relationship. Given the fact-intensive nature of child protective proceedings, these determinations must be made based on the specific circumstances of each individual case. We simply seek to provide guidance on how custody can be a valid permanency option and should be given consideration alongside other permanency goals.

C. Conclusion

The State Bar of Michigan Family Law Section does not advocate for a specific result for either the Respondent-Mother, the children, or the Department of Health

and Human Services. Instead, we merely urge this Court to consider that custody orders can provide permanency and stability for children in a child protective proceeding so long as continuing the parent-child relationship would not be detrimental to the children.

Respectfully submitted,

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WORD COUNT CERTIFICATION

I certify that, pursuant to MCRs 7.212(B)(1), 7.312(A), and 7.312(H)(3), this brief contains 1,443 countable words.