

No. 26-5330

IN THE
SUPREME COURT OF THE UNITED STATES

E.R.,
Petitioner,
v.
NEW JERSEY DIVISION OF
CHILD PROTECTION AND PERMANENCY
Respondent,
IN THE MATTER OF THE GUARDIANSHIP OF J.S., a minor

On Petition for A Writ of Certiorari
To The *Supreme Court of New Jersey*

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Due Process Clause permits a State to withhold custody of a child from a previously non-custodial parent without first overcoming the presumption of fitness recognized in *Stanley v. Illinois*, 405 U.S. 645 (1972) and then rely upon the absence of a parent-child relationship resulting from that denial of custody and State-imposed conditions on visitation as grounds to terminate parental rights?

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REPLY BRIEF

Attempting to avoid review, New Jersey's Office of the Law Guardian (OLG) blatantly misrepresents the record, claiming the father had a "history of serious domestic violence and substance abuse" which it posits should diminish the constitutional standard by which the case should be judged. However, even if such information could alter the constitutional landscape, the record tells a different story.

The State presented no evidence of a domestic violence history or substance abuse which would impact the child's safety if E.R. assumed custody. The OLG simply repeats the unsubstantiated allegations of a mother who acknowledged she wanted to keep E.R. out of the child's life. Here is the testimony of the State's case worker:

Q So outside of [the mother's] representations that there was DV, does the Division have any evidence that there was?

A I don't -- I'm not sure, no.

[6T101:11-14]

Q During your interactions with [E.R.], has he ever manifested any bizarre behavior that would lead you to believe he suffers from mental illness?

A No.

Q Has he ever -- during your interactions with him, ever appeared to be under the influence of anything?

A No.

Q Okay. Did he ever get violent with you or any other caseworker to your knowledge?

A No.

[6T103:5-16]

Q Okay. [Did] the Division -- ever pull up any criminal history regarding my client?

A I'm not sure.

Q ...has the Division ever been able to find anything regarding final restraining orders against my client?

A Not to my knowledge, no.

[6T105:23 -106:5]

DCPP's own documents, admitted at trial, reflect that DCPP described E.R. as "stable," a gainfully employed "hard worker," and that his household already includes two children who are not considered to be at risk. Da217; Da340; Da310-12. He twice underwent substance testing at the State's request, and the State did not produce evidence of substance use. 5T109-15 to -19; 6T47-7 to -8. And to the extent that the OLG's argument depends on E.R.'s statement that he needed a little time or assistance prior to assuming custody, that fact provides no basis to diminish constitutional safeguards.¹

In short, the OLG's assertions are belied by the record. Certainly, DCPP had preliminary concerns to investigate given the mother's allegations, but when its investigation revealed no support for those allegations, it no longer had a legitimate State interest to support custody denial or visitation restrictions as against a biological father. "The State's interest in caring for" E.R.'s child "is de minimis if" E.R. is fit. *Stanley v. Illinois*, 405 U.S. 645, 657-58 (1972).

The OLG's brief demonstrates just how important review is. The OLG is the arm of the New Jersey Office of the Public Defender that provides legal representation to the children of New Jersey, and its position is apparently that the

¹ Further, New Jersey law requires the State to provide reasonable services to enable family reunification, and the State admitted at the termination trial that it had not yet provided such services to E.R. See 6T66:6-8 (State caseworker testified, "if there is a need for services, there have not been any services set into place yet for him"); N.J.S.A. 30:4C-15.1(a)(3)(prior to termination of parental rights, DCPP must demonstrate it "has made reasonable efforts to provide services to help the parent correct the circumstances which led to the child's placement outside the home").

Stanley constitutional standard applies to “good” parents and another standard applies to “bad” parents. It advances the theory that a court must first decide if the parent is good or bad, at fault or not at fault, before determining what level of protection his liberty interest deserves.

Not only is the OLG’s construction an anathema to constitutional jurisprudence on its face, the Court has already rejected this theory:

The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.

Santosky v. Kramer, 455 U.S. 745, 753-54 (1982).

Thus, the Court warned that the State cannot “refuse to provide natural parents adequate procedural safeguards on the ground that the family unit already has broken down; that is the very issue the permanent neglect proceeding is meant to decide.” *Id.* at 754, n.7

The OLG is simply wrong when asserts that this Court cut back on the constitutional protection afforded to parents when a State takes custody by its decisions in *Quilloin v. Walcott*, 434 U.S. 246 (1978) and *Lehr v. Robertson*, 463 U.S. 248 (1983). Neither *Quilloin* or *Lehr* involved the State as the actor who sought to deprive a biological father of parental rights or relationship. Rather, both involved

circumstances in which private individuals, married to the children's biological and custodial mothers, initiated private litigation to formalize relationships in which they and the children were living with the children's mothers. *Quilloin*, 434 U.S. at 247; *Lehr*, 463 U.S. at 250. The question therefore was whether the procedures provided by state adoption law were sufficient to protect the absent biological father's interest against the countervailing interests presented by the factual context and a private actor who was already acting in loco parentis (and, in *Lehr*, as against the biological mother who was also a party). *Quilloin*, 434 U.S. at 247; *Lehr*, 463 U.S. at 249-50.

That is a vastly different constitutional question than what process is owed when the State itself seeks to maintain a child in State custody as against the biological parent who wants custody, when it seeks to place restrictions on that parent's right to visit with his child, and when it thereafter seeks to terminate his parental rights so the child can be adopted by a third party whom the State has chosen and to whom the State is providing assistance. In that factual scenario, the proper test balances the parent's liberty interest against the State's interest in securing the child's safety, with the parent owed the presentation of individualized proofs that he is unfit. *Stanley*, 405 U.S. at 651-53, 658.

That test requires a showing by the State that its alleged interest in the child's safety is legitimate—that it is based in truth and not merely the allegations of a vindictive mother or unsupported attorney representations. *Quilloin* and *Lehr* did not cut back on that test; indeed, *Quilloin* reiterates *Stanley*'s holding that “the State's

interest in caring for children is ‘de minimus’ if the father is in fact a fit parent.” *Quilloin*, 434 U.S. at 248, citing *Stanley*, 405 U.S. at 657-58.

Even if *Quilloin* and *Lehr* could be read to reduce the due process protection owed E.R.’s liberty interest to some extent because he was not the custodial parent when the State removed his child from the mother, it cannot be denied E.R. still has a significant interest in developing a relationship with his child, *see Lehr*, 463 U.S. at 262, which the court was required to weigh against the State’s need to deprive him of that interest and the manner in which it did so. E.R.’s interest should not be treated as weighed as against a private party already in loco parentis as in *Quilloin* and *Lehr*—but against the interest of the State in his child’s safety, which on this record was non-existent.

Further, even if his initial non-custodial status is relevant to the process owed, E.R.’s status does not equate with the fathers’ non-participation in *Quilloin* and *Lehr*. E.R. attempted to acknowledge responsibility as soon as his paternity was confirmed. Da204.² DCP’s own records reflect he immediately asked the State for assistance in placing his name on J.S.’s birth certificate, opened his home for State inspection, offered paternal relatives to care for his child while the State delayed, and provided information on all household members for background checks. Da204, Da289, Da310-11. It is undisputed that he submitted to two urine screens and a psychological

² There is also unrebutted evidence in the record that E.R. visited with the child on FaceTime and sent money when T.B. requested it, even when he was not sure the child was his and another man was named on the child’s birth certificate. Appendix D, page 10; Da310.

evaluation at DCPD's request in an effort to gain custody of his child. 5T109-15 to -19; 6T47-7 to -8; 5T15:3-6.

While it is true E.R. did not visit after the State took custody of his child, the State does not dispute that it moved his child to a pre-adoptive home two hours away, required that he visit only under therapeutic supervision, and then referred the matter to a therapist who had a wait list where E.R. remained at the time of trial. Da289, Da630, Da367; Da593, 6T40-25 to 41-7. Thus, even if the question asked in *Lehr*—did the State adequately protect the father's "inchoate interest in establishing a relationship with" his child—is applicable here, the answer is clearly "no." *See Lehr*, 463 U.S. at 265. Rather, the procedures New Jersey employed ran roughshod over E.R.'s inchoate interest in establishing a relationship and assuming a responsible role for his child and deserve this court's review.

The OLG's reliance on non-custodial status to cut back on constitutional protection is also concerning given changing family dynamics since *Stanely*, *Quilloin* and *Lehr* were decided in the 1970s and early 1980s. As of 2023, living in a single-parent household with the mother only is the second most common U.S. living arrangement. The number of these single-parent households has approximately doubled since 1970. U.S. Census Bureau, Historical Living Arrangements of Children, tbl. CH-1 (Current Population Survey). Thus, any rule which predicates the level of constitutional protection owed to a parent based on non-custodial status or other level of involvement impacts millions of American families, warranting this Court's attention. No State interest in child safety is served if

non-custodial parents, who may well be fit, are not promptly and fairly evaluated to raise their own children when care by the custodial parent has failed.

CONCLUSION

The OLG's misrepresentation of the record and ill-reasoned constitutional theories should not be relied upon to deny review to a father who wants to raise his child in the demonstrably safe home where he is already involved in raising two other children or to deny review to a child who will never know his father given the inadequately safeguarded process employed by New Jersey here. The Court should grant the Petition.

Respectfully submitted,

OFFICE OF PARENTAL REPRESENTATION
OFFICE OF THE PUBLIC DEFENDER



October 1, 2026

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