IN THE MICHIGAN SUPREME COURT

IN RE BATES MINORS

Supreme Court Case No. 165815

Court of Appeals Case No. 361566

Grand Traverse Circuit Court, Family Division, Case No. 2018-004645-NA

APPELLANT-MOTHER'S REPLY BRIEF

Vivek S. Sankaran (P68538)
Child Welfare Appellate Clinic
University of Michigan Law School
701 S. State Street
Ann Arbor, MI 48109-3091
734.763.5000
Attorney for Appellant-Mother

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Throughout its brief, DHHS agrees that a court may not terminate a parent's rights without first ruling out whether alternate remedies would satisfy the State's compelling interests to protect a child's safety and stability. DHHS Supp. Br. at 16, 23, 26. Its brief notes that "the Fourteenth Amendment may restrict the government's ability to infringe on a fundamental liberty interest unless that infringement is narrowly tailored to serve a compelling state interest," DHHS Supp. Br. at 16, and concludes that, "[t]here is agreement that trial courts should find that termination adequately protects a child's welfare and that this option will do so better than other available options." DHHS Supp. Br. at 26. (emphasis added).

Despite agreeing on these fundamental constitutional principles, DHHS fails to explain how the current interpretation of the Juvenile Code by Michigan courts implements this constitutional framework. First, DHHS suggests that the constitutional framework is protected by giving trial court's the broad discretion to deny a TPR petition if it finds that termination is not in the child's best interest. DHHS Supp. Br. at 20 ("A finding that termination is in the child's best interests already necessarily means that there are no suitable alternative outcomes available."). But nothing in the best interest standard — as it is applied today by lower courts — requires courts to rule out alternate remedies prior to terminating parental rights.

In *Lassiter v Dep't of Social Servs*, 452 US 18; 101 S Ct 2153; 68 L Ed 2d 640 (1981), the United States Supreme Court warned that "[t]his Court more than once

has adverted to the fact that the 'best interests of the child' standard offers little guidance to judges, and may effectively encourage them to rely on their personal values." *Id.* at 45, n 13. Consistent with this, Michigan's Juvenile Code offers "little guidance to judges" as it merely instructs trial courts to grant a TPR petition if it finds that TPR is in the "child's best interests" without offering any definition for that phrase. MCL 712A.19b(5). Court of Appeals' caselaw lists several factors a court *may* consider when determining whether TPR is in a child's best interests, see *In re Olive/Metts*, 297 Mich App 35, 41-42; 823 NW2d 144 (2012) (listing factors a court "may" consider in its best interests analysis), though it is unclear how the Court of Appeals developed these factors, since none of them are enumerated in the Juvenile Code. As a result, trial courts have unfettered discretion in deciding whether granting a TPR petition would be in a child's best interest and need not rule out alternate remedies as part of this inquiry.

In *In re Mason*, 486 Mich 142; 782 NW2d 747 (2010), this Court took an important step towards reigning in this unfettered discretion and creating a best interest framework that incorporated constitutional principles. This Court held that "a child's placement with relatives weighs *against* termination.", *id.* at 164 (emphasis added), and found that even if the father could not care for his child, a juvenile guardianship could allow the child to live with his aunt and uncle "both tomorrow and indefinitely" while still having "an ongoing relationship with him." *Id.* at 168. But as this case and others demonstrate, trial and appellate courts have not applied this framework. This Court should use this case as an opportunity to

clarify that *Mason's* holding requires trial courts — as part of its best interests analysis — to rule out alternate remedies that could protect a child's legal relationship with their parent while also furthering the State's goals of protecting the child from harm and giving them stability.

DHHS suggests that even if this Court requires trial courts to rule out alternate remedies, a trial court can overcome this requirement whenever a parent cannot personally care for their child. DHHS Supp. Br. at 21 (noting the State has a compelling interest where a parent cannot "resolve their issues" and they cannot "provide a safe environment for their children."). This argument fails to acknowledge the longstanding precedent in Michigan that precludes unnecessary state intervention — even when parents cannot personally care for their children — where children are living safely with relatives.[1] See *In re Sanders,* 495 Mich 394, 421; 852 NW2d 524 (2012)*; In re Leach*, __ Mich App __; __ NW3d __, (Docket Nos.

[1] A long line of Michigan appellate cases have held that if children are living safely with relatives, the State has no interest in further intruding in the familial arrangements. *In re Taurus F*, 415 Mich 512, 535; 330 NW2d 33 (1982) (opinion by WILLIAMS, J.) (equally divided decision) ("[I]f a mother gives custody to a sister, that can be 'proper custody'."); *In re Maria S Weldon*, 397 Mich 225, 296; 244 NW2d 827 (1976) (opinion by LEVIN, J.) ("Some parents, . . . 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."), overruled in part on other grounds by *Bowie v Arder*, 441 Mich 23, 47; 490 NW2d 568 (1992); *In re Curry*, 113 Mich App 821, 823-26; 318 NW2d 567 (1982) (observing that incarcerated parents may achieve proper custody by placing a child with relatives); *In re Carlene Ward*, 104 Mich App 354, 360; 304 NW2d 844 (1981) (holding that a child "who was placed by her natural mother in the custody of a relative who properly cared for her, is not a minor 'otherwise without proper custody or guardianship' and thus she was not subject to the jurisdiction of the probate court" under MCL 712A.2).

362618, 362621) (2023); *Mason*, 486 Mich 142. In each of these cases, there was overwhelming evidence that the parents were unfit and personally unable to care for their children. *Sanders*, 495 Mich at 402, 421-22 (father had tested positive for cocaine, had a domestic violence conviction, and was incarcerated for violating federal drug laws); *Leach*, slip op at 1 (father was incarcerated after shaking his baby, causing brain bleeding, fractured ribs, and retinal hemorrhaging); *Mason*, 486 Mich at 148, 152 (father was incarcerated, and had convictions for criminal sexual conduct, drunk driving, and larceny). Despite evidence of the parent's unfitness, Michigan appellate courts nevertheless found that further state interference was unwarranted precisely because the children were living safely with their family. As this Court noted in *Sanders*, when a child — regardless of their parent's ability to care for them — is placed with fit relatives, "state interference . . . is not warranted." *Sanders,* 495 Mich at 420.

These holdings reflect the reality that millions of children in the United States — the overwhelming majority of whom are not in foster care — are being raised by relatives without any state involvement whatsoever.[2] Despite the fact that these children are not being raised by their parents, the State has no interest in needlessly injecting itself in familial relationships to terminate the rights of these children's parents. The State lacks a compelling interest because these children are

[2] Generations United, a national kinship care advocacy organization, estimates that 2.6 million children in America are living with kin, and of those only 150,000 are in the foster care system. For every one child living with kin in the foster care system, there are 18 living outside. See https://www.gu.org/app/uploads/2022/10/General-Grandfamilies-Fact-Sheet-2022-FINAL-UPDATE.pdf.

safe and stable with family. Similarly, once children in foster care are safe and stable with family, the State's interest to intervene and destroy a child's relationship with their parent disappears.

Finally, DHHS argues that requiring trial courts to rule out alternate remedies would essentially eliminate the possibility of terminating parental rights in any case. DHHS Supp. Br. at 22-23 ("Respondent does not give any examples of scenarios in which there is ever a circumstance where a trial court would have the authority to terminate parental rights."). This is simply untrue.

Properly applying the constitutional framework would simply require DHHS to provide evidence as to why TPR is necessary to further the State's interests of protecting the child's safety and stability and why alternate remedies could not protect those interests. If DHHS could demonstrate that alternate remedies were inadequate, then a trial court would certainly be empowered to terminate parental rights.

For example, in a case involving sexual or physical abuse, the evidence might demonstrate that continuing a legal relationship between a child and parent would cause ongoing emotional harm to the child, thereby requiring the termination of a parent's rights. Or, in a case where a child has been abandoned by a parent, the evidence might show that the mere possibility of reintroducing the missing parent into the child's life after many years of abandonment would be emotionally devastating to the child. See, e.g. *TV v BS*, 7 So 3d 346, 352-53 (Ala Civ App, 2008) (finding no viable alternative to TPR because two experts believed it would be

traumatic for the child even to learn that the mother was his mother because of her four and a half year absence from his life); *SNW v MDFH*, 127 So 3d 1225, 1230 (Ala Civ App, 2013) (finding no viable alternative to TPR because "the father, due to his drug dependency, his violent and brutal actions against the mother, and his resultant incarceration, has not had any relationship with the [ten-year-old] child since the child's infancy").

Additionally, alternate remedies to TPR may be unavailable when children are living with unrelated foster parents and the State has made extensive, but unsuccessful, reasonable efforts to reunify. See, e.g. *MH v Madison Co Dep't of Human Res*, 375 So 3d 1270, 1281 (Ala Civ App, 2022) ("generally, leaving a child in foster care for an indefinite period in order for a parent to continue to attempt reunification efforts is not a viable alternative to the termination of parental rights."). Or alternate remedies might not exist where relatives are not available to care for the children. See, e.g., *AH v Madison Co Dep't of Human Res*, 215 So 3d 560, 570 (Ala Civ App, 2016) (affirming TPR because placing the children with the paternal grandmother was not a viable alternative to TPR). Under this constitutional framework, TPR would be permissible so long as DHHS demonstrated that alternate remedies were insufficient to further the State's compelling interests.

But when the child is placed with relatives, it is much more likely that alternate remedies would satisfy the State's goals of providing safety and stability to the child. That presumption — that relatives can provide proper care — is

exactly what underlay this Court's holding in *In re Mason*. There, the Court explicitly noted that the father could "fulfill his duty to provide proper care and custody" by granting custody to relatives. *Mason*, 486 Mich at 163. That led the Court to the conclusion that placement relatives "weighs against termination." *Id.* at 164.

Here, the evidence demonstrated the opposite — an alternate remedy of a custody order could have protected the children's safety and stability, while also protecting the children's relationship with their mother. In its brief, DHHS pays scant attention to the close relationship the children had with their mother. While making immense strides to address her sobriety, Ms. Bates developed a close relationship with her children. At the time of the final termination of parental rights hearing, Ms. Bates had completely transformed her life, which was remarkable given her long history of abusing substances and her criminal record. She was employed as a medical technician at an assisted living facility, providing medical care for the residents and even working as a personal assistant for one of the residents. 142a, 143a. More importantly, she was sober and, in her words, dedicated to being the "safe, reliable mother that [her children] can depend on." 140a. She testified that recovery was her "biggest priority." 144a. And she had put that priority into practice, engaging with a plethora of services to ensure her continued sobriety, which included a recovery coach, mental health treatment, counseling, Vivitrol injections, and AA meetings. 199a. Professional after professional involved in her recovery testified about her remarkable progress.

Ms. Bates had also strengthened her relationship with her boys, who were living safely with their father. The specialist supervising parenting time testified that it would be "detrimental to both" AMB and AAB to not see Ms. Bates anymore. 110a. They "both look forward to [seeing] their mom, . . . and they've gotten used to seeing her every week." 110a. They "asked if they were going to have more visits or longer visits," and the specialist stated that they seemed to "enjoy" the longer four-hour visits, compared to the usual two-hour visits. 110a-111a. Even the DHHS caseworker testified that Ms. Bates had a strong bond with her boys. 48a, 95a, 99a. Not one witness testified that continuing a relationship between Ms. Bates and the boys would be harmful to them.

DHHS' only response to justify the necessity of terminating Ms. Bates' parental rights was that a custody order would be insufficient to protect the children should their father pass away. DHHS Supp. Br. at 25. First, given the children's close relationship with their mother, in the unlikely event that Mr. Bates passed away, the children would be far better off having a relationship with a parent they care about than having no legal relationships at all.

Moreover, even if he did pass away and Ms. Bates was unfit to care for them, the trial court could take measures to protect the children through the custody case. Custody courts have broad authority to craft orders they deem necessary for a child's best interests and could issue an order precluding Ms. Bates from assuming physical and legal custody of the children. MCL 722.27(1)(e)(empowering custody

courts to "take any other action considered to be necessary in a particular child custody dispute.").

Additionally, if Mr. Bates passed away, a third party would immediately have standing to file a complaint for custody, or a petition for guardianship. MCL 722.26c; MCL 700.5204(2)(a). And at any point, if anyone had concerns about the children, they could call Child Protective Services, which could initiate an investigation and file a petition in Juvenile Court.

In cases like this, where a child has a close relationship with a parent and that child is living with family, no compelling reasons exist to terminate that parent's rights. By terminating parental rights, DHHS only inflicted unnecessary harm to the children and their mother. As such, this Court should reverse the trial court's decision to terminate Ms. Bates' parental rights and remand the matter for the court to determine why a custody order would not adequately protect the children's interests in safety and stability.

Respectfully submitted,

/s/ *Vivek S. Sankaran*

Vivek S. Sankaran (P68538)
Counsel for Appellant-Father

Child Welfare Appellate Clinic
University of Michigan Law School
701 S. State St.
Ann Arbor, MI 48109-3091
(734) 763-5000
vss@umich.edu

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Statement as to Length and Form of Brief

The foregoing reply brief contains 2,444 countable words, MCR 7.212(G), and meets the formatting standards as directed by MCR 7.212(B). MCR 7.312(A).