FAMILY LAW

SARAH PROUT[†]
KATIE STRICKFADEN[††]

I. INTRODUCTION

Family law, unlike so many areas of the law, is primarily driven by facts, turning on human behavior, equity, and the societal view of familial norms. The rule of law in family law becomes particularly important as each client, practitioner, and judge brings his own judgments about the progression of those norms, his own interpretation of rightness within our current society, and his own understanding of how society should adapt to an ever changing social culture.

The rule of *stare decisis* insures that all of us, layman and attorney alike, are judged by the law uniformly and outside individually inculcated biases that encompass judgments about class, race, sexual orientation and gender. Unfortunately, because of the intimate nature of family law, cases settle more often than not, leaving a dearth of important case law. Each year, however, some cases are argued on appeal and make changes to the body of law governing family dynamics.

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† Managing Attorney, Lakeshore Legal Aid. B.A. *cum laude*, 1995, Eastern Michigan University; J.D., 1998, University of Toledo.

†† Staff Attorney, Lakeshore Legal Aid; Supervising Attorney, Free Legal Aid Clinic, Inc. B.A., 2001, University of Michigan; J.D., 2005, Wayne State University.

Over the last *Survey* period, Michigan courts tackled more cases than usual, ranging from ante-nuptial agreements[1] to the effect of moving school districts on the established custodial environment.[2] Consequently, this review could not be a comprehensive examination of all of those matters. Instead this article focuses on the fundamental right to parent in custody and termination proceedings, as these decisions most directly affect the largest number of cases within family law.

II. ANALYSIS

A. Overview

Families have changed a great deal in the last forty years. Gone are the normative two-parent households, as 40% of American children now live either with only one biological parent or with another biological relative.[3] As the dynamics of families and culture have shifted, the law has struggled to grapple with these new realities. Of particular note is the tension between the role of biology and parenting, especially in light of more children being raised by grandparents, aunts and uncles and the growing number of Lesbian, Gay, Bisexual, and Transgender ("LGBT") parents in Michigan. This tapestry of societal norms is interwoven with our legal standards, triggering important conversations surrounding the fundamental right to parent and the right to counsel if the state is going to deprive a parent of that right. Adding additional complexity, there is the interplay of courts, standards, and statutory requirements, who the parties are, and whether a given hearing is adjudicating guardianship, custody, or termination of parental rights, the combination of which can be confounding to all participants in a case. It is essential to understand where the law has developed with consistency and where it has not.

On June 5, 2000, in *Troxel v. Granville*,[4] the Supreme Court decided the current black letter law on the subject of the fundamental right to parent. In *Troxel*, grandparents of two minor children petitioned for visitation under a Washington statute that allowed anyone to petition for visitation at any time.[5] The question before the Court was whether the

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1. Zapczynski v. Zapczynski, No. 285982, 2009 WL 4163548 (Mich. Ct. App. 2009).

2. Pierron v. Pierron, 486 Mich. 81 (2010).

3. 2000 Census, U.S. CENSUS BUREAU, http://www.census.gov/main/www/cen2000.html (last visited Apr. 2, 2011) [hereinafter *2000 Census*].

4. 530 U.S. 57 (2000).

5. *Id.* at 61.

Washington statute violated the federal constitution.[6] The liberty interest implicated is the fundamental right to parent, which has been found in the penumbra of the Fourteenth Amendment of the Constitution as incorporated to the states through the Fifth Amendment.[7] The Fourteenth Amendment provides "that no person shall deprive any person of life, liberty or property without due process of law"[8] and provides a heightened protection against government interference with certain fundamental rights and liberty interests.[9] Amongst these liberty interests is the fundamental right of parents to establish a home and bring up their children.[10] The Court in *Troxel* found the statute as applied in this case unconstitutional because there was no allegation that the parent denying visitation was unfit;[11] moreover, the Court also found that there is a presumption that fit parents act in the best interests of their children.[12] *Troxel* states in part:

> [O]ur 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 . . . . 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 been recognized that the natural bonds of affection lead parents to act in the best interests of their children. Accordingly, so long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to interject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.[13]

Therefore, the *Troxel* Court determined that the natural parent had an inherent right to determine with whom their children could associate and

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6. *Id.* at 65.
7. *Id.* at 65-66.
8. U.S. CONST. amend. XIV, § 1.
9. Reno v. Flores, 507 U.S. 292, 301-02 (1993).
10. Meyer v. Nebraska, 262 U.S. 390, 399, 401 (1923).
11. *Troxel*, 530 U.S. at 67-68.
12. *Id.* at 68.
13. *Id.* at 68-69 (alterations in original) (citing Parham v. J.R., 442 U.S. 584, 602 (1979)).

the State should not have become involved in parental decisions absent a finding of unfitness.[14]

This article discusses a handful of the important family law cases the Michigan courts have grappled with this year involving the practical implications of the fundamental right to parent as outlined in *Troxel*, including the standard for awarding custody to a third party,[15] the rights of LGBT parents,[16] the nature of the established custodial environment,[17] the standard which the State is required to meet to vitiate the fundamental right to parent and find a natural parent unfit,[18] and the question of whether the denial of right to counsel when the State moves to terminate the right to parent is absolute.[19]

B. Third-Party Custody

In *Hunter v. Hunter*,[20] the Supreme Court of Michigan addressed the statutory standards for awarding custody of a natural parent's minor child to a third party and reconciled conflicting statutory interpretations.[21] Tammy Hunter and her husband Jeff had lived with their four children until they became addicted to crack cocaine.[22] In 2002, when Tammy left Jeff for several days, he called his brother, Robert Hunter, to care for the kids.[23] After some time, Robert and his wife Lorie obtained full guardianship over the children, while Tammy continued to struggle with both incarceration and addiction.[24] In 2005, Tammy petitioned to terminate the guardianship.[25] On November 9, 2005, the Circuit Court ordered Tammy to begin paying child support.[26] She then was allowed supervised contact with the children.[27] In May of 2006, Robert and Lorie filed for sole physical and legal custody of the children.[28] By that time,

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14. *Id.* at 77-79.
15. *See* Hunter v. Hunter, 484 Mich. 247 (2009).
16. *See* Harmon v. Davis, No. 297968 (Mich. Ct. App. July 8, 2010) (order reversing trial court).
17. *See* Pierron v. Pierron, 486 Mich. 87 (2010).
18. *See In re Wimberly*, Nos. 292564, 292565, 2009 WL 4827444 (Mich. Ct. App. Dec. 15, 2009).
19. *See In re McBride*, 483 Mich. 1095 (2009).
20. *Hunter*, 484 Mich. at 247.
21. *Id.* at 257.
22. *Id.* at 251-52.
23. *Id.* at 252.
24. *Id.*
25. *Id.*
26. *Hunter*, 484 Mich. at 253.
27. *Id.*
28. *Id.*

parenting time had progressed so that Tammy was having monthly unsupervised visits with the children.[29] The trial court awarded custody to Robert and Lorie, and made a finding that Tammy was an unfit parent.[30] Tammy appealed the judgment, the court of appeals affirmed the decision, and the matter was appealed to the Michigan Supreme Court.[31]

In reversing and remanding the matter to the trial court, the supreme court considered the following issues: 1) the scope of the fundamental right to parent, 2) how provisions of the Child Custody Act (hereafter "CCA") interact with those rights, and 3) whether the circuit court in this case applied the correct legal standard in determining unfitness.[32]

At the heart of the dispute were contrasting provisions of the CCA.[33] M.C.L.A. section 722.25(1) provided for a presumption in favor of awarding custody to the natural parent, a presumption that must be rebutted by clear and convincing evidence.[34] In contrast, M.C.L.A. section 722.27(1)(c) provides that orders shall not be modified if a custodial environment is present, unless a change of circumstance is presented by clear and convincing evidence.[35] Therefore, in *Hunter*, a conflict arose within the CCA between the preference for an established custodial environment and the presumption in favor of the natural parent.[36] The children had lived with Robert and Lorie, their paternal aunt and uncle, for over five years, while visitation with Tammy, their natural parent, had only recently commenced on a regular basis.[37]

In balancing these competing interests, the court found that the parental presumption in M.C.L.A. section 722.25(1) prevailed over the presumption in favor of an established custodial environment.[38] However, the court went on to discuss the importance of balancing the two competing provisions of the CCA, finding that the lower court must give deference to the parental presumption while at the same time insuring that the best interests of the children are met.[39] Citing *Hetzel v. Hetzel*, the court held that custody of a child should be awarded to a third party custodian instead of the child's natural parent only when the third

29. *Id.*
30. *Id.* at 253-54.
31. *Id.* at 256.
32. *Hunter*, 484 Mich. at 257.
33. *Id.* at 258-59.
34. MICH. COMP. LAWS ANN. § 722.25(1) (West 2002).
35. MICH. COMP. LAWS ANN. § 722.27(1)(c) (West 2002).
36. *Hunter*, 484 Mich. at 259.
37. *Id.* at 254-55.
38. *Id.* at 262-63.
39. *Id.* at 263-64.

person "prove[s] that all relevant factors, including the existence of an established custodial environment and all legislatively mandated best interest concerns within [M.C.L.A. § 772.23] taken together clearly and convincingly demonstrate that the child's best interests require placement with the third person."[40]

In *Hunter*, this conclusion meant that the case was reversed and remanded to determine if it was in the best interest of the children for the natural parent not to be awarded custody.[41] The standard articulated in *Hunter* allows a third-party custodian to be awarded custody of the children under specific circumstances, including the existence of an established custodial environment which clearly demonstrates that the continuation of said environment is in the best interest of the children.[42]

C. *The Rights of Lesbian, Gay, Bisexual or Transgendered (LGBT) Parents*

Many hoped that the decision in *Hunter* would provide more latitude for same-sex parents. If, as *Hunter* seems to suggest, a third party can be awarded custody if a court found that the children have an established custodial environment with the third party and it is in the best interests of the children for that to continue, there seems to be room for an argument to award custody to a non-biological LGBT parent. For the LGBT rights movement, this would have added much needed protections for the rights of non-biological parents in same-sex relationships.

The conversation between the natural or biological rights of a parent and the person or parent with whom there is an established custodial environment is particularly poignant as issues arise between same-sex parents. In many same-sex families, parties often choose one partner to be the natural parent of the child using artificial insemination with the intention that the other parent will fill the second parent role, albeit without a biological connection. However, as Michigan law does not recognize same sex marriage[43] and the status of second-parent adoption in Michigan is ambiguous,[44] the non-biological parent is left without recourse under the law if the parties separate, even if that parent has established a close relationship with the child.[45]

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40. *Id.* at 279 (citing Heltzel v. Heltzel, 248 Mich. App. 1, 27 (2001)).

41. *Hunter*, 484 Mich. at 278-80.

42. *Id.*

43. MICH. CONST. art. I, § 25.

44. *See* Jane S. Schacter, *Constructing Families in a Democracy: Courts, Legislatures and Second-Parent Adoptions*, 75 CHI.-KENT L. REV. 933, 934 (2000).

45. *See In re Anjoski*, 283 Mich. App. 41, 50-52 (2009).

Such was the recently decided issue in *Harmon v. Davis*.[46] Renee Harmon and Tammy Davis had been in a long term, same-sex relationship since 1989.[47] The parties resided together, shared bank accounts, and acquired real and personal property together.[48] The parties jointly agreed that children would be conceived during the relationship and both parties would contribute to the cost of artificial insemination.[49] They further agreed that Tammy Davis, the defendant in the case, would bear the children.[50] The parties had three children together and shared parenting responsibilities throughout their long term relationship.[51]

The parties' romantic relationship ended in 2008 and the parties entered into a co-parenting agreement for about eighteen months thereafter.[52] When the post-relationship interaction deteriorated further and co-parenting stopped being possible, the non-biological parent, Renee Harmon, brought suit for custody in Wayne County Circuit Court.[53] At issue at the trial court level was whether the plaintiff had standing to initiate a custody proceeding.[54] If Ms. Harmon were determined to be a non-parent third party, she would lack standing to initiate a dispute.[55] Unlike Robert and Lorie in *Hunter*, Ms. Harmon had never sought a legal guardianship over the children and thus had no formal rights to the children, even though Ms. Harmon and Ms. Davis shared approximately the same number of overnights with the children.[56] Ms. Harmon's lack of standing was at odds with her established long term parenting relationship with the children and with the fact that the children looked to her as a parent.

Rejecting a third party custodial analysis all together for a same-sex parent, the trial court instead focused on the conceptual definition of "natural parent."[57] If Ms. Harmon was determined to be a natural parent rather than a third party, she would automatically have standing to bring suit and the court would consider the best interests of the children in making a custody determination.[58] The question before the court in

46. Harmon v. Davis, No. 10-101368 (Wayne Cnty. Cir. Ct. 2010).
47. *Id.* at 2.
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.* at 2-3.
52. *Harmon*, No. 10-101368, slip op. at 4.
53. *Id.* at 1.
54. *Id.* at 6.
55. *Anjoski*, 283 Mich. App. at 50-52.
56. *Harmon*, No. 10-101368, slip op. at 5.
57. *Id.* at 9.
58. *Anjoski*, 283 Mich. App. at 50-52.

Harmon was whether someone could be considered a natural parent if that parent had only an actual, practical connection to the child rather than a biological or legal connection.[59]

Although much of family jurisprudence requires biology or genetic connection or heritage in the definition of a natural parent,[60] some does not. A husband, regardless of biology, is presumed to be the father of his child born in wedlock.[61] A man cannot deny paternity even though the child was not likely his biological child if equitable estoppel is at play. [62] The trial court also cited the equitable adoption doctrine as a basis for standing, stating "[u]nder this doctrine, an implied contract to adopt is found when a close relationship, similar to parent-child, exists between a child and the deceased. As a result, the child has right to share in the deceased's estate."[63] In *Atkinson* the court of appeals noted that "[i]t is only logical that a person recognized as a natural parent in death should have the same recognition as in life." [64]

Based on those rules of law, the trial court in *Harmon* found that the definition of natural parent is not dependent on biology alone and the thread that binds a natural parent is "the existence of an obligation to undertake the responsibilities of a parent as to a child." [65] The trial court determined that the matter should be set for evidentiary hearing to determine if there was an agreement for the parties to create such an obligation. [66] An immediate interlocutory appeal was made and the court of appeals determined that Ms. Harmon lacked standing because one cannot confer standing by an agreement, such as the one between Ms. Harmon and Ms. Davis.[67] Moreover, the court of appeals found that Plaintiff could not meet the third party standing requirements under the act because there was neither an active guardianship case nor an active case in controversy in the circuit court.[68] The case was remanded for a decision in favor of Ms. Davis.[69] The decision to apply a formulaic analysis of standing insured that the children in *Harmon* were guaranteed

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59. *Harmon*, No. 10-101368, slip op. at 9-10.

60. *See id.* at 9.

61. Atkinson v. Atkinson, 160 Mich. App. 601, 608-09 (1987).

62. Johnson v. Johnson, 93 Mich. App. 415, 419-20 (1979).

63. *Harmon*, No. 10-101368, slip op. at 12 (citing *Atkinson*, 160 Mich. App. at 611) (internal citations omitted).

64. *Atkinson*, 160 Mich. App. at 611.

65. *Harmon*, No. 10-101368, slip op. at 13.

66. *Id.* at 21.

67. *Harmon*, No. 297968, slip op. at 1 (citing Bowie v. Arder, 441 Mich. 23, 42-43 (1992)).

68. *Id.*

69. *Id.*

a different result than the children in *Hunter despite an analogous relationship with non-biological third party parental figures.*[70]

Further, by finding that Ms. Harmon lacked standing, the trial court was deprived of the opportunity to balance the inherent responsibility of protecting the liberty interest of the biological parent against the best interests of the children based on the totality of the circumstances of the children's lives including the established custodial environment.[71] Because the established custodial environment was not discussed in *Harmon*, it is difficult to analyze the state of LGBT third party custody if the non-biological parent had had standing to bring a child custody case against the biological parent while having an established custodial environment.[72]

D. The Nature of the Established Custodial Environment

In order to balance the fundamental right to parent with an established custodial environment with a third party, it is essential to define what considerations affect the established custodial environment and what do not. An established custodial environment exists when "over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort."[73] In third party cases such as *Hunter* and *Harmon*, the established custodial environment can be essential to judicial overview, because it determines the conduct of the parties and defines where and with whom a child feels most at home.[74]

In cases that involve a dispute between biological parents, the existence of an established custodial environment can also be demonstrated by the conduct of the parties and foreshadow the problems that may arise in the future. For example, in the recent decision in *Pierron v. Pierron*, the Michigan Supreme Court determined the details of what an established custodial environment is.[75] In *Pierron*, the defendant-mother, Kelly Pierron, asked the court to move the parties' two minor children sixty miles from Grosse Pointe to Howell.[76] Tim

70. An unfortunate finding in the opinions of the authors of this article.

71. *Hunter*, 484 Mich. at 278.

72. It is essential to note, however, that the disparity between *Hunter* and *Harmon* was based on a technical evaluation of the basis of procedural posture under the CCA rather than a true evaluation of to whom the children look to for love, affection and guidance.

73. MICH. COMP. LAWS ANN. § 722.27(1)(C).

74. *See generally id.*

75. *Pierron*, 486 Mich. at 90-94.

76. *Id.* at 84.

Pierron, plaintiff-father, objected arguing that a change of school over sixty miles away would modify the established custodial environment.[77] The parties shared joint legal custody.[78] At issue before the court was "whether a proposed change of school . . . would modify the established custodial environment . . . and whether, absent a change in the custodial environment, the trial court must . . . specifically analyze each . . . 'best-interest' factor articulated in MCL 722.23."[79] The trial court held an evidentiary hearing, finding that where the children looked to each parent for guidance an established custodial environment exists with both parents.[80] The court further found that Kelly had failed to show by clear and convincing evidence that the change in schools was in the best interest of the children, thus denying her permission to move to Howell.[81] Ms. Pierron appealed and the Michigan Court of Appeals reversed, finding that Mr. Pierron's custodial environment would not be modified by the move and the trial court erred in finding so.[82] Tim then appealed to the Michigan Supreme Court.[83]

The Michigan Supreme Court affirmed the Michigan Court of Appeals finding:

> The Child Custody Act "applies to all circuit court child custody disputes and actions, whether original or incidental to other actions." The act provides that when parents share joint legal custody—as the parties do here—"the parents shall share decision-making authority as to the important decisions affecting the welfare of the child." However, when the parents cannot agree on an important decision, such as a change of the child's school, the court is responsible for resolving the issue in the best interests of the child.[84]

The court continues:

> While an important decision affecting the welfare of the child may well require adjustments in the parenting time schedules,

77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. *Pierron*, 486 Mich. at 84.
82. *Id.*
83. *Id.*
84. *Id.* at 85 (internal citations omitted) (citing MICH. COMP. LAWS ANN. § 722.26; Lombardo v. Lombardo, 202 Mich. App. 151, 159 (1993)).

this does not necessarily mean that the established custodial environment will have been modified.[85]

The Michigan Supreme Court found that there was no established custodial environment with Mr. Pierron and that Ms. Pierron could move to Howell if she showed by a preponderance of the evidence that it was in the best interest of the minor children to move.[86] *Pierron* demonstrated that biology is not dispositive when the court is weighing the rights between natural parents. Instead of looking at the infringement of a father's liberty interest in protecting his right to parent, the court must take a more nuanced analysis between parents and weigh the judgment of the established custodian—the person to whom the children look to for love, affection and guidance.[87]

E. The State's Right to Terminate an Individual's Parental Rights

Over the last year, three significant cases were decided in Michigan as to the termination of parental rights to children in the juvenile courts.[88] The fundamental liberty interest in the right to parent changes somewhat when placed in juxtaposition with the State of Michigan's right to protect minor children from harm. Because the State is attempting to terminate a parent's right to be involved with their child, rather than balance the rights of competing parties, the court must fully conform with procedural and substantive constitutional due process.[89] Moreover, the courts are not balancing the natural parents' right to parent the child with an established custodial environment and the best interest standard, but rather seeking to find a parent unfit.[90] These cases will turn on the conduct of the parents and proceed in an adversarial posture between the State's interests in protecting children and the parent's fundamental right to parent.[91]

In *In the Matter of Wimberly*, the Michigan Court of Appeals reiterated the standard that must be met for the State to terminate the rights of a natural parent:

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85. *Id.* at 86 (citing Brown v. Loveman, 260 Mich. App. 576 (2002)).

86. *Id.* at 86-87.

87. *Pierron*, 486 Mich. at 92-93.

88. *Wimberly*, 2009 WL 4827444, at *1; *McBride*, 483 Mich. at 1095; *In re Makyla Williams*, 286 Mich. App. 253 (2009).

89. *Hunter*, 484 Mich. at 257.

90. *See generally Wimberly*, 2009 WL 4827444, at *1-4.

91. *See id.*

> In order to terminate parental rights, the trial court must find at least one of the statutory grounds for termination in MCL 712A.19b(3) has been proven by clear and convincing evidence . . . Once a statutory ground for termination has been established, the trial court shall order termination of parental rights if termination is in the child's best interest.[92]

In the Matter of Wimberly centered around three children who were taken into protective custody because their mother, Sharon Fleming-Wimberly, suffered from schizophrenia.[93] Ms. Fleming-Wimberly was unable to maintain the home's physical condition or cleanliness.[94] She had no bedroom furniture for the children in the home.[95] While in her custody, the children smelled of urine and were found to be underweight.[96] Although Ms. Fleming-Wimberly argued that there was neither evidence of neglect nor a sufficient attempt to reunify her with her children, the trial court terminated her parental rights and deprived her fundamental right to parent.[97]

In response, the Michigan Court of Appeals found that the evidence of neglect was sufficient, that efforts had been made to reunify, and that the right to parent is not absolute.[98] The court stated, "Once the petitioner has presented clear and convincing evidence that persuades the court that at least one ground for termination is established under [MCL 712A]19b(3), the liberty interest of the parent no longer includes the right to custody and control of the children."[99]

Interestingly, the decision in *In the Matter of Wimberly* is in contrast to the *Hunter* decision, which stated that "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child." [100]

Wimberly and *Hunter* are distinguished by the State's interest in protecting children and the power of the State to terminate that precious liberty interest in the pursuit of child protection.

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92. *Wimberly*, 2009 WL 4827444, at *1 (internal citations omitted).
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.* at *2.
97. *Id.* at *2-3.
98. *Wimberly*, 2009 WL 4827444, at *2-3.
99. *Id.* at *3 (alteration in original) (citing *In re Trejo*, 462 Mich. 341, 355 (2000)).
100. *Hunter,* 484 Mich. at 257 (quoting *Santosky v. Kramer*, 455 U.S. 745, 753 (1982)).

However, the question arises as to what limits should then be required to balance the State's interest in protecting children and the parent's fundamental liberty interest. It is well established that the State must provide parents with a fundamentally fair process in termination of parental rights cases.[101] Under Michigan law, parents have the right to be informed of a right to counsel and they have a right to be heard in court.[102] Michigan also explicitly recognizes a right to counsel in parental termination cases.[103] Additionally, pursuant to M.C.L.A. 712A.17(c)(4), the Court must advise the respondent in a termination proceeding at the first court appearance of his/her right to an attorney, the right to court-appointed attorney if the respondent cannot afford one, and the right to request a court-appointed attorney at a later hearing.[104]

Notwithstanding that, the Michigan Supreme Court recently denied leave to appeal[105] a Michigan Court of Appeals case that found that failure of the courts to comply with procedural due process for an incarcerated parent can be considered harmless error.[106]

In re Mcbride involved Ronald McBride Jr., a father of three who had been incarcerated.[107] As the respondent father, Mr. McBride had maintained a relationship with the children since the beginning of incarceration through his extended family.[108] The State began proceedings against the mother of the children, who admitted the allegations within the neglect petition.[109] In any such proceedings, a respondent is entitled to communicate with the court by telephone when appearance is not possible;[110] in this case, the father was not informed of this right in violation of the Michigan Court Rules.[111]

On August 27, 2007, the State petitioned for the termination of both parents' rights to the children.[112] Mr. McBride was served with the termination petition and he immediately invoked his right to counsel which was denied.[113] On November 7, 2007, the rights of both parents

101. *Santosky*, 455 U.S. at 753.

102. *See* MICH. COMP. LAWS ANN. § 712A.19b (West, Westlaw through P.A. 2010, No. 383); MICH. CT. R. 3.977.

103. *In re Powers Minors*, 244 Mich. App. 111, 121 (2000).

104. MICH. COMP. LAWS ANN. § 712A.17(c)(4) (West 2002).

105. *In re McBride*, 483 Mich. 1095 (2009), *denying cert.*, 2008 WL 2751233 (Mich. App. 2008).

106. *McBride*, 2008 WL 2751233, at *2.

107. *Id.* at *1.

108. *Id.* at *3 (Gleicher, J. concurring in part, dissenting in part).

109. *Id.* at *2.

110. MICH. CT. R. 2.004(C).

111. *McBride*, 2008 WL 2751233, at *1-2.

112. *Id.* at *4 (Gleicher, J. concurring in part, dissenting in part).

113. *Id.*

were terminated and both parties appealed.[114] The Michigan Court of Appeals affirmed in a split opinion, stating that the trial court's error was harmless.[115] Judge Gleicher, dissenting in part, stated that respondents' procedural and substantive due process rights were violated and therefore the court;s resulting order "lack[ed] any inherent integrity."[116] An application for leave to appeal to the Michigan Supreme Court was denied, but in an unusual step, the dissent to the denial order was published and authored by Judge Corrigan.[117]

Judge Corrigan's dissent concurred with Judge Gleicher's dissent reiterating that Mr. McBride's procedural and substantive due process rights were violated.[118] The parties concede that Mr. McBride's rights under MCR 2.004 were violated and that MCR 2.004 explicitly provided "a court may not grant the relief requested by the moving party . . . if the incarcerated party has not been offered the opportunity to participate in the proceedings."[119] Both Gleicher's and Corrigan's dissents further asserted that a reversal of the decision is required.[120] Moreover, Judge Corrigan asserted that "the error could not have been harmless" stating further:

> The court's decision to terminate respondent's constitutional parental rights after depriving him of the most basic procedural protections throughout the proceedings was certainly inconsistent with substantial justice. Second, respondent has shown that his substantial rights were affected and that, absent the errors, the outcome of the proceeding likely would have been different.[121]

If denial of procedural due process can be considered harmless error, then the fundamental liberty interest in raising one's child is stripped of significant meaning.

In contrast to *In re McBride*, the Michigan Court of Appeals in *In re Williams* reversed and remanded a decision in which a respondent father

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114. *Id.* at *5 (Gleicher, J. concurring in part, dissenting in part).

115. *Id.* at *2.

116. *Id.* at *11 (Gleicher, J. concurring in part, dissenting in part).

117. *McBride*, 483 Mich. at 1095 (Corrigan, J. dissenting).

118. *Id.* at 1099-1106 (Corrigan J. dissenting).

119. *Id.* at 1102 (Corrigan, J. dissenting) (citing MICH. CT. R. 2.004(f)) (emphasis added).

120. *Id.* at 1106 (Corrigan, J. dissenting); *McBride*, 2008 WL 2751233 at *11 (Gleicher, J. concurring in part, dissenting in part).

121. *McBride*, 483 Mich. at 1104 (Corrigan, J. dissenting) (internal quotation marks omitted).

was denied his right to counsel by finding that denial to be plain error, as opposed to harmless error.[122]

Makyla Williams was brought into protective custody because her mother had ceased her outpatient drug treatment program and had renewed her habitual crack cocaine problem.[123] There were no allegations of abuse or neglect on behalf of the child's father, Michael Williams Sr.[124] At the trial, Mr. Williams stated that he had contact with Makyla daily, changed her diapers, and gave Makyla's mother money on her behalf.[125] Both parents' rights were terminated and both parents appealed.[126] The termination of parental rights was upheld as to the mother in this case,[127] but in an unusual step the court *sua sponte* addressed the lack of procedural and substantive due process that Mr. Williams had been deprived, even though Mr. Williams' attorney had not raised the issue on appeal:

> Only rarely will this Court consider and decide an issue not raised by the parties. Here, however, we are confronted with a circuit court order permanently severing respondent father's fundamental right to the care and custody of his child, entered after proceedings conducted without the assistance of counsel. Because we cannot ignore a process that casts serious doubt on the integrity of the proceedings and would risk substantial injustice if allowed to stand unexamined, we turn to a detailed consideration of [the] right to counsel.[128]

After an extensive analysis, the court held that failure to inform Mr. Williams of his right to counsel and the additional failure to provide counsel at a later time was plain error and the termination of Mr. Williams' parental rights was reversed and remanded to the trial court.[129]

The decision in *In re Williams* is in direct contradiction to that of *In re McBride*. The fundamental liberty interest set forth in *Troxel* is a precious, constitutional right; if the state chooses to move forward to terminate that right, the denial of the statutory right to counsel should not be harmless error. Furthermore, while *Troxel* lays forth the fundamental

122. *In re Williams*, 286 Mich. App. 253, 278 (2009) (per curiam).
123. *Id.* at 256.
124. *Id.*
125. *Id.* at 257.
126. *Id.* at 270.
127. *Id.* at 270-73, 78.
128. *Williams*, 286 Mich. App. at 273-74.
129. *Id.* at 278.

right to parent in civil cases,[130] there remains little comprehensive analysis of the interplay between the civil and juvenile courts. Moreover, while the fundamental right to parent remains constant, the intercession of the State necessarily imposes additional protections for the natural parent because of the inherent power of the State. The true termination of parental rights is distinguishable from the award of custody to a third party, primarily because with third party custody, the biological parent retains a right to see and guide her children.

III. CONCLUSION

There are many questions that remain in the fundamental right to parent cases decided during this survey period. On a practical level however, the most important issue that courts continue to face in these cases is that in a field fraught with human emotions rather than static interactions, the rule of law in the above cases has begun to split theoretical hairs. Vast rifts in the judicial results between families that are similarly situated have begun to emerge and it is essential that the courts begin to look at a static, replicable standard.

130. *See Troxel*, 530 U.S. at 65-66.