

IN THE MICHIGAN SUPREME COURT

**Appeal from the Michigan Court of Appeals
Wilder, PJ, and Saad and K.F. Kelly, JJ**

In the Matter of ARS, a Minor

Circuit Court No.: 13-003727-AF
Court of Appeals No.: 318638
Supreme Court No.: 150142

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***AMICUS CURIAE* BRIEF OF THE
LEGAL SERVICES ASSOCIATION OF MICHIGAN**

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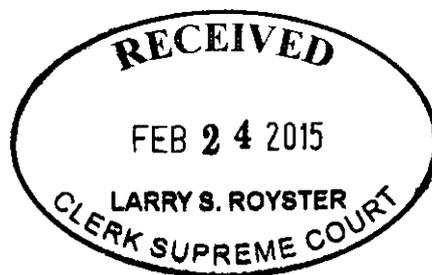


TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW IV

STATEMENT OF INTEREST OF *AMICUS CURIAE* LEGAL SERVICES ASSOCIATION OF MICHIGAN 1

I. INTRODUCTION 3

II. BACKGROUND 4

III. ANALYSIS..... 4

 A. The Court Should Deny Appellants’ Application for Leave to Appeal Because There is No Issue of Jurisprudential Significance and the Court of Appeals Did Not Clearly Err..... 4

 B. The Federal and State Constitutions Mandate Upholding Natural Fathers’ Rights When the Adoption Code and Paternity Act Intersect..... 5

 C. The Trial Court Correctly Applied *In re MKK*’s “Good Cause” Analysis 9

 1. The “Good Cause” Analysis Properly Balances a Putative Father’s Constitutional Rights with the Adoption Code..... 9

 2. The Court of Appeals has Consistently Applied *MKK*..... 10

 3. Musall Demonstrated “Good Cause” to Stay the Adoption Proceedings. 14

 D. The Court Should Reject the Holding of *In re RFF* and Adopt a Broad Definition of “Ability” in the Context of a Putative Father’s Ability to Provide Support or Care 14

 E. The Trial Court’s Failure to Issue an Order of Filiation Was Harmless Error 17

IV. CONCLUSION..... 18

TABLE OF AUTHORITIES

CASES

Hauser v Reilly,
212 Mich App 184; 536 NW2d 865 (1995).....8, 17

In re ARS,
497 Mich 911; 856 NW2d 76 (2014).....1

In re Hudson,
483 Mich 928; 763 NW2d 618 (2009) (CORRIGAN, J., concurring)16

In re Mitchell,
485 Mich 922; 773 NW2d 663 (2009).....16

In re MKK,
286 Mich App 546; 781 NW2d 132 (2009).....*Passim*

In re RFF,
242 Mich App 188; 617 NW2d 745 (2000)..... 14-16

In re RFF,
463 Mich 895; 618 NW2d 575 (2000) (CORRIGAN, J, dissenting)15

In re Utrera,
281 Mich App 1; 761 NW2d 253 (2008).....9

Lassiter v Dep't of Social Servs,
452 US 18; 101 S Ct 2153; 68 L Ed 2d 640 (1981).....5

Lehr v Robertson,
463 US 248; 103 S Ct 2985; 77 L Ed 2d 614 (1983)..... 7-8, 10, 17

Mathews v Eldridge,
424 US 319; 96 S Ct 893; 47 L Ed 2d 18 (1976).....5

People v Buie,
491 Mich 294; 817 NW2d 33 (2012).....9

Quilloin v Walcott,
434 US 246; 98 S Ct 549; 54 L Ed 2d 511 (1978)..... 6-8

Rowell v Security Steel Processing Co,
445 Mich 347; 528 NW2d 409 (1994).....15

Santosky v Kramer,
455 US 745; 102 S Ct 1388; 71 L Ed 2d 599 (1982)..... 3, 5-7

Stanley v Illinois,
405 US 645; 92 S Ct 1208; 31 L Ed 2d 551 (1972).....*Passim*

Troxel v Granville,
530 US 57; 120 S Ct 2054; 147 L Ed 2d 49 (2000).....3, 6

STATUTES

MCL 710.21 *et seq.*.....3

MCL 710.21a(b)10

MCL 710.24a(2)3

MCL 710.25(1)v, 9

MCL 710.25(2)v, 9, 14

MCL 710.25(c)13

MCL 710.36-39.....3

MCL 710.39(2) v, 14-15

MCL 710.56.....3

MCL 722.711 *et seq.*.....3

OTHER AUTHORITIES

Fourteenth Amendment5, 8

MCR 2.613(A)17

MCR 3.800(A)17

MCR 3.800 *et seq.*17

MCR 3.801-3.80717

MCR 7.302(B)4

MCR 7.302(B)(5)..... 10-11

QUESTIONS PRESENTED FOR REVIEW

1. A court may adjourn an adoption proceeding based on a showing of “good cause.” MCL 710.25(2). In *In re MKK*, 286 Mich App 546, 562; 781 NW2d 132 (2009), the Court of Appeals set forth several factors to consider in making a good cause determination. Did the trial court properly apply those factors in finding good cause to stay the adoption proceeding here, where it determined there was never any real doubt that Musall was the biological father, the paternity action was not filed to thwart the adoption proceeding, Musall expressed a sincere interest in being a father, and the mother and maternal grandparents thwarted his efforts to do so?

Trial Court answered: Yes.

Court of Appeals answered: Yes.

Appellants answer: No.

Appellee answers: Yes.

LSAM answers: Yes.

2. In an adoption proceeding, a court may only terminate the paternal rights of a father if he fails to demonstrate that he “provided substantial and regular support or care in accordance with [his] ability to provide support or care for the mother during pregnancy or for either mother or child after the child’s birth during the 90 days before notice of the hearing was served upon him.” MCL 710.39(2). Did Musall adequately demonstrate that he provided substantial and regular support in accordance with his ability, where he provided financial support during the child’s mother’s pregnancy and his efforts to provide further support were impeded by the child’s mother and maternal grandmother?

Trial Court answered: Yes.

Court of Appeals answered: Did not address this issue.

Appellants answer: No.

Appellee answers: Yes.

LSAM answers: Yes.

3. Trial courts are required to give adoption proceedings “the highest priority.” MCL 710.25(1). Here, the Trial Court held an evidentiary hearing on the maternal grandparents’ adoption petition and adjudicated Musall’s paternity action only after considering all of the evidence in the adoption proceeding. Did the Trial Court give adequate consideration to the legislative mandate that all adoption proceedings “be considered to have the highest priority?”

Trial Court answered: Did not address this issue.

Court of Appeals answered: Did not address this issue.

Appellants answer: No.

Appellee answers: Yes.

LSAM answers: Yes.

STATEMENT OF INTEREST OF AMICUS CURIAE
LEGAL SERVICES ASSOCIATION OF MICHIGAN

Amicus curiae Legal Services Association of Michigan (“LSAM”) submits this brief to the Michigan Supreme Court in *In re ARS*. LSAM is a Michigan nonprofit organization incorporated in 1982. LSAM’s members are 13 of the largest civil legal services organizations in Michigan and collectively provide legal services to low-income individuals and families in more than 50,000 cases per year.¹ LSAM members have broad experience with a variety of family law cases where a low income parent’s rights to custody of his or her child is at stake—these involve custody and parenting time cases, third party custody actions, minor guardianship cases, child abuse and neglect cases, paternity proceedings, and adoption proceedings. LSAM members share a deep institutional commitment to ensuring that the rights of low-income families—parents and children—are respected in these proceedings. Almost all LSAM members work daily—*e.g.*, in public benefits, family law, and housing cases—with low income families that are involved in and impacted by adoption, paternity, or similar family law proceedings. And all LSAM members are institutionally interested in and committed to providing fair and equal access to the justice system for low-income individuals.

In particular, LSAM often represents indigent parents whose fundamental constitutional rights to the care and custody of their children are threatened by a party with significantly greater resources. Frequently, these cases involve grandparents seeking rights at the expense of a parent, a category of cases of which this case is an extreme example.

¹ LSAM’s members are: the Center for Civil Justice, Elder Law of Michigan, Lakeshore Legal Aid, Legal Aid and Defender, Legal Aid of Western Michigan, Legal Services of Eastern Michigan, Legal Services of Northern Michigan, Michigan Advocacy Program, Michigan Indian Legal Services, Michigan Migrant Legal Assistance Program, Michigan Legal Services, Michigan Poverty Law Program, and the University of Michigan Clinical Law Program.

LSAM submits this *amicus curiae* brief on behalf of the interests of indigent parents in protecting their constitutional and statutory rights to a relationship with their children. LSAM asks that the Court deny Appellants' application for leave to appeal. In the alternative, if the Court grants Appellants' application for leave to appeal, LSAM respectfully requests that the Court affirm the Court of Appeals.

I. INTRODUCTION

The U.S. Constitution, through the Due Process Clauses of the Fifth and Fourteenth Amendments, protects a parent's fundamental right to custody of his or her children. The U.S. Supreme Court has held that a "natural parent's desire for and right to the companionship, care, custody, and management of his or her children is an interest far more precious than any property right." *Santosky v Kramer*, 455 US 745, 758-759; 102 S Ct 1388; 71 L Ed 2d 599 (1982). Moreover, the Constitution presumes that a child's parents are fit and that "fit parents act in the best interests of their children." *Troxel v Granville*, 530 US 57, 68; 120 S Ct 2054; 147 L Ed 2d 49 (2000).

By statute, the Michigan legislature has likewise recognized the importance of natural parents and has established comprehensive procedures to protect the rights of parents and children against unwarranted interference by third parties. As to children born out of wedlock, the Paternity Act, MCL 722.711 *et seq.*, provides a judicial forum in which putative alleged fathers, mothers, or the Department of Human Services can seek a legal determination of paternity. Similarly, the Adoption Code, MCL 710.21 *et seq.*, provides procedures to ensure the best interests of adoptees are protected and to preserve the rights of interested parties. Indeed, the Legislature recognized that putative fathers are often interested parties in adoption cases. MCL 710.24a(2). Thus, absent certain preliminary determinations, a court in an adoption proceeding may not disturb the paternity rights of a putative father. *See* MCL 710.56 (as to legal fathers); MCL 710.36-.39 (as to putative fathers). While these complex statutory schemes often intersect, their intersection and interpretation must necessarily yield to overarching constitutional principles. *See, e.g., Stanley v Illinois*, 405 US 645, 649; 92 S Ct 1208; 31 L Ed 2d 551 (1972) (holding that state statutory presumption that burdens unwed fathers violates constitutional principles of due process of law).

Here, the trial court properly considered overarching constitutional principles in applying the Adoption Code and the Paternity Act in dismissing the adoption proceeding and deciding the paternity action. In doing so, the trial court interpreted those statutory frameworks to best protect the constitutional rights of Musall and his child and there is no need for this Court to review its decision. Overturning the lower courts' decisions would erode a natural father's constitutional rights and inappropriately intrude on the trial court's factual findings. Accordingly, the Court should deny Appellants' application for leave to appeal.

II. BACKGROUND

LSAM adopts the Statements of Jurisdiction and Material Proceedings and Facts in Respondent-Appellee's Brief.

III. ANALYSIS

A. **The Court Should Deny Appellants' Application for Leave to Appeal Because There is No Issue of Jurisprudential Significance and the Court of Appeals Did Not Clearly Err**

An application for leave to appeal must state the grounds on appeal and articulate why a grant of leave is appropriate. MCR 7.302(B). Absent other enumerated circumstances not applicable here, only jurisprudentially significant issues are grant-worthy. *Id.* The Court scheduled oral argument on whether to grant Appellants' application and ordered supplemental briefing on:

(1) whether the respondent father demonstrated adequate "good cause" under Section 25 of the Adoption Code, MCL 710.25(2), for the adjournment of the adoption proceeding, see *In re MKK*, 286 Mich App 546 (2009); (2) whether the respondent adequately demonstrated that he had "provided substantial and regular support or care in accordance with [his] ability to provide such support or care for the mother during pregnancy or for either mother or child after the child's birth during the 90 days before notice of the hearing was served upon him," MCL 710.39(2); and (3) whether the trial court gave adequate consideration to the legislative mandate that all adoption proceedings "be considered to have the highest priority" MCL 710.25(1). [*In re ARS*, 497 Mich 911; 856 NW2d 76 (2014)]

The Court should deny Appellants' application for leave to appeal. The trial court's decisions on the above-cited questions were based on specific factual findings required by statute and judicial precedent. The trial court made these key factual determinations based on the record before it, including a determination of Musall's credibility, which falls outside the purview of appropriate appellate review. A review of a trial court's "good cause" findings is not a significant jurisprudential question requiring the Court's input. Therefore, the Court should deny Appellants' application.

B. The Federal and State Constitutions Mandate Upholding Natural Fathers' Rights When the Adoption Code and Paternity Act Intersect

The Due Process Clause of the Fourteenth Amendment protects the rights of minor children and parents. *Santosky, supra* at 752–754 & n7. "Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Mathews v Eldridge*, 424 US 319, 332; 96 S Ct 893; 47 L Ed 2d 18 (1976). A review of "first principles" as to a child's best interests, a parent's interests, and the government's role in furthering and protecting those interests, is instructive and highlights the fundamental rights at stake in this case.

Minor children are vulnerable members of society and, as such, are deserving of special protection. *Stanley, supra* at 652. Courts have recognized this by holding that the best interests of a child are of paramount importance to society. *Lassiter v Dep't of Social Servs*, 452 US 18, 28; 101 S Ct 2153; 68 L Ed 2d 640 (1981) ("[T]he State has an urgent interest in the welfare of the child."). The interests of children and the interests of their fit parents are perfectly aligned under the law. Both the Fifth and Fourteenth Amendments recognize and provide "heightened protection against governmental interference" in "[t]he liberty . . . interest of parents in the care,

custody, and control of their children.” *Troxel, supra* at 65 (O’CONNOR, J.) (plurality opinion) (quoting *Washington v Glucksberg*, 521 US 702, 720; 117 S Ct 2258; 138 L Ed 2d 772 (1997)). The U.S. Supreme Court has “recognized on numerous occasions that the relationship between parent and child is constitutionally protected.” *Quilloin v Walcott*, 434 US 246, 255; 98 S Ct 549; 54 L Ed 2d 511 (1978). This liberty interest “is perhaps the oldest of the fundamental liberty interests recognized by this Court,” *Troxel, supra* at 65 (O’CONNOR, J.) (plurality opinion), and “is an interest far more precious than any property right.” *Santosky, supra* at 745.

The Constitution protects not only a father’s right to be a parent, but also the right to custody of his child. “It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.” *Stanley, supra* at 651 (quoting *Prince v Massachusetts*, 321 US 158, 166; 64 S Ct 438; 88 L Ed 645 (1944)). A parent’s “interest in retaining custody of his children is cognizable and substantial.” *Id.* at 652. Importantly, this fundamental liberty interest protects not only the rights of a parent, but, as the U.S. Supreme Court has recognized on several occasions, it promotes the best interests of the child. *See, e.g., Troxel, supra* at 68 (O’CONNOR, J.) (plurality opinion) (“[N]o court has found[] that [the parent] was an unfit parent. That aspect of the case is important, for there is a presumption that fit parents act in the best interests of their children.”). In *Parham v JR*, the U.S. Supreme Court recognized this link between a parent’s custody and the best interests of his or her child:

Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course; our constitutional system long ago rejected any notion that a child is “the mere creature of the State” and, on the contrary, asserted that parents generally “have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations.” *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925). *See also Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *Meyer*

v. Nebraska, 262 U.S. 390, 400 (1923). . . . The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children. 1 W. Blackstone, Commentaries *447; 2 J. Kent, Commentaries on American Law *190.

As with so many other legal presumptions, experience and reality may rebut what the law accepts as a starting point; the incidence of child neglect and abuse cases attests to this. That some parents "may at times be acting against the interests of their children" as was stated in *Bartley v. Kremens*, 402 F. Supp. 1039, 1047-1048 (ED Pa. 1975), *vacated and remanded*, 431 U. S. 119 (1977), creates a basis for caution, but is hardly a reason to discard wholesale those pages of human experience that teach that parents generally do act in the child's best interests. See Rolfe & MacClintock 348-49. The statist notion that governmental power should supersede parental authority in all cases because some parents abuse and neglect children is repugnant to American tradition. [442 US 584, 602-03; 99 S Ct 2493; 61 L Ed 2d 101 (1979).]

The interest at stake here—that of a father in his child—"undeniably warrants deference and, absent *a powerful countervailing interest*, protection." *Stanley, supra* at 651 (emphasis added); *see also Santosky, supra* at 760 ("But until the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship.").

The U.S. Supreme Court has addressed the rights of unwed fathers to their children in several cases. Critically, the Court has held that fundamental constitutional rights extend to unwed fathers. *See Stanley, supra* at 651 (declaring unconstitutional an Illinois law which automatically made children born out of wedlock wards of the state at the time of the unwed mother's death); *see also Quilloin, supra* (holding that a state may terminate the rights of a nonmarital father if due process is provided and a best interests of the child determination is made). Nonetheless, the Court recognized limitations to the rights of an unwed father. In *Lehr v Robertson*, the Court considered the rights of an unmarried father who had failed to provide any support to his two-year-old child and had failed to register in the state's putative father registry. *Lehr v Robertson*, 463 US 248, 254; 103 S Ct 2985; 77 L Ed 2d 614 (1983). The Court held that

the state could deprive the father of his parental rights without notice and hearing. *Id.* at 265. In characterizing the rights of unwed fathers, the Court stated, “the mere existence of a biological link does not merit equivalent constitutional protections.” *Id.* at 261. However, the Court acknowledged that in certain circumstances, an unwed father possesses full due process rights to the child:

When an unwed father demonstrates a full commitment to the responsibilities of parenthood by “coming forward to participate in the rearing of his child” his interest in personal contact with his child acquires substantial protection under the due process clause. At that point, it may be said that he ‘acts as a father toward his children.’ [*Id.* (quoting *Caban v Mohammed*, 441 US 380, 392 & 389 n7; 99 S Ct 1760; 60 L Ed 2d 297 (1979)).]

The Court of Appeals has cited *Lehr* and similarly held that biology alone does not give rise to a protected paternal interest: “The protected interest . . . is in the family life, not in the mere biological link between parent and child.” *Hauser v Reilly*, 212 Mich App 184, 188; 536 NW2d 865 (1995). Again, much like *Lehr*, *Hauser* acknowledged that certain unwed fathers are entitled to due process: “[I]f plaintiff in this case had an established relationship with his child, we would hold that he had a protected liberty interest in that relationship that entitled him to due process of law.” *Id.* at 188.

Against this constitutional backdrop, Musall is entitled to the full protection of the Due Process Clause of the Fourteenth Amendment. Unlike the fathers in *Lehr* and *Hauser*, the trial court made explicit factual findings that Musall supported and had a relationship with his daughter. Thus, the trial court did not recognize Musall’s paternal rights and responsibilities based on a mere biological link. Moreover, unlike in *Quilloin*, no court has made a best interests determination, let alone one that adoption is in the best interests of the child. Without such a determination, Musall is entitled to the panoply of constitutional protections, including the presumptions that he is a fit parent and that his interests align with those of his daughter. By

dismissing the adoption proceeding, the trial court thoughtfully considered these principles. A contrary ruling, as sought by Appellants, would vitiate Musall's constitutional rights.

C. The Trial Court Correctly Applied *In re MKK's* "Good Cause" Analysis

1. The "Good Cause" Analysis Properly Balances a Putative Father's Constitutional Rights with the Adoption Code

Proceedings under the Adoption Code are to be given "the highest priority," MCL 710.25(1), and may only be adjourned on a showing of "good cause." MCL 710.25(2). Though the Adoption Code does not define "good cause," this Court has held that "good cause" "simply means a satisfactory, sound or valid reason." *People v Buie*, 491 Mich 294, 319; 817 NW2d 33 (2012); *see also In re Utrera*, 281 Mich App 1, 10-11; 761 NW2d 253 (2008) (defining "good cause" as "a legally sufficient or substantial reason"). In *MKK*, the Court of Appeals held that "there may be circumstances in which a putative father makes a showing of good cause to stay adoption proceedings in favor of a paternity action." *MKK, supra* at 562. Noting that "the trial court must make a good cause determination based on the particular circumstances of the case," the Court reversed the trial court's refusal to stay an adoption proceeding and articulated several factors to consider in deciding whether to stay an adoption proceeding in favor of a paternity action:

[I]n cases such as this, where there is no doubt that respondent is the biological father, he has filed a paternity action without unreasonable delay, and there is no direct evidence that he filed the action simply to thwart the adoption proceedings, there is good cause for the court to stay the adoption proceedings and determine whether the putative father is the legal father, with all the attendant rights and responsibilities of that status. [*Id.*]

The Court further held that "the timing of the paternity action is but one factor to be considered."

Id.

While amici support the policy stated in the Adoption Code to expedite these cases, the statute, read as a whole, strikes a balance between providing "priority" to adoption cases while

respecting parents' rights to control the upbringing of their child and the child's right that the adoption be in his or her best interest. As *MKK* recognized, "the general presumption followed by courts of this state is that the best interests of a child are served by awarding custody to the natural parent or parents." *Id.* at 563 (citing *Hunter v Hunter*, 484 Mich 247, 279; 771 NW2d 694 (2009)). The Adoption Code was drafted to "safeguard and promote the best interests of each adoptee," MCL 710.21a(b), a directive which is served by preserving the constitutional rights of natural parents, even if that requires, in certain circumstances, that adoption proceedings be stayed. Federal and state constitutional law protects the rights of fit parents, including unwed fathers who have established a link to the child beyond mere biology.

A holding that the Adoption Code trumps the fundamental rights of putative fathers would create a significant constitutional quagmire. Such a ruling would deny a putative father the presumption of fitness to which he is entitled; such a ruling would be an invitation for third parties to hide information about children from their parents; and such a ruling would effectively endorse a "race to the courthouse" as the legal standard in adoption cases. The primacy of the Adoption Code thus cannot serve as justification to terminate the parental rights of a putative father who has "demonstrate[d] a full commitment to the responsibilities of parenthood" without due process of law. *Lehr, supra* at 261. *MKK* correctly recognizes these principles.

2. The Court of Appeals has Consistently Applied *MKK*

Lower courts have consistently applied *MKK*, thus eliminating the need for this Court to address the meaning of "good cause" in the context of a putative father seeking to stay an adoption proceeding. *See* MCR 7.302(B)(5) (listing, as grounds for leave to appeal a Court of Appeals decision, that the decision "conflicts with . . . another decision of the Court of Appeals"). Following *MKK*, the Court of Appeals has considered the "good cause" standard in several subsequent cases and consistently applied the test in each one.

In *In re KMS*, unpublished per curiam opinion of the Court of Appeals, issued August 15, 2013 (Docket No. 314151), the trial court held that there was no “good cause” to stay the adoption proceeding and ruled that the Adoption Code provided sufficient protection for the putative father. *Id.* at 3. The Court of Appeals reversed the trial court, finding that the refusal to stay the adoption proceeding was an abuse of discretion. *Id.* at 5. The Court heavily quoted *MKK* and held that the circumstances required a stay of the adoption proceedings. Specifically, it held that a stay was appropriate because (i) the father made efforts to establish paternity before the child’s birth, (ii) DNA testing would have established paternity well in advance of the adoption hearing but for the mother’s refusal to submit the child for immediate testing, (iii) the father desired to be present at the birth and to sign the birth certificate, and (iv) the father did not unreasonably delay in attempting to establish paternity. *Id.* at 6-7. In short, application of the *MKK* factors justified staying the adoption proceedings.

Appellants mischaracterize *KMS* in an attempt to create inconsistencies between *KMS* and *MKK* where none exist. First, Appellants argue that “[t]he *KMS* Court erroneously established that any putative father who files a notice of intent to claim paternity has not only established good cause to stay but also enjoys the rebuttable presumption of legal parentage in the adoption proceeding.” Application for Leave at 20. As described above, *KMS* considered each *MKK* factor and decided that the circumstances supported a finding of “good cause.” At no point did the Court hold that filing a notice of intent is on its own sufficient to establish “good cause.” See *In re KMS, supra* at 6-7.

Second, Appellants misleadingly state that “the putative father in *KMS* had no established biological relation to the child nor had he presented any evidence as to his desire and intention to parent or support the child.” Application for Leave at 21. Yet the Court explicitly

acknowledged that “respondent would have established his paternity well before the adoption proceeding” if not for the mother’s obstruction of DNA testing and that “respondent wished to be present for the child’s birth, to be named on the birth certificate, and to sign an affidavit of parentage.” *In re KMS, supra* at 6. Clearly, contrary to Appellants’ argument, the Court found that there existed a biological relationship and a desire to parent and support the child. Appellants thus mischaracterize *KMS* as eviscerating the *MKK* factors, a characterization which is belied by even a cursory reading of the Court’s opinion.

The Court of Appeals has upheld trial courts’ refusals to stay adoption proceedings in two similar cases. *See In re MMK*, unpublished per curiam opinion of the Court of Appeals, issued July 29, 2014 (Docket No. 319156); *In re J*, unpublished per curiam opinion of the Court of Appeals, issued June 24, 2014 (Docket No. 319359). In each case, the putative father never filed a paternity action or even requested a stay of adoption proceedings, factors which the Court held prevented the putative father from demonstrating “good cause” under *MKK*. *In re MMK, supra* at 3 (“Because respondent never filed a paternity action and did not ask for an adjournment of the adoption proceedings until the end of the termination hearing, there was not “good cause” to stay the adoption proceedings in this case.”); *In re J, supra* at 3 (“[R]espondent had not sought an order of filiation in a case filed under the Paternity Act or express any intent to file an action under the Paternity Act, must less request a stay in order to file such an action. Because respondent did not request or show a need for a stay, the trial court’s failure to stay the proceeding cannot be plain error. Moreover, since the trial court’s discretion was never invoked, it can hardly be said that it was abused.”). If the father had filed a paternity action, however, the Courts intimated that they would have found “good cause” to stay the adoption proceedings. *In re MMK, supra* at 3; *In re J, supra* at 2-3.

The Court of Appeals applied the “good cause” requirement in *In re JDH*, unpublished per curiam opinion of the Court of Appeals, issued January 5, 2010 (Docket No. 291839). There, the Court looked to MCL 710.25(c) and *MKK* before ultimately relying on the general definition of “good cause” from *Utrera* to hold that the trial court did not abuse its discretion by granting a stay of an adoption proceeding pending a hearing before the Friend of the Court on custody and parenting time. *Id.* at 3. The Court also stated that the fact that the putative father had filed his custody action before the initiation of the adoption proceeding was not an independently sufficient reason to stay the adoption proceeding. *Id.* Both of these determinations are consistent with *MKK* because *MKK* did not expressly limit the factors that could constitute “good cause.” Instead, *MKK* noted that “the trial court must make a good cause determination based on the particular circumstances of the case.” *MKK, supra* at 562. Accordingly, *JDH* correctly held that filing the custody proceeding first did not alone warrant staying the adoption proceeding under *MKK*. *See id.* (“In so holding, we do not attempt to create a ‘race to the courthouse’ . . .”).

Similarly, the Court in *In re KLW*, unpublished per curiam opinion of the Court of Appeals, issued May 17, 2011 (Docket No. 301741), did not consider the *MKK* factors in finding “good cause” existed to stay the adoption proceedings: “[T]his Court concludes that the unexpected illness of [the father’s] counsel constituted good cause for an adjournment . . .” *Id.* at 2. The court relied only on the general definition of “good cause,” as the circumstances did not call for an application of the factors articulated in *MKK*. *See id.* at 2 n9. Thus, *KLW* is not inconsistent with *MKK*—it simply recognizes that “good cause” will not be determined in every case by reliance on factors that are only applicable in certain circumstances.

In sum, *MKK* sets forth a workable and constitutionally sound analytical framework for adjudicating when a stay of adoption proceedings is warranted. Lower courts have consistently applied *MKK* and there is no need for this Court to revisit that decision.

3. Musall Demonstrated “Good Cause” to Stay the Adoption Proceedings

The Court of Appeals correctly applied the “good cause” standard of MCL 710.25(2) and *MKK* to this case. The Court considered the *MKK* factors and concluded that Musall had satisfied each one. By doing so, it rightfully deferred to the trial court’s findings of fact:

[R]espondent’s identity as the real father has never been in doubt, nor was it ever disputed by the mother Nor was respondent’s delay in filing his paternity complaint unreasonable. . . . Once the adoption petition was filed, it became clear that respondent would not be able to informally negotiate with the mother and her family for access to the child, and he promptly filed his complaint for paternity. Moreover, respondent does not seem to have filed the action simply to thwart petitioners’ request for adoption—instead, it appears that he wants to ensure he has a relationship with the child. [*In re ARS*, unpublished per curium opinion of the Court of Appeals, issued June 12, 2014 (Docket No. 318638)]

The Court of Appeals properly recognized that this determination was within the realm of discretion. Reversing the trial court would inappropriately displace the trial court’s factual determinations.

The Court of Appeals reasoning and conclusion are wholly consistent with *MKK*. There is no basis for this Court’s intervention.

D. The Court Should Reject the Holding of *In re RFF* and Adopt a Broad Definition of “Ability” in the Context of a Putative Father’s Ability to Provide Support or Care

The second issue before the Court is whether Musall demonstrated that he provided substantial and regular care or support in accordance with his ability. In determining whether to terminate a parent’s rights under the Adoption Code, courts assess a parent’s “ability to provide support or care.” MCL 710.39(2). To provide clarity to the lower courts and comport with due

process, the Court should reject the reasoning of *In re RFF*, 242 Mich App 188; 617 NW2d 745 (2000).

In *RFF*, the Court of Appeals considered the meaning of “ability” under MCL 710.39(2) and held that the statute only refers to financial ability. *Id.* at 198-201. In that case, the putative father did not provide financial support to the mother or child but argued that, as a deceived father, he had provided support to the best of his ability, a term which he argued should be construed to account for his lack of knowledge of the mother’s pregnancy. *Id.* at 200-201. The Court of Appeals rejected that argument, concluded that the statute was ambiguous and, after considering the statute’s legislative history, held that the legislature did not intend the statute to protect deceived fathers. *Id.* at 199-200.

RFF’s error rests in its failed interpretive analysis, as MCL 710.39(2) is not ambiguous. “When applying any legislation, it must first be determined whether the language of the statute is clear and unambiguous. Where the language of the statute is clear and unambiguous, no judicial interpretation is warranted.” *Rowell v Security Steel Processing Co*, 445 Mich 347, 351-353; 528 NW2d 409 (1994). As Justice Corrigan explained in her dissenting statement to the Court’s denial of leave to appeal in *RFF*, “ability” is a term whose common meaning is broader than that articulated by the Court of Appeals and is not ambiguous: “Ability means the power or capacity to do or act physically, mentally, legally, morally, or financially.” *In re RFF*, 463 Mich 895; 618 NW2d 575, 576 (2000) (CORRIGAN, J, dissenting) (internal quotation marks omitted) (quoting *Random House Webster’s College Dictionary* (2000)). In the particular context of the Adoption Code, a father may lack “ability” in many senses of the term:

A father may also lack the physical, mental, legal, or moral power or capacity to act. When a father lacks knowledge of a pregnancy because of the mother’s deception and is induced not to act by the agency’s misrepresentation, he arguably

lacks the power or capacity to provide support or care, since he does not even know that support or care are needed! [*Id.*]

It is noteworthy that this Court's decisions subsequent to its denial of leave in *RFF* have recognized the concerns articulated by Justice Corrigan in her dissent. These concerns about the practical barriers faced by low income parents in termination cases are, in the experience of LSAM members, applicable in adoption cases too. Often, a prospective adoptive parent with resources has the ability to initiate adoption proceedings, whereas the natural parent has no experience with the court system, no right to counsel, and no access to services. See *In re Hudson*, 483 Mich 928; 763 NW2d 618 (2009) (CORRIGAN, J., concurring) (noting the consequences of the trial court's failure to advise a parent of a plea of admission in a termination of parental rights case); *In re Mitchell*, 485 Mich 922; 773 NW2d 663 (2009) (reversing the trial court's termination of parental rights for failure to advise the parent of the implications of his plea and for the court's wrongful consideration of the parent's economic and financial status).

Sometimes, as in this case, one parent appears to be using the adoption process to terminate the parental rights of the non-custodial parent without any legal consideration of the second parent's rights. If this were a formal parental rights termination case, Musall would have been entitled to a full array of rights, including the right to counsel, the application of a higher standard of proof, an obligation by the state to engage in reasonable efforts to reunify the family, and access to services to assist him in connecting with his child, among others. None of these rights attach in a private adoption case. When a fundamental constitutional right is at stake and there is a significant resource disparity between the parties, the Court should not adopt a procedural rule that permits a prospective adoptive parent to terminate a natural parent's rights without any legal consideration of those rights.

For these very reasons, Justice Corrigan’s analysis in her *RFF* dissent is particularly apropos in this case. Allowing *RFF* to remain good law sanctions the interpretation of the Adoption Code that runs afoul of the Federal and Michigan Constitutions. *See Stanley, supra*. An unwed father who has established a connection to his child beyond mere biology is entitled to the same due process protections as any other parent. *Lehr, supra; Hauser, supra*. This includes the presumptions of fitness and that his interests as a fit parent align with the best interests of his child. The erroneous interpretation of a statutory scheme that provides no protection for deceived fathers—or other fathers who are otherwise unable to provide support or care—without any adjudication as to fitness, eradicates the father’s fundamental constitutional rights. *RFF*’s underinclusive definition of “ability” is constitutionally deficient and this Court should overrule that decision.

E. The Trial Court’s Failure to Issue an Order of Filiation Was Harmless Error

The trial court dismissed the adoption proceeding but failed to enter an order of filiation. This was harmless error and at most should result in an order remanding the case to the trial court for an entry of an Order of Filiation. As previously discussed, the trial court properly applied the Adoption Code’s “good cause” standard and stayed the adoption proceedings in favor of the paternity action, at which the court concluded that Musall is the child’s father. However, the trial court judge—the same judge in both the adoption and paternity proceedings—did not issue an Order of Filiation to formalize Musall’s legitimacy. This error was harmless and is insufficient to justify this Court’s intervention as an error-correcting authority.

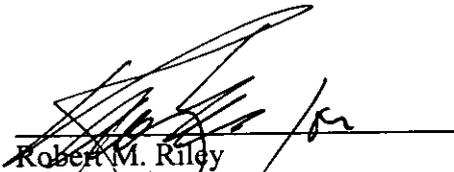
Adoption Proceedings are governed by the Michigan Court Rules unless displaced by a specific rule. MCR 3.800(A) (“Except as modified by MCR 3.801-3.807, adoption proceedings are governed by Michigan Court Rules.”). No provision in that chapter purports to modify the harmless error standard of review. *See MCR 3.800 et seq.* Therefore, an error is only to be

corrected if it is “inconsistent with substantial justice.” MCR 2.613(A) (“[A]n error in a ruling or order . . . is not ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice.”). Here, the trial court’s order comports with substantial justice because there existed “good cause” to stay the adoption proceedings in favor of the paternity action and Musall had satisfied the Paternity Act so as to be legitimized as the child’s father. Therefore, at most, this Court should remand for entry of an Order of Filiation.

IV. CONCLUSION

For these reasons, LSAM respectfully requests that the Court deny Appellants’ application for leave to appeal. If the Court is inclined to grant Appellants’ application, LSAM respectfully requests that the Court affirm the Court of Appeals.

Respectfully submitted,



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