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IN THE MICHIGAN SUPREME COURT

Appeal from the Michigan Court of Appeals
(Servitto, PJ, and Whitbeck and Shapiro, JJ)

^{re}
~~IN THE MATTER OF~~
K FARRIS,
Minor ~~child~~

Supreme Court No. 01u 8-8-13
Court of Appeals No. 311967
Antrim Circuit No. 10-005512-NA

JK N. Hamej

APPELLANT-FATHER'S APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF GROUNDS ON APPEAL

"This case goes to the core of the problem with the one-parent doctrine and demonstrates the need to modify it."

Judge Shapiro, dissenting opinion, *In re K Farris*

The trial court terminated James Farris's parental rights to his son, Keagan, based on a false premise – that he was an unfit father who needed services to fix his abusive or neglectful conduct towards his son. The judicially-created "one parent doctrine"¹ allowed the trial court to do this. First, the doctrine allowed the court to deny Mr. Farris placement of his son even though the court had only made adjudication findings against the child's mother based on a very narrow plea. Then, it permitted the court to use its dispositional authority to place the child in foster care, restrict Mr. Farris's parenting time to supervised visits and require him to complete an extensive court-ordered treatment plan. Finally, it let the court terminate Mr. Farris's parental rights based on his failure to complete certain aspects of that plan. Mr. Farris is requesting that this Court reverse the trial court's order dated August 9, 2012, terminating his parental rights to Keagan and to find that the "one parent doctrine" denies unadjudicated parents due process and equal protection of the law.

¹ The "one parent doctrine" refers to the pervasive practice in child protective proceedings where courts obtain jurisdiction over children based solely on unfitness findings against one parent and then use its dispositional authority to infringe upon the rights of the unadjudicated and presumptively fit parent.

In a split decision, the Court of Appeals affirmed the trial court's decision and upheld the "one parent doctrine." See *In re K Farris*, unpublished decision per curiam of the Court of Appeals issued on August 8, 2013 (Docket No 311967). While acknowledging that the "one parent doctrine" may not "be the best practice of the trial court" and may "lead to procedural confusion" the majority rejected Mr. Farris's constitutional arguments. *Id.* at 6. But Judge Shapiro dissented from the decision finding that the trial court denied Mr. Farris equal protection of the law and due process of law by applying the "one parent doctrine." *Id.* (dissenting opinion).

This Court should grant Mr. Farris's Application for Leave to Appeal because the appeal confronts the constitutionality of the "one parent doctrine," an issue that this Court has acknowledged is "obviously a jurisprudentially significant issue and one which this Court will undoubtedly soon be required to address given the widespread application of the doctrine." *In re Mays*, 490 Mich 993, 994 n 1; 807 NW2d 304 (2012). Indeed, this Court has granted leave in *In re Sanders*, 493 Mich 959; 828 NW2d 391 (2013), to review one aspect of the "one parent doctrine" - whether a juvenile court can place a child in foster care absent an adjudication finding against each parent. The instant case raises the same legal issue as *In re Sanders*, plus an additional issue - whether a juvenile court can terminate the rights of an unadjudicated parent based on his failure to complete certain aspects of a treatment plan.

As illustrated by this case, the constitutionality of the "one parent doctrine" is not merely an academic issue. It has practical effects on the well-being of children involved in child protective proceedings. The State shares an interest in children remaining in the care of fit parents. *Stanley v Illinois*, 405 US 645, 652; 92 S Ct 1208; 31 L Ed 2d 551 (1972)("[T]he State registers no gain towards its declared goals when it separates children from the custody of fit parents."). Yet, the "one parent doctrine" allows trial courts to separate children from presumptively fit parents without ever determining whether the parent is unfit as defined in the Juvenile Code. Simply put, the doctrine increases the likelihood that children will be erroneously taken from their parents and placed unnecessarily in foster care. This is exactly what happened in this case.

Additionally, the doctrine permits trial courts to impose treatment plans on unadjudicated parents, like Mr. Farris, without ever determining whether a parent is actually unfit to care for the child. Thus, parents are ordered to comply with a litany of costly services - including parenting classes, drug screens, and psychological evaluations - despite the absence of any facts justifying the need for a particular service. Then, a parent's future ability to regain custody of his child hinges on whether he can prove his fitness by complying with a treatment plan. That parent's rights may be terminated based on his failure to comply with the treatment plan.

Until this Court squarely confronts the “one parent doctrine,” it will continue to be applied by trial courts to deprive unadjudicated parents of their constitutionally-protected right to care for their children. Given the widespread application of the doctrine and its major significance to the jurisprudence of child welfare law, compelling grounds for granting this Application exist.

STATEMENT OF THE BASIS OF JURISDICTION

This is an application for leave to appeal after a decision by the Michigan Court of Appeals. This Court has jurisdiction pursuant to Const 1963, art 6, §4; MCL 600.212; MCL 600.215(3); and MCR 7.301(A)(2) to review by appeal a case after a decision by the Court of Appeals.

On August 8, 2013, the Court of Appeals, in a split decision, affirmed the trial court’s decision to terminate Mr. Farris’s parental rights. See *In re K Farris*, unpublished decision per curiam of the Court of Appeals issued on August 8, 2013 (Docket No 311967) (attached to this Application at **Tab 1**; 08/09/12 Trial Court Opinion and Order, attached to this Application at **Tab 2**). Judge Shapiro dissented from the decision. *Id.* (dissenting opinion). This timely application is being filed within 28 days of the Court of Appeals’ decision. MCR 7.302(C)(2).

**STATEMENT IDENTIFYING ORDER ON APPEAL
AND RELIEF SOUGHT**

Appellant-Father challenges the Court of Appeals' unpublished decision dated August 8, 2013 (Docket 311967). The decision was split, with Judges Whitbeck and Servitto in the majority, and Judge Shapiro dissenting. The Court of Appeals' decision affirmed the Trial Court's order terminating parental rights of three parents to four children- this application only pertains to the parental rights of James Farris to his son Keagan-Farris.

Appellant-Father requests this Court grant leave to appeal to address the significant jurisprudential question regarding the application of the "one parent doctrine" to unadjudicated parents. Because this case involves similar issues to those in *In re Sanders*, 493 Mich 959; 828 NW2d 391 (2013), which is currently pending before this Court, the Court may wish to consolidate the matters.

In the alternative, Appellant-Father requests this Court peremptorily reverse the lower court's decision terminating his parental rights because he was denied due process and equal protection when the State forced him to comply with a service plan even though the allegations of abuse and neglect had nothing to do with his own conduct and he was never adjudicated to be unfit, and further because the statutory grounds were not proven by clear and convincing evidence as against him.

STATEMENT OF QUESTIONS PRESENTED

- I. **The Substantive Due Process Clause of the Fourteenth Amendment requires the State to prove that a parent is unfit prior to infringing upon the right of that parent to direct the care of his children. *Stanley v Illinois*, 405 US 645; 92 S Ct 1208; 31 L Ed 2d 551 (1972). Here, the trial court - applying the "one parent doctrine" - assumed jurisdiction over the child based solely on a narrow plea entered into by the child's mother. Then, it denied Mr. Farris's request to have his son placed with him, sent his son to foster care, restricted Mr. Farris's contact with his son to supervised parenting time and conditioned Mr. Farris's parental rights on complying with a treatment plan. Did the trial court deny Mr. Farris due process of law by placing his son in foster care and conditioning his parental rights on complying with a treatment plan without first adjudicating his parental unfitness?**

The trial court did not answer the question.

The majority of the Court of Appeals answered "No" to the question.

Judge Shapiro answered "Yes" to the question.

Respondent-Appellant answers "Yes" to the question.

- II. **The Equal Protection Clause of the Fourteenth Amendment prohibits states from imposing different procedural consequences on different categories of people. Here, the trial court stripped Mr. Farris of his right to care for his child without ever adjudicating his parental fitness. But it afforded the child's mother the right to an adjudication trial, which she chose not to exercise. Instead, she entered into a plea, which the court only accepted after advising her of the significant procedural rights she was waiving. Thus, the trial court provided the mother with significant procedural protections which, when she waived them, also waived them for Mr. Farris who had no right to object, let alone demand an adjudication trial. Did the trial court deny Mr. Farris equal protection of the law?**

The trial court did not answer this question.

The majority of the Court of Appeals answered "No" to the question.

Judge Shapiro answered "Yes" to the question.

Respondent-Appellant answers "Yes" to the question.

III. Prior to terminating a parent's rights to his child, the Juvenile Code requires the State to prove by clear and convincing evidence that a parent has failed to provide proper care or custody for the child or that the child would be harmed if he returned to the parent's home. Here, the State introduced no evidence that Mr. Farris, an unadjudicated father, had harmed his son in any way or had failed to provide him with proper care or custody. To the contrary, Mr. Farris consistently paid child support, maintained housing suitable for his son, shared a close bond with his son, and was appropriate during visits. In fact, the child's therapist testified that she opposed terminating Mr. Farris's rights to his son. Did the trial court commit clear error when it determined that clear and convincing evidence existed to terminate Mr. Farris's parental rights to his son?

The trial court answered "No" to the question.

The majority of the Court of Appeals answered "No" to the question.

Judge Shapiro answered "Yes" to the question.

Respondent-Appellant answers "Yes" to the question.

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

This case began when the DHS removed two of Keagan Farris's half-siblings from their mother's care based on allegations of medical neglect by their mother. This case ended when the trial court permanently severed Keagan's relationship with his father, James Farris, who had nothing to do with the neglect of Keagan's half-siblings. Mr. Farris's parental rights were terminated because he did not complete all aspects of his treatment plan and because he had hostile interactions with the DHS case workers who placed his son in foster care. At no point did DHS file a petition or prove that Keagan had been abused or neglected by Mr. Farris.

Mr. Farris played an important role in Keagan's life.

Mr. Farris is the biological and legal father of Keagan, who was born on January 17, 2004. (08/09/12 Order at 2). Keagan's mother is Samantha Thornburg. (08/09/12 Order at 2.). Keagan also has three half-siblings - Rylan (DOB 12/28/10), Aschar (DOB 1/19/10), and Kialee Jeska (DOB 4/28/08). (08/09/12 Order at 2). Anthony Jeska is the biological and legal father of Keagan's siblings. (08/09/12 Order at 2).

A year before Keagan was born, Mr. Farris and Ms. Thornburg got married. (07/14/10 Tr. at 7). Together, they raised Keagan until 2007 when they separated. (07/14/10 Tr. at 7-9). When they finally divorced three years later - during the pendency of the abuse and neglect file -- Ms. Thornburg received primary custody of Keagan. (11/18/10 Tr. at 14). But Mr. Farris maintained parenting time with his son.

(04/17/12 Tr. at 7). Keagan spent summers with Mr. Farris at Mr. Farris's parents' house, along with weekends and holidays during the school year. (04/17/12 Tr. at 7; 07/26/11 Pscyh Eval at 7). Most importantly, at all times, Keagan remained closely bonded to his father. (02/06/12 Tr. at 62-63; 04/07/12 Tr. at 6-7; 12/06/11 Tr. at 47; 12/06/11 Tr. at 84).

After the divorce, Mr. Farris provided consistent financial support for Keagan. He owned his own company, Farris Hardwoods, which cuts lumber in Northern Michigan. (01/24/12 Tr. at 17). Mr. Farris consistently maintained his child support payments, which amounted to \$233 a month (12/16/11 Tr. at 160).

At no point did the DHS file a petition accusing Mr. Farris of ever abusing or neglecting Keagan in any way.

Two of Keagan's Siblings Are Removed From Ms. Thornburg's Home.

On April 8, 2010, Keagan's life changed forever. DHS filed a petition alleging that two of Keagan's siblings, Ryan and Aschar, were being medically neglected by their mother, and requesting that the trial court assume jurisdiction over all four children in the home, including Keagan. (08/09/12 Order at 2). The petition contained no allegations that Keagan had been abused or neglected. (04/08/10 Petition). The next day, the trial court held a preliminary hearing, which was continued on April 14, 2010 so that Ms. Thornburg and Mr. Jeska could be appointed counsel. (04/09/10 Tr. at 10). The trial court ordered that Ryan and Aschar be placed in foster care but permitted

Keagan and another sibling to remain at home with their mother. (04/09/10 Tr. at 26; 04/08/10 Order).

The next day, the DHS filed a second supplemental petition. (04/09/10 Supplemental Petition). The supplemental petition included allegations of past criminal conduct involving Mr. Farris. (04/09/10 Supplemental Petition, ¶ 5). Another supplemental petition followed on April 13, 2010. (04/13/10 Second Supplemental Petition). Four days later, the court held a brief preliminary hearing but notice of the hearing had only been mailed to Mr. Farris the day before, and Mr. Farris was not represented by counsel. (04/14/10 Tr. at 4).

On April 28, 2010, the preliminary hearing resumed. Mr. Farris's recently appointed counsel attended the hearing. (04/28/10 Tr. at 4). At the hearing, the trial court authorized the supplemental petitions based on Ms. Thornburg's decision to waive the probable cause finding. (04/28/10 Tr. at 5-6).

Seven weeks later, on July 14, 2010, the court held a pre-trial hearing. The parties confirmed that Mr. Farris was Keagan's father, but not the father of any of the other children. (07/14/10 Tr. at 8, 11, 13).

The DHS filed a third amended petition on August 11, 2010. (08/11/10 Amended Petition). This petition included additional details about Mr. Farris's prior criminal history but falsely alleged that Mr. Farris had tested positive for drugs while

on probation.² (08/11/10 Amended Petition, ¶ 13).

Several months later, the trial court held a combined adjudication and dispositional hearing. At the hearing, Ms. Thornburg, after being advised of her procedural rights, entered into a no contest plea to specific allegations in the petition (those allegations contained in Paragraphs 1, 15, and 16). (11/18/10 Tr. at 7-8). She pled no contest to allegations that she had missed medical appointments for Rylan and Aschar and that she had not maintained stable housing. (11/18/10 Tr. at 9-10). Although the plea did not involve any allegations that Keagan had been abused or neglected by anyone, the trial court took jurisdiction over all of the children. (11/18/10 Tr. at 11; 11/18/10 Order of Adjudication as to Keagan and Kialee at 1).

Based on Ms. Thornburg's no contest plea, the trial court ordered Mr. Farris to comply with a treatment plan. (11/04/10 Service Plan; 11/24/10 Order of Disposition). The plan required Mr. Farris to undergo a psychological evaluation, complete drug screens, enroll in an anger management program, completing a substance abuse evaluation, provide proof of employment, engage in counseling, and attend supervised parenting time. (11/18/10 Tr. at 14-15; 02/16/11 Tr. at 5-6). Meanwhile the trial court allowed Keagan and his sibling to continue to live with their mother and Mr. Jeska. (11/18/10 Tr. at 12; 11/18/10 Order of Adjudication at 3).

² At the termination hearing two years later, the DHS conceded that the allegations that Mr. Farris had tested positive for drugs during his probation had been incorrect after Mr. Farris's probation agent testified that Mr. Farris had never missed any of the weekly, and later bi-weekly, drug tests required as

Mr. Farris Requests Placement Of Keagan After DHS Removes Keagan From His Mother's Home.

After DHS learned that Ms. Thornburg's boyfriend had attempted to choke her with a cord, it requested an order to remove Keagan and his sibling from his mother's care. (02/02/11 Amended Petition). The trial court held an emergency hearing two days later. At the hearing, Mr. Farris's counsel told the court that Mr. Farris wanted his son placed with him. Counsel stated:

[Mr. Farris] stands ready, willing and able to parent Keagan and has parented him for a significant portion of his life. When this case came about, he had worked out an agreement where [Thornburg] would have Keagan for a period of time and then he would take him back later when he wasn't quite as busy working. And when school was over. Then all this came about and part of his incredible frustration is because this case is taking probably longer than any; I can think of one or two cases that I've been involved in, but it took an incredible amount of time to even get jurisdiction in this case. And he did do supervised visits for a long, long period of time. And he is incredibly frustrated that he's done all this and yet, still no disposition.

(02/04/11 Tr. at 19).

But the trial court denied Mr. Farris's request, relying on testimony from Kelly Schaub, a DHS service provider. (02/04/11 Tr. at 21-27; 02/04/11 Order after Emergency Removal Hearing). Ms Schaub testified that Keagan should not be placed with Mr. Farris because he had not complied with the court-ordered treatment plan and because he had tested positive for cocaine while on probation, an allegation that was later proven to be false. (02/04/11 Tr. at 13-14). So the trial court placed Keagan in

part of his probation and that he had never tested positive. (04/17/12 Tr. at 13-16).

foster care. (02/04/11 Order for Emergency Removal).

Mr. Farris Engages in the Court-Ordered Treatment Plan

Despite his frustration that the trial court placed his son in foster care without first adjudicating his parental unfitness, Mr. Farris engaged in many aspects of his treatment plan. At the review hearing on February 16, 2011, Jeannie Donegan, a foster care worker for the DHS, testified that Mr. Farris has complied with some aspects of his treatment plan. Although he still needed to schedule a psychological evaluation and engage in counseling, he had taken two drug screens, had enrolled in the MENS anger management program, and had completed a substance abuse evaluation. (02/16/11 Tr. at 5-6). Ms. Donegan also testified that although Mr. Farris's parenting time had stopped in September 2010 because he did not want to have supervised visits with his son, he had set up a parenting time schedule with the DHS after Keagan was removed from Ms. Thornburg's house. (02/16/11 Tr. at 7-8). Ms. Donegan's testimony was clarified by Charles Farris, the father of Mr. Farris with whom Mr. Farris lived. Charles Farris testified that during the fall of 2010, Keagan stayed at their house every weekend and during holidays. (04/17/12 Tr. at 7).

Similar testimony about Mr. Farris's progress on the treatment plan was elicited at the next hearing on March 23, 2011. Becky Scott, the new service provider for the family with Bethany Christian Services, stated that Mr. Farris and his probation officer had provided her with documentation of his participation in the AWARE program

through the MENS group. (03/23/11 Tr. at 12). Ms. Scott also stated that she was awaiting proof that Mr. Farris was employed and was requesting that he participate in a psychological evaluation and in counseling sessions with Keagan. (03/23/11 Tr. at 11-12). She also noted that Mr. Farris had been "pretty inconsistent" with his supervised parenting time. (03/23/11 Tr. at 12).

Mr. Farris's attorney told the trial court that Mr. Farris stood "ready and willing to take Keagan." (03/23/11 Tr. at 14). Mr. Farris addressed the trial court directly and stated the following:

I just want it on the record that not only am I more than willing, I'm more than wanting to get my son back. I feel that I have made great strides towards that I'm more capable of being a father. This whole process has been dragged out way longer than I ever imagined. My concern is that my son is still in foster care, and I just would love to have my son back. What steps, actually, have to be taken for that to happen? That's basically what I want to say on the record.

(03/23/11 Tr. at 17). In response, the trial court told Mr. Farris that he needed to complete his psychological evaluation, and needed to attend his supervised parenting time and Keagan's counseling sessions. (03/23/11 Tr. at 17-18).

Just one month later, the trial court held a permanency planning hearing. At the hearing, Ms. Scott testified that "James has been participating with his Plan . . . [and] he's become more consistent with his parenting time." (04/27/11 Tr. at 25). She also stated that Mr. Farris had scheduled a psychological evaluation, but had not attended Keagan's counseling sessions. (04/27/11 Tr. at 25). Mr. Farris has "completed his

MENS program and stated that he has shown benefit and taken responsibility for what had brought him here." (04/27/11 Tr. at 25). Ms. Scott also noted that Mr. Farris had completed a drug relapse program. (04/27/11 Tr. at 25-26). Further, Ms. Scott testified that Mr. Farris had submitted clean drug tests through probation, and that he was no longer required to do drug screens with either DHS or Bethany. (04/27/11 Tr. at 26). Ms. Scott was waiting for Mr. Farris to verify his employment, but as he was self-employed as the owner of Farris Hardwoods, she needed a tax return or some other documentation about the business. (04/27/11 Tr. at 27-28).

Ms. Scott also indicated that Mr. Farris had appropriate housing for his son, as he was living in his parent's home - who had a separate bedroom set up for Keagan. (04/27/11 Tr. at 27). Ms. Scott said that she had met with Keagan's paternal grandparents and they were "excited about the possibility" of Keagan living with them. (04/27/11 Tr. at 27).

DHS foster care worker, Jeannie Donegan, also testified. (04/27/11 Tr. at 77-80). Ms. Donegan verified that Mr. Farris had participated in drug testing through probation up until the time the requirement ended and that he had done a few random screens since then, which were negative. (04/27/11 Tr. at 78).

During the hearing, Mr. Farris again addressed the trial court. He stated:

This is all a little too confusing for me, as to the way I have to prove myself to everyone, and I still went over and above to prove myself to each and everyone of you gentlemen. I missed things and, yes I have not attended everything that I

should have, but its - first off, it cost me over twenty-five dollars to make a round trip to and from every appointment that I have to follow . . . So I'm a little confused and I don't understand how in any way, shape or form they're going to know harm to my son, for him to be returned to me, when I didn't neglect him. It had nothing to do with me.

(04/27/11 Tr. at 113-114).

The trial court responded by telling Mr. Farris that the DHS was "giving you an opportunity to prove that you should have your child back." (04/27/11 Tr. at 115). Then the trial court advised the parents that at the next hearing, they should be ready to establish that they had complied with the treatment plan "in all aspects" and if they did not do so, "[y]ou know what's going to happen." (04/27/11 Tr. at 115).

On June 27, 2011, the DHS filed a petition requesting the termination of Mr. Farris's parental rights to Keagan. (06/27/11 Petition for TPR). The allegations against Mr. Farris involved (1) his past criminal history; and (2) his failure to complete and benefit from his treatment plan which the DHS alleged was demonstrated by his inconsistent attendance at supervised parenting time and his hostile interactions with DHS workers. (06/27/11 Petition, ¶¶ 3, 53-57). The petition did not allege that Mr. Farris had abused or neglected Keagan in any way. (06/27/11 Petition).

The Trial Court Terminates Mr. Farris's Parental Rights To Keagan Against The Recommendations Of Keagan's Therapist

The trial court conducted a six day termination hearing at which numerous witnesses testified. At the conclusion of the hearing, the evidence introduced by both

sides proved the following facts:

- Mr. Farris had used drugs in the past and had been convicted of two drug offenses, the most recent having been six years earlier. (04/17/12 Tr. at 16). No party, however, disputed that Mr. Farris had addressed his drug use and his convictions openly and honestly.
- Mr. Farris completed a psychological evaluation. (12/06/11 Tr. at 35; PX 3). While Mr. Farris delayed participating in the evaluation, he eventually appeared and cooperated. (12/05/11 Tr. at 94-121; PX 3). Psychological testing showed the presence of some anti-social and narcissistic traits, but not enough to diagnose him with a personality disorder. (12/05/11 Tr. at 99-101). The psychologist opined that these problems were "relatively straightforward" and recommended that Mr. Farris undergo individual counseling for several months after which he believed Mr. Farris would be able to parent Keagan. (12/05/11 Tr. at 121).
- Mr. Farris failed to attend many of the supervised visits scheduled by DHS and his failure to do so caused emotional distress to his son. (12/06/11 Tr. at 39-40; 02/06/12 Tr. at 42). But when he did visit his son, he was appropriate with Keagan. (01/23/12 Tr. at 163-164). Keagan was always happy to see his father. (01/24/12 Tr. at 121-122)
- Mr. Farris failed to attend many of Keagan's counseling sessions as required in his treatment plan. (12/06/11 Tr. at 46-47; 01/23/12 Tr. at 89-90). But Keagan's therapist testified that Mr. Farris interacted well with him and was appropriate during counseling sessions. (04/17/12 Tr. at 25). Although the therapist agreed that Mr. Farris had failed to appreciate the degree to which inconsistent parenting time had hurt his son, she testified that over the few months preceding the termination hearing, Mr. Farris had been largely consistent and demonstrated an increasing awareness and had benefitted from the counseling sessions. (04/17/12 Tr. at 25, 28).
- Although Mr. Farris did not complete the drug testing required by the DHS, (12/05/11 Tr. at 125; 01/23/12 Tr. at 86), he did submit to all his drug testing for probation and his tests were all negative. (04/17/12 Tr. at 13-16).
- Mr. Farris completed his anger management program. (12/06/11 Tr. at 35-36). He missed two of the sessions but completed four additional sessions to make it up. (12/06/11 Tr. at 37).

- Mr. Farris was occasionally angry and argumentative with the DHS workers, including case manager, Jeannie Donegan. (12/06/11 Tr. at 37; 01/23/12 Tr. at 164-170). Ms. Donegan testified that he did not benefit from the anger management training. (01/23/12 Tr. at 87). Ms. Donegan was the only witness who testified that Mr. Farris's parental rights should be terminated. (01/23/12 Tr. at 105-106).
- Mr. Farris was current and complying with his child support payments of \$233 a month. (12/06/11 Tr. at 160).
- Mr. Farris had appropriate housing for Keagan at his parents' home and had a bedroom for him. (01/24/12 Tr. at 21).
- Keagan and his father shared a very close bond, which was attested to by his foster mother, DHS case workers and his therapist. (12/06/11 Tr. at 84, 133-136; 02/06/12 Tr. at 62-63). Keagan's therapist testified that she did not believe that Mr. Farris's parental rights to him should be terminated. (04/17/12 Tr. at 30-31).

Based on this testimony, the trial court terminated Mr. Farris's rights under MCL 712A.19b(c)(i), MCL 712A.19b(g) and MCL 712A.19b(j). (08/09/12 Order at 18-19).

Mr. Farris appealed the trial court's decision to the Court of Appeals. The Court of Appeals, in a split decision, affirmed the trial court's order. *In re K Farris, supra*. Although the majority found that the trial court erred in finding statutory grounds for terminating Mr. Farris's rights under MCL 712A.19b(c)(i) since he was not responsible for the conditions that led to Keagan's adjudication, *id.* at 10, it affirmed the trial court's findings under the other two statutory provisions. *Id.* As to grounds (g) and (j), the majority opined that "[a] parent's failure to participate in and benefit from a service plan is evidence that the parent will not be able to provide a child with proper care and

custody." *Id.* at 10.

The majority of the Court of Appeals also rejected Mr. Farris's arguments that the application of the "one parent doctrine" in his case denied him of due process of the law. *Id.* at 6-8. The majority found that so long as an unadjudicated parent receives notice and an opportunity to be heard, his due process rights are not violated. *Id.* at 7.

The majority also rejected Mr. Farris's equal protection arguments. It found that an adjudication trial does not affect a parent's constitutional rights and that parental unfitness is not determined at such a trial. *Id.* at 8. Rather, the court ruled that a parent's unfitness is not determined until a termination hearing. *Id.* Since Mr. Farris was afforded a termination hearing, he was not denied equal protection of the law. *Id.* at 9.

Judge Shapiro dissented from the opinion. He found that the trial court erred in determining that clear and convincing evidence existed to terminate Mr. Farris's parental rights. *In re Farris, supra* at 7-8 (dissenting opinion). He found that the "unwillingness to cooperate with DHS alone" cannot serve as a basis for termination. *Id.* at 8. Additionally, "there was never a showing that Mr. Farris needed any of the DHS services in order to be a fit parent. *Id.* at 9. "He was never determined to be an *unfit* parent until after being denied custody of his son for two years when his 'non-cooperation' with the agency that advocated keeping the child from him was deemed a sufficient basis to call him 'unfit'." *Id.* at 9.

Judge Shapiro also found that the trial court denied Mr. Farris due process and equal protection of the law. *Id.* at 1. He found that the trial court violated Mr. Farris's constitutional rights when "it ordered that he comply with a DHS plan restricting access to his son and requiring him to participate in programs and tests, despite the absence of any allegations that he was an unfit parent or even that his son had been abused or neglected by anyone at all." *Id.* at 1-2. Judge Shapiro also recognized that "[u]nder the one parent doctrine, the at-fault parent receives substantial procedural protections but when she waives them, she waives them for the not-at-fault parent who has no right to object, let alone demand a trial." *Id.* at 8.

Judge Shapiro concluded that "this case goes to the core of the problem with the one-parent doctrine and demonstrates the need to modify it." *Id.* at 9.

ARGUMENT

I. THE TRIAL COURT VIOLATED MR. FARRIS'S SUBSTANTIVE DUE PROCESS RIGHTS WHEN IT STRIPPED HIM OF THE RIGHT TO DIRECT THE CARE, CUSTODY, AND CONTROL OF HIS CHILDREN WITHOUT ADJUDICATING HIS PARENTAL UNFITNESS.

Standard of Review.

Constitutional questions and issues of statutory interpretation, as well as family division procedure under the court rules, are reviewed de novo. *In re Rood*, 483 Mich 73, 91; 763 NW2d 587 (2009); *Dep't of Human Svs v Cox*, 269 Mich App 533, 536; 711 NW2d 426 (2006). Although Mr. Farris immediately requested placement of Keagan when the trial court was considering whether to place Keagan in foster care, (02/04/11 Tr. at 19), he did not preserve the constitutional issue at the trial court. But this Court may still review the issue to determine whether there was plain error affecting Mr. Farris's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). This issue was also fully briefed in the Court of Appeals and addressed in the Court of Appeals' opinion. (See Appellant's COA Brief, pp. 30-41; COA Reply Brief, pp. 1-6; *In re K Farris*, *supra* at 5-9).

A. Parents Have A Substantive Due Process Right To Direct The Care, Custody And Control Of Their Children.

This appeal confronts whether the “one parent doctrine” violates the substantive due process rights of unadjudicated parents. Here, the trial court - applying the doctrine - violated Mr. Farris’s constitutional rights by depriving him of the right to direct the care, custody and control of his son despite never having found him to be an unfit parent after an adjudication trial. The court infringed upon Mr. Farris’s parental rights based solely on a no contest plea entered into by Keagan’s mother as to her own neglectful conduct and as to allegations not pertaining to Keagan. (11/18/10 Tr. at 9-10; 11/24/10 Order of Adjudication).

The right implicated in this case - that of parents to direct the care, custody, and control of their children - is an element of liberty protected by due process that is “well-established” under the law. *In re JK*, 468 Mich 202, 211; 661 NW2d 216 (2003); *Hunter v Hunter*, 484 Mich 247, 258; 771 NW2d 694 (2009). Decisions in both the United States Supreme Court and this Court “establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation’s history and tradition.” *Michael H v Gerald D*, 491 US 110, 123-124; 109 S Ct 2333; 105 L Ed 2d 91 (1989); *Reist v Bay County Circuit Judge*, 396 Mich 326, 342-343; 241 NW2d 55 (1976). This right to family integrity exists to protect reciprocal rights held by both parents and children. It is the interest of the parent in the “companionship, care, custody, and management of his or her children,” *Stanley, supra* at 651, and of the

children in not being dislocated from the “emotional attachments that derive from the intimacy of daily association” with the parent. *Smith v Organization of Foster Families for Equality and Reform*, 431 US 816, 844; 97 S Ct 2094; 53 L Ed 2d 14 (1977).

The law’s concept of the family rests on a presumption that the natural bonds of affection lead parents to act in the best interests of their children. *Parham v JR*, 442 US 584, 602; 99 S Ct 2493, 61 L Ed 2d 101 (1979). See also *Troxel v Granville*, 530 US 57, 69; 120 S Ct 2054; 147 L Ed 2d 49 (2000) (noting the “traditional presumption that a fit parent will act in the best interest of his or her child.”). Any legal adjustment of these rights and obligations affects this fundamental human relationship, which courts have zealously guarded from unwarranted governmental intrusion. *In re Brock*, 442 Mich 101, 109; 499 NW2d 752 (1993); *Reist, supra* at 342.

B. The State Must Prove That A Parent Is Unfit Prior To Infringing Upon His Substantive Due Process Right To Direct The Care Of His Children.

In order to infringe upon the decision-making rights of a parent, substantive due process requires the State to prove that a parent is unfit to care for his child. *Stanley, supra* at 649. Absent proof of unfitness, the “state-required breakup of a natural family” cannot be founded “solely on a ‘best interests’ analysis.” *In re JK, supra* at 210. As this Court noted in *In re Clausen*, 442 Mich 648; 502 NW2d 649 (1993), “the mutual rights of the parent and child come into conflict only when there is a showing of parental unfitness.” *Id.* at 687. “[W]hen a parent is fit and a child’s needs are met, there is no

reason for the state to interfere in a child's life." *In re AP*, 283 Mich App 574, 591; 770 NW2d 403 (2009).

The Juvenile Code and applicable court rules establish a process that, if followed, permits the State to strip an unfit parent of decision-making authority over his children while comporting with the due process requirements in the Constitution. To deprive a parent of physical and legal custody of his children, the State must file a petition detailing allegations of abuse and neglect as defined under MCL 712A.2(b). MCL 712A.11; MCR 3.961. Then, the petition must be authorized by the trial court upon a showing of probable cause for the child protective proceeding to continue. MCL 712A.11; MCR 3.965. Since, as noted by the Court of Appeals in *In re AMB*, 248 Mich App 144, 183; 640 NW2d 262 (2001), the allegations in a petition do not always fully represent the situation, an adjudication trial must be held within 63 days before a judge or a jury to test those allegations, and to determine whether grounds exist for the trial court to assume jurisdiction over the child. MCL 712A.17(2); MCR 3.972(A). The rules of evidence apply at this hearing, and the State bears the burden of proving, by a preponderance of evidence, that abuse or neglect occurred. MCR 3.972. If the State fails to meet this burden, its case is dismissed and the child must be returned to her presumptively fit parent. And if the State prevails, a parent has a right to appeal that decision to the Court of Appeals. MCR 3.993(A). The procedures governing

adjudication trials protect parents from the risk that their fundamental interest in raising their children will be wrongly taken away from them. *In re Brock, supra* at 111.

Consistent with due process requirements, the Juvenile Code also limits the trial court's dispositional authority in situations where jurisdiction is obtained solely through unfitness findings against one parent. Although MCL 712A.6 permits a trial court to issue "orders affecting adults" once it obtains jurisdiction over a child, the Juvenile Code limits the trial court to issuing only those orders which are "necessary" for the child's well-being and are "incidental to the jurisdiction of the court over the juvenile." MCL 712A.6; see *In re Macomber*, 436 Mich 386, 399; 461 NW2d 671 (1990) ("The word 'necessary' is sufficient to convey to probate courts that they should be conservative in the exercise of their power over adults."); *State Fire Marshall v Lee*, 101 Mich App 829, 834; 300 NW2d 748 (1980) (adopting Black's Law Dictionary definition of incidental to mean "[d]epending upon or appertaining to something else as primary; something necessary, appertaining to, or depending upon another which is termed the principal; something incidental to the main purpose."). Similarly, MCL 712A.18, which enumerates the specific orders a court may enter at a dispositional hearing, states that those orders can only be entered into "in view of the facts proven and ascertained." MCL 712A.18(1). No such facts exist with respect to unadjudicated parents.

Read together, these provisions create a constitutionally coherent scheme which allows a trial court to obtain jurisdiction over a child based on findings against one

parent but prohibits the court from using its dispositional powers to infringe upon an unadjudicated parent's substantive due process right to direct the care, custody and control of his child.

C. The "One Parent Doctrine" Permits Courts To Deprive Unadjudicated Parents Of Their Right To Direct The Care, Custody And Control Of Their Children Without Establishing Their Parental Unfitness.

In this case, the trial court - applying the "one parent doctrine" - failed to provide these constitutionally-mandated protections to Mr. Farris. The doctrine, which was described by the Court of Appeals in *In re CR*, 250 Mich App 185; 646 NW2d 506 (2001), permits trial courts to obtain jurisdiction over children based on a plea by one parent. Then the trial court can place the child in foster care without ever adjudicating the unfitness of the other parent and can shift the burden onto the unadjudicated parent to demonstrate his or her fitness through compliance with a court-ordered treatment plan. *Id.* at 205. Notably, trial courts around this State have relied on this "one parent doctrine" from *In re CR* to enter dispositional orders against unadjudicated parents even though the doctrine was created by one sentence of dicta. The father in *In re CR* had voluntarily availed himself of the court's jurisdiction on the record by entering into an agreement with the DHS in exchange to having the children placed with him. *Id.* at 188.

Consistent with the dicta holding from *In re CR*, the trial court here applied the one parent doctrine to deprive Mr. Farris of his procedural rights and to subject him to a detailed service plan. On the day of the adjudication trial, Keagan's mother entered into a no contest plea to three of the allegations in the petition against her after being advised of the significant procedural rights she was waiving. (11/18/10 Tr. at 8-10). Yet the trial court kept Keagan in his mother's home while ordering all of the parents, including Mr. Farris, to comply with a treatment plan. (11/18/10 Tr. at 12; 11/18/10 Order of Adjudication at 3). Mr. Farris was ordered to undergo a psychological evaluation, complete drug screens, enroll in an anger management program and finish a substance abuse evaluation. (11/18/10 Tr. at 14-15; 02/16/11 Tr. at 5-6). Mr. Farris's contact with his son was also limited to supervised parenting time. (11/24/10 Order of Adjudication; 11/04/10 Service Plan, p. 6). Prior to ordering Mr. Farris to complete a treatment plan, the court never adjudicated his parental unfitness. Unlike Ms. Thornburg and Mr. Jeska who entered into a parent agency agreement for services, Mr. Farris never agreed to his service plan. (11/04/10 Service Plan; 11/18/10 Tr. at 12-13, 14-15).

Then, when problems arose between Keagan's mother and her boyfriend which necessitated Keagan's removal from his mother's home, the trial court refused to place Keagan in Mr. Farris's home. Mr. Farris's counsel requested placement at the emergency removal hearing but the court denied the request and instead placed Keagan

in foster care. (02/04/11 Tr. at 19). The trial court refused to place Keagan with his father - relying on testimony that Mr. Farris had not complied with all aspects of the court-ordered treatment plan and because he had tested positive for cocaine while on probation, an allegation that was later proven to be false. (02/04/11 Tr. at 13-14). As it made explicit several hearings later, the trial court had shifted the burden onto Mr. Farris to prove his parental fitness by fully complying with his treatment plan. (04/27/11 Tr. at 115 - noting that DHS was "giving you an opportunity to prove that you should have your child back."). Because Mr. Farris had failed to prove his parental fitness by completing every last aspect of his treatment plan, the trial court left his son in foster care. Ultimately, it terminated Mr. Farris's parental rights on this basis.

The application of the "one parent doctrine" in this case and many others across the state violates the Constitution because it creates a scheme where the burden is shifted to presumptively fit parents like Mr. Farris to prove their fitness. This type of burden-shifting was rejected by the United States Supreme Court in *Stanley v Illinois*. At issue in *Stanley* was an Illinois law which automatically placed the children of unwed fathers in foster care upon the death of their mother. *Id.* at 646. The State argued that proof that an unmarried mother of a child was dead was enough to separate the children from their father. The State sought to shift the burden of proving parental fitness onto the father whom it said could prove his ability to care for the child by filing

for guardianship or adoption, proceedings in which he would be treated as a legal stranger to the child. *Id.* at 647.

The Supreme Court rejected the argument and held that the Constitution requires, as a matter of due process, that the father have a "hearing on his fitness as a parent before his children were taken from him." *Id.* at 649. The Court found that the State's interest in presuming the unfitness of all unmarried fathers and efficiently disposing of their rights did not outweigh the constitutional interests of the father. The Court stated:

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. *Id.* at 656-657.

The Court made clear that infringing upon a parent's right to custody of his children is strictly forbidden under the Constitution absent a judicial determination of parental unfitness.

This constitutional burden cannot be satisfied by making unfitness findings against the other parent. In *Parham v JR, supra*, the United States Supreme Court noted that "[t]he statist notion that governmental power should supersede parental authority in *all* cases because *some* parents abuse and neglect children is repugnant to American tradition." *Id.* at 603. Other federal decisions have made similar findings. See, e.g.,

Burke v County of Alameda, 586 F3d 725, 733 (9th Cir 2009) (holding that where the noncustodial parent was not accused of wrongdoing and the State failed to investigate the possibility of placing his daughter with him rather than the government, a reasonable jury could find his constitutional rights were violated); *Wallis v Spencer*, 202 F3d 1126, 1142 n. 14 (9th Cir 2000) (“The government may not, consistent with the Constitution, interpose itself between a fit parent and her children simply because of the conduct - real or imagined - of the other parent.”).

But this is precisely what the “one parent doctrine” allows. It permits juvenile courts to infringe upon the constitutional rights of both parents based solely on findings against one parent. It then allows the court to place the burden on the unadjudicated parent to demonstrate his fitness by complying with a treatment plan while his child remains in foster care. It also authorizes a trial court to terminate the unadjudicated parent’s rights based on his failure to comply with the service plan. The “one parent doctrine” conflicts with the constitutional precedent of this Court and the United States Supreme Court and must be overruled.

D. The Overwhelming Majority of States To Address The Rights Of Unadjudicated Parents Have Rejected The One Parent Doctrine.

Numerous states have considered and rejected the “one parent doctrine,” recognizing that parental unfitness must be proven before the state can interfere with a

parent's substantive due process right to have care and custody of his children.³ Most recently, for example, the Nevada Supreme Court thoroughly analyzed the "one-parent

³ See, e.g., *Meryl R v Ariz Dep't of Econ Sec*, 992 P2d 616, 618; 196 Ariz 24 (1999) (finding that the court correctly dismissed a dependency case because the child had a noncustodial father who was ready and willing to parent him); *In re DS*, 52 A3d 887 (DC Ct App 2012), *aff'd* on rehearing in *In re DS*, 60 A3d 1225 (DC Ct App 2013) (finding that an unadjudicated, willing, parent who had relationship with his children was entitled to custody absent a finding by clear and convincing evidence to the contrary); *In re Austin P*, 118 Cal App 4th 1124, 1128; 13 Cal Rptr 3d 616 (2004) (applying California statute that instructs courts to place children with unadjudicated parents absent a detriment finding); *People ex rel AH*, 271 P3d 1116, 1123 (Colo Ct App 2011) (ordering return of child to parent because the father had not been adjudicated); *People ex rel US*, 121 P3d 326, 328 (Colo Ct App 2005) ("Nothing in the statute grants a court the power to impose a treatment plan on a parent when the child has not been found to be dependant and neglected by that parent."); *JP v Dep't of Children and Families*, 855 So 2d 175 (Fla Dist Ct App 2003) (recognizing the requirement to transfer physical custody of the child to the unadjudicated parent); *In re MK*, 649 NE2d 74, 80-82; 271 Ill App 3d 820 (1995) (permitting the court to take jurisdiction over a child based on the conduct of one parent but finding that custody of the child should be awarded to the fit parent); *In re MML*, 900 P2d 813, 823; 258 Kan 254 (1995) (finding that a parent's fundamental right to custody cannot be disturbed by the State absent a showing of unfitness); *In re Sophie S*, 891 A2d 1125, 1133; 167 Md App 91 (2006) (noting that where one parent is "able and willing" to care for child, a court may not adjudge the child to be in need of assistance); *In re Russell G*, 672 A2d 109, 114; 108 Md App 366 (1996) ("A child who has at least one parent willing and able to provide the child with proper care and attention should not be taken from both parents and be made a ward of the court."); *In re ML*, 757 A2d 849, 851; 562 Pa 646 (2000) ("[A] child is not dependent if the child has a parent who is willing and able to provide proper care to the child."); *In the Interest of Amber G*, 250 Neb 973, 984; 554 NW2d 142 (1996) ("While it is true that the juvenile court has broad discretion to determine placement, that discretion is limited by the presumption in favor of the biological parent. Absent an affirmative finding of unfitness, the father is entitled to custody of his children."); *In re Bill F*, 761 A2d 470, 476; 145 NH 267 (2000) (finding that the court must give an unadjudicated parent a full hearing at which the State must prove unfitness prior to depriving him of custody); *New Mexico ex rel. Children Youth & Families Dep't v Benjamin O*, 160 P3d 601, 609-610; 141 NM 692 (2007) (reversing termination because the trial court did not consider placing the child with the unadjudicated father); *In re JAG*, 617 SE2d 325, 332; 172 NC App 708 (2005) (finding that

doctrine" in light of constitutional requirements and declared that "each parent is entitled to a hearing before being deprived of the custody of his or her child." *In re Parental Rights as to AG*, 295 P3d 589, 593 (Nev 2013) (attached to this Application at Tab 3). In that case, the child was taken into foster care by the State based on her mother's conduct, which included drug use. *Id.* at 590. The father was prohibited from contacting the mother and child by a protective order that had been issued due to alleged domestic violence. *Id.* at 591. The father also tested positive for marijuana and methamphetamine. *Id.* The state agency subsequently filed a neglect petition against both parents, and the mother admitted to several allegations. *Id.* The father denied neglecting the child. *Id.* As in this case, the juvenile court took jurisdiction over the child based on the mother's plea and set a dispositional hearing as to the mother. *Id.* An evidentiary hearing was set as to the father. *Id.* The agency subsequently dismissed the petition regarding the father, yet it filed a service plan listing services with which it wanted the father to comply. *Id.* The father did not sign the service plan. *Id.*

At a dispositional hearing held around that time, the father requested that the child be placed with him, as Mr. Farris did here. *Id.* By that time, the protective order against the father had been modified to allow him contact with the child. *Id.* The trial

the trial court erred in denying fit parent physical custody); *In re NH*, 373 A2d 851, 856; 135 Vt 230 (1977) (permitting adjudication of the child based on findings against one parent but mandating that the child be placed with other parent absent evidence of unfitness).

court denied the father placement of the child, kept the child in foster care, and limited the father to supervised parenting time. *Id.* at 591-92. The trial court issued this decision despite the lack of any findings that the father was unfit. The father then filed a motion requesting dismissal of the child protection case and placement of the child with him or, alternatively, to begin the reunification process with unsupervised visits in his home. *Id.* at 592. The trial court denied the motion, maintained the child's placement in foster care, and continued the father's supervised visits, because although the father had one recent negative drug test, he had not submitted to drug testing for approximately five months prior to that screen. *Id.* Six months later, at a permanency planning hearing, the court approved a permanency plan of reunification with the father and a concurrent plan of termination of parental rights. *Id.* The court also ordered the father to complete services. *Id.* After another six months, a permanency planning hearing was held, and the father was found to have failed to comply with services because he had failed another drug test, failed to maintain contact with the agency, and had not attended any counseling or substance abuse treatment. *Id.* The permanency plan was changed to termination of parental rights and adoption. *Id.* A termination of parental rights petition was filed, but the district court denied the petition, noting that the father had been an unadjudicated parent throughout the case. *Id.* In other words, his parental unfitness had never been proven.

The agency appealed to the Nevada Supreme Court, arguing precisely the one-parent doctrine: once jurisdiction over a child is obtained based on the conduct of one parent, the juvenile court can place the child in foster care even if the other parent is available to take custody. *Id.* at 594. The agency also argued that the juvenile court has the statutory authority to order the unadjudicated parent to complete services in order to demonstrate his fitness, and that a failure to complete such services can lead to a termination of parental rights. *Id.* at 595.

The Nevada Supreme Court disagreed after engaging in a thorough analysis of the constitutional protections of parental rights rooted in substantive due process. *Id.* at 595-96. Although the court found that jurisdiction can be obtained based on the conduct of one parent, it held that an unadjudicated parent cannot be denied custody of the child and required to complete a case service plan. *Id.* The court noted that the juvenile court had been concerned about the father's inconsistent compliance with the case plan but rejected that concern, writing that it was "a case plan that [the father] should not have been required to complete in the first place." *Id.* at 596.

The Nevada Supreme Court thoughtfully sought to balance competing concerns between a child's health and safety and protections for the constitutional rights of parents, concluding that if the agency believes that a parent is not fit to have custody of his children, it should file a petition and prove the allegations. *Id.* at 596-97. The court wrote that requiring a petition and proof of neglect or abuse "protects the due process

rights of the parent's relationship with his child, while also serving the government's interest in protecting the child's welfare if there is an adequate basis for concern." *Id.* at 597. The court noted that without findings of parental unfitness, "a parent is presumed to make decisions in the best interest of his or her child." *Id.* at 596 (citing *Troxel, supra* at 65). The burden cannot be shifted onto a parent to prove his fitness through service compliance absent the parent being adjudicated unfit in the first place. *Id.*

As noted by the Nevada Supreme Court and other courts across the country, the "one parent doctrine" violates the substantive due process rights of unadjudicated parents and should be overruled by this Court.

II. THE TRIAL COURT VIOLATED MR. FARRIS'S EQUAL PROTECTION RIGHTS BY ARBITRARILY DENYING HIM A PROCEDURAL RIGHT AVAILABLE TO SIMILARLY- SITUATED PARENTS.

Standard of Review.

Constitutional questions and issues of statutory interpretation, as well as family division procedure under the court rules, are reviewed de novo. *In re Rood, supra* at 91; *Dep't of Human Svs v Cox, supra* at 536. Although Mr. Farris immediately requested placement of Keagan when the trial court was considering whether to place Keagan in foster care, (02/04/11 Tr. at 19), he did not preserve the constitutional issue at the trial court. But this Court may still review the issue to determine whether there was plain

error affecting Mr. Farris's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). This issue was also fully briefed in the Court of Appeals and addressed in the Court of Appeals' opinion. (See Appellant's COA Brief, pp. 30-41; COA Reply Brief, pp. 1-6; *In re K Farris*, *supra* at 5-9).

The trial court denied Mr. Farris equal protection of the law when it place his son in foster care and ordered him to comply with a treatment plan without ever adjudicating him as an unfit parent. The constitutional guarantee of equal protection means that "all persons similarly circumstanced must be treated alike." *El Souri v Dep't of Soc Svs*, 429 Mich 203, 207; 414 NW2d 679 (1987) (internal quotes omitted); *In re AH*, 245 Mich App 77, 82; 627 NW2d 33 (2001). Thus, the State cannot arbitrarily deny one person a right that it has given to others in similar circumstances. When such a practice by the State impacts a fundamental liberty interest, the State must demonstrate that the "classification scheme has been precisely tailored to serve a compelling governmental interest." *Doe v Dep't of Soc Svs*, 439 Mich 650, 662; 487 NW2d 166 (1992); *In re AH*, *supra* at 83.

Distinctions that arbitrarily deprive some people, but not others, of a procedural right are especially offensive to the Equal Protection Clause. In a series of cases, the United States Supreme Court has applied this reasoning to invalidate the arbitrary assignment of procedural rights. For example, in *Rinaldi v Yeager*, 384 US 305, 310; 86 S

Ct 1497; 16 L Ed 2d 577 (1966), the Court found that a statute that required repayment of certain appellate court costs only by some imprisoned appellants violated the Equal Protection Clause. The Court explained that procedural avenues “must be kept free of unreasoned distinctions that can only impede open and equal access to the courts.” *Id.* Likewise, in *Lindsey v Normet*, 405 US 56; 92 S Ct 862; 31 L Ed 2d 36 (1972), the Court struck down a statute that imposed a “double bond” requirement on certain tenants who wished to appeal adverse housing decisions. *Id.* at 79. The same reasoning applied in *Stanley, supra*, where the Court concluded that denying unwed fathers the right to a hearing and proof of neglect “while granting it to other Illinois parents is inescapably contrary to the Equal Protection Clause.” *Id.* at 658.

The United States Supreme Court extended this line of reasoning in *MLB v SLJ*, 519 US 102; 117 S Ct 555; 136 L Ed 2d 473 (1996). There, the Court, articulating both equal protection and due process concerns, held that Mississippi could not withhold a trial record from indigent parents appealing the termination of their parental rights. *Id.* at 121, 128. The Court noted 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.” *Id.* at 119. With such an important interest at stake, the Court found that a state distinction that imposed “different consequences on two categories of persons” was inconsistent with the Equal Protection Clause. *Id.* at 107, 127 (internal quotations omitted).

The "one parent doctrine" violates the equal protection rights of unadjudicated parents like Mr. Farris by arbitrarily denying them a state-based procedural right - the right to an adjudication trial - that other parents routinely receive. The doctrine arbitrarily assigns similarly situated parents markedly different procedural rights. In the first category of cases, only one parent of a child is named as a respondent. These parents have an absolute right to an adjudication trial in which the allegations against them must be proven by the DHS before a court can place their children in foster care. The trial can be before a judge, jury, or referee, and the rules of evidence apply. If the parent prevails, the State has no authority to infringe upon the parent's right to direct the care of his or her child.

The "one parent doctrine," however, creates a second category of cases - those in which both parents are named as co-respondents - where the right to an adjudication trial is summarily eliminated for one parent. In these cases, the doctrine makes each parent's right to a trial reciprocally contingent on the findings against the other parent. If findings are made - after a trial or a plea - against one of the respondents, the other respondent automatically loses the right to a trial. The unadjudicated parent is deprived of the opportunity to contest the allegations in the petition against him at a trial.

A review of the court rules and statutes regarding termination cases reveals how the application of the "one parent doctrine" creates serious equal protection concerns.

On one hand, some parents (those against whom allegations of abuse and neglect have been made) would receive the benefits of an adjudication trial. For these parents, the State would have to file a petition in which the allegations of neglect or abuse would be detailed. MCR 3.961. These parents would have a right to discovery and the ability to request a trial before a jury. MCR 3.912; MCR 3.922. The case against them would have to be proven by a preponderance of evidence, and the rules of evidence would apply. MCR 3.972(C)(1). Additionally, the specific standard set forth in MCL 712A.2(b), which has been interpreted on numerous occasions by this Court and the Court of Appeals, would govern the unfitness determination. See, e.g., *People v Tennyson*, 487 Mich 730; 790 NW2d 354 (2010).

For unadjudicated parents, none of these safeguards would exist. Nothing would require the State to detail the allegations of unfitness in writing. The unadjudicated parent would not have the right to a trial before a jury, nor would he have the right to discovery.⁴ No legal standard would govern the trial court's unfitness determination - since none is set forth in the dispositional statutes or court rules - nor is a standard of proof stated. Evidentiary standards would also be relaxed since the Michigan Rules of Evidence do not apply at dispositional hearings. MCR 3.973(E)(1); MCR 3.975(E). "All relevant and material evidence, including oral and written reports,

⁴ Michigan Court Rule 3.922 only affords parents the right to discovery before trials. MCR 3.922(A).

may be received and may be relied upon to the extent of its probative value.” MCR 3.973(E)(2). Additionally, the court would have the ability to “consider . . . any written or oral evidence concerning the child” from a lengthy list of people including the child’s foster parent, child caring institution, or relative with whom the child is placed. MCR 3.973(E)(2); MCR 3.975(E). While some parents would receive an unfitness determination made after a trial full of procedural safeguards, others would have determinations made with no notice of the specific allegations of unfitness, no evidentiary rules and no defined legal standards. The Constitution does not permit this type of arbitrariness.

Judge Shapiro noted these equal protection problems in his dissent. He observed that while “[the mother] was advised of a long series of rights she was giving up by admitting to three paragraphs in the petition, [Mr.] Farris neither received nor waived any of those rights.” *In re K Farris, supra* at 8. Instead, the trial court presumed his unfitness and the case simply moved on to the dispositional phase of the proceedings where the trial court infringed upon the rights of both parents. Judge Shapiro summarized the equal protection problems created by the “one parent doctrine” in the following way: “Under the one-parent doctrine, the at-fault parent receives substantial procedural protections but when she waives them, she waives them for the not-at-fault parent who has no right to object, let alone demand a trial.” *In re K Farris, supra* at 8 (dissenting opinion).

The Equal Protection Clause of the Fourteenth Amendment does not permit this type of arbitrariness. Just as the State may not arbitrarily deny a litigant access to the courts to vindicate a state-based legal right, or access to appellate review, the State may not make a parent's right to an adjudication trial contingent on whether that parent is a sole respondent or a co-respondent in a petition. Simply put, procedural rights - such as the right to an adjudication trial - "cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection clause." *Lindsey, supra* at 77.

III. THE TRIAL COURT CLEARLY ERRED WHEN IT DETERMINED THAT THERE WAS CLEAR AND CONVINCING EVIDENCE TO TERMINATE MR. FARRIS'S PARENTAL RIGHTS.

Standard of Review.

A trial court's decision to terminate parental rights is reviewed for clear error. MCR 3.977(J); *In re Sours Minor*, 459 Mich 624, 633; 593 NW2d 520 (1999). This standard controls the review of "both the court's decision that a ground for termination has been proven by clear and convincing evidence and, where appropriate, the court's decision regarding the child's best interest." *In re Trejo Minors*, 462 Mich 341, 356-357; 612 NW2d 407 (2000). A decision is clearly erroneous when, "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made." *In re JK*, 468 Mich 202, 209-210; 661 NW2d 216 (2003).

Both this Court and the United States Supreme Court have long recognized that cases involving the involuntary, permanent termination of parental rights are “unique in the kind, the degree, and the severity of the deprivation they inflict.” *In re Sanchez*, 422 Mich 758, 766; 375 NW2d 353 (1985); *MLB v SLJ*, 519 US 102, 118; 117 S Ct 555; 136 L Ed 2d 473 (1996). A decision to terminate parental rights is both total and irrevocable, and, unlike other custody proceedings, it leaves the parent, who possesses a constitutional right to direct the upbringing of his or her child, *Santosky v Kramer*, 455 US 745, 753; 102 S Ct 1388; 71 L Ed 2d 599 (1982), with no legal right to visit or communicate with the child or to participate in - or even to know about - any important decision affecting the child’s religious, educational, moral, or physical development. *Hunter v Hunter*, 484 Mich 247, 269; 771 NW2d 694 (Mich 2009) (observing that termination cases involve an “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 is not surprising that this forced dissolution of the parent-child relationship “has been recognized as a punitive sanction by courts, Congress and commentators,” *Sanchez, supra* at 766, and has been described by courts across the country as the equivalent of a “civil death penalty.” See, e.g., *ME v Shelby County Dep’t of Human Resources*, 972 So 2d 89, 102 (Ct Civ App Ala 2007); *In re Tammila G*, 148 P3d 759, 763 (Nev 2006); *In re KAW*, 133 SW3d 1, 12 (Mo 2004).

In order to protect the fundamental rights at stake in termination proceedings, a parent's unfitness, prior to termination, must be proven by clear and convincing evidence, the most stringent standard of proof applied in civil proceedings. *Santosky, supra* at 769; *Hunter, supra* at 270. ("To protect the parental interest from improper state intrusion . . . the state must show that the natural parent is unfit."); MCL 712A.19b(3).

As described by this Court:

Evidence is clear and convincing when it produces 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... Evidence may be uncontroverted, and yet not be clear and convincing." *In re Martin*, 450 Mich 204, 227; 538 NW2d 399 (1995).

Additionally, demonstrating parental unfitness is a weighty burden. The fundamental liberty interest of parents "does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State," *Santosky, supra* at 753, nor can a termination decision be based solely on a belief that the child's best interests mandate the result. *In re JK, supra* at 211. As noted by the United States Supreme Court, little doubt exists "that the Due Process Clause would be offended '[if] a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children . . . for the sole reason that to do so was thought to be in the children's best interest.'" *Quilloin v Walcott*, 434 US 246, 255; 98 S Ct 549; 54 L Ed 2d 511 (1978).

The Michigan legislature, taking into account this weighty burden, has enumerated specific conditions, of which one or more must be proven by clear and convincing evidence, before a court can terminate parental rights. MCL 712A.19b(3); *Hunter, supra* at 269-270.

Here, the trial court determined that Mr. Farris was an unfit parent pursuant to MCL 712A.19b(3)(c)(i), MCL 712A.19b(3)(g), and MCL 712A.19b(3)(j).⁵ As is discussed more fully below, the trial court erred in finding that statutory grounds for termination existed, and erred in concluding that an unadjudicated parent's failure to comply with all aspects of a treatment plan provides clear and convincing evidence of that parent's unfitness.

MCL 712A.19b(3)(g) requires the DHS to prove that a parent both "fails to provide proper care or custody" for the children and has no reasonable expectation to provide such care within a reasonable time considering the child's age. MCL 712A.19b(3)(j) requires proof that there is a "reasonable likelihood, based on the conduct or capacity of the child's parent" that the child will be harmed if he or she is returned to the home of the parent.

⁵ The Court of Appeals agreed with Appellant-Father that the statutory ground under MCL 712A.19b(3)(c)(i) was not satisfied by clear and convincing evidence because "none of the conditions that [mother] pleaded to at adjudication pertained to Farris," and the DHS could not establish that the "conditions that led to the adjudication continued to exist as related to him." *K Farris, supra* at 10. Therefore, this Application will only address why the trial court erred in finding the statutory grounds for subsections (g) and (j) as to Mr. Farris.

The evidence in this case did not demonstrate under any standard of proof that Mr. Farris either provided improper care or custody to Keagan or harmed him in any way. The DHS never accused Mr. Farris of ever abusing or neglecting his son.

Instead, the uncontroverted evidence proved that Mr. Farris shared a close bond with Keagan. (12/06/11 Tr. at 84, 133-136; 02/06/12 Tr. at 62-63). He regularly paid child support, tested negative for drugs, and maintained appropriate housing for Keagan in the home of his parents' home who were excited to have Keagan placed there. (12/06/11 Tr. at 160; 04/07/12 Tr. at 13-16; 01/24/12 Tr. at 21). Even Keagan's counselor testified that she opposed the termination of Mr. Farris's parental rights. (04/17/12 Tr. at 25, 30-31).

But the Court of Appeals affirmed the trial court's termination of Mr. Farris's parental rights because he had not completed all aspects of his treatment plan. It held that "[a] parent's failure to participate in and benefit from a service plan is evidence that the parent will not be able to provide a child with proper care and custody."⁶ *In re K Farris, supra* at 10. Further, it found that Keagan would be subject to harm in Mr. Farris's home because Mr. Farris had not complied with supervised parenting time with his son. *Id.* at 10.

⁶ In support of this reasoning, the Court of Appeals cited this Court's decision in *In re JK, supra*, in which similar language appeared. *Id.* at 214. But importantly, *In re JK* involved a mother who was adjudicated to be unfit after she pled to marijuana use. *Id.* at 204. Thus, the trial court established a need for services to remedy the unfitness. Here, Mr. Farris was never adjudicated as an unfit parent.

However, this logic makes little sense when applied to unadjudicated parents.

Judge Shapiro described the flaw in this reasoning succinctly and accurately. He wrote:

Had Farris been found to have engaged in neglect or abuse in an adjudicative proceeding, I would agree that failing to comply with DHS directives and not benefitting from the programs would be a proper basis to terminate. However, there was *never* a showing that Mr. Farris needed any of the DHS services in order to be a fit parent. He was never determined to be an *unfit* parent until after being denied custody of his son for two years when his "non-cooperation" with the agency that advocated keeping the child from him was deemed a sufficient basis to call him "unfit." *In re K Farris, supra* at 9 (dissenting opinion).

In short, the trial court erred in finding that statutory grounds to terminate Mr. Farris's parental rights existed. It mistakenly presumed that Mr. Farris was unfit based on his failure to complete all aspects of his treatment plan when the need for such a treatment plan was never established in the first place. Simply put, an unadjudicated parent's failure to complete a treatment plan cannot serve as the basis for terminating that parent's rights without an adjudication finding that the parent is unfit.

CONCLUSION

The trial court violated Appellant-Father's constitutional rights when it required him to comply with a detailed service plan even though there had never been any allegation that Appellant-Father had abused or neglected his son, Keagan. Indeed, Keagan and his three-half siblings were brought into the child welfare system because

of his mother's medical neglect of Keagan's two youngest half siblings. The trial court foisted the service plan on Appellant-Father without giving him an opportunity for an adjudication trial because the respondent-mother plead to some of the allegations in the petition that she had neglected her youngest children, but not due to any plea by Appellant-Father. Indeed, there was nothing to which Appellant-Father could have pled as the non-respondent, non-neglectful, and presumptively fit parent. Nonetheless, when Appellant-Father could not complete every aspect of the detailed service plan, the trial court used that as a basis to terminate his parental rights to his son. Not only was this insufficient to satisfy the statutory grounds for termination, but the whole process violated Appellant-Father's due process rights and denied him equal protection of the law.

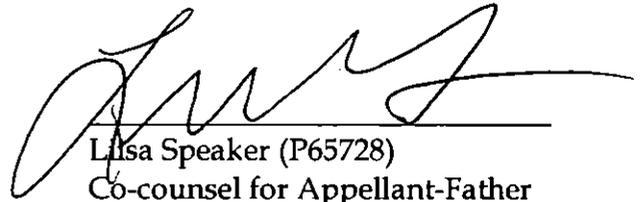
REQUEST FOR RELIEF

For the reasons stated above, James Farris requests this Court grant this Application and consolidate the matter with *In re Sanders*, 493 Mich 959; 828 NW2d 391 (2013), which is currently pending before the Court. Alternatively, Mr. Farris requests that this Court issue a peremptory order reversing the trial court's decision terminating his parental rights to Keagan Farris. This Court should rule that absent an adjudication finding of unfitness, the trial court must return Keagan to the care and custody of his father.

Respectfully submitted,

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