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But I Didn't Do Anything Wrong: Revisiting the Rights of Non-Offending Parents in Child Protection Proceedings

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By Vivek Sankaran

Steven, a minor living with his mother, enjoyed a nurturing relationship with his father, Mark. He saw his father every weekend and looked forward to their time together. Mark looked for ways in which to stay involved in his child's life.

Two days ago, the Department of Human Services (DHS) removed Steven from his mother's custody because, unbeknown to Mark, Steven's mother was selling drugs in the home. At the time of removal, the police did not inquire about the whereabouts of Steven's father; DHS immediately placed Steven in a foster home.

The next day, a preliminary hearing was held before a judge in the family division of the circuit court. Steven's mother, recognizing the overwhelming evidence against her, entered a no contest plea to the allegations. The court accepted the plea, assumed temporary custody of the child, and scheduled a dispositional hearing.

"Not so fast," shouted Mark, who appeared at the hearing, despite never having received formal notice of the proceeding. Mark demanded that Steven be placed in his custody immediately and objected to the court assuming any power over him or his child. The law presumed him to be a fit parent, he stated, and the state's petition contained no allegations to the contrary. Yet the court informed Mark that, under Michigan law, a court can obtain temporary custody or jurisdiction over a child once one parent is found to have neglected the child, even if the other parent did nothing wrong. The court further stated that at the dispositional stage, it would determine whether placement with Mark was in the child's best interest. The court ordered that DHS conduct criminal background and child protection checks of Mark, as well as a home study. Until the disposition, Steven was to remain in foster care, and his father was given weekly, supervised visits.

At the dispositional hearing, DHS reported that Mark had several drug-related arrests in the past and a shaky employment history. On the basis of these concerns and the DHS recommendation, the court ordered Mark to submit to random drug screens and obtain suitable employment before any consideration of placing Steven with him. Mark pleaded with the court, wondering, "How can the court have so much power over me and my child if I didn't do anything wrong?"

Unfortunately for Mark, the court was correct in its interpretation of Michigan law on this issue. In *In re CR,* the court of appeals held that a court can assume temporary custody of a child and enter dispositional orders affecting the child and both parents solely on the basis of a finding that one parent neglected the child.[1] The court stated, "[T]he court rules simply do not place a burden on a petitioner like the FIA[2] to file a petition and sustain the burden of proof at an adjudication with respect to every parent of the child involved in a protective proceeding before the family court can act in its dispositional capacity."[3] One parent's plea eliminates "the FIA's obligation to allege and demonstrate by a preponderance of legally admissible evidence that [the other parent] was abusive or neglectful . . . before the family court could enter a dispositional order that

would control or affect his conduct."[4] In a series of unpublished opinions after *In re CR,* the court of appeals repeatedly has affirmed this holding.[5]

These holdings are consistent with the longstanding view in Michigan child protective proceedings that the court acquires a form of *in rem* jurisdiction over the child once there is any evidence that the child was abused or neglected by either parent.[6] Such a finding empowers the court, as *parens patriae,* to issue any order it considers necessary, even if it infringes on a non-offending parent's rights. The scope of the power the court obtains after it assumes jurisdiction over a child is extensive. At the dispositional stage in a neglect proceeding, the court becomes the surrogate parent for a child and obtains authority to make decisions typically held by parents.

For example, the court can place the child where it deems best, determine the appropriateness of medical treatment, and decide who may visit the child.[7] In addition, the court can decide whether to accept a case plan submitted by the DHS, which may require each parent to comply with services such as parenting classes, individual counseling, random drug testing, and psychological evaluations.[8] These orders are not limited to the abusive parent. The statute makes clear that the court can issue orders "affecting adults as in the opinion of the court are necessary for the physical, mental or moral well-being of a particular juvenile,"[9] which has been interpreted to include the non-abusive parent.[10]

The practice of assuming jurisdiction over a child solely on the basis of the wrongdoing of one parent raises serious constitutional concerns. The liberty interest of parents in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests recognized by the United States Supreme Court.[11] The Court's decisions "'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.'"[12] The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Ninth Amendment.[13]

The law presumes parents to be fit,[14] and anyone, including the state, seeking to separate a child from his or her parent must present evidence of parental unfitness at a court hearing before removing the child absent exigent circumstances.[15] Without such evidence, the state is forbidden from removing a child from such a home, and the fit parent is entitled to custody of the child.[16] Even when there is evidence that one parent has abused the child, the non-offending parent still maintains familial rights, even if he or she has not been a model parent.[17] Simply put, without evidence of parental unfitness, children must remain with their families.

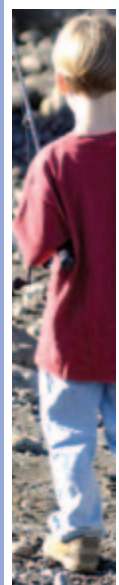
The United States Supreme Court, in *Stanley v Illinois,* rejected the use of blanket presumptions of unfitness in child welfare proceedings. In *Stanley,* the Court addressed the issue of presumptively denying unmarried fathers custody of their children without a judicial finding of parental unfitness.[18] Under Illinois law, the children of unwed fathers automatically became wards of the state upon the death of their mother. The state argued that proof that an unmarried mother of a child was dead was enough to separate the father from his child and that the father could seek to prove his fitness by initiating guardianship or adoption proceedings.[19]

The 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 . . . ."[20] 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.*[21]

The Court was clear that categorical presumptions of fitness are forbidden by the Constitution.

The current practice of depriving non-offending parents custody of a child without a judicial determination of unfitness raises concerns similar to those articulated in *Stanley.* Unlike the situation in *Stanley,* in which the state specifically argued that the father was unfit because he was not married to the child's mother, Michigan law permits courts simply to ignore the fitness of the non-offending parent and proceed to disposition. At disposition, the burden shifts to the non-offending parent to demonstrate parental fitness through various tests established by the state, ranging from a home study to parenting classes to random drug screening. A failure to jump through any one of a number of hoops could result in indefinite separation between the parent and child. Unless the state seeks to



Fast Facts:

Under Michigan law, a court can obtain temporary custody or jurisdiction over a child once one parent is found to have neglected the child, even if the other parent did nothing wrong.

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One of the flaws in the child welfare system is the system's reluctance to allow children in its grasp to return to the care of parents, particularly those who did nothing wrong.

terminate that parent's rights, it is never forced to prove, with legally admissible evidence, that the parent is not fit. The court becomes the child's surrogate parent despite the presence of a biological parent who is presumed to be fit under the Constitution.

To accord with the constitutional principles articulated by the United States Supreme Court, current practice must be reformed. One possibility is that, once a non-offending parent steps forward and seeks custody of his child, the court should ask the state what evidence it has to prove that the parent is unfit and whether it plans to amend its petition to include allegations against that parent. The court should give the state a very short period of time to investigate and, at that point, the state must either amend its petition to include the parent or release the child into the custody of the non-offending parent.

If the state amends its petition and seeks to keep the child in foster care, an immediate hearing must be held in which the state must demonstrate that placement in the non-offending parent's custody would be contrary to the welfare of the child.[22] If no such evidence exists, the child must be returned to the non-offending parent. In either case, a trial must be held on the allegations against both parents; the court cannot obtain temporary custody over the child until that occurs.

The proposed approach balances the parent's right to custody with the state's interest in safeguarding the minor. Parents are guaranteed a speedy decision about whether a child neglect case is going to be brought against them and, if not, are entitled to custody of their child. The state, which likely removed the child during exigent circumstances, is given a short period of time to conduct any additional investigation to ensure that the recently surfaced parent, about whom the state likely possesses very little information, will not harm the child.

A few jurisdictions have endorsed this approach. In California, if a non-custodial, non-offending parent exists, "the court is required to place the child with that parent unless it finds by clear and convincing evidence that placement with that parent would be detrimental to the safety, protection, or physical or emotional well-being of the child."[23] The Pennsylvania Supreme Court has held that a child cannot be considered neglected if she has a non-custodial parent who is ready, willing, and able to provide her with adequate care.[24] Similarly, in Maryland, "[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."[25] These decisions support the concept articulated above: that a child should be placed with the non-offending parent if the state fails to bring forth evidence of parental unfitness.

Conclusion

Caseworkers at child welfare agencies face difficult decisions every day. They enter homes at late hours and take actions, often with little information, that will affect the rest of a child's life. Workers do not have the luxury of taking time to assess a situation, and the snapshot judgments they form lay the foundation for what they do. The difficulty of this process is not to be minimized.

Yet one of the flaws in the child welfare system is the system's reluctance to allow children in its grasp to return to the care of parents, particularly those who did nothing wrong. By adopting a bright-line test in which courts must return children to the care of a parent if the state fails to bring forth allegations of unfitness against that parent, the autonomy of the family, a fundamental principle cherished by the drafters of the Constitution, can be restored. ◆

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Footnotes

1. *In re CR,* 250 Mich App 185; 646 NW2d 506 (2001).
2. FIA stands for the Family Independence Agency, the former name of the Department of Human Services.
3. *In re CR,* supra at 185.
4. Id.
5. See, e.g., *In re Finney,* unpublished opinion per curiam of the Court of Appeals, issued May 17, 2005 (Docket No 260190); 2005 Mich App LEXIS 1268; *In re Miller,* unpublished opinion per curiam of the Court of Appeals, issued March 22, 2005 (Docket No 257090); 2005 Mich App LEXIS 771; *In re Shawley,* unpublished opinion per curiam of the Court of Appeals, issued March 10, 2005 (Docket Nos 256408, 256409); 2005 Mich App LEXIS 656.
6. Black's Law Dictionary (6th ed) defines *"in rem"* as "[a]ctions in which the court is required to have control of the thing or object and in which an adjudication is made as to the object which binds the whole world and not simply the interests of the parties to the proceeding."
7. MCL 712A.18.
8. MCL 712A.18f.
9. MCL 712A.6.
10. *In re CR,* supra at 202–203.
11. *Troxel v Granville,* 530 US 57, 65; 120 S Ct 2054, 2060; 147 L Ed 2d 49, 56 (2000).
12. *Michael H. v Gerald D.,* 491 US 110, 123–124; 109 S Ct 2333, 2342; 105 L Ed 2d 91, 106 (1989).
13. *Stanley v Illinois,* 405 US 645, 651; 92 S Ct 1208, 1213; 31 L Ed 2d 551, 559 (1972).
14. See *Parham v J.R.,* 442 US 584, 602; 99 S Ct 2493, 2504; 61 L Ed 2d 101, 118 (1979).
15. See *Tenenbaum v Williams,* 193 F3d 581, 593 (CA 2, 1999); see also *Stanley,* 405 US at 658; 92 S Ct at 1216; 31 L Ed 2d at 562–563.
16. See *Troxel,* 530 US at 68–69; 120 S Ct at 2061; 147 L Ed 2d at 58–59.
17. *Santosky v Kramer,* 455 US 745, 753; 102 S Ct 1388, 1394–95; 71 L Ed 2d 599, 606 (1982); *Nicholson v Williams,* 203 F Supp 2d 153, 238 (ED NY 2002).
18. *Stanley,* 405 US at 645; 92 S Ct at 1208; 31 L Ed 2d at 551.
19. Id. at 647; 92 S Ct at 1210; 31 L Ed 2d at 556.
20. Id. at 649; 92 S Ct at 1211; 31 L Ed 2d at 557.
21. Id. at 656–657; 92 S Ct at 1215; 31 L Ed 2d at 562.
22. MCR 3.965(C)(2) permits a court to place a child in foster care only upon a showing that "continuing the child's residence in the home is contrary to the welfare of the child."
23. *In re Colin R.,* unpublished opinion of the California Court of Appeals, issued December 16, 2004 (Docket No F045842); 2004 Cal App LEXIS 11492 at *12.
24. *In re M. L.,* 562 Pa 646, 650; 757 A2d 849, 851 (2000).
25. *In re Russell G.,* 108 Md App 366, 377; 672 A2d 109, 114 (1996).