

IN THE MICHIGAN SUPREME COURT
Appeal from the Michigan Court of Appeals
Owens, PJ, Jansen and O'Connell, JJ

IN RE MCCARTHY, MINOR

Supreme Court No. 151039
Court of Appeals No. 318855
Circuit Court No. 07-739244-NA

***AMICI CURIAE* BRIEF OF THE**
LEGAL SERVICES ASSOCIATION OF MICHIGAN, MICHIGAN STATE
PLANNING BODY FOR THE DELIVERY OF LEGAL SERVICES TO THE POOR
AND THE NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN

Vivek S. Sankaran (P68538)
Counsel for Amici Curiae
University of Michigan Law School
Child Welfare Appellate Clinic
701 S. State Street
Ann Arbor, MI 48108
734-763-5000
vss@umich.edu

TABLE OF CONTENTS

	Page
INDEX OF AUTHORITIES	ii
STATEMENT OF INTEREST	1
ARGUMENT	4
CONCLUSION	10

INDEX OF AUTHORITIES

	Page
Statutes	
MCL 700.5101	8
MCL 700.5203	8
MCL 710.43	9
MCL 712A.17d	4, 7
MCL 712A.19a	8, 9
MCL 722.23	8
Court Rules	
MCR 3.903	7
Cases	
<i>In re Brock</i> , 442 Mich 101; 499 NW2d 752 (1993)	5
<i>In re Mason</i> , 486 Mich 142; 782 NW2d 747 (2010)	8
<i>Kubicki v Sharpe</i> , 306 Mich App 525; 858 NW2d 57 (2014)	8
<i>Lewis v Lewis</i> , 73 Mich App 563; 252 NW2d 237 (1977)	8
<i>Pierron v Pierron</i> , 486 Mich 81; 782 NW2d 480 (2010)	8
<i>Stringer v Vincent</i> , 161 Mich App 429; 411 NW2d 474 (1987)	8

Other States

<i>AA v State of Utah</i> , 266 P3d 844 (Utah Ct App 2011)	9, 10
<i>Allen v Dep't of Human Resources</i> , 540 SW2d 597 (Ky 1976)	9
<i>In re Shakima Renee M</i> , 43 AD3d 343; NYS2d 270 (2007)	9
<i>New Jersey Division of Youth and Family Services v EP</i> , 952 A2d 436; 196 NJ 88 (2008)	5, 7

Other Authorities

2013 Adoption and Foster Care Analysis and Reporting System (AFCARS) Data	6
Catherine Roller White, et al., <i>Michigan Foster Care Alumni Study Technical Report</i> , Casey Family Programs (November 2012)	6
Deborah Gibbs, et al, <i>Termination of Parental Rights for Older Foster Children: Exploring Practice and Policy Issues</i> , US Dept of Health and Human Services (2004)	4, 7
Lashanda Taylor, <i>Resurrecting Parents of Legal Orphans</i> , 17 Va J Soc Pol'y 318 (2010)	5
<i>Life After Foster Care: Mentors Help Teens Prepare</i> , USA Today (December 13, 2014)	6
Michigan Foster Care Review Board, 2013 Annual Report; < http://courts.mi.gov/Administration/SCAO/Resources/ Documents/Publications/Reports/fcrb/FCRB_ar13.pdf >	4
Michigan Youth Opportunities Initiative, 2010 Report, < https://www.michigan.gov/documents/fyit/ DHS-Voice_3_420956_7.pdf >	5
Patrick Folder and Paul Toro, <i>Youth Aging Out of Foster Care in Southeast Michigan: A Follow-up Study</i> , Wayne State University (2006)	6

STATEMENT OF INTEREST OF AMICI CURIAE

The Legal Services Association of Michigan (“LSAM”) is a Michigan nonprofit organization incorporated in 1982. LSAM’s members are thirteen 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 child welfare cases and a deep institutional commitment to ensuring that low-income families, parents, and children are treated fairly 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 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.

The Michigan State Planning Body for the Delivery of Legal Services to the Poor (“MSPB”) is an unincorporated association of about forty individuals – from the legal services community, judiciary, private bar, and community organizations providing services to low-income persons – that acts as a forum for planning and coordination of the state’s efforts to deliver civil and criminal legal services to the poor.

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, Legal Services of South Central Michigan, Michigan Indian Legal Services, Michigan Migrant Legal Assistance Program, Michigan Legal Services, Neighborhood Legal Services, and the University of Michigan Clinical Law Program.

Founded in 1977, the National Association of Counsel for Children (NACC) is a non-profit child advocacy and professional membership association dedicated to enhancing the well-being of America's children. The organization is multidisciplinary and has approximately 2000 members representing all 50 states and the District of Columbia. NACC membership is comprised primarily of attorneys and judges, although the fields of medicine, social work, mental health, education, and law enforcement are also represented. More information about the NACC can be found at www.naccchildlaw.org.

The NACC works to strengthen the delivery of legal services to children, enhance the quality of legal services affecting children, improve courts and agencies serving children, and advance the rights and interests of children. NACC programs which serve these goals include training and technical assistance, the national children's law resource center, the attorney specialty certification program, the model children's law office program, policy advocacy, and the *amicus curiae* program. Through the *amicus curiae* program, the NACC has filed numerous briefs involving the legal interests of children in state and federal appellate courts and the Supreme Court of the United States. The NACC uses a highly selective process to determine participation as *amicus curiae*. Cases must pass staff and Board of Directors review using the following criteria: the request must promote and be consistent with the mission of the NACC; the case must have widespread impact in the field of children's law and not merely serve the interests of the particular litigants; the argument to be presented must be supported by

existing law or a good faith extension of the law; and there must generally be a reasonable prospect of prevailing.

Amici submit this brief to safeguard the interests of older youth in foster care and to ensure that all youth have their voices heard before the rights of their parents are terminated.

ARGUMENT

"I know who my family is. What is the point of getting another?"²

This case presents an opportunity for this Court to protect the best interests of older youth in foster care, whose voices are often unheard in termination of parental rights ("TPR") hearings despite the enormous impact these hearings have on their lives. This Court can do so by articulating that juvenile courts must 1) explicitly consider the views of children prior to terminating the rights of their parents and 2) absent compelling circumstances,³ find that termination is not in the best interests of a youth, 14 years and older, if that youth objects to the termination of her parents' rights. Neither this Court nor the Court of Appeals has ever issued an opinion making these two points. Such an opinion is important because Amici strongly believe that often, TPR decisions are made without explicitly considering the views of children.⁴ Thus, this Court's guidance is necessary.

² Statement made by an older foster youth documented in Deborah Gibbs, et al., *Termination of Parental Rights For Older Foster Children: Exploring Practice And Policy Issues*, U.S. Department of Health and Human Services, 6-12 (2004) <http://www.rti.org/pubs/tpr_final_report_sept04.pdf> (accessed April 7, 2015).

³ Compelling circumstances could include situations in which a parent has physically or sexually abused the child, or has manipulated or threatened the child.

⁴ The Juvenile Code requires lawyers-guardians ad litem to share the views of children with the court. MCL 712A.17d(1)(i). But several reports have concluded that lawyers-guardians ad litem in Michigan frequently fail to adequately represent children in child welfare cases. In its 2013 Annual Report, the Foster Care Review Board concluded that lawyers-guardians ad litem often failed to clearly advise children "of their roles and responsibilities in the case, did not inform [children] of their right to attend court hearings or encourage them to do so, spent little time getting to know them, and failed to encourage contact when needed. Michigan Foster Care Review Board, 2013 Annual Report

<<http://courts.mi.gov/Administration/SCAO/Resources/Documents/Publications/>

A juvenile court issues a TPR decision not to punish a parent, but to further the best interests of children.⁵ The decision, while affecting a parent's constitutional right, directly impacts the future of a child. When a court issues a TPR decision, it strips children of the right to have a legal relationship with their parent, which includes, among other rights, the right to visit them, contact them, or inherit from them in the future. TPR decisions transform children into legal orphans, until, at some point, another family adopts them or provides them with another form of permanency. Thus, "courts have recognized that terminating parental rights without any compensating benefit, such as adoption, may do great harm to a child."⁶

If adoption does not happen, children are "left in legal limbo and are likely to experience post-termination changes in placement."⁷ Unfortunately, far "too many children 'freed up' for adoption do not in the end find permanent homes."⁸ This is particularly true for older youth in foster care who often remain in legal limbo after their parents' rights are terminated. In 2013, nearly 3500 children, whose parents' rights were terminated, exited foster care or "aged out" without any permanent living

Reports/fcrb/FCRB_ar13.pdf.pdf> (accessed April 7, 2015). These findings echo similar observations made by foster youth in a 2010 report issued by the Michigan Youth Opportunities Initiative available at https://www.michigan.gov/documents/fyit/DHS-Voice_3_420956_7.pdf. As perhaps some evidence of this systemic problem, it is uncommon for lawyers-guardians ad litem to file briefs in proceedings before this Court or the Court of Appeals.

⁵ *In re Brock*, 442 Mich 101, 108; 499 NW2d 752 (1993).

⁶ See *New Jersey Division of Youth and Family Services v EP*, 952 A2d 436, 448; 196 NJ 88 (2008) (reversing TPR of older youth's parent because child objected to TPR and TPR had no compensating benefit to the child).

⁷ Lashanda Taylor, *Resurrecting Parents of Legal Orphans*, 17 Va J Soc Pol'y 318, 325 (2010).

⁸ *Id.* at 448.

arrangement; over 250 of those children lived in Michigan.⁹ Michigan has the second highest number of children aging out of the foster care system in the country.

For legal orphans who age out of foster care, outcomes are dire. Nationally, nearly 40% of children who age out of foster care end up homeless. Nearly 60% are convicted of a crime and only 48% are employed. Half of all children aging out of foster care abuse drugs and alcohol.¹⁰

Outcomes for children aging out of foster care in Michigan are equally dismal. One study found that 50% of those aging out had a mental health diagnosis, only 35% had received a high school diploma and over 30% had experienced homelessness. Over 40% of males and 25% of females had been convicted of a crime. And 60% had given birth to or fathered a child within five years of exiting foster care.¹¹ A second study found that 70% of youth reported average incomes below the poverty line and nearly 50% of youth were unemployed upon leaving the foster care system. Forty-five percent of youths reported smoking marijuana and 40% endorsed two or more symptoms of abuse or dependence. And 55% of children reported being physically abused after leaving foster care.¹² Unsurprisingly, many of these youth, who often find themselves

⁹ 2013 Adoption and Foster Care Analysis and Reporting System (AFCARS) Data

¹⁰ See *Life After Foster Care: Mentors Help Teens Prepare*, USA Today (December 13, 2014) <<http://www.usatoday.com/story/news/nation/2014/12/13/life-after-foster-care-mentors-help-teens-prepare/20378091>> (accessed on April 7, 2015)

¹¹ Catherine Roller White, et al., *Michigan Foster Care Alumni Study Technical Report*, Casey Family Programs 24 (November 2012) <http://www.casey.org/media/StateFosterCare_MI_es.pdf> (accessed on April 7, 2015)

¹² Patrick Folder and Paul Toro, *Youth Aging Out Of Foster Care In Southeast Michigan: A Follow-up Study*, Wayne State University (2006).

lost with no place to go, have contact with their parents post-termination and reunify with their parents once they exit the foster care system.¹³ The best interests of these youth would be furthered if courts, rather than terminating parental rights, continued to work with their parents to stabilize the family unit. Indeed, for these children, “the detriment [caused by a TPR decision] may be greater than keeping the parent-child relationship intact since the child’s psychological and emotional bond to the parent may have been broken with nothing substituted in its place.”¹⁴

Fortunately, the law allows juvenile courts to reduce the likelihood of these tragic outcomes by 1) requiring courts to ascertain and consider the views of children before terminating their parents’ rights and 2) identifying that compelling reasons not to terminate exist where a child, 14 years or older, objects to the termination of their parents’ rights and does not want to be adopted.

The law gives children an important role in TPR proceedings, as children are parties to these cases.¹⁵ As such, prior to entering a TPR decision, the Juvenile Code requires courts to consider the views of a child. MCL 712A.19a(3) mandates that a court must “obtain the child’s views regarding the permanency plan in a manner that is appropriate to the child’s age.” Similarly MCL 712A.17d(1)(i) instructs lawyers-guardians ad litem to inform the court “as to the child’s wishes and preferences.” Read together, these provisions prevent courts from entering a TPR decision without

¹³ *Termination of Parental Rights of Older Foster Children*, *supra* note 1 at 6-15.

¹⁴ *EP*, 952 A2d at 448.

¹⁵ MCR 3.903(A)(19)(b).

explicitly considering the views of the children regarding the termination of their parents' rights.

These provisions are consistent with those in other statutes that require courts to consider the views of children prior to making a decision involving their custody. Both guardianship and custody statutes explicitly require courts to consider the child's reasonable preference, so long as the court considers the child to be of a sufficient age to express a preference.¹⁶ Moreover, the guardianship statutes allow a child, 14 years or older, to prevent the parental appointment of a guardian over her.¹⁷ Thus, appellate courts have reversed custody decisions based on a trial court's failure to explicitly consider the preferences of children.¹⁸

But in addition to requiring courts to explicitly consider the views of children prior to issuing a TPR decision, the law also creates a strong presumption against terminating the rights of youth, 14 years and older, when they object to the termination of their parents' rights. First, the Juvenile Code establishes that where adoption is not the permanency goal in a case, compelling reasons exist for the court to find that termination would not be in the best interests of the child.¹⁹ Second, the Adoption Code

¹⁶ See MCL 700.5101(a)(ix); MCL 722.23(i).

¹⁷ MCL 700.5203

¹⁸ See *Kubicki v Sharpe*, 306 Mich App 525, 544-545; 858 NW2d 57 (2014); *Stringer v Vincent*, 161 Mich App 429, 434; 411 NW2d 474 (1987); *Lewis v Lewis*, 73 Mich App 563, 566; 252 NW2d 237 (1977). See also *Pierron v Pierron*, 486 Mich 81, 92; 782 NW2d 480 (2010)(noting that trial court erred by failing to consider the preferences of children related to school placements).

¹⁹ MCL 712A.19a(6)(b). In *In re Mason*, 486 Mich 142; 782 NW2d 747 (2010), this Court interpreted a related section of MCL 712A.19a to hold that a court must explicitly

establishes that a court cannot grant an adoption petition if a child, 14 years or older, objects to the adoption.²⁰ This Court should read these provisions together to mean that when a child, 14 or older, objects to the termination of her parents' rights, that child is effectively objecting to her adoption. Therefore, terminating parental rights to that child would not be in her best interests because the child will not truly be free for adoption. The purpose of termination of parental rights in such a case would be thwarted.

Courts in other jurisdictions have interpreted their statutes in similar ways. For example, in *In re Shakima Renee M*,²¹ a New York appellate court reversed a TPR decision in part because of a child's objection to the TPR. The court noted that "since [the child] is over the age of 14 and refuses to consent to adoption, the termination of parental rights would serve no purpose."²² Similarly, in *Allen v Department of Human Resources*,²³ the Supreme Court of Kentucky overturned the termination of a 10 year old child's mother noting that "[i]f a child this age opposes termination, efforts to provide him a stable, permanent environment may well be defeated, and the benefits from termination are certainly not sufficiently clear in this case to justify overriding the child's wishes."²⁴ And in *AA v State of Utah*,²⁵ the Court of Appeals of Utah held that a

consider a child's placement with relatives as a factor weighing against terminating a parent's rights. *Id.* at 164.

²⁰ MCL 710.43(2)

²¹ *In re Shakima Renee M*, 43 AD3d 343; 841 NYS2d 270 (2007).

²² *Id.* at 344.

²³ *Allen v Dep't of Human Resources*, 540 SW2d 597 (Ky 1976).

²⁴ *Id.* at 599.

²⁵ *AA v State of Utah*, 266 P3d 844 (Utah Ct App 2011).

TPR was premature in light of the fact that an adoption was impossible without the consent of the child, who objected to the TPR decision.²⁶

CONCLUSION

In summary, Amici urge this Court to protect older youth involved in child welfare proceedings by 1) requiring courts to explicitly consider the views of all children prior to entering a TPR order and 2) finding that compelling circumstances not to terminate parental rights exists where a child, 14 years or older, objects to the TPR. The pronouncement of these rules, which are fully supported by Michigan's statutory scheme, will help ensure that every child leaves the foster care system with at least one legally-protected relationship with an adult.

Respectfully submitted,

/s/ Vivek S. Sankaran

Vivek S. Sankaran (P68538)
Counsel for Amici Curiae
University of Michigan Law School
Child Welfare Appellate Clinic
701 S. State Street
Ann Arbor, MI 48108
734-763-5000
vss@umich.

Dated: April 16, 2015

²⁶ *Id.* at 849.