IN THE MICHIGAN SUPREME COURT

IN RE D N DAILEY MINOR

Supreme Court Case No. 165889

Court of Appeals Case No. 363164

Wayne County Circuit Court, Family Division, Case No. 2019-000790-NA

APPELLANT-FATHER'S REPLY BRIEF

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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 22, 25, 26, 27. Its brief notes that "[d]ue process precludes a government from infringing on the parent's rights absent a compelling state interest" 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 courts 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 27. But nothing in the best interest standard — as it is applied today by lower courts — actually 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 defining 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 22 (noting the State has a compelling interest where a "parent has failed to that parent's obligation to care for a child"). This argument fails to acknowledge the longstanding precedent in Michigan that precludes unnecessary state intervention — even when parents cannot personally care for 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. 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,

[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).

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 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 no longer exists.

[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.

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 23-24 ("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 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 certainly 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 alternative remedies would satisfy the state's goal 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 in that case 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 with relatives "weighs against termination." *Id.* at 164.

Here, the evidence demonstrated exactly that: an alternate remedy of a juvenile guardianship could have protected the child's safety and stability, while also protecting the child's beneficial relationship with his father. In its brief, DHHS pays scant attention to the close relationship D.D. had with his father. Throughout the proceeding even while struggling to overcome an addiction, Mr. Dailey maintained a close relationship with his son. 18a. The foster care worker reported that the parents were "very attentive to D.D." and that visits were going "very well." 18a. She testified that the parents were "able to read his cues. He responds to them as well. He smiles and laughs with them." 18a. The worker testified that the father's attachment and bond with D.D. were strong and described the visits as going well. 19a-21a. She stated that D.D. looked forward to visits and concluded that D.D. would be harmed if visits were cut off. 48a.

DHHS' only response to the evidence that D.D. would be harmed if he lost his legal relationship with his father was a blanket assertion that D.D. needed permanency and that a juvenile guardianship was not permanent enough. DHHS Supp. Br. at 33-35. This argument is undercut by the law, DHHS' own policy, and social science. The Legislature intended for juvenile guardianships to be "permanent and self-sustaining." MCL 722.875b. In fact, the law explicitly describes juvenile guardianships as "permanent placements," MCL 722.875a, that transfers parental rights to third parties. MCL 712A.19a(10); MCL 722.875b; see

also *In re TK*, 306 Mich App 698, 705; 859 NW2d 208 (2014) (noting that "the guardian assumes the legal duties of a parent."); *In re Prepodnik*, 337 Mich App 238, 245; 975 NW2d 66 (2021) (finding that the law "governing juvenile guardianships created during neglect proceedings provide that a juvenile guardian 'has the powers and responsibilities of a parent.'") .

The DHHS foster care manual similarly notes that juvenile guardianships deliver the same stability benefits as adoptions: "Adoption and guardianship both offer the child legal stability, a sense of security and family attachment and allow the adoptive parent or guardian to make decisions on the child's behalf." DHHS Children's Foster Care Manual, FOM 722-07 at 3. The law and policy are supported by numerous social science studies that demonstrate that children living in juvenile guardianships experience permanency. See. e.g., Gupta-Kagan, *The New Permanency*, 19 UC Davis J Juv L & Pol'y 1, 36 (2015) ("Adoption's more legally binding nature has not made it more lasting or permanent in fact, as the guardianship studies . . . establish.").

And contrary to DHHS' assertions, because children can achieve permanency through a juvenile guardianship, neither federal nor state law require the filing of a TPR petition when children are living with relatives, regardless of how much time a child has spent in foster care. MCL 712A.19a(8)(a).[3] These statutory provisions

[3] This provision mirrors a similar provision in federal law instructing state agencies that they do not need to file TPR petitions when children are living with relatives. 42 USC 675(5)(E)(i).

send a clear signal that when children are living safely in stable arrangements with relatives, the State no longer has an interest in terminating parental rights.

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 D.D. and his father. As such, this Court should reverse the trial court's decision to terminate Mr. Dailey's parental rights and remand the matter for the court to determine why a juvenile guardianship with the maternal grandmother would not adequately protect D.D.'s interest in safety and stability.

Respectfully submitted,

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Statement as to Length and Form of Brief
The foregoing reply brief contains 2,388 countable words, MCR 7.212(G), and meets the formatting standards as directed by MCR 7.212(B). MCR 7.312(A).