STATE OF MICHIGAN
KENT COUNTY CIRCUIT COURT -- FAMILY DIVISION

IN THE MATTER OF:
Kyron and Christian Robinson

Case No.: 01-0702-00 NA

Hon. Kathleen A. Feeney

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MICHIGAN PROTECTION AND ADVOCACY SERVICE, INC's AMICUS CURIAE MEMORANDUM OF LAW ASSERTING NO JURISDICTION

Introduction

> **Experience should teach us to be most on our guard to protect liberty when Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.**

Olmstead v US, 277 US 438, 479 (1928).

Michigan Protection and Advocacy Service, Inc. [MPAS] submits this amicus curiae memorandum per this Court's October 2, 2002 verbal order granting MPAS' motion seeking permission to file same. MPAS understands the timing considerations present in this case, and appreciates this Court's willingness to allow MPAS to speak directly for itself and its many constituents who have a significant stake in how this case

is resolved.

Argument Summary

This case asks whether Michigan's Probate Code, Chapter XII A, MCL 712A.1 *et. seq*. [the Code], empowers family court judges to authorize elective, non-routine, non-emergency medical surgery for children who are temporary wards of the court. This jurisdiction issue is one of law, not of fact, and presents a case of first impression in Michigan. Diligent library and computer research has not disclosed any similar reported cases from other state or federal courts. MPAS asserts that the Code does not confer jurisdiction on family courts to authorize such surgery.

Issue I proclaims the right of parents to "parent" children; making medical and other essential decisions for them is a fundamental right under the United States Constitution. The ability of the state to insert itself into the family and to intervene in core family decisions is subject to those constitutional interests. State laws and levels of intervention must be evaluated in a constitutional context even when, as here, the state has properly -- but to this point only "temporarily" -- asserted control over the parents and children. While the Constitution clearly permits a state to act to protect children when their parents have failed to do so, the level of intervention depends as much on the parent's current status as it does on the children's best interests. True, it is the parent's conduct, and not the state's, that places the parent's fundamental rights in jeopardy, but those rights continue in some form right up until the state, after affording full due process, lawfully terminates them.

Issue II observes that the Code's primary objective in abuse and neglect cases is to reunify the family. The Code gives family courts broad authority to address the

family's access to and ability to benefit from services designed to help the family correct the factors creating the neglect and abuse so that the family can be reunited. The Code clearly and unambiguously preserves for parents their right to make "nonemergency, elective surgery" decisions for their children who are temporary court wards, MCL 722.124a(3). The Family Independence Agency [FIA] has implemented policies specifically designed to ensure that parents retain their right to make "nonemergency, elective" medical decisions for their children who temporarily have been placed outside the home, (FIA, Children's Foster Care Manual [CFF] 722-11; CFB 2001-008; 12-1-2001). This interpretation makes the best sense given the statutory intent that the family will be reunited

MPAS concludes with Issue III, describing how the policy considerations attendant in the above arguments compel a decision that this Court does not have jurisdiction to authorize the requested elective surgery here. As a matter of policy, this result is necessary not just for the Larson family, but for all families who have children with disabilities. Ms. Larson's parental rights have not been terminated, and her right to decide whether her children should have cochlear implants [CI] has been preserved for her by Michigan law and FIA policy. MPAS understands that Ms. Larson's *competency* to make the CI medical decision for her children has not been placed in issue. Instead, there is a difference of opinion between Ms. Larson and others about whether the CI's will benefit the children. This Court would not be involved in the CI issue but for the fact that her conduct in an area completely unrelated to the children's deafness allowed this Court to take jurisdiction. There is worldwide controversy over the use of CI's, embracing medical, mechanical and cultural issues. Reasonable minds disagree.

Many deaf parents who have deaf children have chosen not to use the implants either for themselves or their children. Michigan and federal constitutional and statutory law and practices honor and embrace the family unit as the centerpiece of the fabric of America. Taking Ms. Larson's right to make this core medical decision on behalf of her children would rip that fabric, and imperil her ability to reunify her family. The policy determination that reunification honors both Ms. Larson's fundamental right to parent and her children's rights to be parented by her would be dashed if the necessary intervention created by her conduct last fall was followed by the forced surgical invasion of her children's bodies against her will now.

Ms. Larson and her children are not the only stakeholders in this case. This is, after all, a question of law, not of fact. For families who have children with special needs, family culture and values are central to how the family survives and whether the family thrives in a world that devalues disability and values uniformity. ALL families are special and unique, but families who have children with disabilities regularly encounter barriers that impact on the family and require them to form a different view of how "normal" is defined within their family, and how they interact with the world around them. Second-guessing by outsiders is a regular part of that life, and contributes to the development of the family's culture. A decision allowing "outsiders," including this Court, to invade the family core by second-guessing parental decisions about how and by whom their children's disabilities will be treated takes a challenging family environment and threatens its very core.

Statement of Interest of Amicus Curiae

MPAS' decades of experience in protecting the rights of persons with disabilities

renders MPAS uniquely qualified to assist this Court in determining and defining the rights of children with disabilities and the court's jurisdiction to hear and decide a petition to perform elective, non-routine, non-emergency surgery on children who are temporary wards of the court when they are children with disabilities. MPAS, as a result of its history of representing the interests of persons with disabilities and its first-hand knowledge of the devaluation and vulnerability of such persons, has grave concerns about the implications of the decision to be made by this Court and appreciates the complexity of the issues presented. Amici's constituents include thousands of Michigan citizens who have disabilities and are parents of children who have disabilities. Parents have a fundamental liberty interest in raising their children, as do children in being raised by their parents. A court decision authorizing a surgery which could compromise the family culture is tantamount to terminating the parents' right to raise their children. These interests go beyond constitutional issues and into ethical, cultural and societal concerns of the highest magnitude.

MPAS' previously submitted motion seeking permission to file this brief states its federal mandates and Michigan statutory obligations. The motion and brief are attached to and incorporated into this brief as Exhibit 'A.'

Fact Statement

The parties before this Court are a deaf mother and her two deaf children, ages 3 and 4. This Court properly exercised subject-matter jurisdiction over the parents and children and declared the children temporary wards of the court after finding that the mother neglected the children by leaving them with care providers who then physically abused them. Neither the mother's nor the children's deafness were direct factors in

the activity that led to this Court's intervention.

MPAS's brief is based upon the following facts, which MPAS reasonably believes are not disputed in this case:

- ♦ Ms. Larson is deaf.
- ♦ Both children are deaf.
- ♦ The children are temporary court wards.
- ♦ Ms. Larson's *competence* to decide whether her children should have cochlear implants is not at issue.
- ♦ Ms. Larson has a parenting plan in place and is making progress on its objectives.
- ♦ The goal of family court intervention in this case remains to reunify Ms. Larson and her children.
- ♦ The fact that the children are deaf does not create an emergency situation within the meaning of MCL 722.124a.
- ♦ Cochlear implant surgery is elective and not routine surgery.
- ♦ Ms. Larson wants to be reunited with her children.
- ♦ Ms. Larson's children want to be reunited with her.
- ♦ There has been court testimony on the Deaf culture, including on aspects related to a belief within parts of the Deaf culture that deafness is not a disability, but rather a culture that has its own language.

Argument

ISSUE I: THE RIGHT TO PARENT IS A FUNDAMENTAL CONSTITUTIONAL RIGHT.

The United States Supreme Court, in *Parham v J. R.* 442 US 584 (1979), stated the constitutional dimensions of the American family.

> 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, 45 S.Ct. 571,573, 69 L.Ed. 1070 (1925). See also *Wisconsin v. Yoder,* 406 U.S. 205, 213, 92 S.Ct. 1526,1532, 32 L.Ed.2d 15 (1972); *Prince v. Massachusetts,* 321 U.S. 158, 166, 64 S.Ct. 438, 442, 88 L.Ed.645 (1944); *Meyer v. Nebraska,* 262 U.S. 390, 400, 43 S.Ct. 625, 627, 67 L.Ed. 1042 (1923). Surely, this includes a "high duty" to recognize symptoms of illness and seek and follow medical advice. The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgement required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affections lead parents to act in the best interests of their children.

Id., at 601.

In *Smith v Organization of Foster Families for Equality and Reform,* 431 US 816 (1977), at 844 the Supreme Court wrote that:

> ...the importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in "promot(ing) a way of life "through the instruction of children, *Wisconsin v. Yoder*, 406 U.S. 205, 231-233, 92 S.Ct. 1526, 1541-1542, 32 L.Ed.2d 15 (1972), as well as from the fact of blood relationship.

Id.

In *Parham, supra,* at 621, Justice Stewart, concurring, noted that:

> For centuries it has been a canon of the common law that parents speak for their minor children. So deeply imbedded in our traditions is this principle of law that the Constitution itself may compel a State to respect it. In ironic contrast, the District Court in this case has said that the Constitution requires the State of Georgia to disregard this established principle. I cannot agree.
>
> Finally, in *Parham*, *Id.,* at 602, the Court wrote that:
>
> That some parents "may at times be acting against the interests of their children" 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. 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.

These cases leave no doubt about the importance of Ms. Larson's fundamental right to parent her children, and to remain in the center of their lives medically.[1]

ISSUE II: THE CIRCUIT COURT FAMILY DIVISION DOES NOT HAVE STATUTORY JURISDICTION PURSUANT TO THE JUVENILE CODE TO ORDER NONEMERGENCY, ELECTIVE SURGICAL TREATMENT FOR CHILDREN TEMPORARILY PLACED IN OUT-OF-HOME CARE.

The child protective jurisdiction of the Family Division of the Circuit Court (formerly the Probate or "Juvenile" Court) is stated in MCL 712A.2(b)(1) and (2). The Michigan Supreme Court explained the court's jurisdiction:

> MCLA §712A.2(b)(2); MSA 27.3178(589.2)(b)(2) provides the probate court with "[j]urisdiction in proceedings concerning any child under 18 years of age found within the court...[w]hose home environment, by reason of neglect, cruelty, drunkenness, criminality, or depravity on the

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[1] This argument has been condensed given the time constraints for brief submission. It adequately sets the stage for Issue II, which is complete and focuses on the Michigan statutes central to the resolution of this case.

> part of the parent, guardian, or other custodian, is an unfit place for the child to live in." Within the context of subsection (b)(2), the term "jurisdiction" refers to the probate court's authority to hear and decide a case on the basis of a finding of fact that the child belongs to the class of children over who the court has the power to act. In short, a juvenile court must determine that the facts of a particular case place a child within the specific provisions of subsection (b)(2). *In re Hatcher*, 443 Mich 426, 433 (1993).

The *Hatcher* court noted that subject matter jurisdiction is established by pleadings, such as the petition, rather than by the later trial proceedings. 443 Mich at 438.

Here MPAS agrees that the initial petition, filed 10/3/01, properly brought Kyron and Christian Robinson within the subject matter jurisdiction of the court, because it was of a class *that the court is authorized to adjudicate* and the claim was not clearly frivolous. *Hatcher, supra* at 437. Clearly, if the allegations of the first petition were true, the children needed protection from the court as intended under MCLA 712A.2(b)(2). As a practical matter, the issue for the court is the parent[s]' fitness, rather than the child's best interests. *In the Matter of Atkins*, 112 Mich App 528 (1982). The burden of showing fitness after the court has taken jurisdiction rests upon the parent to show she or he is a fit parent. *Id.*; *Matter of LeFlure*, 48 Mich App 377 (1973).

The attorney for the children subsequently filed the Motion For Court to Order Cochlear Implants, claiming that it is in the children's best interests "...that they receive cochlear implants in order for them to realize their full potential in life" and that time is of the essence given "...the 'window of opportunity' ...is from birth through age 4." Motion, filed 4/11/02, paragraphs 4 & 5. The court must look to MCLA 722.124a to determine if it has proper authority to order medical care for these children.

MCLA 722.124a states in **relevant part**:

> (1) A probate court, a child placing agency, or the department may consent to **routine, nonsurgical medical care, or emergency medical and surgical treatment** of a minor placed in out-of-home care....
> (3) Only the minor child's parent or legal guardian shall consent to nonemergency, elective surgery for a child in foster case. If parental rights have been **permanently terminated** by the court action, consent for nonemergency, elective surgery shall be given by the probate court or the agency having jurisdiction over the child. **(Emphasis added).**

This provision is clear and unambiguous, and explicitly reserves to the parent the right to make "nonemergency, elective surgery" decisions for their children who are temporary wards of the state. The cochlear implant petition expresses that the CI's are needed "in order for them to realize their full potential in life." This language does not describe either an emergency or a routine medical treatment situation. The court therefore does not have a clear grant of authority to order surgical cochlear implants as a form of medical care under this statute because the statute vests that right in Ms. Larson under the present circumstances. In a similar vein, there is no petition allegation claiming that Ms. Larson lacks the competence to decide whether her children should have the implants. See *In re AMB*, 248 Mich App 144 (2001), where the court noted that:

> We think it important to draw a distinction between cases in which the parent cannot make a decision for the child because of incompetency or another legitimate reason and cases in which the factors bringing the case to the family court's attention are unrelated to the parent's competency or other factors that would disqualify the parent as a decisionmaker. ... [W]hen the allegation is that the parent ... is incapable of making a decision concerning the patient's care because of incompetency, there *must* be clear and convincing evidence that this incompetency actually exists. (Emphasis original) *Id.,* at 205, 206.

Here the children's attorney is asking this Court to use a "best interests"

approach to secure a decision ordering the cochlear implant surgery without regard for Ms. Larson's constitutional interest in parenting, and without considering Ms. Larson's ability to evaluate and decide for her children whether or not they should have the surgery.

Michigan courts should strictly construe statutes and case law to protect the lives and welfare of children. It is well-settled that "[t]he jurisdiction and powers of the probate court are derived entirely from the statutes." Ashbaugh v Sinclair, 300 Mich 673, 676; 2 NW2d 810 (1942); *In re Kasuba Estate,* 401 Mich 560, 566; 258 NW2d 731 (1977). Also well-settled is that the "Legislature is presumed to be aware of, and thus to have considered the effect on, all existing statutes when enacting new laws." Walen v Department of Corrections, 443 Mich 240, 248; 505 NW2d 519 (1993).

Given that the Legislature is presumed to know the law, §722.124a(1) and (3) can hardly be said to acknowledge, let alone purport to satisfy, the substantial interests and heavy presumptions attendant in the fundamental right to parent implicated by non-routine and non emergency medical treatment or surgery. Not only would such a strained interpretation be unreasonable, but the absolute lack of any statutory scheme providing procedural and substantive protections would doom the statute to a finding of unconstitutionality, had jurisdiction truly been intended.

It is also well established that if statutory language is clear and unambiguous, judicial construction is neither required nor permitted, and courts must apply the statute as written. *People v Morey,* 461 Mich 325, 603 NW2d 250; *In the Matter of Huisman v Huisman*, 230 Mich App 372; 584 NW2d 349; *Sun Valley Foods Co. v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999); *Barr v Mount Brighton Inc.*, 215 Mich. App. 512, 516-

517; 546 NW2d 273 (1996); *Tryc v Michigan Veterans' Facility*, 451 Mich 129, 135; 545 NW2d 642 (1996).

The Family Independence Agency (FIA) is the State agency responsible for enforcement of Michigan's Child Protection Laws and is therefore entitled to deference regarding its interpretation of the Child Protection laws. Although it remains the Court's responsibility to determine the meaning of the statute, it must give "appropriate deference" to the agency's interpretation. *Department of Civil Rights ex rel Parks v General Motors Corp,* 93 Mich App 366, 373-374; 287 NW2d 240 (1979). This Court ordinarily defers to the construction of a statute by the agency charged with applying it unless the interpretation is "clearly wrong." "*Jones-Jennings v Hutzel Hosp,* 223 Mich App 94, 105; 565 NW2d 680 (1997). In this regard, FIA has stated that "only the child's parents may consent to non-emergency elective surgery unless parental rights have been terminated by court action." Policy CFF 722-11.

ISSUE III: FAMILIES WHO HAVE CHILDREN WITH DISABILITIES OR SPECIAL NEEDS FORM FAMILY CULTURES AND VALUES THAT CELEBRATE AND EMBRACE THE DIVERSITY OF DISABILITY.

Deaf Culture exists. The testimony has established it, and this Court should now have become thoroughly educated on the divergent opinions within the disability community. Here is the larger picture.

There are 225,000 children and young adults in Michigan who receive special education services. They are 225,000 kids and young adults who might some day be a party to an abuse and neglect action under the Code. What do those families deal with on a daily basis? Here's a list.

- ♦ Daily or frequent medical services, often with professionals who do not know the family or its culture.
- ♦ Accessing and using community services on a weekly or more frequent basis.
- ♦ Accessing and maximizing special education services.
- ♦ Finding and hiring skilled care providers.
- ♦ Researching and trying to understand what the child's disability is and how it should be treated.
- ♦ Trying not to squeeze out or shortchange the children in the family who do not have significant disabilities.
- ♦ Providing for the family financially.
- ♦ Helping or getting help from other similarly situated families.

The list goes on and on. Families who care for their children with special needs often have to fight for services, and often are approached to submit their children for tests of the latest treatments and medications. They have recurring emergencies at home and in the community, like seizures, clogged feeding or breathing tubes, muscle failure, etc.

These are the families who will receive the benefit or the burden of this Court's decision today. These are the people who tell the doctors no, and then get threatened with abuse or neglect actions if they refuse to reconsider. These are the parents and children who have formed their own unique, cohesive emergency response team that just reacts when things happen. Outsiders never understand the first time they see it, but some times they call CPS.

These are the families who go any distance and fight any battle to improve life for their families -- their children with and without disabilities. Had there been more time,

this brief would have included some of the studies identifying how these families -- our clients, our families -- form their cultures and values around people, beliefs and realities that are outside the knowledge of the general public.

The purpose of the Juvenile Code is to protect and support the vital, fundamental constitutional relationship between parents and their children. The Michigan Legislature preserved for the parents the right to make nonemergency, elective, nonroutine decisions for their children who are temporary court wards. The statute protects Ms. Larson and her children from excessive involvement, especially under the present circumstances. This Court should do so, too. MPAS asks this for our clients, and for the community as a whole.

Respectfully submitted,

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