

**STATE OF MICHIGAN  
IN THE SUPREME COURT  
APPEAL FROM MICHIGAN COURT OF APPEALS**

Saad, C.J., Borrello, and Gleicher, J.J.

**ROBERT HUNTER & LORIE HUNTER,**

Appellees/Plaintiffs,

**Supreme Court No 136310**

v

**Court of Appeals No. 279862**

**TAMMY JO HUNTER,**

Appellant/Defendant

**Oakland Circuit No. 2006-721234-DC**

and

**Oakland Probate No. 2002-285,883A-GM**

**JEFFREY HUNTER,**

Defendant

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**DEFENDANT-APPELLANT'S BRIEF ON APPEAL**

**ORAL ARGUMENT REQUESTED**

Dated: November 10, 2008

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## QUESTIONS PRESENTED

I. DOES THE STANDARD FOR PARENTAL FITNESS IN *MASON V SIMMONS*, 267 MICH APP 188, 206 (2005), AND THE COURTS' APPLICATION OF *MASON* HERE, VIOLATE A NATURAL PARENT'S FUNDAMENTAL RIGHTS TO HIS OR HER CHILD?

- A) APPELLANT-DEFENDANT: YES
- B) APPELLEES-PLAINTIFFS: NO
- C) COURT OF APPEALS: NO
- D) TRIAL COURT: NO

II. IF A NATURAL PARENT IS FOUND TO HAVE BEEN UNFIT UNDER THE APPROPRIATE STANDARD AND HIS OR HER LACK OF FITNESS LED TO THE CHILD'S ESTABLISHED CUSTODIAL ENVIRONMENT WITH A THIRD PARTY, IS THE PARENT'S LATER FITNESS AT THE TIME HE OR SHE SEEKS CUSTODY RELEVANT TO A PROPER FITNESS DETERMINATION?

- A) APPELLANT-DEFENDANT: YES
- B) APPELLEES-PLAINTIFFS: NO
- C) COURT OF APPEALS: NO
- D) TRIAL COURT: NO

III. DID THE LOWER COURTS HERE AND IN *HELTZEL V HELTZEL*, 248 MICH APP 1 (2001) PROPERLY APPLY THE CHILD CUSTODY ACT'S PRESUMPTION FAVORING THE CHILDREN'S ESTABLISHED CUSTODIAL ENVIRONMENT, MCL 722.27(1)(C), INSTEAD OF THE PRESUMPTION IN FAVOR OF NATURAL PARENTS, MCL 722.25(1)?

- A) APPELLANT-DEFENDANT: NO
- B) APPELLEES-PLAINTIFFS: YES
- C) COURT OF APPEALS: YES
- D) TRIAL COURT: YES

IV. IS THE TRIAL COURT'S FINDING OF PARENTAL UNFITNESS AGAINST THE GREAT WEIGHT OF THE EVIDENCE?

- A) APPELLANT-DEFENDANT: YES
- B) APPELLEES-PLAINTIFFS: NO
- C) COURT OF APPEALS: NO
- D) TRIAL COURT: NO

V. ARE THE TRIAL COURT'S DETERMINATIONS REGARDING THE BEST INTERESTS OF THE CHILDREN AGAINST THE GREAT WEIGHT OF THE EVIDENCE?

- A) APPELLANT-DEFENDANT: YES
- B) APPELLEES-PLAINTIFFS: NO
- C) COURT OF APPEALS: NO
- D) TRIAL COURT: NO

## **JURISDICTIONAL STATEMENT**

On June 22, 2007, an order was entered by the Oakland County Circuit Court, by Honorable Linda S. Hallmark, in favor of Appellees/Plaintiffs Robert and Lorie Hunter and against Appellant/Defendant Tammy Hunter. Under 1970 PA 91, MCL 722.26b (4), this order superceded all previous non-final orders in *In the Matter of Garrett Thomas Hunter, Jefferson Chase Hunter, Robert Mason Hunter & Alexis Jo Hunter*, Oakland County Probate Court file number 2002-285,883-GM,. On July 3, 2007, Appellant/Defendant filed a motion for reconsideration. An order denying the motion for reconsideration was entered by Honorable Hallmark on July 25, 2007. This order constituted a “final order” under MCR 7.202(6)(a)(i).

Appellant/Defendant filed a claim of appeal with the court of appeals on August 6, 2007. The court of appeals had jurisdiction over the appeal of right pursuant to MCR 7.202(6). An unpublished per curiam opinion and a dissenting opinion were issued on March 20, 2008. A timely application for leave to appeal with this Court was filed by Appellant/Defendant. And an order granting leave to appeal was issued on September 17, 2008. Pursuant to MCR 7.301(2), the Michigan Supreme Court has jurisdiction

## **STANDARD OF REVIEW AND STANDING**

Pursuant to MCL 722,28, findings of fact in custody disputes are reviewed pursuant to the great weight of the evidence standard and will be sustained unless the evidence clearly preponderates in the opposite direction. *Fletcher v Fletcher (2)*, 447 Mich 871, 876-877; 526 NW2d 889 (1994). A trial court does not have "unfettered discretion" over child custody matters. *Id.* at 880. “When an appellate court reviews a trial judge's findings, it acts as the functional equivalent of a trial judge reviewing the findings of a jury.” *Id.* at 878.

Questions of law are subject to review on clear error of law and erroneous application of

law to facts. *Sparks v Sparks*, 440 Mich 141, 151-152, 485 NW2d 893 (1992). "When a court incorrectly chooses, interprets, or applies the law, it commits legal error that the appellate court is bound to correct." *Fletcher, supra* at 881.

A challenge to the constitutionality of a statute is reviewed de novo. *Tolksdorf v Griffith*, 464 Mich 1, 5; 626 NW2d 163 (2001). Unless the statute's unconstitutionality is clearly apparent, this Court is to presume it is constitutional. *DeRose v DeRose*, 469 Mich 320, 326; 666 NW2d 636 (2003). Further, when statutory language is unambiguous, the plain meaning of the text must be enforced, "without further judicial construction or interpretation." *In re KH*, 469 Mich 621, 628; 677 NW2d 800 (2004).

Tammy Hunter has standing to challenge the constitutionality of MCL 722.25 as it is applied by *Mason v Simmons* as its application had a direct adverse effect on her constitutional rights. *County Court of Ulster County, N.Y. v Allen*, 442 US 140, 155, 99 S Ct 2213 (US NY, 1979). Further, Tammy's constitutional challenges are not diminished because private parties, rather than a state agency, brought this action. The "challenged state action remains essentially the same," as Tammy "resists the imposition of an official decree extinguishing, as no power other than the State can," her right to a parental presumption in her favor; similar to *M.L.B. v. S.L.J.*, 519 US 102, 117 ft 8; 117 S.Ct. 555 (1996).

## **MATERIAL FACTS & PROCEEDINGS**

In 2002, Tammy and Jeff Hunter became addicted to drugs and placed their four children with Jeff's brother and his wife, Robert and Lorie Hunter, in Michigan so they could enter a rehabilitation program in their home state of Indiana. (Appendix 18A). After successfully petitioning the probate court to approve a limited guardianship for her children with the Hunters (7A-15A), Tammy's life deteriorated. The probate court suspended her visitation rights and modified the nature of the guardianship from limited to full in mid-2003. (27A). From the children's initial placement with the Hunters, Tammy regularly contacted the children until she was jailed in 2004 for theft. (28A). While in prison, Tammy participated in drug therapy programs and parenting education. (31A). After staying clean a number of months after her release in 2005, she petitioned for visitation. (32A).

From July 2005 until May 2006, the probate court steadily increased Tammy's visitation. (92A). Satisfied with her numerous clean drug tests, attendance at support meetings, payment of child support, maintenance of weekly telephone contact with her children, and ability to provide a safe environment for her children, the probate court eventually expanded Tammy's parenting time to include unsupervised weekend visits in Indiana. (33-38A). Three weeks after this increase in parenting time, the Hunters filed a custody complaint in the circuit court requesting full custody and alleging that Tammy is an unfit parent. (39A). The probate guardianship matter was held in abeyance pursuant to MCL 722.26b. (43A).

Due to numerous procedural delays, an evidentiary trial to determine Tammy's parental fitness under the Child Custody Act was not held until June 2007. Evidence showed that Tammy has a full time job and a stable home. A compendium of clean drug test results and a letter from her drug-therapist showed that Tammy successfully and actively battles her addiction and has not relapsed since 2003. (108A). Despite this and other evidence demonstrating Tammy's successful

participation in additional parenting classes (44A), drug therapies (45A), and family counseling with her children (46A), the circuit court found that Tammy is an unfit parent. (49-55A). Following current precedent, the court placed the Best Interests burden of proof and persuasion on Tammy. (61-2A). Unable to convince the court, the Hunters were awarded full custody of her children. Despite being found “unfit,” Tammy was granted extensive parenting time, including four uninterrupted weeks of summer parenting time, alternating weekends and holidays. (72A).

On appeal, a split court affirmed the trial court’s decision. (76A). A lengthy dissent was written opposing the constitutionality of the applied standard for parental fitness. (91A).

### **SUMMARY OF ARGUMENT**

Michigan’s current standard for parental fitness under the Child Custody Act, invented by the court of appeals in *Mason v Simmons*, is wildly different than the standards applied in other similar Acts such as the Child Protection, Juvenile, and Adoption Codes. As will be detailed throughout this argument, the *Mason* standard is constitutionally defective under the Due Process and Equal Protection Clauses of the Michigan and Federal Constitutions. If a proper procedure, such as the one contained in this brief, were applied here, there would be no justification for deeming Tammy an unfit parent.

The application of the *Mason* standard in this case highlights how *Mason* is unconstitutionally broad, vague, and permissive of arbitrary deprivations of the fundamental right to the care and custody of one’s child. Though lower courts cannot be faulted for following *Mason*’s flawed precedent, even if *Mason* is upheld as constitutional the lower courts’ application of *Mason* must be overturned as it relied on factors unrelated to Tammy’s ability to parent, factors which are contrary to Michigan’s jurisprudence.

In addition to the wealth of problems related to the finding that Tammy is an unfit parent,

the lower courts repeatedly failed to follow precedent when determining MCL 722.23's Best Interests factors. The lower courts' decisions are replete with counterintuitive best interests findings such as finding MCL 722.23(g) (existence of domestic violence) in favor of the Hunters despite their admission to using a holed-wooden paddle to discipline the children.

This argument supports the reversal of *Mason v Simmons*, its parent case *Heltzel v Heltzel*, and the acceptance of a constitutionally sound procedure to preserve Michigan's "parental presumption" statute, MCL 722.25(1). Additionally, this argument details why the great weight of the evidence refutes the allegations of unfitness and supports reunification.

### **ARGUMENT**

#### **I. THE STANDARD FOR PARENTAL FITNESS IN *MASON V SIMMONS* 267 MICH APP 188, 206 (2005), AND THE COURTS' APPLICATION OF *MASON* HERE, VIOLATE A NATURAL PARENT'S FUNDAMENTAL RIGHTS TO HIS OR HER CHILD UNDER *TROXEL v GRANVILLE*, 530 US 57 (2000).**

##### **a. Introduction: The Current Standard for Determining Parental Fitness Under the Child Custody Act is Inadequate to Protect a Natural Parent's Constitutional Right to the Care and Custody of His/Her Children.**

The United States Supreme Court, in *Troxel v Granville*, 530 US 57, 69; 120 S. Ct 2054, 147 L.Ed.2d 49 (2000), concluded that fit parents have a fundamental constitutional right to decisions concerning the care, custody, and control of their children. This protected right, which is "perhaps the oldest of the fundamental liberty interests," is protected by the Due Process Clause, the Equal Protection Clause, and the Ninth Amendment. *Id at 65, and see Stanley v Illinois*, 405 US 645, 651; 92 S Ct 1208 (1972). Both the Federal and Michigan Constitutions ensure that "no person" shall be "deprived of life, liberty or property, without due process of law." US Const, Am XIV; Const 1963, art 1, §17. However, *Troxel* emphasized the rights of "fit" parents and left the door open with regard to the privacy rights of allegedly unfit parents. *Troxel, supra* at 68.

In Michigan, questions of parental fitness are primarily addressed under the Probate Code, which contains adequate protections for a parent’s constitutional right. see 1939 PA 288, MCL 712A.1 et seq. The only protection given to a parent’s rights during a dispute with third parties under the Child Custody Act is found in 1978 PA 510, MCL 722.25(1), which does not mention parental fitness. If the Supreme Court’s proclamation in *Troxel* were properly combined with 722.25(1) and Michigan’s jurisprudence regarding child welfare, it would provide adequate protections of this core human right. The current standard, examined below, does not meet this potential.

Due process protections of the parental presumption identified in *Troxel* can be stripped pursuant to a standard developed in *Mason v Simmons*, 267 Mich App 188, 198; 704 NW2d 104 (2005). *Mason* is the most recent published opinion concerning standards of parental fitness under the Child Custody Act. The court in *Mason* was faced with a case of first impression when deciding whether a parent is entitled to a “parental presumption” in a case where the parent seeking custody is charged with being unfit. *Id.* at 198. Without looking to Michigan’s established statutory schemes concerning parental fitness, *Mason* construed MCL 722.25(1) and case precedent to require the stripping of a parent’s constitutionally protected right to raise his children if the “parent's conduct is inconsistent with the protected parental interest, that is, the parent is not fit, or has neglected or abandoned a child.” *Id.* at 206. As this argument explores, *Mason* is inadequate because it focuses on a parent’s past conduct instead of current parental capabilities and does not otherwise protect constitutional tenets concerning parents and children.

As *Mason* is the only published case articulating a standard for parental fitness under the Child Custody Act, the lower courts are bound to follow its lead. MCR 7.215(C)(2). Problems arise in *how* they are to follow it. Neither this Court nor the Child Custody Act has set forth

parameters for a trial court to follow when determining whether a parent should be stripped of Michigan's statutory parental presumption and deprived of her fundamental constitutional liberty interest in raising and living with her children under the Custody Act. Without guidance on what actions are inconsistent with a parent's parental interests under *Mason's* interpretation of the Child Custody Act, trial courts have complete discretion in interpreting the phrase. Without identifying definitions of "abandonment" and "neglect," lower courts have no way of knowing whether to apply the plain meaning of the terms, look to definitions in other Acts, or rely on their own discretion. As concisely stated by the court of appeals dissent here, "[*Mason's*] explanation of the term 'unfitness' may have sufficed given the facts presented in *Mason*,<sup>1</sup> but it does not provide adequate guidance in this or any other custody case." (96A). As it does not contain objective factors and is not narrowly tailored to meet Michigan's interest in protecting children from unsafe environments, *Mason* does not satisfy due process.

There is a need for this Court to clarify the standards by which a parent can lose his rights under the Child Custody Act. The lack of clarity and specificity in *Mason* allows for cases such as this one, where a parent who voluntarily transferred custody of her children to relatives when unable to care for them is later found to be unfit and unworthy of substantive due process protections because of the initial placement decision. This argument proposes such a standard.

**b. *Mason v Simmons*' Standard for Fitness Based on Current Evidence is Unconstitutionally Subjective and Inadequate to Protect a Parent's Constitutional Rights from Undue Governmental Interference.**

The court of appeals in *Mason v Simmons* provided a standard for lower courts to follow in determining whether a parent is entitled to the parental presumption described in *Troxel v*

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<sup>1</sup> "The father in *Mason* had little and inconsistent contact with his daughter until she reached the age of nine, when he acknowledged his paternity and a court ordered him to pay child support. Two months later, never having lived with his daughter, the father filed a custody action. [*Mason*] at 191-192." (96A).

*Granville* and MCL 722.25(1). The first part of the *Mason* standard, whereby a parent will be deemed unfit if his “conduct is inconsistent with the protected parental interest,” fails to adequately safeguard a parent’s constitutional rights from undue governmental interference. see *Mason, supra* at 206. This is because the phrase “parental interest” is primarily used when dissecting the limits of government’s interference with a parent’s affirmative rights. Legally identified parental interests include directing the religious upbringing of children (*Wisconsin v Yoder*, 406 US 205, 221; 92 S Ct 1526, 1536 (1972)), living with one’s child (*Michael H. v. Gerald D.*, 491 US 110; 109 S Ct 2333 (1989)), participating in the raising of one’s child (*Bowen v. Gilliard*, 483 US 587; 107 S Ct 3008 (1987)), and having children attend school within the vicinity of their homes (*Keyes v. School Dist. No. 1*, 413 US 189; 93 S Ct 2686 (1973)).

Though a parent’s interest in the upbringing of his children is “a counterpart of the responsibilities they have assumed”, the term “parental interests” has not been used to dictate a parent’s responsibilities. see *Lehr v. Robertson*, 463 US 248, 257; 103 S. Ct. 2985, 2991 (1983). There is no detailed list of parental responsibilities because, however correlative the responsibilities of a parent are to parental interests, dictating a parent’s responsibilities in raising children would be an unconstitutional overstep of the judicial and legislative branches’ authority. see *Washington v Glucksberg*, 521 US 702, 721; 117 S Ct 2258 (1997). As such, a reasonable approach to discerning what “conduct inconsistent with the protected parental interest” entails is to examine which parental actions have been deemed converse to the State’s interest in protecting the welfare of children, i.e. cases involving neglect, abuse, and child protection. Other Acts, such as the Juvenile Code, Probate Code, and Child Protection Act, are not in conflict with

and have substantially similar purposes as the Child Custody Act.<sup>2</sup> As those similar Acts provide a clear statutory framework for determining the substantive evidentiary standard for infringing a parent’s constitutional right to custody, the Child Custody Act should be construed as incorporating the “fitness” framework found in such similar Acts. see *People v. Webb*, 458 Mich 265, 274; 580 NW2d 884 (1998). Following *Mason*, the lower courts in this case disregarded this approach.

By refusing to consider the surrounding body of law, the lower courts drew an artificial line between custody determinations under the Probate Code and those under the Child Custody Act. This legal fiction is detrimental to justice and should not be condoned, especially when the concept of mixing child custody laws with child protection laws has already survived appellate review. The Court in *Stanley* rejected the suggestion that it “need not consider the propriety of the dependency proceeding that separated the [family] because [the father] might be able to regain custody of his children[.]” *Stanley, supra* at 647. As in *Stanley*, Tammy’s theoretical ability to regain custody under MCL 722.27(c) does not alleviate the deprivation of her children.

By rejecting the application of similar Acts, refusing the guidance of case law concerning those Acts, and ignoring the legal definitions contained in those Acts, the lower courts embarked on a constitutionally vague and thereby impermissible interpretation of the already vague standard espoused in *Mason*. Without guidance from termination cases, a strict following of the *Mason* standard leads to excessive reliance on the discretion of individual trial courts. As “[o]ne

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<sup>2</sup> see Child Custody Act: 1970 PA 91, MCL 722.21, et seq. see *Frame v. Nehls*, 452 Mich 171; 550 NW2d 739 (1996); Probate Code: 1939 PA 288, MCL 712A.1, et seq. see *In re Brock*, 442 Mich 101; 449 NW2d 752 (1993); and Child Protection Law: 1975 PA 238, MCL 722.621, et seq. see *Becker-Witt v. Board of Examiners of Social Workers*, 256 Mich App 359, 364; 663 NW2d 514 (2003).

judge's excess very well may be another's moderation,"<sup>3</sup> due process requires that "judgment[s] should be informed by objective factors to the maximum possible extent." *Rummel v Estelle*, 445 US 263, 274; 100 S Ct 1133 (1980). The Child Protection Code, the Juvenile Code, and other similar Acts contain such objective factors. The due process infirmities of *Mason* could be reduced if the collective body of those laws is used for guidance.

This constitutional challenge is not based on mere conjecture. In the present case, the application of *Mason*'s vague standard allowed the lower court to indulge in its personal viewpoints on what conduct is inconsistent with a parent's parental interests. The lower courts found Tammy's current conduct to be inconsistent with her parental interests because she "earns \$10.50 an hour, she does not own a car, and would not be able to afford the house in which she currently lives without her boyfriend's financial assistance." (78A). This case is a key example of the harm caused by failing to incorporate the objective standards for parental fitness.

**c. *Mason v Simmons*' Standard for Fitness Based on Past Evidence is Unconstitutionally Vague and Must be Overturned.**

The *Mason* court held that a parent is not entitled to the constitutional parental presumption "when a parent's conduct is inconsistent with the protected parental interest, that is, the parent is not fit, or has neglected or abandoned a child." *Mason, supra*, at 206. As constitutional rights are at stake and the appellate courts have issued contradictory opinions based on *Mason*,<sup>4</sup> an examination of the language used in *Mason* is necessary. A close reading of the *Mason* standard reveals that a parent will be deemed unfit only in the following cases: (1) when a parent's current actions are inconsistent with his parental interests, (2) when a parent

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<sup>3</sup> *TXO Production Corp v Alliance Resources Corp*, dissenting opinions of Justices O'Connor, White and Souter, 509 US 443, 481, 113 S Ct 2711 (1993).

<sup>4</sup> *compare this case with Yount v. Yount, unpublished per curiam opinion of the Court of Appeals*, decided Dec. 11, 2007 (Docket No. 278890), *lv den by Yount v. Yount*, 745 NW2d 114 (Mich Mar 07, 2008).

neglected the child in the past, or (3) when a parent abandoned the child in the past.

It would be an incorrect application of *Mason* to base a finding of unfitness on a parent's past actions that were neither neglect nor abandonment. *Mason* used the verb "is" in its present continuous tense: "when a parent's conduct *is* inconsistent with the protected parental interest, that is, the parent *is* not fit [ . . .]". *Mason, supra* at 206. Thus, if a parent recently or currently acts inconsistently with his parental interests (whatever those may be), then he is unfit. The first part of *Mason*'s standard, through its use of a present continuous verb, excludes past instances where parents have acted inconsistently with their protected parental interests. By applying the "is inconsistent" portion of the standard to Tammy's past actions, the lower courts here were incorrectly following precedent. see (77A).

The second part of the *Mason* standard addresses cases where a parent is rehabilitated and whose current actions are consistent with his parental interests, but who acted so egregiously in the past that Michigan's compelling interest in the welfare of children would not be served by declaring the parent "fit." *Mason* deemed two conditions egregious enough for a finding of unfitness based upon past behavior: when a parent "*has neglected* or *abandoned* a child." Thus, *Mason* limits a trial court's ability to look at a parent's previous actions only in cases involving "neglect" and "abandonment."<sup>5</sup> By mixing tenses and stating "or has neglected..." instead of "or neglects or abandons..." it is clear that the court did not merely list abandonment and neglect as examples of actions inconsistent with parental interests.

This is highly problematic because *Mason* does not specify which definition of "abandonment" and "neglect" apply in cases under the Child Custody Act. Under Michigan's

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<sup>5</sup> This limitation can lead to bizarre results, as in a case where a parent physically or sexually abused his/her child in the past. A trial court following the language of *Mason* would be foreclosed from considering the parent's past conduct.

jurisprudence, the simple dictionary definitions of “abandonment”<sup>6</sup> and “neglect”<sup>7</sup> have been insufficient for a finding of unfitness for the purposes of termination proceedings or even a finding of jurisdiction.<sup>8</sup> The legislature narrowed the definitions to include only the most somber actions. Further, the definition of abandonment has been narrowed to exclude cases where a parent places a child in a relative's home and the child receives adequate care. 1939 PA 288, MCL 712A.2(b)(1); *In re Nelson*, 190 Mich App 237; 475 NW2d 448 (1991). If the lower courts here gave deference to Michigan’s jurisprudence on issues of child welfare, then Tammy’s voluntary transference of custody of her children to the Hunters by executing guardianship papers with an intent to eventually regain custody, would not satisfy any definition of abandonment. *see Argument II, below*. In following *Mason*, the lower courts here did not apply the plain meaning or the statutory definitions of abandonment.

Though the State’s interest in protecting children from neglect, abuse, and abandonment is great, an infringement on a natural parent’s fundamental rights cannot be justified if the infringement hinges primarily on a single judge’s personal definition of abandonment. *see Rummel, supra* at 274. As this case exemplifies, there is nothing in the *Mason* standard that prevents a lower court from substituting an examination of the *causes* of the alleged abandonment instead of the abandonment itself. By refusing to apply the statutory schemes and definitions found in other similar Acts, the *Mason* standard, and the lower courts’ application thereof, must be deemed unconstitutionally broad, vague, and subjective.

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<sup>6</sup> Abandonment, in relation to family law, is defined as “the act of leaving a spouse or child willfully and without an intent to return.” Black’s Law Dictionary (7th ed).

<sup>7</sup> Child neglect is defined as “the failure of a person responsible for a minor to care for the minor’s emotional or physical needs.” Black’s Law Dictionary (7th ed).

<sup>8</sup> *see* 1975 PA 238, MCL 722.622(j) for a definition of neglect under the Juvenile Code; *see* 1931 PA 328, MCL 750.161 for a definition of neglect and abandonment under the Penal Code; *see* MCL 712A.2(b)(1) for definition of “without proper custody” under the Probate Code.

**d. For Want of Procedural Safeguards, *Mason v Simmons*' Interpretation of Michigan's "Parental Presumption" Statute, MCL 722.25(1) Renders the Statute Unconstitutional as Applied to Tammy Hunter and Similarly Situated Parents.**

***i. Mason construed MCL 722.25(1), an unambiguous statute, in a manner inconsistent with its plain language***

*Mason's* interpretation of MCL 722.25(1), an unambiguous statute, in a manner inconsistent with its plain language created an unconstitutionally vague and subjective standard for parental fitness. The construction of unambiguous statutes is impermissible,<sup>9</sup> and, as in this case, can lead to erroneous results. The sweeping deprivation of Tammy's rights questions the constitutionality of the very statute that *Mason*, and its parent case *Heltzel v Heltzel*, sought to interpret. see *Heltzel v Heltzel*, 248 Mich App 1; 638 NW2d 123 (2001). The statute, which has been construed to mean that a parent is entitled to a parental presumption unless unfitness is established, states the following,

If a child custody dispute is between the parents, between agencies, or between third persons, the best interests of the child control. If the child custody dispute is between the parent or parents and an agency or a third person, the court shall presume that the best interests of the child are served by awarding custody to the parent or parents, *unless the contrary is established by clear and convincing evidence.* MCL 722.25(1), *emphasis added.*

This text is unambiguous: the court shall presume that the best interests of the child are served by being placed with the parents, except in the case where clear and convincing evidence shows that it is not in the best interests of the child to be placed with the parents. The sentence in question is composed of an independent clause ("If the child . . . the court shall presume that the best interests of the child are served by awarding custody to the parents") and a dependent clause ("the contrary is established by clear and convincing evidence"). As joined by the subordinate conjunction "unless," the dependent clause works as an adverb to modify the main verb phrase,

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<sup>9</sup> *Dimmitt & Owens Financial, Inc. v. Deloitte & Touche (ISC), L.L.C.*, 481 Mich 618, 624; 752 NW2d 37 (2008).

i.e. "the court shall do X, unless the condition Y is true." The Y condition here ( "best interests of the child") is a statutory phrase defined in MCL 722.23 requiring a best interests evidentiary hearing which compares the adequacy of competing custodians.<sup>10</sup> There is no justification for inserting a fitness test, which address the relationship between a parent and his child.

Further, there is no question as to whether reasonable minds can differ over the meaning of the statute, it is susceptible to only one meaning. If the statute stated "unless parental unfitness is established" or "unless a risk of future harm is established" or any other phrase which would signal a fitness determination then yes, maybe it would be ambiguous for signaling both best interests and fitness. But it does not. Nor does it limit the presumption to only "fit parents;" it references "the parent," not "the fit parent."

The "best interests of the child" is a term of art defined in the Act and requires a judicial determination on twelve factors contained in MCL 722.23. In no uncertain terms, 722.25(1) opens the door to a best interests hearing in all custody cases between third parties and parents regardless of fitness. There is no other method for a party to prove that the best interests of the child are not served by awarding custody to the natural parent. The courts in *Heltzel* and *Mason* construed 722.25(1) not to require a best interests test, but a fitness test. This construction conflicts with the unambiguous language of 722.25. As described below, while at first blance such an interpretation seems more stringent and protective of parental rights, it is not.

***ii. The plain language of MCL 722.25(1) does not reference parental fitness nor does it contain procedural protections for fit parents, thus it is unconstitutional for violating substantive and procedural due process.***

A statute is "repugnant to the Due Process Clause" if it deprives a person of a right without referencing the factor that is fundamental to the State's statutory scheme. *Stanley, supra*

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<sup>10</sup> 1970 PA 91, MCL 722.23; see *Harvey v Harvey*, 470 Mich 186; 680 NW2d 835 (2004).

at 653. The complete retention of protections afforded to the fundamental right to custody of one's children hinges on whether a parent is fit. Thus, any parental presumption statute is suspect if it permits the deprivation of a parent's constitutional right without referencing parental fitness. MCL 722.25 does just that. Further, this Court has recognized that a "due-process violation occurs when a state-required breakup of a natural family is founded solely on a "best interests" analysis that is not supported by the requisite proof of parental unfitness." *In re JK*, 468 Mich 202, 210; 661 NW2d 216 (2003). The "parental presumption" is the primary statutory due process protection afforded to a parent in a third party custody case and, under the plain meaning of the statute, that protection can be lost through a best interests analysis. Thus, 722.25(1) is repugnant to due process and must not continue in its current application.

The Due Process Clause of the Fourteenth Amendment guarantees more than fair process; it includes a substantive component that provides heightened protection against government interference with certain fundamental rights and liberty interests. *City of Cuyahoga Falls, Ohio v Buckeye Community Hope Foundation*, 538 US 188; 123 S Ct 1389 (2003). In this case, we are concerned with not only the substantive adequacy of fitness tests, above, but also with the adequacy of the procedure that invites a judge to strip a parent's rights based solely on a "best interests" analysis under 722.25(1). *Troxel* was limited to an analysis of a fit parent's fundamental rights and did not address safeguards pertaining to allegedly unfit parents. *Troxel*, *supra* at 68. It naturally follows that, in a case involving allegedly unfit parents, a court would have to conduct a fitness test to determine whether the parent is entitled to *Troxel's* protection against governmental intrusion into a fit parent's private family realm.

A court faced with the task of adjudicating parental fitness under the Child Custody Act is faced with a conundrum: if *Troxel* prohibits intrusions into a fit parent's family realm, how

can a court determine fitness without potentially infringing on the rights of some fit parents? That court would have two options. The first is to look at similar statutory schemes that have handled questions of parental fitness and incorporate that wisdom into its analysis. The second, chosen by *Mason*, is to reinvent the “fitness” wheel by creating a new standard. By conducting a procedural due process analysis, it is apparent that the former choice is best.

To determine whether a law satisfies procedural due process, a court must engage in a three-part analysis. First, the court must identify the private interest that will be affected by the proposed or existing procedure. *Mathews v Eldridge*, 424 US 319, 335; 96 S Ct. 893 (1976). Second, the court must evaluate “the risk of an erroneous deprivation of such interest through the procedures used, and the probable value of additional or substitute procedural safeguards.” *Id.* And third, the court must identify the government’s interest in lessening administrative and/or judicial burdens. *Id.* The first factor is met because the lack of a proper procedure for determining parental fitness affects what the Supreme Court has identified as “perhaps the oldest of the fundamental liberty interests”: a parent’s right to the care and custody of their children. *Troxel, supra* at 65.

The second factor is satisfied because there is a high risk of erroneous deprivation of this right due to the Child Custody Act’s lack of a fitness test and the current case precedent, *Mason*, containing a subjective standard. As the deprivation of a parent’s constitutional rights is directly linked to the adequacy of a fitness hearing, the value of an additional or substituted procedural safeguard is great. This is especially true considering that an established statutory scheme, which contains procedural safeguards for a parent’s right to custody of their child, already exists in other similar Acts. Others may argue that the value of stringent procedural safeguards in a child custody case where a parent can potentially regain custody under MCL 722.27(c), is

substantially less than the value of the same safeguards in a termination proceeding where a parent is permanently cut off from their child. This counter must be rejected, as the Supreme Court has not “embraced the general proposition that a wrong may be done if it can be undone.” *Stanley, supra* at 647.

Lastly, the third factor consists of an evaluation of the judicial costs of the existing and proposed procedural protections. When *Mason* invented a new standard, it embarked on a costly and time-consuming journey. Michigan courts have been perfecting the application of the Probate Code’s statutory scheme concerning the protection of minors since 1940. see *Oversmith v Lake*, 295 Mich 627; 295 NW 339 (1940). Almost seventy years later, this Court is still presented with cases involving parental rights issues under the Probate Code. see *In re Kyle*, 480 Mich 1151; 746 NW2d 302 (2008). It would hardly be in the interests of judicial economy to spend another seventy years developing a similar set of procedures under the Child Custody Act. The alternative procedure below, which incorporates the vast statutory and case law under the Probate Code is by far less time consuming and more judicially economic.

***iii. If this Court accepts the proposed procedure contained herein for an evaluation of parental fitness under the Child Custody Act, then the Constitutional infirmities of MCL 722.25(1) could be rectified.***

The following proposed procedure for a court to evaluate parental fitness under the Child Custody Act combines the consideration of past conduct and present capabilities. It is important to note that most, if not all, custody complaints arising from MCL 722.26b stem from probate court guardianship proceedings. 1970 PA 91, MCL 722.26b. A finding of unfitness in the past should be used as a condition precedent to engaging in any further proceedings which risk continued deprivation of the fundamental right at issue. This proposed procedural protection is similar to the adjudicative phase of child protection proceedings where a probate court decides

whether jurisdiction is appropriate; thus acting as a safeguard against the more intrusive dispositional phase of the proceedings. see *In re Brock, supra*.

Specifically, in custody disputes between third parties and natural parents, without a finding of unfitness in the past there is no justification for a family to be subjected to an emotional fitness trial. Without a finding of prior unfitness, the court should either automatically return the children to their parents' custody or return the parties to their pre-complaint status by summarily dismissing the custody complaint and lifting the MCL 722.26b(4) order of abeyance. This may seem harsh for third parties, but it is important to remember that it is third parties, like the Hunters, who voluntarily choose to file a custody complaint and remove the case from the protections afforded by the probate court. As the substantive right to custody is "inextricably intertwined with the limitations on the procedures" protecting that right, a third party "must take the bitter with the sweet." *Cleveland Board of Education v Loudermill*, 470 US 532, 540; 105 S Ct 1487 (1985). If a third party wishes to circumvent established probate procedures by filing a complaint in the circuit court, thereby suspending the normal progression of the guardianship, then the third party simply has to check the guardianship file to see if the court has previously found the parent unfit. If there were no previous findings of unfitness, then a third party guardian would be wise to abstain from switching jurisdictions. If this Court validates this prerequisite, then the likelihood of 722.25(1) infringing on the due process protections afforded to parents will be substantially reduced.

The second part of the proposed procedure rectifies the constitutional infirmity of basing a fitness determination solely on past conduct. While a past determination of unfitness can suffice as a threshold requirement, it cannot be the basis of whether a parent "is fit" under

*Troxel*.<sup>11</sup> The Supreme Court in *Stanley* stated that when determining “issues of competence and care,” a court must not “disdain present realities in deference to past formalities.” *Stanley, supra* at 656-7. This Court has also recognized the importance of considering up-to-date information in custody disputes. see *Fletcher v Fletcher*, 447 Mich 871, 889; 526 NW2d 889 (1994). As numerous provisions in the Child Custody Act focus on present circumstances, there is no reason for cases involving parental fitness to be an exception. In consideration of this, a parent who has been deemed unfit in an appropriate proceeding must have his current capabilities examined. To avoid the constitutional over-breadth and arbitrary nature of the *Mason* standard, a trial court should be guided by the standards and considerations detailed in the Probate Code when evaluating a parent’s current fitness.

Any refusal to acknowledge the application of the Juvenile Code’s extensive statutory scheme regarding parental fitness and abandonment (78A), defies established precedent. *In pari materia*, a well-settled principle of law dating back to the 1800s, works to consolidate Acts that relate to the same subject by mandating courts to view similar statutes together as a whole. *Fanning v. Gregoire*, 57 US 524, 529; 1853 WL 7685, (1853). Statutes such as the Child Custody Act, the Juvenile Code, and the Child Protection Law share a common purpose: protecting children.<sup>12</sup> Further, the Child Protection Act is contained in the same legislative chapter as the Child Custody Law (Chapter 722, entitled “Children”) and the Acts were enacted within five years of each other. If statutes *in pari materia* are to be read and construed together as one law even though separated by time and lack of specific reference to one another, then

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<sup>11</sup> The Supreme Court in *Troxel* used the present tense when emphasizing its applicability to a parent who “is fit.” *Troxel, supra* at 68.

<sup>12</sup> see Child Custody Act: MCL 722.21, et seq. see: *Frame v. Nehls, supra*; Probate Code: MCL 712A.1, et seq. see *In re Brock, supra*, and Child Protection Law: MCL 722.621, et seq. see *Becker-Witt v. Board of Examiners of Social Workers, supra*.

statutes that were enacted at approximately the same time and are within the same chapter must also be construed together. *State Treasurer v Schuster*, 456 Mich 408, 417; 572 NW2d 628 (1998). Thus, when a court is determining a parent's current fitness under the Child Custody Act it must look to other similar Acts for guidance.

In sum, to satisfy procedural due process, when a third party guardian files a custody complaint under the Child Custody Act, the circuit court judge must look to whether the probate record contains a finding of parental unfitness. This threshold procedure protects parents from governmental intrusion into their private family realm in the same manner that the probable cause requirement protects the accused in criminal cases. If a parent has not been deemed unfit during the previous guardianship proceedings, then the custody complaint must be denied. This could result in either the automatic return of the children to the parent, or the lifting of the MCL 722.26b(4) order of abeyance. However, if a court found the parent to be unfit in the past based on the application of an appropriate standard, then the circuit court can proceed to a hearing on the parent's current fitness. During this phase, the circuit court should look to the established statutory schemes contained in the Juvenile Code, the Child Protection Laws, and other similar Acts. If a parent who was unfit is shown to still be unfit under an appropriate standard, *then* the circuit court can proceed to MCL 722.25(1)'s best interests hearing.

This proposed procedure passes the third part of a procedural due process analysis (economic and administrative costs) because it has only one step more than the *Mason* standard. Both *Mason* and the proposed procedure require a finding of parental unfitness based on clear and convincing evidence prior to the start of a best interests evidentiary trial. The only administrative difference is that the lack of a previous finding of unfitness would justify a summary dismissal of the custody complaint.

*iv. Conclusion*

Not only does this proposed procedure satisfy procedural due process requirements by erecting barriers to potential intrusion into a fit parents' private realm, it satisfies substantive due process by directing lower courts to consider surrounding law thereby significantly reducing the occurrence of arbitrary and subjective decisions. By establishing a prerequisite to the application of MCL 722.25(1), the proposed procedure does not impermissibly insert a fitness test into its unambiguous language. Preserving the constitutionality of 722.25(1) is accomplished without thwarting the legislative intent to have courts presume that it is in the best interests of a child for custody to be awarded to the parent unless a third party clearly and convincingly prevails in a best interests analysis. Thus, this Court should reject the standard invented by *Mason v Simmons* and adopt the proposed procedure for determining parental fitness described above.

**II. IF A NATURAL PARENT IS FOUND TO HAVE BEEN UNFIT UNDER AN APPROPRIATE STANDARD AND HIS OR HER LACK OF FITNESS LED TO THE CHILD'S ESTABLISHED CUSTODIAL ENVIRONMENT WITH A THIRD PARTY, THE PARENT'S LATER FITNESS AT THE TIME HE OR SHE SEEKS CUSTODY IS RELEVANT TO A PROPER FITNESS DETERMINATION.**

As discussed at length *supra*, custody determinations must be based on up-to-date information. *see Fletcher v Fletcher, supra*. Any emphasis on past behavior is inappropriate to the extent that it interferes with a court's consideration of "present realities." *Stanley, supra* at 656-7. Further, an evaluation of a parent's past conduct should only be relevant for the limited purpose of procedural due process, regardless of whether the parent's past actions were laudable or despicable. Despite this clear precedent, the decisions below are in conflict regarding the relevance of rehabilitation.<sup>13</sup>

As a parent's right to the care, custody, and control of their children is a fundamental right protected by the Equal Protection Clause of the Fourteenth Amendment, the State must not

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<sup>13</sup> compare *Mason v Simmons, supra*, with *Yount v. Yount, supra*.

treat similarly situated parents differently. *Engquist v Oregon Dept. of Agr*, 128 S Ct 2146, 2153 (2008). When fundamental rights are subjected to legislative classifications, a strict scrutiny analysis must be employed. *Philips v Mirac, Inc*, 470 Mich 415, 432-3; 685 NW2d 174 (2004). “When such review is called for, the courts require “the State to demonstrate that its classification has been precisely tailored” and it must “serve a compelling governmental interest.”” *Id.* at 432, *citing Plyler v Doe*, 457 US 202, 216-7; 102 S Ct 2382 (1982). If determinations of parental fitness under the Child Custody Act fail to provide a substantive due process analysis that incorporates current evidence, then previously unfit parents in custody disputes have a significantly reduced level of protection afforded to their fundamental rights under the Child Custody Act than previously unfit parents under the Probate Code.

Rehabilitation, and the current ability of a previously unfit parent to provide a stable environment for their children is a highly relevant consideration in termination proceedings under the Probate Code.<sup>14</sup> If evidence of current fitness is irrelevant in a custody proceeding under the Child Custody Act then the Equal Protection Clause in both the Federal and Michigan Constitutions is violated. see Const 1963, art 1, §2. A parent who was previously unfit and is defending against a petition to terminate his rights to a child under the Probate Code is similarly situated with a parent who was previously unfit and is defending against a custody complaint under the Child Custody Act. Both parents are at risk of the State denying reunification with their children. And such parents are treated differently if evidence of rehabilitation and current fitness is relevant under the Probate Code, but irrelevant under the Child Custody Act. Thus, any failure to consider evidence of current fitness in a fitness test under the Child Custody Act implicates the Equal Protection Clause and is unconstitutional.

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<sup>14</sup> see 1939 PA 288, MCL 712A.19 (6)(a).

The primary opposition to the consideration of rehabilitation stems from the legitimate fear of returning children to a home where they had been traumatized in some manner. Though this concern is very serious, if a third party is concerned about returning a child to the home of a parent who is currently fit but was unfit in the past, then the third party can refrain from filing a custody complaint; thereby staying within the purview of the Probate Court. Third party custody cases, which stem from guardianship matters, can be categorized into two primary groups: those that warranted the involvement of child protective services, and those that did not. In cases that are extreme enough to warrant the involvement of child protective services, the courts are required to make findings of unfitness or danger to support the assertion of jurisdiction and adequate safeguards are in place to protect children. see MCL 712A.19. It is important to recognize this distinction so that the purpose behind child welfare and custody laws can be given full effect. The purpose of these laws is to protect children from unfit homes, not to punish the parent. *In re Brock, supra* at 108. If a court seeks to focus on the guilt or innocence of a natural parent, then such an inquiry belongs in a criminal proceeding. see *People v Gates*, 434 Mich 146, 161; 452 NW2d 627 (1990).

In a fitness determination, any differentiation between a parent who voluntarily contributed to the establishment of a custodial environment and a parent who involuntarily contributed to the establishment of a custodial environment is a distraction to the real issue of whether the children can safely be reunited with the natural parent. From a child's perspective, the absence of a parent due to, for example, the parent's legitimate need to undergo chemotherapy for cancer is just as heart wrenching as an absence due to a parent's need to enter a drug rehabilitation program. Both absences disrupt the parent-child relationship. There is no clear answer as to which situation causes the most harm to a child; whether it is more harmful for

a child to believe that his parent will die and never return, or for a child to know that there is a chance for their parent to rehabilitate and regain custody. Attempts at separating unfitness due to causes outside of a parent's control, such as cancer, and those stemming from the fault of the parent, such as criminality, invites courts to delve into matters best left to the legislature.

**III. THE LOWER COURTS HERE IMPROPERLY APPLIED THE CHILD CUSTODY ACT'S PRESUMPTION FAVORING THE CHILDREN'S ESTABLISHED CUSTODIAL ENVIRONMENT, MCL 722.27(1)(C) INSTEAD OF TROXEL'S (OR MCL 722.25(1)'S) PRESUMPTION IN FAVOR OF NATURAL PARENTS**

- a. The appellate panels in *Heltzel* and *Mason* incorrectly considered MCL 722.25(1) and MCL 722.27(c) to be conflicting statutes. This Court can reconcile the two statutes by finding that, in cases involving unfit parents, a third party has the burden to prove with clear and convincing evidence that the best interests of the child are served by awarding custody to them.**

Minimizing the discomfort a child must undergo during a custody dispute is a laudable goal of the Child Custody Act. In furtherance of that goal, MCL 722.27(c) mandates that a court must not disturb a child's established custodial environment absent a showing of clear and convincing evidence that it is in the child's best interests. MCL 722.25(1) states that a court shall presume it is in a child's best interests for a natural parent to be granted custody unless clear and convincing evidence shows otherwise. Both statutes are unambiguous. And while both require a showing of clear and convincing evidence, neither statute specifies which party must bear the burden of proof. The statutes can be read together by requiring one party to show with clear and convincing evidence that it is in the best interests of the child to remain in the custodial home of the third party, i.e. that it is not in the child's best interests to award custody to the natural parent. Statutes which may appear to conflict must be "read together and reconciled, if possible." *People v Bewersdorf*, 438 Mich 55, 68; 475 NW2d 231 (1991). The appellate panels in *Heltzel*, *supra*, and *Mason*, *supra*, arguably engaged in the *creation* of law more than the *construction* of it by

reading the statutes as conflicting and then inventing methods for avoiding the fictitious conflict.

In reading the two statutes together, the burden of proof must be placed with the third party. In *DeRose v DeRose*, this Court found a statute granting standing to grandparents unconstitutional in part due to its failure “to clearly place the burden in the proceedings on the petitioners rather than the parents.” *DeRose*, 469 Mich 320, 336; 666 NW2d 636 (2003). Further, in determining which party will bear the burden, this Court must consider the surrounding body of laws concerning child welfare and custody. see *Haliw v City of Sterling Heights*, 471 Mich 700, 706; 691 NW2d 753 (2005). Placing the burden on a parent would be inconsistent with the surrounding body of law, considering that even in the most extreme abuse and neglect cases under the Child Protection Code, the parent does not carry the burden of persuasion. see MCL 712A.19b(3) and *In re Trejo Minors*, 462 Mich 341, 350; 612 NW2d 407 (2000).

After finding that the statutes can be read together, this Court must consider the constitutional elephant in the proverbial room: whether due process prevents a fit parent from undergoing proceedings of this nature at all. see *Argument I*. When the appeals court in *Heltzel* considered the issue of competing statutory presumptions, it attempted to reconcile the two statutes. *Heltzel, supra*. However well intentioned the *Heltzel* court may have been, by giving a third party the chance to engage in a best interests determination against a fit parent, it permitted an impermissible governmental intrusion into the private family realm. Without proof of parental unfitness, the State’s interest in the family is *de minimus*. *Stanley, supra* at 657-8, and see *Troxel, supra*. The existence of a custodial environment in a case against a fit parent does not increase the State’s interest, and does not justify an intrusion into a fit parent’s family realm.

As with a fit parent, placing the burden of proof on the unfit parent is inconsistent with

Michigan's jurisprudence regarding the welfare of children. *see In re Trejo, supra*. Placing the burden of proof on a fit or allegedly unfit parent clearly runs afoul of due process when the issue of fitness has yet to be adjudicated. However, when a parent is found to be currently unfit under an appropriate standard, there is no constitutional bar to engaging the unfit parent in a best interests evidentiary hearing. In which case, 722.25(1) would be constitutional as applied and a third party would have the opportunity to prove with clear and convincing evidence that the best interests of the child are served by awarding custody to the them under 722.27(c) and 722.25(1).

Some may argue that a clear and convincing evidentiary standard is too high for a third party who has established a custodial environment for a child to meet, frustrating the overall intent of the legislature to protect the best interests of children. While no one disputes that it is a high standard, one must remember that third party guardians, like the Hunters, only have to meet this elevated standard when they file a custody complaint. Any third party guardian that takes advantage of 722.26b's granting of standing by *volunteering* to be under the providence of the Child Custody Act instead of the Probate Code must not be able to claim hardship.

As this Court must assume the legislature understood what it was drafting, one must read the varying statutes within the Child Custody Act in a manner that does not render any of them meaningless. *see Walen v Department of Corrections*, 443 Mich 240, 251; 505 NW2d 519 (1993). If the statutes are not read together to require the placement of both burdens on the third party custodian, then MCL 722.25(1) will be rendered meaningless. Looking at the statutes which grant standing to and place conditions on third parties, MCL 722.26b and 722.26c, it is plain that in most cases, the third party will have established a custodial environment. As most third parties will have lived with the children for an appreciable amount of time and will have created a custodial environment, if the custodial mandate outweighs the parental presumption,

then the latter is meaningless. Reconciling the two statutes serves the legislative intent apparent from the plain meaning of the texts and prevents a substantive due process violation by keeping the burden of proof with the third party and requiring an elevated evidentiary standard.

**b. The Lower Court Here Relied on an Incorrect Legal Standard and Unconstitutionally Placed the Burden of Proof on the Natural Parent.**

As is discussed in *Argument IV*, the lower court's finding of unfitness is against the great weight of the evidence. Regardless of the existence of an established custodial environment with the Hunters, because Tammy is a fit parent, the State's has a *de minimus* interest in the welfare of her children. Though custody cases are to be remanded to the trial court for reevaluation upon a finding of error under *Fletcher*, there is no State justification for further invading her private family realm. *Fletcher v Fletcher, supra* at 889. If this Court finds that she is a fit parent, she and her children must be reunited.

As the lower courts found Tammy unfit, it was bound to follow the precedent of *Mason* and *Heltzel* when saddling her with the burden of proof. MCR 7.215(C) and (J)(1). Assuming arguendo, that the trial court's finding of unfitness had sufficient evidentiary support and was based on an appropriate standard, this Court must overturn the placement of the evidentiary burden on Tammy as it is inconsistent with surrounding laws and Michigan's general jurisprudence regarding the rights of parents and children. *see In re Trejo and DeRose, supra*.

In reconciling the statutory mandate in favor of an established custodial environment with the constitutional parental presumption, the Hunters should have been required to prove, with clear and convincing evidence, that the best interests of Tammy's children are best served by denying her custody. Under a conciliatory reading of the two statutes, if Tammy is truly an unfit parent, then the Hunters would easily have been able to meet their burden and retained custody of the children. As described in *Argument V*, the Hunters did not satisfy their burden.

**IV. THE TRIAL COURT’S FINDING OF PARENTAL UNFITNESS HERE WAS AGAINST THE GREAT WEIGHT OF THE EVIDENCE.**

**a. The Lower Courts Misapplied *Mason v Simmons*’ Standard for Parental Fitness by Basing its Fitness Decision on Tammy’s Past Conduct that was Neither Neglect nor Abandonment.**

The Hunters had the burden of proving, by clear and convincing evidence, that Tammy is an unfit parent and thereby not entitled to the parental presumption codified in MCL 722.25(1). see *In re Clausen*, 442 Mich 648; 502 NW2d 649 (1993). The current standard for parental fitness under the Child Custody Act was created by the appellate panel in *Mason v Simmons*. *Mason* held that a parent will be found unfit if her “conduct is inconsistent with the protected parental interest, that is, the parent is not fit, or has neglected or abandoned a child.” *Mason*, *supra* at 206. As described in detail in Argument I above, the *Mason* court failed to define “parental interest,” used undefined terms (abandonment and neglect), and inconsistently applied its own holding; thereby creating a standard for parental fitness that is highly susceptible to arbitrary discretionary rulings of individual judges. Nonetheless, the lower courts here were charged with determining Tammy’s fitness according to *Mason*’s flawed precedent.

When making findings regarding Tammy’s past actions in its bench ruling, the trial court made no findings of abandonment or neglect. (Appendix 52-3A). To justify a finding of parental unfitness based on past behavior under *Mason* the trial court was required to make a finding that Tammy abandoned or neglected her children. The trial court’s findings that “in 2002 the parents were drug addicted [and] [t]hey could not provide a home for the children” fails to comport with the basic past action requirements of the *Mason* standard. (52A).

The closest indication that Tammy abandoned her children is the trial court’s statement that the probate court’s modification of the nature of the guardianship (from limited to full) rendered the placement involuntary. (51-2A). This statement qualified the court’s finding that

“the parents acted appropriately in 2002 and they set up a limited guardianship for these children and that was a voluntary placement.” (51A). It is counterintuitive to say that the probate court’s decision to modify the guardianship constituted an affirmative act of abandonment by Tammy. The trial court’s decision was based on the testimony of four witnesses that Tammy and Jeff voluntarily relinquished custody of their children to the Hunters when they encountered an arduous period in their lives. (112A, 115-16A, 137A, & 156-7A). Witnesses testified that, in making the decision to create a guardianship, Tammy and Jeff were acting in their children’s best interests *and there was always intent for the children to return. Id.* While the Hunters described three alleged incidents as abandonment (when Tammy left the children with Jeff for six days, and two other incidents that occurred while the children resided with the Hunters) none of the incidents fit the ordinary or legal definitions of abandonment. (132-3A, 124-5A, 104-5A & 109-10A).

The majority of the appeals court interpreted the trial court’s findings as being abandonment. The appellate panel stated that Tammy “abandoned the children for an extended period of time, from November 2002 to July 2005.” (77A). Those dates mark Tammy’s consent to the limited guardianship (7-15A) and her subsequent request for visitation (32A). No law or definition exists which would make sense of the appellate panel’s reasoning that establishing a guardianship constitutes abandonment.

The Hunters had the burden of proving, by clear and convincing evidence, that Tammy was so extremely unfit that she should be deprived of her fundamental constitutional liberty interest in raising her children. *In re Clausen, supra* at 687. When juxtaposed with Tammy’s eight witnesses, by presenting only one witness other than themselves (75A), and by giving highly unconvincing and contradictory testimony, the Hunters failed to meet their burden. For

instance, despite their allegation of unfitness being rooted in Tammy's supposed failure to provide a safe environment in 2002 due to her drug use, they did not present evidence on the extent of her drug use. Nor did they present evidence on how her drug use affected the children.

On the other hand, Tammy presented a wealth of evidence in defense of the claim that she created a critical time in her children's lives prior to the establishment of the guardianship, refuting the claim that she abandoned her children. While undesirable, Tammy and Jeff's drug use did not create a critical point in their children's lives. They both testified that their drug use was not on a regular daily basis, and that they used it away from the children when the children were asleep. (106A, 118-19A) Three non-party witnesses testified that they were in direct contact with Tammy and Jeff during that period and that their children were well cared for. (144A, 142A, and 146A). Witness Imogene Montgomery testified that Tammy "did all of her regular routine just as if she wasn't on drugs and I [lived with her] for six weeks and I did not know." (140A). Other than providing generalized statements concerning Tammy's supposedly "chaotic" 2002 Indiana home, the Hunters did not provide sufficient evidence supporting their claim that Tammy was unfit in the past. (133A). Further, the Hunter's only non-party witness, the former guardian ad litem Elissa Ray, admitted that she did not visit Tammy's home in 2002-3 or contact her while making recommendations to the probate court during that time.

The trial court's finding that Tammy's past behavior supports a finding of parental unfitness is against the great weight of the evidence and is a palpable abuse of discretion. Based primarily upon the probate judge's decision to modify the nature of the guardianship from limited to full *after the children were already placed with the Hunters*, the trial court's finding that Tammy did not voluntarily relinquish custody of her children is a clear error of law. Further, the appellate court's interpretation of the trial court's findings as "abandonment" is also

a clear error of law and fact. Without finding any instances of neglect or abandonment, and without identifying which actions were inconsistent with her parental interests, the lower courts incorrectly applied the *Mason* standard when depriving Tammy of her fundamental liberty interest in raising her children.

**b. The Finding that Tammy Abandoned her Children by Placing Them with Relatives is Inconsistent with Michigan’s Jurisprudence in Favor of Voluntary Relinquishment of Custody.**

The court of appeals held that Tammy continuously abandoned her children during the length of the guardianship. (77A). Michigan has a statutory scheme that excludes cases where a parent voluntarily relinquishes custody of her children from the definition of “abandonment”. Codified by MCL 712A.2(b)(1)(B) and recognized by a variety of cases, a parent who is unable to provide proper care for his child and places a child in the care of others is not considered having ‘abandoned’ the child. Under the Probate Code, this voluntary relinquishment has not been considered abandonment, regardless of whether the parent’s decision to relinquish custody was due to incarceration,<sup>15</sup> low income,<sup>16</sup> or hospitalization.<sup>17</sup>

Contrary to precedent, the lower courts held that the conditional agreement between the parties to return custody of the children when Tammy regained stability did not support a finding that Tammy voluntarily relinquished custody because “temporary is generally not construed to mean five years in duration.” (66A). As seen in *Matter of Ward*, the length of time that the children reside with third parties has not affected the exclusion of these cases from the definition of abandonment. In *Ward*, the court rejected the argument that a mother abandoned her children despite the passage of seven years from the mother’s initial decision to place her child with a

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<sup>15</sup> *Matter of Taurus F.*, 415 Mich 512, 556; 330 NW2d 33 (1982); *Matter of Curry*, 113 Mich App 821, 826-7; 318 NW2d 567 (1982).

<sup>16</sup> *Matter of Ward*, 104 Mich App 354, 356; 304 NW2d 844 (1981).

<sup>17</sup> *In re Sysma*, 197 Mich App 453, 455-6; 495 NW2d 804

relative. *Matter of Ward*, 104 Mich App 354, 356 (1981). Further, under other similar Acts, a child is to be returned to the parental home unless doing so presents a substantial risk of harm to the child, the parent has failed to comply with court orders regarding reintegration, or if it is established by clear and convincing evidence that continuation would serve the best interests of the minor. MCL 712A.19a(5), and MCL 700.5209(a)(B)(ii).

Michigan's jurisprudence regarding the voluntary relinquishment of custody in probate cases was applied to a case arising under the Child Custody Act in *Straub v Straub*, 209 Mich App 77, 81; 530 NW2d 125 (1995). In *Straub*, the court of appeals stated that it is "good public policy to encourage parents to transfer custody of their children to others temporarily when they are in difficulty by returning custody when they have solved their difficulty." *Id.* The appellate panel in this case held that the policy in favor of voluntary relinquishment, as stated by *Straub*, was inapplicable because it would not "tip the scale" in Tammy's favor. (79A).

By reading *Straub* in a vacuum and rejecting the policy in favor of voluntary relinquishment, the court of appeals failed to consider other case precedent such as *Miller v Miller*, 23 Mich App 430, 432; 178 NW2d 822 (1970). In *Miller*, the court of appeals granted custody to a mother who was unable to financially support her children and voluntarily relinquished custody of her children to their grandparents on the condition that she would regain custody when she became able to provide for the children. Despite the passage of four years since the children's initial placement with their grandparents, in returning custody of the children to their mother, the *Miller* court identified the "sound policy once reflected in the case law of this state" and found that "a mother would be most reluctant to give up her children if she knew that custody could not be regained once it passed to the father or to a third party." *Id.* at 437.

As the *Miller* court found Michigan's jurisprudence favoring return of the children to their

mother compelling and dispositive, the appellate panel here was incorrect in holding that the policy in favor of voluntary relinquishment was only applicable in cases where parties are equal on all of the best interests factors. Further, the *Miller* court was not concerned with the intermediate ups and downs the mother may have experienced while struggling to regain financial stability while her children were safely in the care of relatives. It was only concerned with whether she reached the condition previously agreed to by the parties. Likewise, the courts here should not have been concerned with what happened to Tammy, or what the probate court did, while the children were with the Hunters. Rather, the courts should have only looked to whether Tammy satisfied the condition of return as agreed to by the parties, i.e. whether she regained relative stability.

The facts of this case justify an application of Michigan's policy favoring return of children in cases where a parent voluntarily relinquishes custody to serve the best interests of his children. It is undisputed that Tammy and Jeff transferred custody of their children to the Hunters when they were "having problems with drugs and they were trying to get off the drugs." (137A). The trial court found that Tammy and Jeff acted appropriately when they set up the limited guardianship, and that the initial placement was voluntary (51A). Presumably, based on the initial placement of the children with the Hunters, even the trial court here would have found Michigan's policy favoring return to the natural parent applicable. However, with a legal slight of hand, the trial court decided that the policy was inapplicable because the Probate court modified the nature of the guardianship while the children were still with the Hunters without Tammy's input; thus rendering the relinquishment of custody involuntary and making the policy inapplicable. This is a clear error of law under *Miller*. Tammy's criminal actions while the children were in the custody of their guardians did not affect their welfare and should not affect

the applicability of established precedent.

A trial court commits a clear error when its decision seriously affects the “fairness, integrity or public reputation of judicial proceedings.” *People v Nyx*, 479 Mich 112, 125; 734 NW2d 548 (2007). The lower courts’ mistake regarding the applicability of the strong jurisprudence on the issue of returning custody to parents when they have solved their difficulties, combined with its staunch refusal to apply any case law or statutes related to termination of parental rights cases, makes it difficult for a parent to regain custody of her children under the Child Custody Act if that parent seeks assistance of others **before** she is in a situation where child abuse or neglect may occur. Without recognition or application of the vast amount of case law concerning the welfare of children in parental rights termination cases, the lower courts’ decisions make it harder for a parent who has not neglected her children to regain custody under the Child Custody Act than a parent who is under the jurisdiction of the Probate Court due to child abuse.

As Michigan’s jurisprudence supports voluntary relinquishment, this Court must reject the categorization of Tammy’s actions in 2002 as abandonment. The lower court’s decision must be overturned as it is illogical, contrary to Michigan’s jurisprudence, and discourages parents from voluntarily relinquishing custody when they run into difficulty, thereby threatening the integrity of our laws.

- c. By basing its decision on Tammy’s low income, lack of custody, and cohabitation, the lower courts misapplied *Mason v Simmons*’ standard for parental fitness when finding that Tammy’s current conduct is inconsistent with her parental interests.**

To justify a finding of parental unfitness based on current behavior, under *Mason*, the trial court was required to make a finding that Tammy’s current actions are inconsistent with her protected parental interests. Though primarily basing its finding of unfitness on Tammy’s past

actions, the trial court also made findings as to why Tammy is currently unfit. Notably, after finding Tammy an unfit parent, the trial court awarded her four weeks of unsupervised summer visitation, alternating holiday vacations, and two weekends of parenting time per month. (72A)

As discussed at length by the appeals court dissent, the trial court “committed clear legal error on a major issue by concluding that defendant is unfit, because this conclusion lacks any legal mooring and is directly contradicted by her perfect compliance with every requirement that the court imposed on her.” (99A). The trial court’s conclusion that Tammy cannot provide a stable home, thereby being an unfit parent, was wholly based on the following three findings: (1) she does not currently have custody of the children, (2) she cohabitates with her significant other, and (3) she would be unable to maintain her current standard of living if her relationship with her significant other ended (note the absence of any findings concerning risk of drug relapse).

i. ***The trial court impermissibly relied on Tammy’s lack of custody as evidence of parental unfitness.***

The trial court palpably abused its discretion when basing its finding of current unfitness on Tammy’s supposed inability to perform the “grueling day to day work” of a parent when she has been trying to regain custody and have the opportunity for such work since July 2005. As summed by the Dissent, Tammy “has not parented full-time because the circuit court has not permitted her to do so, despite her persistent requests for increased visitation.” (100A).

This Court stated in *In re Mathers* that a rehabilitated parent’s absence from her child due in part to a lengthy custody battle is not “some unpardonable sin which now makes the State master of her destiny and that of her child”. *In re Mathers*, 371 Mich 516, 535; 124 NW2d 878 (1963). By incorporating Tammy’s lack of custody due to litigation into its determination of parental fitness the trial court abused its discretion and committed a clear error of law.

***ii. The trial court impermissibly use of low-income as evidence of conduct inconsistent with Tammy's protected parental interest.***

Under *Mason*, a parent is unfit if his conduct is inconsistent with his protected parental interest. *Mason, supra* at 206. The lower courts used evidence of Tammy's low-income to support a finding that Tammy is currently unfit. Tammy is employed full time and earns \$10.50 an hour, totaling approximately \$21,840 annually in pre-tax income. (48A). Her hourly wage exceeds both Michigan's current minimum wage rate of \$7.40<sup>18</sup> and her home state of Indiana's rate of \$6.55.<sup>19</sup>

Without a showing of a risk of neglect or future harm, there is no justification for the lower courts' categorization of Tammy's employment as assistant manager at a retail store as 'conduct inconsistent with her parental interests,' or for the holding that Tammy is incapable of providing a stable home for her children due to her income level.<sup>20</sup> According to the United States' Census Bureau's 2007 Community Survey of Michigan's population, the annual household income for approximately 990,760 households is less than \$25,000.<sup>21</sup> Applying the lower courts' rulings to the economic reality of Michigan, then parents that are similarly situated to Tammy (i.e. the 990,760 households with similar incomes) would also be considered "unfit" and would not be entitled to the due process protection of their fundamental right to custody.

Tammy does not dispute that Michigan undoubtedly has a compelling interest in protecting the welfare of its children by lifting them out of poverty or protecting them from neglectful homes. However, when interfering with substantive rights, there must be congruence

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<sup>18</sup> MCL 408.384 (1)(d), Minimum Wage Law of 1964, 154 PA 1964

<sup>19</sup> Department of Labor, *Minimum Wage Laws in the State*,  
<<http://www.dol.gov/esa/minwage/america.htm>> (accessed October 15, 2008).

<sup>20</sup> The lower courts specifically mentioned that Appellant does not own a car (78A); disregarding evidence that Appellant's boyfriend allows her exclusive use of a vehicle.

<sup>21</sup> *see* United States Bureau of the Census, *American Community Survey Data Products for: Michigan*, September 5, 2007.

and proportionality to the State's methods of meeting such ends. see *Tennessee v Lane*, 541 US 509; 124 S Ct 1978 (2004). Stripping a parent of his fundamental right to custody is not a legitimate means for meeting the State's interest in the welfare of children when other means, such as referring the parent to social service agencies, are readily available.

Upholding the usage of low-income as a basis for a finding of parental unfitness, without a finding of potential neglect or harm, gives rise to a host of constitutional challenges. Such a decision could give rise to an Equal Protection claim due to the higher incidence of poverty in minority families. see *Smith v Organization of Foster Families*, 431 US 816; 97 S Ct 2094. Or, it could give rise to an Equal Protection challenge based on the increased likelihood of disparate treatment of women contrary to important governmental objectives. see *Orr v Orr*, 440 US 268, 280; 99 S Ct 1102 (1979). Thus, a finding of low-income, without a correlative finding of potential neglect or harm to the children, cannot be a proper basis for a finding of unfitness.

***iii. The trial court impermissibly used cohabitation as evidence of parental unfitness.***

The trial court relied heavily on Tammy's unmarried cohabitation with her significant other in finding that she cannot provide a stable home for her children. The court found that the children's exposure "to an out of wedlock relationship" is "questionable judgment", and stated that there "is a reason that we have marriage in this society and marriage protects her." (53-4A)

In Michigan, there are 640,513 single parent households with children under the age of eighteen.<sup>22</sup> Additionally, there are 205,888 households where the householder is cohabitating with an unmarried partner. Far greater than that is the number of Michigan households where householders are cohabitating with relatives (483,021 households) and nonrelatives (480,266); totaling 963,287 Michigan households. *Census, supra*. As the trial court's finding of unfitness is

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<sup>22</sup> 475,035 single mother households, and 165,478 single father households. *Census, supra*.

based in large part on Tammy's cohabitation with her significant other, upholding its decision could affect the constitutional rights nearly of a million Michigan residents.

The trial court stated that "without Mr. McConnell being there and without his financial assistance," Tammy would not be able to maintain her current lease. As the court of appeals dissent noted, the Friend of the Court concluded that Tammy's living in a smaller apartment was evidence of being an unfit parent. "[Tammy] and McConnell subsequently rectified this problem by renting a four-bedroom home." (100A). The Hunters did not provide evidence concerning the cost of living in Indiana which would refute Tammy's evidence that while she could not afford the current four-bedroom, 2,000 square foot home that she lives in without her partner's assistance, she *would* be able to afford alternative housing if their relationship ended. (187A).

Though the trial court did not differentiate between cohabitation due to desire or necessity, it specifically mentioned marriage in its ruling on Tammy's fitness. As such, it is likely that the trial court would have ruled in the different way if she were cohabitating with her parents or a roommate instead of a significant other. The Michigan Supreme Court had the opportunity to use cohabitation against a party in *Ireland v Smith* and did not mention cohabitation as a negative indicator, where the father lived with his parents and suitability of the custodial home was directly at issue. *Ireland v. Smith*, 451 Mich 457, 459; 547 NW2d 686 (1996). Thus, if the financial necessity of living with her significant other was the reason for using cohabitation as a basis for a finding of unfitness, then the trial court made an error of law.

The limited ability of a trial court to use cohabitation as evidence of parental moral unfitness is evident by the inclusion of morality as a best interests factor. MCL 722.23(f). Incorporating morality into MCL 722.23 suggests that some parents will make choices of debatable morality and others will not; if actions based on 'questionable judgment' were enough

to justify a deprivation of a fundamental liberty interest then the legislature would have directed courts to weigh evidence of moral fitness more heavily than other factors in MCL 722.23. Instead, the legislature did not distinguish morality, thus rendering it as no more important than the other factors. The legislature is “presumed to be aware” of precedent and any omission must be seen as intentional. *Bahr v Bahr*, 60 Mich App 354, 359; 230 NW2d 430 (1975).

More so in cases where a constitutional right is at stake than in an ordinary best interests analysis, due process requires protection against arbitrary and subjective viewpoints of individual judges. *Rummel, supra* at 274. Using subjective views of morality as justification for infringing on a parent’s constitutional rights is dubious, as other courts have ruled “standing alone, unmarried cohabitation is not enough to constitute immorality.”<sup>23</sup> By incorporating inherently subjective moral judgments regarding “out of wedlock” relationships (53A) into its fit-parent analysis, the trial court palpably abused its discretion. This Court cannot uphold a decision that strips a parent of her protected fundamental liberty interests when she earns more than minimum wage and chooses to cohabit. As the lower courts’ decisions are clearly against the great weight of the evidence, this court must reverse the conclusion that Tammy is unfit; thus altering the burden of proof and justifying a reversal of the trial court’s award of custody to the Hunters.

**d. Under an Appropriate Standard for Parental Fitness, a Finding that Tammy is Unfit is Against the Great Weight of the Evidence.**

Throughout the guardianship, the probate court did not find Tammy “unfit.” It is undisputed that, after Tammy placed her children with the Hunters, her life steadily deteriorated due to her addiction to drugs and she was incarcerated in August 2004 for theft. (112A). When Tammy’s life began to deteriorate, the Hunters filed an emergency *ex parte* petition to modify

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<sup>23</sup> *Hilliard v Schmidt*, 231 Mich App 316, 324; 586 NW2d, 263 (1998), *rev’d on other grounds by Molloy v. Molloy*, 247 Mich App 348; 637 NW2d 803 (Mich App Sep 04, 2001).

the guardianship. (17A). The next day, following the recommendation of guardian ad litem Elissa Ray, the court entered an *ex parte* order suspending Tammy's visitation. (22A). Just one month later, the court modified the guardianship without any evidence placed on the record. (25-27A). Neither the order suspending Tammy's visitation nor the order appointing the Hunters as full guardians mention an evidentiary basis for such decisions. In the petition for appointment as full guardians, filed June 17, 2003, the Hunters alleged that Tammy and Jeff had "disappeared." (21A). The guardian ad litem's recommendation on this petition confirmed that she was unable to reach Tammy or Jeff. (25A). While failure to reach the parents may be indicative of desertion, the entire process of filing the petition, filing the recommendation, and granting the *ex parte* order suspending visitation lasted a mere two days. A two-day absence, when she had already placed the children with relatives, cannot be seen as desertion. *see* MCL 712A.19b(3)(a)(2).

What complicates matters is the passage of one month between the visitation suspension and appointment of the Hunters as full guardians. Though Tammy was not present for the latter hearing, evidence does not suggest that she failed to contact her children during that month. The Hunters argued in their appellate briefs that Tammy disappeared for two years after placing the children with them; this is inconsistent with their trial testimony. Lorie testified that Tammy visited the children regularly until she went "on the run," and that Tammy "was only on the run for a few weeks" before becoming incarcerated in Indiana. (125 & 127A). Supporting Lorie's testimony is Tammy's testimony that she visited the children both physically and via telephone from the onset of the guardianship in November 2002 until her incarceration in August 2004. (112A). Examining Lorie's testimony, if Tammy was incarcerated in August 2004, and if she regularly visited the children until a few weeks prior, then Tammy was regularly contacting the children when the guardianship was modified. Thus, all the evidence suggests that Tammy

regularly contacted the children before and after the order suspending her visitation. This does not justify a finding of prior unfitness based on abandonment.

As Tammy was not found to be an unfit parent in the past under an appropriate standard, there is no cause for a court to further intrude her private family realm by examining her current fitness. see *Argument I*. Further, a determination of parental fitness guided by similar Acts would have led to reunification instead of a finding of current or past unfitness. When a child's involuntary removal from their parent's home is justified under the Child Protection Code, a court must reunify the child with his parent if "the return of the child to his or her parent would not cause a substantial risk of harm to the child's life, physical health, or mental well-being[.]" MCL 712A.19a(5). As Tammy's conduct did not warrant removal by child protective services, she should not be subjected to a harsher standard than that which applies to parents who have warranted such an involuntary removal. The lower courts did not find a risk of future harm to the children, though the court of appeals emphasized that she is a recovering addict. (78A).

Even assuming, arguendo, that the trial court was correct that Tammy cannot provide a stable home for her children, it is obvious from the trial court's granting of extended parenting time to her that there is no "substantial risk of harm." It belies common sense for a court to find that a parent is too unfit to be entitled to due process protection of her right to parent while simultaneously finding that she is fit enough to parent her children for a month every summer, every other weekend, and holidays. (72A). As "justice must satisfy the appearance of justice,"<sup>24</sup> especially when the injustice is based on failure to apply established precedent, this Court must rectify the lower courts' errors by reversing the finding of parental unfitness

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<sup>24</sup> *Republican Party of Minnesota v White*, 536 US 765, 817; 122 S Ct. 2528 (2002), quoting *Offutt v United States*, 348 US 11, 14, 75 S Ct. 11 (1954).

**V. THE TRIAL COURT'S DETERMINATIONS REGARDING THE BEST INTERESTS OF THE CHILDREN WERE AGAINST THE GREAT WEIGHT OF THE EVIDENCE.**

**a. Overview**

Under *Mason v Simmons*, in custody disputes between third parties and a natural but unfit parent, the parent is not entitled to the protection of her fundamental constitutional interest in raising her child detailed in *Troxel*. *Mason, supra* at 207. Following the *Mason* precedent, as Tammy was deemed unfit prior to the best interests evidentiary hearing, she carried the ultimate burden of proving, by a preponderance of the evidence, that an award of custody in her favor would be in the children's best interests. *Id.* Even if this Court deems *Mason* constitutional and affirms the lower courts' finding of parental unfitness, if this Court reverses the lower courts' findings on the best interest factors argued below, then Tammy will have met her burden of persuasion under *Mason* and the children must be returned to her custody.

Further, if this Court recognizes the constitutional deficiencies of *Mason*, *Heltzel*, and the application of MCL 722.25(1) in those cases, as urged in *Argument I, supra*, then the children must be reunited with Tammy. The lower courts in this case found that an established custodial environment exists with the Hunters (78A), and that eight of the best interests factors exclusively favored of the Hunters, but found the parties equal for three factors.<sup>25</sup> Based on the combined clear and convincing tests found in MCL 722.25(1) and 722.27(c),<sup>26</sup> third party custodians should not be awarded custody unless an overwhelming majority of the best interests factors are in their favor. Thus, if this Court overturns the lower court's finding that Tammy is an unfit parent yet does not find any of the arguments below persuasive, then the Hunters will have failed to meet the elevated burden and an award of custody in favor of Tammy would be required.

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<sup>25</sup> The lower courts found that eight factors (B, C, D, E, F, G, H, and L) favored the Hunters. The parties were found equal as to factors A, J and K. No finding was made for factor I. (62A-71A).

<sup>26</sup> *see Argument III, supra.*

**b. The Circuit Court Palpably Abused its Discretion by Finding, Against the Great Weight of the Evidence, that MCL 722.23(b) (the capacity and disposition of the parties involved to give the child love, affection, and guidance) Favors the Hunters.**

**i. *The circuit court failed to make appropriate findings of fact to support its conclusion that factor (b) favors the Hunters.***

As the appellate panel noted, “a trial court is not required to comment on every matter in evidence.” (81A). However, the trial court has the responsibility of making clear findings of fact. Failure to make definite and clear findings of fact frustrates the ability of a reviewing court to carry out its responsibilities. *Wolfe v Howatt*, 119 Mich App 109, 112; 326 NW2d 442 (1982). The trial court’s “specific findings of fact” regarding this factor were only 1) that the Hunters have been caretakers of the children for five years, 2) that Tammy used drugs between 2002 and 2004, and 3) both parties take the children to church. (62-3A).

As the Circuit Court did not make any findings or reference any evidence that linked Tammy’s prior drug use with her current capacity and disposition as a parent, the inclusion of past behavior is clearly erroneous. Further, the remainder of the trial courts’ findings for this factor only addresses the parties’ capacity to raise the children in their religion. As the court noted that both parties take the children to church, this factor should have been neutral. The findings do not concern either party’s current capacity to give the children love, affection and guidance. Unless Tammy is found to be a fit parent (whereby further evidentiary best interests trials would be unconstitutional), as the trial court failed to make adequate and specific findings for this factor, this Court must remand this case for specific findings of fact and conclusions of law to be placed on the record. see *Marker v Marker*, 482 Mich 948; 753 NW2d 634 (2008).

**ii. *The circuit court’s ultimate finding on Factor B is against the great weight of the evidence and constitutes a palpable abuse of discretion.***

Testimony was given stating that when the children are in Tammy’s care, she oversees their needs. Further, Tammy’s manager, Kamran Iqbal, gave testimony that her work schedule can be

modified to meet the needs of her children, so if they were sick, it would not be a problem for her to take off of work or reschedule her hours. (160A). Comparatively, Lorie testified that one of the children became a “missing person” while she was at work; which evidences the Hunters’ failure to supervise the children. (128A).

Additionally, Tammy presented evidence that she has successfully completed two parenting programs. Tammy’s parenting class coordinator, therapist Lindsey Evans, stated in a letter that Tammy has not only been taught general themes relating to good parenting, but has “learned to adapt the different topics to her parenting situation right now.” (44A). Accordingly, Tammy is “able to look to the future and address the problems she will encounter as a single parent of four children.” (44A). Thus, Tammy presented evidence supporting a finding that she is capable of giving the children love, affection, and guidance.

In contrast, the Hunters did not present any evidence or witness testimony regarding their ability to parent the children. Furthermore, the Hunters’ physical methods of discipline (which include paddling, smacking, and making the children hold hot sauce in their mouths) are unquestionably less preferable than Tammy’s methods. Under *Harper v Harper*, the court of appeals held that a custodian’s use of a paddle for discipline is a fact that can be used against him for this Best Interests factor. *Harper v Harper*, 199 Mich App 409; 502 NW2d 731 (1993). The Hunters admitted to using a paddle for discipline, however, this evidence was not used against them when the court determined this factor. (129-31A).

The small amount of evidence presented by the Hunters, when compared to the wealth of evidence presented in Tammy’s favor, cannot logically lead to the conclusion that this factor favors the Hunters. The Circuit Court’s ultimate finding on this factor must be overturned as the great weight of the evidence clearly preponderates in the opposite direction.

**c. The circuit court committed clear legal error by basing its decision for MCL 722.23 Factor F (moral fitness of the parties) on Tammy's actions in 2002/2003 and on her legal strategy.**

The trial court found this factor in favor of the Hunters. (65-7A). Referencing Tammy's previous drug use and the children's placement with the Hunters, the trial court placed significant weight on her *past* actions when determining the relative morality of the parties. *Id.* Under *Fletcher*, immoral conduct is only relevant if it has a significant impact on how one will function as a parent. *Fletcher, supra* at 877. As the Hunters presented no evidence regarding how Tammy's former drug use impacts her current ability to function as a parent, the court's finding for this factor is a clear error. Further, though one can assume that Tammy's former drug use impacted her ability to parent in *some* manner, no evidence was presented that her prior drug use had a *significant* impact on how she functioned as a parent at that time.<sup>27</sup>

Other than emphasizing Tammy's past drug use, the Hunters did not submit evidence questioning her current morality. Nor did they provided evidence suggesting that Tammy is likely to relapse. In the absence of any evidence to the linking Tammy's past conduct with her current morality, the trial court did not satisfy its duty to make a balanced comparative finding on Tammy and the Hunters' current moral fitness as it relates to their current abilities to parent.

In addition to making a clear error of law by failing to follow *Fletcher*, the lower courts confused Tammy's legal strategies with evidence of immorality.<sup>28</sup> Despite Tammy's July 2005

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<sup>27</sup> Tammy and Jeff testified that their drug use was not on a regular daily basis, and that they used it away from the children when the children were asleep. (104-6A, 119A). Three non-party witnesses testified that they were in direct contact with Tammy and Jeff during that period and that the children were well cared for. (142-3A, 145A, &147A,). Imogene Montgomery testified that Tammy "did all of her regular routine just as if she wasn't on drugs and I [lived with her] for six weeks and I did not know." (140A). A brief statement that Tammy's home was 'chaotic' was the Hunters' sole evidence regarding the affect Tammy's drug use had on the children. (133A).

<sup>28</sup> Lower courts are in conflict when weighing legal strategy as evidence of immorality. Compare this case with *Zulkowski v Zulkowski*, unpublished opinion per curiam of the Court of Appeals, issued July 20, 2004 (Docket No. 25056).

petition for visitation, only two years after the full guardianship was established, the trial court found that “[a]fter five years in a stable, loving home, [Tammy] now seeks to assert her constitutional rights as a biological parent.” (66A). The court also stated that she “has adopted an ‘all or nothing’ strategy which is harmful to the children.” *Id.* As both parties have actively battled for full custody of the children, the court’s negative inclusion of only Tammy’s “strategy,” without a balanced consideration of the Hunters’ twin strategy, constitutes an abuse of discretion. Although the Hunters were solely responsible for removal of this case from the jurisdiction of the probate court, the circuit court stated that Tammy “has always put her own needs ahead of those of her children. The present custody dispute has caused the children substantial anguish.” (66A). Not only does this ignore Tammy’s laudatory act of legally establishing a guardianship before her drug use affected her ability to parent, the trial court insinuates that the fault for the current emotional custody battle, and the resulting effects on the children, falls solely on Tammy. Such an accusation is not only improper for a judge to assert, but clearly an error, as Tammy’s unwillingness to succumb to the Hunters’ complaint for custody cannot be considered evidence of immorality. Even if Tammy’s attempts to regain custody did evidence general immorality, it certainly does not impact how she will function as a parent.

As the trial court misapplied law to facts and impermissibly focused on past actions and legal strategy, the finding that MCL 722.23(f) is in favor of the Hunters is against the great weight of the evidence. Unless previous drug use is *per se* evidence of immorality, as neither party presented evidence concerning the effect of immorality on the other’s ability to parent, this factor should have been found equal between the parties.

**d. The circuit court failed to follow *MacIntyre v MacIntyre* when finding, against the great weight of the evidence, that MCL 722.23 Factor G (the mental and physical health of the parties) favors the Hunters.**

The trial court found this factor in favor of the Hunters and the court of appeals affirmed the finding out of deference to a trial court's ability to assess credibility. (67A). Irregardless of the high amount of deference that the appellate panel gave to the trial court's assessment of credibility, it confused the "abuse of discretion" standard (applied to findings of fact)<sup>29</sup> with the "clear error" standard (applied to questions of law). *Fletcher v Fletcher (3)*, 229 Mich App 19, 24; 581 NW2d 11 (1998). In applying the former standard of review, the appellate panel did not evaluate whether the trial court's failure to apply *MacIntyre v MacIntyre* was an error of law. see *MacIntyre v MacIntyre (On Remand)*, 267 Mich App 449, 705 NW2d 144 (2005). Further, even assuming arguendo that Lorie is a credible witness and Tammy is not, it was Lorie who testified that she had mental health issues that affected her ability to parent. (170-1A). No evidence was presented linking Tammy's history of addiction with her current ability to parent.

In *MacIntyre*, this factor favored the plaintiff where the record was replete with evidence of defendant's uncontrollable and inappropriate displays of anger in the child's presence. The record in this case is also replete with evidence of Lorie's uncontrollable and inappropriate displays of anger not only in the presence of the children, but often directed at the children. see (131A, 174A, 176-7A, & 167A). Thus, when balancing the mental health of the parties, this factor should have been found in Tammy's favor. In light of the large amount of evidence illustrating Lorie's mental health issues and the direct effect they have on her treatment of the children, to dismiss her current mental problems, and to focus on Tammy's past physical drug addiction, demonstrates a clear misapplication of *MacIntyre*; the circuit court's finding of this

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<sup>29</sup> *Foskett v Foskett*, 247 Mich App 1, 5; 634 NW2d 363 (2001).

factor in favor of the Hunters is against the great weight of the evidence and a clear error of law.

- e. The circuit court committed a clear legal error by failing to make a finding regarding MCL 722.23 Factor I (preference of the child) when the record was replete with evidence favoring Tammy.**

The lower court stated that the children’s “stated preferences have been taken into consideration,” but did not make a finding for this custody factor. Though a trial court “need not violate a child’s confidence by revealing his or her preference on the record,”<sup>30</sup> it is an error of law for a court to refuse to make a finding when the record makes abundantly clear what the children’s preference is. Upholding a trial court’s refusal to make a finding is directly adverse to the statutory requirement to make clear findings and frustrates the responsibilities of reviewing courts. *Wolfe, supra* at 112.

The trial court in *Fletcher* stated “[t]he court has interviewed the children in chambers and has considered the reasonable preferences of the children in making its decision.” *Fletcher v Fletcher (1)*, 200 Mich App 505, 518-9, 504 NW2d 684 (1993), *rev on other grounds Fletcher v Fletcher (2)*, 447 Mich 871, 526 NW2d 889 (1994). The reviewing court noted that the trial court’s statement did not satisfy the requirement that a court must make a finding on each factor. *Id.* Despite the trial court’s failure to make a finding, the reviewing court in *Fletcher (1)* weighed factor (I) in favor of the defendant because the record reflected that the children preferred to remain with her. *Id.*

The trial court’s failure to state a finding with regards to Factor (I) is almost identical to that of the trial court in *Fletcher (1)*. The record in this case is similar to *Fletcher (1)*, as it is replete with the children’s acknowledged preference to resume living with Tammy. (46A, 156A). As such, the trial court could have made a finding on this factor without disclosing the

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<sup>30</sup> (84A), *citing MacIntyre, supra*.

children's confidential statements. As the great weight of the evidence suggests that this favors Tammy, the court's finding in favor of the Hunters constitutes a palpable abuse of discretion.

**f. In modifying the circuit court's finding for MCL 722.23 Factor J (willingness and ability of the parties to facilitate and encourage a close and continuing relationship), the appellate panel should have found this Factor in favor of Tammy instead of finding the parties equal.**

Despite the trial court finding this factor in favor of the Hunters, the appellate panel found that evidence of the Hunters' unwillingness to facilitate the children's familial relationships clearly preponderated in the opposite direction of the trial court's findings and concluded that the trial court should have found the parties equal for this factor. (85A). Based on the testimony of multiple witnesses,<sup>31</sup> the appellate panel found that

Although plaintiffs do "permit" defendant to have parenting time with her children, plaintiffs are under court order to do so. As such, plaintiffs allowing defendant to exercise her parenting time is not necessarily an indication of their willingness and ability to facilitate the children's relationship with their mother. . . [P]laintiffs are actually not willing to facilitate relationships between the children and other family members. Plaintiffs regularly block family members' phone calls and emails, and have refused to let the children's extended family visit them. In additions, plaintiffs presented no evidence that defendant has ever tried to inhibit their relationship with the children. (87-8A).

Courts are charged with determining which party individual factors favor. It is illogical and an incorrect application of law for a court to conclude that this factor favors neither party while simultaneously finding that one party clearly inhibits the other's relationship with the children.

Some lower courts base adverse findings for this factor on "unwilling" behaviors and attitudes without a showing of actual visitation refusals or blockings of communication. *Goodrich v Goodrich*, unpublished per curiam opinion of the Court of Appeals, decided July 18, 2006 (Docket No. 265816). Other lower courts (like the ones here) refuse to make an adverse

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<sup>31</sup> *see testimony of*: Tammy (114A, 176-7A, & 185-6A); the children's grandmother (138A & 156A); the children's father (118A); the children's brother (142-3A & 161-3A); the children's sister, (148-9A); and the children's maternal aunt (144-5A).

finding despite direct evidence of a party's actual prevention of relationship building. As various panels of the court of appeals render conflicting decisions, there is a great need for this Court to specify what constitutes "unwillingness" for this factor. Such drastically different results cannot be brushed aside under the oft-cited credo that an appellate court must defer to a trial court's credibility assessment. (78A).

Lower courts are applying inconsistent and arbitrary standards in determining whether a party is willing and able to facilitate and encourage a close and continuing familial relationship. As the evidence for this factor clearly preponderates in Tammy's favor, this Court should modify the appellate reversal of the trial court's finding and conclude that this factor favors Tammy.

**g. The Lower Courts Committed Clear Legal Errors by Failing to Consider Corporal Punishment as Evidence Not in the Hunters' Favor, and Espousing Injury as an Evidentiary Requirement Before Making a Finding Regarding the Existence of Domestic Violence, for MCL 722.23 Factor K.**

The appellate panel upheld the Circuit Court's neutral finding for this factor, stating "There is no evidence that the children were injured, physically or psychologically, by the corporal punishment." (85A). The court refused to find error despite the following findings:

Lori acknowledged that Robert had spanked the children with a wooden paddle before the July 27, 2006 Court order, but stopped subsequently. Lori testified that in November 2006 she put hot sauce in Mason's mouth because he lied. She also admitted "smacking" Alexis causing her to "set down." These incidents were clearly in violation of the Court's order and demonstrated very poor judgment on Lorie's part. Lorie admitted having anger issues and she testified that she and Robert believe in corporal punishment. Those admissions are quite concerning to the Court. Corporal punishment should not be condoned and should not be necessary . . . The incidents as related do not, however, constitute domestic violence. (70A).

As with the issue of parental fitness, lower courts have come to a wide variety of conclusions regarding the effect of a custodian's use of corporeal punishment when weighing Factor (k). The lower courts are in conflict over this issue, *compare this case with Ellis v. Evers*, unpublished per

curiam opinion of the Court of Appeals, issued Oct. 12, 2004 (Docket No. 253712).

The law in Michigan clearly separates the infliction of corporal punishment by a parent, or those acting *in loco parentis*, from the actionable definitions of assault and battery. *People v Green*, 155 Mich 524, 529, 532; 119 NW 1087 (1909). However, this separation does not exclude the consideration of corporal punishment for this Best Interests factor. The legislature's mandate is clear, courts are to consider "[d]omestic violence, regardless of whether the violence was directed against or witnessed by the child." MCL 722.23(k). The Domestic Violence Act defines "domestic violence" as including physical acts against children that would cause a reasonable person to feel intimidated or threatened. MCL 400.1501. The Hunters' actions clearly fall under this definition. (131A & 173-81A). If the legislature intended to exclude instances of corporal punishment from consideration, it would have included language to that effect in MCL 722.23(k). As legislative omissions must be seen as intentional, the omission of a corporal punishment exception must be construed as intentional. *Bahr v Bahr*, *supra* at 359.

Regardless of whether the Hunters' corporal punishment caused lasting injury, it is still, undeniably, violence. The acts themselves are to be examined when evaluating the existence of violence, not the resulting harm or lack thereof.<sup>32</sup> When a trial court makes a finding that violence exists in one household and not in another, it is an incorrect application of law to find the parties equal. As the trial court made findings of fact regarding the existence of family violence in the Hunters' home, and not in Tammy's home, a neutral finding for this factor is against the great weight of the evidence. This factor should have been found in Tammy's favor.

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<sup>32</sup> see testimony of: Kent (166-69A), Lorie (128-31A & 172-3A), Tammy (174-8A, 180-1A).

## RELIEF REQUESTED

Appellant Tammy Hunter respectfully requests that this Honorable Court order a prompt return of her children to her custody. Additionally, she requests that this court

- Overturn the unconstitutional standard for parental fitness set by *Mason v Simmons*, 267 Mich App 187, 206; 704 NW2d 104 (2005).
- Uphold the constitutionality of MCL 722.25(1) by adopting the proposed procedure for a parental fitness determination under the Child Custody Act.
- Uphold Michigan's established jurisprudence, which encourages parents to voluntarily relinquish custody of their children when they are unable to care for their children, by re-establishing custody when the parent regains fitness.
- Uphold the constitutionality of MCL 722.25(1) by mandating a finding of current parental unfitness prior to subjecting any parent to a MCL 722.23 best interests determination in a third party custody dispute.
- Clarify that cohabitation and low-income are not proper considerations in a parental fitness determination unless there is a clear linkage to the parent's current ability to care for a child.
- Reconcile MCL 722.25(1) and MCL 722.27(c) by holding that, in a third party custody dispute where an established custodial environment exists with the third party, the third party must prove with clear and convincing evidence that the best interests of the child are served by not returning the child to the parent and by continuing the established custodial environment; thereby overturning *Heltzel v Heltzel*, 248 Mich App 1, 638 NW2s 123 (2001).
- Clarify that the Best Interests factors contained in MCL 722.23 are to be decided based on current evidence, deeming past evidence relevant only to the extent that it affects a parent's current ability to care for his/her children.
- Recognize the existence corporal punishment in a custodial home as evidence which must be included in the evaluation of MCL 722.23(k).
- Clarify what level of "unwillingness" affects a determination under MCL 722.23(j).

Respectfully submitted by,

*signed* November 7, 2008

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