Public Policy Position
Amicus Brief in the Case of
In re LMB (Case No. 157903)

The Children's Law Section is a voluntary membership section of the State Bar of Michigan, comprised of 459 members. The Children's Law Section is not the State Bar of Michigan and the position expressed herein is that of the Children's Law Section only and not the State Bar of Michigan. To date, the State Bar does not have a position on this item.

The Children's Law Section has a public policy decision-making body with 19 members. On April 19, 2018, the Section adopted its position after a discussion and vote at a scheduled meeting. 10 members voted in favor of the Section submitting an amicus brief in the case of *In re LMB*, 0 members voted against this position, 0 members abstained, 9 members did not vote.

Contact Person: Paula A. Aylward
Email: paylward@allegiantlegal.com

IN THE MICHIGAN SUPREME COURT
Appeal from the Michigan Court of Appeals
(O'Brien, P.J., Jansen, and Murray, JJ.)

In re LMB, Adoptee.

Supreme Court No. 157903
Court of Appeals No. 338169
Wayne Circuit Court
Case No. 16-000241-AD
Hon. Christopher D. Dingell

Liisa R. Speaker (P65728)
Jennifer M. Alberts (P80127)
SPEAKER LAW FIRM, PLLC
Attorneys for Appellants Prospective Adoptive Parents
230 N. Sycamore Street
Lansing, MI 48933
(517) 482-8933
lspeaker@speakerlaw.com
jalberts@speakerlaw.com

Elliott D. Margolis (P28078)
Attorney for Putative Father
2304 E. 11 Mile Rd.
Royal Oak, MI 48067-2338
(248) 547-7888
emargolis@familylegaladvice.net

Dion E. Roddy (P76976)
The Law Office of Dion E. Roddy, PLLC
Attorney for Biological Mother
930 Mason St., Suite 201
Dearborn, MI 48124-2215
(313) 278-8779
dion@michigan-adoptions.com

William E. Ladd (P30671)
Chair, Amicus Committee of the State Bar of Michigan Children's Law Section
Michigan Children's Law Center
1 Heritage Dr, Ste 210
Southgate, MI 48195-3048
(734) 281-1900

BRIEF OF *AMICUS CURIAE* CHILDREN'S LAW SECTION OF THE STATE BAR OF MICHIGAN, IN SUPPORT OF APPELLANTS' PROSPECTIVE ADOPTIVE PARENTS' APPLICATION FOR LEAVE TO APPEAL

* * *

THIS CASE INVOLVES PROCEEDINGS UNDER THE ADOPTION CODE WHICH ARE GIVEN PRIORITY BY STATUTE

* * *

By: William E. Ladd (P30671)
Chair, Amicus Committee
State Bar of Michigan Children's Law Section

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STATEMENT OF JURISDICTIONAL BASIS

Amicus Curiae Children's Law Section concurs with the jurisdictional summary set forth in Appellants' Application for Leave to Appeal. MCR 7.303(B)(1); MCR 7.305(A), (B); MCR 7.212(D)(2). (Appellants' Application, p 1).

DATE AND NATURE OF THE ORDER ON APPEAL AND RELIEF SOUGHT

Amicus Curiae Children's Law Section concurs with the "Date and Nature of the Order On Appeal and Relief Sought" section of Appellants' Application for Leave to Appeal. MCR 7.303(B)(1). (Appellants' Application, pp 1-2).

STATEMENT OF GROUNDS FOR APPEAL AND WHY THIS COURT SHOULD GRANT LEAVE

Amicus Curiae Children's Law Section adopts the Statement of Grounds for Appeal and Why This Court Should Grant Leave, as set forth in Appellants' Application for Leave to Appeal. MCR 7.305(A)(1)(d). (Appellants' Application, pp 2-7). Amicus Curiae Children's Law Section also urges this Court to grant leave to address the important questions Appellants note that are presented by this appeal. As well, this case presents the important issue of the child's right to a lawyer guardian ad litem (LGAL) to protect his interests, and to give voice to the child, a right that was denied LMB by both the paternity court and adoption court, below.

STATEMENT OF QUESTIONS INVOLVED

I. Should this Court grant leave to appeal to rectify the Court of Appeals' legally erroneous decision when it declared an adoption appeal moot based on general principles of judicial notice that an order of filiation was entered while the adoption case was pending on appeal, which is particularly troublesome where there is no other case in this State's jurisprudence which addresses the impact of a subsequent paternity order on an adoption case, and thus the unpublished Court of Appeals' decision in LMB has already been utilized by other jurists in an effort to thwart adoption appeals?[1]

Appellants-Prospective Adoptive Parents state: YES

Amicus Curiae Children's Law Section states: YES

II. Should this Court grant leave to appeal to resolve the jurisprudentially significant issue that a trial court in paternity case can vitiate prosective adoptive parents' statutory right to appeal an erroneous adverse decision by allowing a pternity case to proceed to judgment prior to the completion of appellate review in the adoption case?

Appellants-Prospective Adoptive Parents state: YES

Amicus Curiae Children's Law Section states: YES

III. Should this Court grant leave to appeal because jurists, practitioners, families, and adoptees in this State need direction from this Court on the impact of a paternity order on a pending adoption case, and further because this Court needs to unequivocally state that the Legislature intended to give priority to adoption cases by the plain language used in the Adoption Code and that elevating a paternity case above an adoption case violates the Legislative mandate contained in the Adoption Code – not only that an adoption case takes the highest priority, but also that "[i]f conflicts arise between the rights of the adoptee and the rights of another, the rights of the adoptee shall be paramount"?

Appellants-Prospective Adoptive Parents states: YES

Amicus Curiae Children's Law Section states: YES

[1] The Questions Presented that are not bold-font are identical to those presented in Appellants' Application for Leave to Appeal to this Court. The bold-face questions (IV and V) are new questions presented by the Children's Law Section.

IV. Should this Court grant leave to appeal because of the lower courts' errors in failing to appoint LMB a lawyer guardian ad litem, to advocate for LMB's best interests, and to give LMB a voice in the lower courts (handling the paternity and adoption cases) and Court of Appeals proceedings?

Appellants-Prospective Adoptive Parents states: YES

Amicus Curiae Children's Law Section states: YES

V. Should this Court grant leave to appeal because of the lower courts' errors in subjecting LMB to needless transer trauma, which danger will persist absent this Court's review and reversal of the lower courts' decisions?

Appellants-Prospective Adoptive Parents states: YES

Amicus Curiae Children's Law Section states: YES

STATEMENT OF INTEREST OF AMICUS CURIAE CHILDREN'S LAW SECTION OF THE STATE BAR OF MICHIGAN

The Children's Law Section (Section or CLS) is a recognized section of the State Bar of Michigan. The Section has over 400 members who are attorneys and judges working in Michigan's child welfare system. Working together, the Section's members make crucial decisions each day that directly and substantially affect the lives of children and families. The Section provides services to its membership in the form of educational seminars, advocating and commenting on proposed legislation relating to child welfare law topics, and filing *amicus curiae* briefs in selected child welfare law cases filed in Michigan Courts.

The Section works to advance the rights and interests of children and families who become involved in matters before the Probate Courts and Family Divisions of the Circuit Courts, in the State of Michigan, including in adoption and paternity matters. The Section strives to improve courts and agencies serving children and their families, through regular meetings among peers, organizing and attending relevant training events, active engagement by members on multi-disciplinary task forces convened by the Section itself, as well as by the Michigan Department of Health and Human Services (DHHS), the State Court Administrative Office (SCAO), Courts and other groups; and through the Section's participation as *amicus curiae* in cases with the potential for widespread impact in the field of child welfare law, such as the one before this Court.

The Section, because of its active and exclusive involvement in the field of child welfare/juvenile law, and as part of the State Bar of Michigan, has an interest in the development of sound legal principles in these legal areas. The instant case is of particular interest to members of the Children's Law Section because it concerns direct placement adoptions, and the paramount importance and priority that adoptions are to be given under Michigan Law. Left unchecked, the Court of Appeals ruling in this matter stands to create confusion, and will unfairly relegate

adoptions to a second fiddle status contrary to both federal and Michigan Law. As such, children and their potential adoptive parents will be left in a state of limbo with no recourse; this will have a detrimental effect on Michigan children and families for generations to come.

The additional concern for the CLS is the lower courts' grave errors in refusing to appoint a lawyer guardian ad litem (LGAL) for LMB in the paternity and adoption proceedings below. This had the detrimental effect of creating a vacuum where LMB's voice and best interests should have been heard, with the concomitant deleterious absence of LMB's input when the proceedings were appealed to the Michigan Court of Appeals.

STATEMENT OF FACTS

Amicus Curiae Children's Law Section concurs with the Statement of Facts as set forth in Appellants' Application for Leave to Appeal and incorporates same into this brief. MCR 7.305(A)(1)(d). (Appellants' Application, pp 6-18).

INTRODUCTION

The minor child, LMB, is not a "bale of hay" as the dissent in *In re Clausen* put it.[2] LMB is not some fungible piece of property whose "ownership" or "possession" should depend upon the lower courts' confusion or misunderstanding about which actions – paternity cases or adoption proceedings – take precedence under Michigan law. Nor should LMB be left out in the cold, as it were, by the lower courts' clear and grave errors in failing to appoint the child a lawyer guardian ad litem (LGAL) or other advocate, so that the child could have a voice in the lower court

[2] *In re Clausen (DeBoer v Schmidt)*, 442 Mich 648; 502 NW2d 649, 688 (Mich 1993). (Levin, J., dissenting).

proceedings – and in the related appeals to the Court of Appeals – that affect his entire life, his happiness, his clear and strong bond with and attachment to, his prospective adoptive parents.

Though the entirety of Appellants' Application to this Court is well-reasoned, compelling, and provides a correct statement of the law, these few words from the Application are particularly arresting and succintly pinpoint the grave dangers posed by letting the Court of Appeals' *LMB* decision stand: "***The adoptee's interests should never be determined on the basis of a race to obtain an order of filiation***." Appellants' Brief, p 31 (emphasis added). The Children's Law Section could not agree more: to allow the child's life, well-being, and future to be decided by an 11th-hour decision by a do-nothing father to file for paternity is neither the law of the land (and clearly the very opposite of well-reasoned U.S. Supreme Court precedent), nor ever in the best interests of a child, nor in any way consonant with the Michigan Legislature's clearly-stated Adoption Code which elevates adoption matters to the highest level of priority over all other matters – and which unambiguously makes the child's rights paramount over those of others, MCL 710.21a(b), including over those of a putative father (or of even a late-to-the-game father with an 11th-hour order of filiation in hand).

The dire risk to Michigan adoptees is disturbingly depicted by the convoluted procedural histories of the adoption and paternity proceedings below. Appellants have provided this Court with a detailed summary of the linked lower court proceedings in their Application (Application, pp 6-18). The Adoption Code's language is clear and unambiguous. Applying that clear language, and in keeping with the purpose and spirit of the law, a court should have no doubt but that an adoption proceeding must be prioritized and advanced on a court's calendar before any and all other proceedings. But, as the Application details, the lengthy, time-consuming, and unnecessarily disruptive proceedings entailed the ripping of the then 18-month old baby from the arms of his

prospective adoptive parents (Appellants) – the only parents the child had known his entire life – to place the infant with his biological mother with visits ordered for the biological father – both of whom the child had never met by that point! This is not hyperbole: the judge of the Juvenile Division of the Wayne Circuit Court ordered Appellants to bring the baby to court on December 11, 2017 (which they did) and ordered Appellants to transfer the baby to biological mother, Ms. Healy, while at the same time reflecting the court's serious concerns for the well-being of this baby by ordering the child could not be left unsupervised with either biological parent! The sole basis for the paternity court's extreme and distressing order was a positive DNA test of Mr. Sarna which showed a biological link to LMB, resulting in the late order of filiation. Based on that mere biological connection, the paternity court believed "it had no choice" other than to "return" this baby to his mother (when, again, the only parents the baby has known his entire life has been Appellants, the adoptive parents). Thus, for a period of 7 days, LMB lived in several different places – not the home he had long known – with virtual strangers, until the Court of Appeals thankfully ordered "the entry of a stay at this juncture is required" while also correctly noting that the circuit court had failed to consider LMB's best interests.[3]

Additionally, it would seem to Amicus CLS that this Court should be as disturbed as Appellants and Amicus, to allow the haphazard entry of orders in competing paternity vs adoption trial courts to strip away a party's clear rights to appeal an adoption order entered by a trial court.

Thus, the Children's Law Section joins in all of Appellants' arguments presented to this Court and adds another. The CLS takes real issue with the lower courts' refusal to appoint this

[3] Appellants, fortunately, were able to obtain the Court of Appeals' order staying the lower courts' misguided and legally erroneous decisions pending appeal, such that LMB was returned to Appellants December 18, 2017, pending appeal. (Court of Appeals Order, December 18, 2017, at Tab D to Appellants' Appendix with Application for Leave to Appeal filed with this Court).

vulnerable, young child a Lawyer Guardian Ad Litem (LGAL), guardian ad litem (GAL), or, indeed, any advocate to speak for LMB and to assure that the lower courts were guided by *his* best interests. It is hard for the Amicus to conceive of any justifiable reason for a trial court to have denied this small child a voice and an advocate in the trial courts.

This error was then compounded twice more when Appellants sought leave to appeal to the Michigan Court of Appeals, such that LMB's voice was not heard on appeal. No brief was filed by anyone for the minor child in the Court of Appeals, or in response to the Application for Leave to Appeal to this Court. As a result, the child continues unrepresented in these important appellate proceedings. If this Court grants leave to consider the important issues presented, the lower courts' clear error in refusing to appoint the child an advocate is compounded yet again. What is more, this Court would be addressing issues which directly affect the well-being and legal interests of countless other children (potential adoptees) of this state, without them having any legal representation or voice.

ARGUMENTS

I. The Court of Appeals' decision violated the Legislature's intent that a putative father's parental rights in an ongoing adoption proceeding be determined by the Adoption Code, not by the Paternity Act.

Amicus Curiae Children's Law Section concurs with the Appellants-Prospective Adoptive Parents' Argument and incorporates it into this brief. (Appellants' Application, pp 18-33).

A. A putative father has no constitutional right to parent his biological child unless he has established a substantial parent-child relationship with the child.

Amicus Curiae Children's Law Section concurs with the Appellants-Prospective Adoptive Parents' Argument and incorporates it into this brief. (Appellants' Application, pp 20-24).

B. The Michigan Legislature chose to limit the ability of biological father to thwart an adoption where he has not established a custodial relationship with the child or provided substantial and regular support to the child or birth mother.

Amicus Curiae Children's Law Section concurs with the Appellants-Prospective Adoptive Parents' Argument and incorporates it into this brief. (Appellants' Application, pp 24-27).

Amicus Curiae Children's Law Section offers the following additional comments bearing upon Appellants' Arguments I, I-A, and I-B:

To begin with, each of the Appellants' arguments in their Application for Leave to Appeal to this Court is compelling, well-reasoned, and consistent with both the language and spirit of Michigan's Adoption Code. Appellants correctly point out that the focus in our Adoption Code – and all decisions stemming from that Code – must focus upon and must be guided by what is in the best interest of *the child*, the potential adoptee. Period. That is the crux of the trial courts' errors here: that they instead focused upon the perceived (but at most, only inchoate) "rights" of a do-nothing father – who has provided no more than DNA to the child at issue – rather than to the paramount best interests of the child. The trial courts' decisions – and then the Court of Appeals' distressing affirmance of same – consigned this small child to continuing limbo status, depriving him of the stability and permanency that both state and federal law mandate should be accorded each child at the earliest opportunity.

As Appellants note, the decision of the United States Supreme Court, in *Lehr v. Robertson*, 463 U.S. 248, 103 S.Ct. 2985, 77 L.Ed.2d 614 (1983), with similar facts to the instant case, highlights some of the substantial errors in the trial court's decisions. In *Lehr*, the putative father claimed that the New York Court had inappropriately denied him of a protected liberty interest. *Lehr* at 258. The *Lehr* Court held that a biological link alone is insufficient to preserve one's due process right to notice in adoption proceedings; rather, it takes more than mere DNA. *Lehr*, at 262.

To preserve one's right to notice and due process, a putative father needs to be an *involved* father. Id. The *Lehr* Court noted that a substantial relationship between parent and child is a relevant criterion in evaluating both the rights of the parent and the best interests of the child. *Lehr* at 267. A putative father could show a substantial relationship with a child by doing those kinds of things that would be commonly expected of a father. A court presiding over such a matter, should therefore question whether the putative father has regularly seen the child, regularly provided financial support, attended important events in the child's life, to cite a few examples.[4] Absent a showing of such a substantial relationship, a putative father's due process rights can fall to the wayside.

> [A] biological father's interest exists only in those men who have "grasp[ed] that opportunity [to develop a relationship with their offspring] and accept[ed] some measure of responsibility for the child's future." *Lehr*, at 262, 103 S.Ct. at 2993, 77 L.Ed.2d at 627.

Because the father in *Lehr* – as with Appellee in the case before this Court – was a non-involved father, the *Lehr* Court found that he had lost his due process interests in the adoption proceeding. Appellants correctly detail the relevant U.S. Supreme Court cases and also correctly point out how the Michigan Legislature incorporated into our Adoption Code the requirements of doing something for and with, beyond merely contributing some DNA to, a child.

The U.S. Supreme Court in *Caban v Mohammed*, 441 U.S. 380, 99 S.Ct. 1760, 60 L.Ed.2d 297 (1979) likewise held that a father *acquires* his substantial due process protection; it is not an automatic, *carte blanche* protection. Unlike a mother whose due process interest in the child arises naturally at birth, a putative father must do something to acquire the protections the Constitution

[4] Judge O'Brien correctly noted that for Appellee to be "considered 'a do-something' father under MCL 710.39(2)" Appellee must actually have done something "on a regular basis." (02/27/18 COA Opinion in *In re MGR*, Court of Appeals Docket No. 338286, Judge O'Brien dissenting, p 6). *In re MGR*, ___ Mich App ___, ___; ___ NW2d ___ (Docket No. 338286, February 27, 2018).

provides. The existence of a biological link by itself will not provide Due Process protection.[5] The Constitution will not automatically compel Due Process protections for a natural father who fails to grasp the opportunity to develop a relationship with his child. And, again, Michigan's Adoption Code properly reflects this reality. See, *e.g.*, MCL 710.21a, specifically providing that in the event of a conflict arising between the rights of an adoptee and another, "the rights of the adoptee shall be paramount."

Much like the *Lehr* father, Appellee was a non-involved putative father for much of LMB's life – during which time he took no meaningful action to become involved in the life of the mother of the child, or of LMB, as Appellants' Statement of Facts details.

Appellee needed to preserve his due process rights by demonstrating that he had made some effort to create a meaningful relationship to this child, a child who is now over two years old, and who has resided nearly his entire life with Appellants.[6] Appellee had multiple methods available to him to create a substantial relationship with this child. For example, Appellee could have acknowledged his paternity at the child's birth. Appellee could have provided financial and emotional support to the mother of the child during the pregnancy, and financial and emotional support to the child following his birth. Appellee could have sought parenting time with the child. Instead, Appellee did nothing (Appellants' Application, pp 8-13).

[5] Likewise, see the U.S. Supreme Court's decision in *Michael H. v. Gerald D.*, 491 U.S. 110, 123–30, 109 S.Ct. 2333, 105 L.Ed.2d 91 (1989) (holding that biological father who had an established relationship with his child did not have liberty interest sufficient to invalidate state statutory presumption that the mother's husband was the child's father).

[6] LMB was placed in Appellants' home just one day after the child's birth. He has remained in Appellants' home consistently thereafter, other than for the needlessly distressing "transfer" of LMB to the supervised custody of his biological mother for 7 days in December 2017. See note 3, *supra*.

The *Lehr* Court noted that the state has a legitimate interest in facilitating adoptions, and having the adoption proceeding completed quickly. The purpose of Michigan's Section 39 hearing is to finalize adoptions for children to assure the adoptee is free for adoptive placement at the earliest possible time. MCL 710.21a(c). Throughout the adoption proceeding, the trial court must always be cognizant of the best interests of the child. That awareness carries through every stage of the adoption proceeding; in fact, the best interest of the child is the very reason the legislature makes permanency for children so important, insisting that all other proceedings take less priority. MCL 710.25(1).

By allowing Appellee to pursue the paternity action and establish legal parentage while the adoption matter was pending, the trial court essentially gave Appellee the unfettered ability to thwart the clear language and intent of both state and federal law, and to circumvent a recognized state interest in facilitating and quickly completing adoptions as mandated by the general purposes of the adoption code delineated in MCL 710.21a.

Generally, the adoption of children has been largely left to the states to craft and enforce laws. However, the federal government does play a significant role in assisting the state in accomplishing permanency and stability for children. The Preamble of 42 U.S. Code § 670, commonly referred to as Title IV-E, for example, states that under both federal and State laws courts play an essential role in the child welfare system by ensuring stability and permanency for abused children under that system. 42 USC 670. The Adoption and Safe Families Act of 1997 (P.L. 105-89) explicitly states that a child's health and safety must be the primary concern when any decision is made regarding a child in the child welfare system. The Adoption and Safe Families Act of 1997 goes even further by requiring timely decision-making in determining if an abused child should go home, or should be moved into an adoptive home. *Id*. The Fostering Connections

to Success and Increasing Adoptions Act of 2008 (P.L. 110-351) provides financial incentives to finalize adoptions. 42 U.S. Code § 673 creates additional financial incentives toward finalizing adoptions for special needs children.

The clear intention of each of these federal acts – just as in our State's Adoption Code – is to make finalizing adoptions for children a priority. Each of these laws is in large part inspired by the recognition that children have a special need for permanency and stability at the earliest possible opportunity. Again, the U.S. Supreme Court has provided our Legislature guidance in these regards:

> It is undisputed that children require secure, stable, long-term, continuous relationships with their parents or foster parents. There is little that can be as detrimental to a child's sound development as uncertainty over whether he is to remain in his current "home," under the care of his parents or foster parents, especially when such uncertainty is prolonged. *Lehman v Lycoming County Children's Services Agency*, 458 U.S. 502, 513 (1982).

The important state interest at issue in the case before this Court is that of the best interest of children. Countless Michigan and federal cases and laws acknowledge that permanency and stability are always in the child's best interest. It is with the goal of creating permanency for children that the federal laws protect the best interests of children by helping to remove potential barriers to adoptions that the states may encounter. As noted, the Fostering Connections to Success and Increasing Adoptions Act of 2008 amended the Adoption and Safe Families Act of 1997 by creating additional financial incentives to finalize adoptions for children.

The federal government has enacted various laws to reflect the policy that adoption and permanency is so important for a child, so much in the best interests of a child, that the federal government is willing to assist the states to remove potential roadblocks to finalizing adoptions. Furthermore, as noted above, the federal government has taken the additional step of monitoring and rewarding States that comply with prioritizing and finalizing adoptions. That prioritization is

mirrored in Michigan's Adoption Code. The plain, unambiguous language of both MCL 710.21a and MCL 710.25(1) states that an adoption is to be given the highest priority over all other matters. Indeed, as Appellants' correctly point out, the Michigan Legislature has codified the federal mandates to achieve permanency and stability for children by finalizing adoptions as quickly as possible. *Id.* Thus, the plain language of MCL 710.21a[7] and MCL 710.25(1)[8] states that adoption proceedings are to be given priority over all other proceedings.

While much of the federal law addresses children in foster care settings, it still has applicability to this case. The balance the federal and State laws attempt to strike for foster children, is protecting their best interests by giving them permanency. However, whether the child is a foster child, or a child directly placed for adoption, or any other child for that matter, the one constant is that a child's best interest is always a protected state interest. The core issue at stake is the best interest of the child.

In *In re LaFlure*, 48 Mich App 377; 210 NW 2d 482 (1973), the Court of Appeals aptly noted that time for a child is measured very differently than for an adult. Referencing Wayne County Probate Judge James H. Lincoln's *Judicial Considerations in Child Care Cases*, 11 Wayne

[7] MCL 710.21a provides in pertinent part that "The general purposes of this chapter are:
(b) To provide procedures and services that will safeguard and promote the best interests of each adoptee in need of adoption and that will protect the rights of all parties concerned. If conflicts arise between the rights of the adoptee and the rights of another, the rights of the adoptee shall be paramount.
(c) To provide prompt legal proceedings to assure that the adoptee is free for adoptive placement at the earliest possible time.
(d) To achieve permanency and stability for adoptees as quickly as possible.
(e) To support the permanency of a finalized adoption by allowing all interested parties to participate in proceedings regarding the adoptee."

[8] MCL 710.25(1) provides: "All proceedings under this chapter shall be considered to have the highest priority and shall be advanced on the court docket so as to provide for their earliest practicable disposition." And subsection 2 provides: "(2) An adjournment or continuance of a proceeding under this chapter shall not be granted without a showing of good cause."

L Rev 709 (1965), the *LaFlure* Court observed that custody decisions for a child need to be resolved with all possible speed. For a child, a year can be like an eternity. In this case, it is no exaggeration to say that LMB has been waiting *his entire lifetime* for permanency and stability, due to the trial court improperly and incorrectly elevating Appellee's rights over those of the child in contravention of the clear language and intent of MCL 710.21a and MCL 710.25(1).

This Court should grant leave and reverse the lower courts' erroneous decisions. It is only by granting leave and reversing the lower courts' decisions that the proper and intended focus on the best interests of adoptees can be restored, and the priority status that adoptions are meant to hold in court proceedings can be restored.

C. Concurrent, and often prioritized, paternity proceedings thwart the intent of the Legislature that only a putative father who has supported his child, or who can demonstrate that he is not only fit and able to parent but that placing the child in his care will serve the child's best interests should be able to prevent adoption of the child.

Amicus Curiae Children's Law Section concurs with the Appellants-Prospective Adoptive Parents' Argument and incorporates it into this brief.

D. Entry of an order of filiation prior to the resolution of an adoption appeal deprives parties of their statutory right to appeal, and deprives an adoptee of any interest he or she has in remaining with Prospective Adoptive Parents.

Amicus Curiae Children's Law Section concurs with the Appellants-Prospective Adoptive Parents' Argument and incorporates it into this brief.

II. The child should have been appointed a lawyer guardian ad litem (LGAL) or other advocate, to represent the child's best interests and to give the child a voice in the two trial court (paternity and adoption) proceedings, and in the appeals to the Michigan Court of Appeals.

The Children's Law Section strongly disagrees with the lower courts' refusals to appoint the child a GAL or LGAL, to ensure that the child's voice was heard by the courts deciding his

fate. It would seem that this would go without saying, but as former University of Michigan Law Professor Suellyn Scarnecchia wrote: "Children involved in contested adoptions have the right to be considered persons who may be significantly affected by the loss of their established families. It is imperative that this children's right be explicitly recognized and aggressively protected."[9] The Children's Law Section would suggest to this Court that the best way to "aggressively protect" the rights of children in court proceedings like the ones below that very clearly hold LMB's life and well-being in the balance, is to ensure that the child is appointed an LGAL, GAL, or other advocate.

Appellants tried repeatedly to get both the two Wayne County Circuit court judges to appoint LMB an advocate. On October 20, 2016, Appellants moved jointly with LMB's birthmother, Erin Healy, in the adoption proceedings for appointment of a lawyer guardian ad litem (LGAL) for LMB ("Joint Motion" filed in Wayne County Circuit Court Case #2016-000241-AD, Hon. Christopher Dingell presiding).[10] The Joint Motion noted that "family courts in adoption proceedings routinely appoint a LGAL to represent the prospective adoptee's interest independent of those of the interested parties." (Joint Motion, p 9). The Joint Motion identified a clear need and justifiable basis for the requested appointment of an LGAL for LMB. *Id*. Joint movants also specifically reminded the adoption court of its own prior appointment of an LGAL to determine the child's best interests in the case of *In Re [LTB]*, Wayne County Case No. 2015-432-AD, Hon.

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[9] Scarnecchia, Suellyn. *A Child's Right to Protection from Transfer Trauma in a Contested Adoption Case*. Duke J. Gender L. & Pol'y 2, no. 1 (1995), at p 7. Professor Scarnecchia's article is cited to at length in Children's Law Section Argument III, below.

[10] See 10/10/2016, "Birthmother and Prospective Adoptive Parents' Joint Motion for 1) Appointment for Lawyer Guardian Ad Litem (LGAL), 2) Admission of Evidence Under MCL 710.22(g)(iv) concerning 'the length of time the adoptee has lived in a stable, satisfactory environment, and the desirability of maintaining continuity' and 3) An order compelling putative father Christopher Sarna to submit to a full psychological evaluation of [sic] under MCR 2.311", filed in Wayne County Circuit Court Case #2016-000241-AD.

Christopher D. Dingell presiding. (Joint Motion, p 10). Joint movants further noted how "appellate courts and trial courts alike, . . . have appointed a LGAL in Section 39(1) cases as it was necessary to examine and advocate for the child's independent best interests which, pursuant to the Adoption Code, are paramount in importance to those of the interested parties." (Joint Motion, p 10). But the judge presiding over the adoption case, strangely and unfortunately, refused this reasonable request.[11] The child was left voiceless in Wayne County Family Court adoption proceedings.

Likewise, on December 4, 2017, Appellants moved in the paternity case for appointment of a Guardian Ad Litem (GAL) for LMB ("Intervening Parties' Motion to Appoint Guardian Ad Litem (GAL) for Minor Child" in Wayne County Circuit Court Case #2016-113512-DP, Hon. Charlene Elder). In Appellants' Motion, they noted that a GAL for LMB could direct and oversee any custody or parenting time that may be ordered, and report upon the child's best interests to the court. (Motion for GAL, p 2). They cited MCL 722.22(g), defining GAL as "an individual whom the court appoints to assist the court in determining the child's best interests." Id. They also cited MCL 722.27(d) which authorizes the court to utilize a GAL "in the investigation and study of custody disputes and consider their recommendations in the resolution of the dispute." Id. But the paternity court, strangely and unfortunately, refused this reasonable request. The child was left voiceless in Wayne County Family Court paternity proceedings.[12]

[11] The trial court does not seem to have ever signed the proposed order which Appellants' trial court counsel submitted to that court under cover letter dated December 12, 2016, but the request for appointment of LGAL was definitely denied "for the reasons set forth on the record" on November 30, 2016.

[12] Judge Elder essentially ignored the motion for appointment of a GAL for LMB at the December 11, 2017, hearing at which she awarded custody of LMB to Ms. Healy without any best interests hearing or determination. This precipitous and dangerous custody order led Appellants' trial counsel to seek an emergency order for superintending control to prevent the "handover" of the 18-month old baby to a woman he did not know. Wayne County Chief Judge Colombo denied the motion. Appellants then filed their Emergency Motion for Stay Pending Appeal in the Michigan

The laws of this state require that the trial court appoint a lawyer-guardian ad litem to represent the child in all child protective proceedings. See, *e.g.*, MCL 712A.17c.[13] By court rule the lawyer-guardian ad litem is required to represent the child at every hearing. MCL 3.915(B)(2). The statute also requires that "...the court shall not discharge the lawyer-guardian ad litem for the child as long as the child is subject to the jurisdiction, control, or supervision of the court, or of the Michigan Children's Institute or other agency, ... except for good cause shown on the record. MCL 712A.17c(9). If the lawyer-guardian ad litem is discharged, the court must immediately appoint another lawyer-guardian ad litem. *Id*. The statute further provides: "To assist the court in determining a child's best interests, the court may appoint a guardian ad litem for a child…" MCL 712A.17c(10). Given the stated intent of the statutory scheme, that children be represented at all dependency hearings in the trial court, it is only logical that children should also be represented in

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Court of Appeals on December 12, 2017, and were successful in obtaining the stay so that LMB was returned to their care, pending appeal, on December 18, 2017.

[13] The statute in pertinent part provides:

(1) In a proceeding under section 2(a) or (d) of this chapter or a proceeding regarding a supplemental petition alleging a violation of a personal protection order under section 2(h) of this chapter, *the court shall advise the child that he or she has a right to an attorney at each stage of the proceeding.*

(2) In a proceeding under section 2(a) or (d) of this chapter, *the court shall appoint an attorney to represent the child* if 1 or more of the following apply:

(a) The child's parent refuses or fails to appear and participate in the proceedings.

(b) The child's parent is the complainant or victim.

(c) The child and those responsible for his or her support are financially unable to employ an attorney and the child does not waive his or her right to an attorney.

(d) Those responsible for the child's support refuse or neglect to employ an attorney for the child and the child does not waive his or her right to an attorney.

(e) The court determines that the best interests of the child or the public require appointment.

* * *

(7) In a proceeding under section 2(b) or (c) of this chapter, *the court shall appoint a lawyer-guardian ad litem to represent the child. The child shall not waive the assistance of the lawyer-guardian ad litem.* In addition to any other powers and duties, a lawyer-guardian ad litem's powers and duties include those prescribed in section 17d. (MCL 712A.17c(1), (2), and (7), all emphasis added).

appeals arising out of those trial court proceedings. See, e.g., *ABA Model Act Governing the Representation of Children in Abuse, Neglect and Dependency Proceedings*, Sec. 7(10) (p 7).[14] To assume otherwise would be to effectively deny the children representation in proceedings that matter most to their interests, in violation of due process. See generally, *In re Gault*, 387 U.S. 1; 87 S.Ct. 1428; 18 L.Ed. 2d 527 (1967).

The Child Custody Act also specifically permits a court to appoint a child an LGAL or other advocate to represent the child, including to assist the court in determining the child's best interests.[15] Thus, MCL 722.24 provides, in relevant part:

> (2) If, at any time in the proceeding, the court determines that the child's best interests are inadequately represented, the court may appoint a lawyer guardian ad litem to represent the child. A lawyer-guardian ad litem represents the child and has powers and duties in relation to that representation as set forth in section 17d of chapter XIIA of 1939 PA 288, MCL 712A.17d. All provisions of section 17d of chapter XIIA of 1939 PA 288, MCL 712A.17d, apply to a lawyer guardian ad litem appointed under this act.[16]

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[14] Reflecting the reality that so often, different court proceedings involving a family, the parents, and/or a child, may well have many points of intersection, the ABA Standards sensibly provide:

> "*The child's lawyer may request authority from the court to pursue issues on behalf of the child, administratively or judicially, even if those issues do not specifically arise from the court appointment*. [ABA Standards, Part I, Section D-12]. Such ancillary matters include special education, school discipline hearings, mental health treatment, delinquency or criminal issues, status offender matters, guardianship, ***adoption, paternity***, probate, immigration matters, medical care coverage, SSI eligibility, youth transitioning out of care issues, postsecondary education opportunity qualification, and tort actions for injury, as appropriate. [ABA Standards, Part I, Section D-12]. *The lawyer should make every effort to ensure that the child is represented by legal counsel in all ancillary legal proceedings*, ... Having one lawyer represent the child across multiple proceedings is valuable because *the lawyer is better able to understand and fully appreciate the various issues as they arise and how those issues may affect other proceedings*." *ABA Model Act Governing the Representation of Children in Abuse, Neglect and Dependency Proceedings*, Section 7, p 7, all emphasis added.

[15] The terms "GAL" and "LGAL" are both defined by the Child Custody Act (CCA), MCL 722.21 *et seq*. "Guardian ad litem" means an individual whom the court appoints to assist the court in determining the child's best interests. A guardian ad litem does not need to be an attorney. MCL 722.22(f). "Lawyer-guardian ad litem" means an attorney appointed under section 4. A lawyer-guardian ad litem represents the child, and has the powers and duties, as set forth in section 4 [MCL 722.24]. MCL 722.22(g).

[16] This statute also permits the LGAL for the child to file a report and recommendation to the court.

Similarly, the Juvenile Code, MCL 712A.17d[17] provides as follows:

> (1) A lawyer-guardian ad litem's duty is to the child, and not the court. The lawyer-guardian ad litem's powers and duties include at least all of the following:
>
> (a) The obligations of the attorney-client privilege.
> (b) To serve as the independent representative for the child's best interests, and be entitled to full and active participation in all aspects of the litigation and access to all relevant information regarding the child.
> (c) To determine the facts of the case by conducting an independent investigation including, but not limited to, interviewing the child, social workers, family members, and others as necessary, and reviewing relevant reports and other information. . .
> (d) To meet with or observe the child and assess the child's needs and wishes with regard to the representation and the issues in the case . . .
>
> * * *
>
> (g) To file all necessary pleadings and papers and independently call witnesses on the child's behalf.
>
> * * *
>
> (i) To make a determination regarding the child's best interests and advocate for those best interests according to the lawyer-guardian ad litem's understanding of those best interests, regardless of whether the lawyer-guardian ad litem's determination reflects the child's wishes.

What is more, MCL 712A.17d(1)(l) *requires* a L-GAL "[t]o request authorization by the court to pursue issues on the child's behalf that do not arise specifically from the court appointment." So, just as the Child Custody Act specifically references and incorporates the duties and responsibilities – and focus upon the child's best interests – specifically listed in the Juvenile Code statute, so, too, the responsibility of a child's advocate in any proceeding must be sure to ask the appointing court for permission to pursue other related issues on the child's behalf. This

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> "(3) In a proceeding in which a lawyer-guardian ad litem represents a child, he or she may file a written report and recommendation. The court may read the report and recommendation. The court shall not, however, admit the report and recommendation into evidence unless all parties stipulate the admission. The parties may make use of the report and recommendation for purposes of a settlement conference." MCL 722.24(3).

[17] Although MCL 712A.17d involves matters related to child protection proceedings, MCL 722.24(2) explicitly provides that this Juvenile Code statute applies to a LGAL appointed under the CCA as well.

statutory reference is so important given the many intersecting points that various different court proceedings involving families and children – dependency, custody, adoption, paternity, others – always have.

Thus, that the lower courts here had the authority and discretion to appoint LMB an attorney cannot be questioned. It was particularly important that LMB be provided with some form of representation in the proceedings below – proceedings which, it cannot be overstated, will impact LMB's entire life – and in the ongoing appeals to the Michigan Court of Appeals and to this Court, especially where this Court's decision could directly affect the life-long circumstances and permanency of the child, as well as those of many other children involved in dueling paternity vs adoption proceedings statewide.[18] It is critical that the separate point of view of the children be represented by counsel in all such proceedings. Indeed, the ABA Standards reflect the reality that so often, different court proceedings involving a family, the parents, and/or a child, may well have many points of intersection, and thus sensibly provide:

> "*The child's lawyer may request authority from the court to pursue issues on behalf of the child, administratively or judicially, even if those issues do not specifically arise from the court appointment*. [ABA Standards, Part I, Section D-12]. Such ancillary matters include special education, school discipline hearings, mental health treatment, delinquency or criminal issues, status offender matters, guardianship, ***adoption, paternity***, probate, immigration matters, medical care coverage, SSI eligibility, youth transitioning out of care issues, postsecondary education opportunity qualification, and tort actions for injury, as appropriate. [ABA Standards, Part I, Section D-12]. *The lawyer should make every effort to ensure that the child is represented by legal counsel in all ancillary legal proceedings*, either personally, when the lawyer is competent to do so, or through referral or collaboration. Having one lawyer represent the child across multiple proceedings is valuable because the lawyer is better able to understand and fully appreciate the various

[18] It is true that the direct placement adoption provisions do not include any statutory language requiring a court to appoint the child an LGAL. But the Children's Law Section strongly asserts that a court's inherent powers to enter any order that the interests of justice may require, the courts' interests in deciding matters upon the merits with full information about all relevant issues, and the fact that this direct placement adoption was clearly affected by the late-filed paternity action, which starkly highlighted the need for someone to speak for LMB, all amply would support the lower courts' appointment of an advocate for the child.

> issues as they arise and how those issues may affect other proceedings." *ABA Model Act Governing the Representation of Children in Abuse, Neglect and Dependency Proceedings*, Section 7, p 7, all emphasis added.

Other Michigan statutes likewise reflect the importance of ensuring that children's best interests are safeguarded and advocated for, and that children are provided a voice, in court proceedings that affect their lives. In the Safe Delivery of Newborns Act (SDNA), MCL 712.1, et seq., for example, the statute provides:

> The court may appoint a lawyer-guardian ad litem to represent a newborn in proceedings under this chapter. MCL 712.2(1).

The focus of a SDNA proceeding – as with an adoption proceeding – is the best interests of the child:

> In a custody action under this chapter, the court shall determine custody of the newborn based on the newborn's best interest. The court shall consider, evaluate, and make findings on each factor of the newborn's best interest with the goal of achieving permanence for the newborn at the earliest possible date. MCL 712.14(1).

The Estates and Protected Individuals Code (EPIC) likewise provides for a court in a minor guardianship proceeding to appoint that child an attorney:

> (4) If, at any time in the proceeding, the court determines that the minor's interests are or may be inadequately represented, the court may appoint a lawyer-guardian ad litem to represent the minor, giving a consideration to the preference of the minor if the minor is 14 years of age or older. MCL 700.5213(4), and MCL 700.5219(4).

Along the same lines, a Fordham law school publication contains recommendations that strongly support the appointment of an attorney to represent children in many types of proceedings in which their rights and interests are at stake. See, e.g., *Recommendations of the Conference on Ethical Issues in the Legal Representation of Children*, 64 Fordham L. Rev. 1301 (1996).[19] That publication states:

[19] Available at:

To enable children to receive ethical and competent representation of counsel in contexts in which legal representation is appropriate, courts and other legal authorities should be guided by the Recommendations set forth in Part VIII. (64 Fordham L. Rev. 1304).

In turn, Part VII, provides as follows:

VIII. JUDGES' AND COURTS' ROLE AND RESPONSIBILITIES WITH RESPECT TO THE CHILD'S REPRESENTATION

6. Additional judicial responsibilities.

Judges have a responsibility to children that is not satisfied solely by appointing counsel for the child. Their additional responsibilities include the following:

a. Judges must recognize their own responsibility for the speedy resolution of cases involving children, and should demonstrate it by effective case management and the minimization of delays.

b. Judges should impress upon lawyers and all parties the priority that should be afforded each child's case.

c. Judges should advocate the creation of specialized child advocacy programs, law school clinical child advocacy programs, and specialized child advocacy units within legal services and public defender agencies.

d. Judges should advocate the adoption and funding of systems (as described elsewhere in these Recommendations) for the appointment, training, and evaluation of lawyers for children.

e. Judges have a responsibility in cases involving children to monitor the competent and effective representation of the child.

f. Judges should engage in continuing education to enable them effectively to appoint and utilize counsel for children.

g. Juvenile and family court judges must be leaders in their communities, state capitals, and at the national level to improve the administration of justice for children and families. (64 Fordham L. Rev., pp 1322-1323).

https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=3232&context=flr

In other words: it is supremely important for children to have an independent and zealous advocate to protect the child's best interests and be sure the courts hear the child, loud and clear. The dangers that all these statutes and publications are concerned about are manifested by the lower courts' grave errors here in failing to appoint LMB an LGAL or other advocate below.

Thus, many sections of the adoption court's April 20, 2017, Opinion and Order, stand in mute condemnation of the adoption court's denial of an LGAL for LMB.[20] First, those many sections detailing Mr. Sarna's chosen lifestyles and personality traits. When, for example, the adoption judge details how Mr. Sarna "constructed for himself a place on the margins of life" (O&O, p 2), how Mr. Sarna is "introverted and brooding" and "quick to anger" and how the court "saw a lot of anger out of him in Court," as well as "intimidation out of him toward others", one could well imagine LMB's advocate – had the baby had one – seeking to amplify on these judicial insights into Mr. Sarna in terms of how such characteristics may well impact and adversely affect LMB. When the court tiptoed around Mr. Sarna's 15 years' tax evasion and other "corner cutting" and then notes how the court "is rather impressed" with "how well" Mr. Sarna has done, one could imagine the baby's LGAL to have responded vociferously for LMB to remind the court about how Mr. Sarna was a stipulated do-nothing father, who could not even be troubled to have filed a timely paternity action, or taken any one of the many other steps he could have taken to try to establish himself as a "father" in LMB's life during the pregnancy or 18 months of the child's life (a well over two-year period of time).

Second, as to the legal lacunae which an LGAL could have filled for LMB. When the trial court concedes that Mr. Sarna "does appear to feel he has rights at times that do not appear to be

[20] The adoption court's Opinion and Order is Tab B to Appellants' June 5, 2018, Application for Leave to Appeal to this Court.

supported by law" (O&O, p 2), one could well imagine that LMB's LGAL would have fully briefed the myriad statutory and case law references that demonstrate just that: that as a (then-)putative father, Mr. Sarna had no more than inchoate rights which he did nothing to make manifest. *Lehr, supra*. And this the trial court noted repeatedly in the Opinion & Order (See, e.g., O&O, p 2: Mr. Sarna "did not file a Notice of Intent to Claim Paternity, after being notified of the pregnancy"; O&O p 7: discussing the section of the Adoption Code which "deals with putative fathers [like Mr. Sarna] who are notified and respond by doing anything [sic] other than say 'Place the child with me'"; O&O, p 7, citing "Section 39(1) deals with the 'Do Nothing' putative father and is applicable here"; O&O, p 10: "It would have cost the putative father significant money to do the things required to achieve the protections of Adoption Code 39(2), but he did not." "[T]he putative father could have filed an action in the Domestic Section of Wayne County's Family Court, seeking to be declared the legal father, or other productive things… but he did not file an action to be declared the legal father.")

Third, one could also imagine the LGAL for LMB (had the child only had one!) to have spoken in detail with Ms. Healy about her court-recognized "desire to escape" from Mr. Sarna, her intense emotionality when in his presence, her sitting as far away from Mr. Sarna as possible, and her obviously not wanting anything more to do with him (O&O, p 1).Oh, and all the reasons why Ms. Healy was asking the adoption court to terminate Mr. Sarna's (putative father) rights in the first place (O&O, p 10). All these obvious signs which the adoption court observed, and Ms. Healy's motivations in terminating Mr. Sarna's (inchoate) rights to LMB, would have been delved into by LMB's LGAL because they are matters which are relevant to LMB's best interests.

Next, an LGAL for LMB would have fully and independently investigated all relevant information bearing upon the rights of the adoptee and upon LMB's best interests, and would then

have provided the court with the LGAL's conclusions about same. MCL 710.21a; MCL 710.22(g). The adoption court itself noted that LMB "has an interest in not having [his] development in the home of the prospective adoptive parents disrupted. (O&O, p 10). The court duly noted it was to be guided by the best interests of the child. (O&O, p 11). It correctly noted that the Adoption Code's list of 11 best interest factors "is not an exhaustive list" (O&O, p 11).

Lastly, the trial court deprived itself of the invaluable input an LGAL for LMB could have provided it on every single one of the best interest of the child factors. Almost without exception, the trial court viewed the BIC factors through the tinted lens of what it "feels" Mr. Sarna "would" do, rather than through the reality on the ground: that Mr. Sarna did nothing for Ms. Healy while she carried LMB to term; that Mr. Sarna did nothing to support or even contact LMB during the 18-months of his life (other than to once request to see the child as Mr. Sarna assaulted the prospective adoptive father in the court house; see Appellants' Emergency Motion for Stay Pending Appeal, COA Dkt No. 341211, filed 12/12/2017, p 12). This distorted viewpoint would have been corrected to 20/20 vision by an LGAL for LMB. And there was no reason *not* to appoint the baby his own advocate, to give this vulnerable child a voice. To cite but a few examples about how an LGAL for LMB could have re-focused the sometimes puzzling and off-base conclusions as to the best interests factors as determined by the trial court:

- Factor i: the trial court notes that it is to consider "the love, affection, and other emotional ties" existing between Mr. Sarna and LMB. (O&O, p 11, ¶ 1). But then the court notes only that there "are no emotional ties" existing here; the court should more properly have noted *the absence of **all three** important factors here* – no love, no affection, no emotional ties. The trial court fails to conclude this portion of its opinion with any decision about who this factor favors or disfavors.[21] Had LMB had an LGAL or other advocate, that person would undoubtedly have argued to

[21] Indeed, the entirety of the best interests of the child analysis of the lower court's Opinion and Order suffers from this defect: the 11 factors are rotely listed, followed by brief (and sometimes starkly off-base analysis) and only four of the 11 contain the court's conclusion (the court finds only two that weigh against putative father, and finds another two as inapplicable to this matter).

shift the focus of the best interests of the child factors to LMB, whether it belonged.

- Factor ii: the trial court mused "Can the putative father give the child love, affection and guidance, having had so little exposure to them during much of his own upbringing." LMB's LGAL or other advocate might well have pointed out the relevance and importance of viewing this factor *from the child's perspective*, that is: "Does Mr. Sarna have the capacity and disposition to give the child love, affection and guidance, when he has not once done so in the child's entire life? Does Mr. Sarna possess that capacity and/or disposition do so when he is so clearly ready-to-anger, when he intimidates others in his presence, and when the baby's biological mother is 'terrified about the prospect of Putative Father having custody of their child.'" (Appellants' Application, p 12, citing 10/05/16, Hearing, p 25). (O&O, p 11, ¶ 2).

- The trial court sadly left factor ii on the benefit-of-the-doubt to Mr. Sarna footing that pervades so much of the Opinion and Order: "…the Court *feels* the putative father *will try to figure these things out* and provide them." (O&O, p 11, ¶ 2). LMB's LGAL would have committed malpractice to not respond to this conclusion with the actual legal standards applicable, and to point out that it is not what the trial court "feels" about a putative father, but whether there is actual evidence in the record that demonstrates the requisite capacity and disposition.

- Factor iii suffers from the same defects as factor ii, with the same irrelevant and misplaced conclusion referencing the trial court's "feelings" about how Mr. Sarna "will muddle through adequately" (O&O, p 11, ¶ 2), and Children's Law Section again notes how important an advocate for this baby was under such circumstances.

- An LGAL for LMB would have pointed out that the trial court's conclusion about how factor viii is "inapplicable" is not accurate: LMB undoubtedly has a "home, … and community record" in the long-term, stable, and loving family home he has lived in with Appellants his entire life.

- And, in addition to other legal arguments, perhaps a report, expert witness testimony or other such evidence on the best interests factors, an LGAL for LMB would have been able to proffer relevant evidence and argument as to the catch-all factor xi, since the LGAL would know LMB, would know his likes and dislikes, and his preferences, from having observed the child with Appellants and others, from having interviewed Appellants and the child's biological mother who wants Appellants to adopt LMB, among other such aspects of the independent and thorough investigation the LGAL would have conducted to properly represent LMB and the child's best interests. MCL 712A.17d.

A similar sad litany of "might have been's" obtains when analyzing the erroneous and unjustified decision of the Juvenile Court judge presiding in the paternity case to deny LMB a

GAL (or other advocate). Such an advocate for the baby would rightly (and loudly) protested to the court that there was no legal basis to bend over backwards for Mr. Sarna, focusing upon his (perceived) "rights" to the exclusion of LMB's rights and best interests; and likewise, no legal justification to rush to enter the order of filiation, nor to fail to require Mr. Sarna to pay support under said order. Indeed, an LGAL might have requested the Juvenile Court presiding over the paternity action to hold a full evidentiary hearing, with expert witnesses to address child attachment and child bonding in general as well as in particular to LMB, before any "return" of LMB to his biological mother (whether supervised or not). Or, indeed, to take judicial notice of the entire record of the proceedings in the related adoption matter pending in another courtroom of the same courthouse hearing the paternity action. Or any one of a number of actions an LGAL would bring to bear in his or her zealous advocacy for LMB.

An advocate for LMB would also have made sure the black letter law about prioritization of adoption proceedings over any others, and the paramount rights of the adoptee over those of Mr. Sarna and everyone else, were reiterated to the paternity court, with child-specific references to LMB's needs and best interests.

Accordingly, the Children's Law Section respectfully asks this Court to grant leave, reverse the lower courts' harmful decisions respecting this child, and order the child's right to an LGAL or other advocate whenever such competing adoption vs paternity conflicts arise.

III. The child should not be subjected to needless transfer trauma which will occur if the lower courts' decisions are not reviewed and reversed by this Court.

The Children's Law Section here cites to and quotes extensively from, the well-reasoned law review article, with draft brief, prepared by former University of Michigan Law Professor, Suellyn Scarnecchia. Professor Scarnecchia compellingly advocates for due process protections to

attach to any decisions that may separate a small child from his long-term caregiver – as here, with LMB when he was wrenched from Appellants for 7 traumatizing days, and as he may yet be again if this Court does not address the lower courts' obvious confusion between precedence of adoption proceedings over paternity cases, as well as the importance of appointing adoptees an LGAL or other advocate to ensure his best interests are paramount.

All of what follows is copied (with permission) directly from: Scarnecchia, Suellyn. *A Child's Right to Protection from Transfer Trauma in a Contested Adoption Case*. Duke J. Gender L. & Pol'y 2, no. 1 (1995) (hereafter, *A Child's Right to Protection*).[22] **To help make clear the verbatim quotes to Professor Scarnecchia's law review article and brief, the portions cited are presented below in a different font type:**

The removal of a child from an established family has been likened to kidnapping. Jeree H. Pawl, Ph.D., Director of Infant-Parent Program at San Francisco General Hospital, who has more than thirty years of experience treating young children and their parents, wrote in her affidavit:

> Jessica, in being removed from her current "parents," will be transported into a nightmare and it is one which will never end. The feelings she will experience cannot be resolved. Perhaps the most compelling way to try to imagine it is to think of it as a kidnapping. Legally it is certainly not a kidnapping, but psychologically, that is exactly what it is *from the point of view of Jessica* . . . The most important people in her world upon whom she depends for everything and for the central understanding of herself and of the world are missing. This is just the beginning for Jessica. The terror and confusion as to where her "parents" are and why it is that they don't come will not be resolved. The yearning, the fear and the sorrow are dreadful and it is only the beginning. (*A Child's Right to Protection*, p 41, n 5).

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[22] Available at: https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1349&context=articles

Dr. Elissa P. Benedek, Professor of Psychiatry at the University of Michigan, Director of Training and Research at the Center for Forensic Psychiatry, and the former President of the American Psychiatric Association, stated in her affidavit:

> Notwithstanding whatever adult reasons might exist for such a transfer of custody, Jessica, at the age of 2 years and 5 months, will experience this change of custody as a complete loss of everyone she has grown to love. She will experience this as the death of her parents, the DeBoers. She will not be grieving one death, but two deaths.
>
> ….
>
> …She will blame herself for the loss of her family. She will believe that she was a bad girl, or that she did not love her parents enough or that she did or said or thought one bad thing which made her parents give her away to someone else.…Even if she later comes to understand what happened to her in more adult ways, her personality will be changed by blaming herself for this very traumatic loss. (*A Child's Right to Protection*, p 42, n 8).

* * *

In addition to this argument that children have the right to protect their established families, I offer the transfer trauma theory.[23] This argument is based on a child's right to due process when state action, in the form of a transfer of custody, is likely to cause substantial harm to the child. It is based on the predicted harm to the child, the violation of the child's own liberty, not on the child's right to protect an established family relationship. In short, I argue that children have a constitutionally protected right to liberty in the form of security from state-imposed harm, including substantial harm to their psychological and emotional welfare. (*A Child's Right to Protection*, p 46).

While representing the DeBoers, I repeatedly thought about the fact that if Jessica were an adult, she would have a right to a hearing considering her interests. Justice Levin of the Michigan Supreme Court also recognized that Jessica's inability to speak for herself

[23] The term "transfer trauma" was used to describe the harm a patient was likely to suffer if moved from one nursing home to another. *O'Bannon v Town Court Nursing Ctr.,* 447 U.S. 773, 784, 802-03 (1980).

denied her the legal process that any adult would demand.[24] (*A Child's Right to Protection*, p 46).

This outcome treats the child as an object to be possessed and not as a person under the Constitution. A child is a person with constitutional rights in the context of decisions concerning his custody. (*A Child's Right to Protection*, p 53).

1. *The child has a right to due process under the Fourteenth Amendment.* (*A Child's Right to Protection*, p 53).

[LMB]'s status as a minor does not deprive him of constitutional protections afforded adults. "Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights." *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976). "[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone." *In re Gault*, 387 U.S. 1, 13 (1967). This Court must recognize that a child faced with the imminent loss of everyone he knows is a person with due process rights. (*A Child's Right to Protection*, p 53).

The child in this case has two different grounds for asserting a right to due process. First, [LMB]'s liberty, in the most traditional sense, is at stake when it is argued that the court should remove him from his home and family, and physically move him somewhere else. The Fourteenth Amendment protects a citizen's right to be free from state-imposed

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[24] Justice Levin wrote:

If the danger confronting this child were physical injury, no one would question *her right to invoke judicial process to protect herself against such injury*. There is little difference, when viewed from the child's frame of reference, between a physical assault and a psychological assault.

…It is only because this child cannot speak for herself that adults can avert their eyes from the pain that she will suffer.

In re Clausen, 502 N.W.2d at 689 (Levin, J., dissenting) (emphasis added).

removal from one's home without due process of law. *See* U.S. Const. amend. XIV. The second ground for claiming due process protection for this child is his protected liberty interest in his relationship with his adoptive parents. Thus, both [LMB]'s right to live free from state-imposed infringements on his physical liberty without due process of law and his right to protect his family relationship with his adoptive parents are at stake here. (*A Child's Right to Protection*, pp 53-54).

2. *The child is likely to suffer grievous harm if his relationship with his adoptive family is terminated.* (*A Child's Right to Protection*, p 54).

* * * . . . In a similar case, a Michigan trial court concluded at the close of a hearing on the best interests of the child that separation from the child's established family would be traumatic. Later, the Michigan Supreme Court reversed the trial court opinion for lack of jurisdiction and standing; however, the trial judge's opinion was cited with approval in the dissent: "[w]e had different degrees of testimony from the experts. All the way from permanent, serious damage…down to the child would recover in time. But every expert testified that there would be serious traumatic injury to the child at this time." *In re Clausen*, 502 N.W.2d at 669 (Levin, J., dissenting).[25] Justice Levin further articulated the risk of minimizing a child's psychological injury:

> If the danger confronting this child were physical injury, no one would question her right to invoke judicial process to protect herself against such injury. There is little difference, when viewed from the child's frame of reference, between a physical assault and a psychological assault.

[25] See generally, John Bowlby, *Attachment* 1 (1969); John Bowlby, *Separation* 1 (1973); William, Damon, *Social and Personality Development, Infancy Through Adolescence* 27-52 (1983); Joseph Goldstein et al., *Beyond the Best Interests of the Child* 1 (1973); Leslie M. Singer et al., *Mother-Infant Attachment in Adoptive Families*, 56 Child Dev. 1543 (1985). (*A Child's Right to Protection*, p 54, n 2).

> The law …has recognized that persons who suffer psychological injury are entitled to the protection of the law. It is only because this child cannot speak for herself that adults can avert their eyes from the pain that she will suffer.

Id at 689. The risk to [LMB]'s psychological and emotional welfare posed by this contested adoption mandates protection of his constitutional right to security from state-imposed harm. (*A Child's Right to Protection*, p 54).

3. The threat to the child's well-being posed by a judicial determination that does not take his interests into account triggers his Fourteenth Amendment right to due process. (*A Child's Right to Protection*, p 54).

A child has a Fourteenth Amendment liberty interest in avoiding the trauma caused by a state-imposed removal from his established family. Th[e United States Supreme Court] has previously recognized that, when the state physically transfers an individual from one residence to another and the individual is in danger of suffering harm due to that transfer, the individual has a due process right to be heard before the transfer occurs. See *Addington v. Texas*, 441 US. 418 (1979); see also *Vitek v. Jones*, 445 U.S. 480, 488 (1980) (holding that "grievous loss" in transfer to mental hospital entitles prisoner to the procedural protections of the opportunity for notice and an adequate hearing before transfer). (*A Child's Right to Protection*, pp 54-55).

* * *

The term "transfer trauma" is appropriate for the case at hand. . . . the transfer trauma suffered by a young child when his home and family are at stake is predictable and substantial. LMB is likely to suffer significant harm as a direct result of government action if he is taken from his established adoptive family. If the child is transferred now, he will be cut off from everyone he has known throughout his life and from every well-known place. He is too young to call or visit on his own, an as a result, he will suffer a

complete loss of his established family. State action never isolates adults so completely from everyone they know and love. Even an incarcerated or institutionalized adult is typically afforded the right to communicate and perhaps to visit with family members. A child must be afforded a hearing in which his particular interests are considered, before he is forced to suffer such a trauma. (*A Child's Right to Protection*, p 56).

4. The child has a constitutionally protected interest in protecting his established familial relationships with his adoptive family. (*A Child's Right to Protection*, pp 56).

Apart from his right to protection from the state-imposed harm caused by a change of custody, [LMB] has a separate and distinct right to protect his established family relationships. . . . [T]his case presents an opportunity to recognize a child's right to protect his established relationships. Here, [LMB] has <u>never</u> lived in a unified biological family and was <u>voluntarily</u> placed for adoption by his birth mother. In addition, the adoptive parents had every expectation of being the child's permanent family. (*A Child's Right to Protection*, pp 56, emphasis original).

From the child's perspective, his relationship with his adoptive family is no different from the most traditional family relationships protected in the past from state interference by [the U.S. Supreme Court]. "There does exist a 'private realm of family life which the state cannot enter,'…that has been afforded both substantive and procedural protection." *Smith v. Organization of Foster Families for Equity & Reform*, 431 U.S. 816, 842 (1977). (citations and footnotes omitted). This Court should recognize that [LMB] has at least an equal right to protection of his established family as his birth father has to "possession" of the child. (*A Child's Right to Protection*, p 56).

* * *

> The ultimate question must be whether the father has, in fact, created a relationship [with the child]. Even if this father had taken all possible steps to bond with this child and failed, *Lehr's* message is that to protect his interest, and the child's well-being, he must do more. For in the child's eyes, a valiant but failed attempt to create a relationship means little. Severing long-established bonds with others is equally harmful to the child, regardless of whether the father first attempted to create a relationship.

In re Juvenile Severance Action No. S-114487, 876 P.2d at 1133. Note that this reading of *Lehr* balances the rights of the child against the rights of the father. (*A Child's Right to Protection*, p 59, citing *In re Juvenile Severance Action No. S-114487 (Father in Juvenile Severance Action No. S-114487 v. Adam)*, 876 P.2d 1121 (Ariz. 1994), which in turn "relied heavily on *Lehr*).

* * *

D. Where the Rights of an Unwed Father and Child Are in Conflict, the State Must Provide a Remedy That Recognizes and Balances the Respective Rights of Father and Child. (*A Child's Right to Protection*, p 60).

Once it is established that the child has a liberty interest, either in protection from harmful state action or in protecting his established familial relationships, "the question remains what process is due." *Morrissey v Brewer*, 408 U.S. 471, 481 (1972). [LMB] is being removed from his established family with no acknowledgment of his interests; therefore, the child has not been provided due process. This Court does not face an evaluation of whether existing process is adequate, because no process was afforded the child. He will simply go to live with respondent as though he were "a bale of hay," *In re Clausen (DeBoer v Schmidt*), 502 N.W.2d 649, 688 (Mich. 1993). (Levin, J., dissenting), a piece of property not affected by the change of families. (*A Child's Right to Protection*, p 60).

* * *

Where a child is a member of an established, loving family, he should not be removed from that family by the state without due process of law. Automatically denying an adoption and removing a child from his established family, with no acknowledgment of the effect of that removal on the child, violates the child's constitutional rights. He has a right to due process because of the significant risk of transfer trauma upon his removal from his established family. In addition, he has a right to due process to protect his established relationship with his prospective adoptive parents. (*A Child's Right to Protection*, p 61).

The child should not be the prize granted to the winner of the litigation. He is a person with the right to have his personhood meaningfully considered by any court with the power to change his life forever. (*A Child's Right to Protection*, p 60).[26]

* * *

CONCLUSION

Amicus Curiae Children's Law Section concurs with the Appellants-Prospective Adoptive Parents' Conclusion and incorporates it into this brief.

RELIEF REQUESTED

WHEREFORE, Amicus Curiae Children's Law Section respectfully requests that this Honorable Court grant leave to appeal to the Appellants, reverse the Court of Appeals' decision, and remand to the Court of Appeals for a decision on the merits of the adoption appeal, and to grant any and all other relief appropriate under the circumstances.

[26] This concludes all verbatim quotes from the Scarnecchia law review article and draft brief, which, again, have appeared in this brief in a different font to make clear the portions cited from those materials.

The Children's Law Section also respectfully asks this Court to declare that a child in LMB's position – in a direct placement adoption, with a paternity action that threatens to derail the child's adoption – be appointed an LGAL to speak for the child and advocate for the child's best interests.

Respectfully submitted,

Dated: August 20, 2018

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William E. Ladd (P30671)
Chair, Amicus Committee of the
State Bar of Michigan Children's Law Section