FAMILY LAW SECTION

**Report on Public Policy Position**

**Name of section:**
Family Law Section

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**Regarding:**
Amicus Brief in Hunter v. Hunter, Michigan Supreme Court Case No. 136310

**Date position was adopted:**
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Position adopted after discussion and vote at a scheduled meeting.

**Number of members in the decision-making body:**
18

**Number who voted in favor and opposed to the position:**
18 Voted for position
0 Voted against position

**Position:**
See below

**STATEMENT OF FACTS**

The Family Law Council adopts the Statement of Facts set out in Appellant's brief, as well as that set out by the dissent in the Court of Appeals decision in this case. See *Hunter v Hunter*, [*unpublished per curiam opinion of the Court of Appeals*] decided March 20, 2008 (Docket No. 279862).

## ARGUMENT

**I. THE INTERPRETATION OF PARENTAL UNFITNESS IN *MASON V SIMMONS*, AND THE TRIAL COURT'S RELIANCE ON *MASON*, VIOLATE A NATURAL PARENT'S CONSTITUTIONAL RIGHTS TO CUSTODY OF HIS OR HER CHILD UNDER *TROXEL*. THE TRIAL COURT CREATED ITS OWN DEFINITION OF UNFITNESS, CONTRARY TO ESTABLISHED MICHIGAN LAW. TRIAL COURTS SHOULD NOT BE ALLOWED TO MAKE *AD HOC* AND SUBJECTIVE DECISIONS, IN THE ABSENCE OF CLEAR STANDARDS, THAT AMOUNT TO THE IMPROPER "SUBSTITUTION OF JUDGMENT" CONDEMNED IN *TROXEL*.**

**A. BACKGROUND: PARENT'S FUNDAMENTAL RIGHTS:**

The United States Supreme Court most recently addressed the constitutional dimension of parental rights in family court cases with the landmark case of *Troxel v. Granville*, 530 U.S. 57, 69, S Ct 2054 (2000). *Troxel* held that the Fourteenth Amendment's Due Process Clause has a substantive component that provides heightened protection against government interference with certain fundamental rights and liberty interests, including a parent's fundamental right to make decisions concerning the care, custody, and control of their children. This case, more than any other in recent Supreme Court history, caused state legislators and state appellate courts across the country to reexamine not only their third-party custody statutes, but grandparent visitation statutes and statutes that allowed for relative and non-relative custody and access to children, which this Court did in *DeRose v DeRose,* 469 Mich 320, 336; 666 NW2d 636 (2003).

*Troxel* declares that parents have "perhaps the oldest of the fundamental liberty interests recognized by this Court," i.e. the right to determine the care, custody, and control (including the associations) of their children. *Id* at 530 US at 65. Children share in this due process liberty interest with their parents. In *In re Clausen*, 442 Mich 648; 502 NW2d 649 (1993) this Court specifically

recognized that children and parents have a mutual due process liberty interest. A child's due process liberty interest in his or her family life is not independent of the child's parents. *Id* at 686.

There is nothing in the inherent and Constitutionally protected parent-child relationship that limits that right to two-parent families. The right is intact for all fit parents and their children. See e.g. *Rust v Rust*, 846 SW2d 52, 56 (Tenn. Ct. App 1993)(single-parent family unit entitled to similar measure of constitutional protection against unwarranted governmental intrusion as accorded intact two-parent family). See also *Troxel* (single mother); *Frame v Nehls*, 452 Mich 171, 550 NW2d 739 (1996) (paternity cases involving unmarried parents, finding that compared to parents [including single parents], grandparents have no fundamental right to a relationship with the child, thus grandparents cannot argue equal protection).

Appellees' argument that this Court should not afford a natural parent her full constitutional rights because this is a custody, as opposed to a termination case, is without merit. *Troxel* found that the fundamental parent-child liberty interest was implicated in a visitation context; the constitutional right is even more affected in custody cases. Further, it is not just parental care, custody and control that is the fundamental liberty interest, it is a parent's "fundamental right ***to make decisions*** concerning the care, custody and control of their children." *Troxel*, *Id* at 57. The parental liberty interest is directly affected in third-party *custody* cases. Loss of custody, including loss of legal custody in a third-party case, deprives a parent of his or her right to make decisions concerning their

own children, let alone the care, custody, and control of a child, and by definition implicates the fundamental parent-child liberty interest.[1]

Appellees cite *Michael H. v Gerald D*, 491 US 110, 113, 109 S. Ct 2333 (1989) in support of a discredited argument that the due process liberty interest is limited (*Michael H* involved a biological father). However, this Court in *Clausen* directly addressed this claim and found that to the extent that some of the United States Supreme Court cases appear to limit the rights of a biological father, those cases involved litigation essentially pitting one natural parent against the other (such as an unwed father against the mother and, by circumstance, her husband). In those cases "almost of necessity, one natural parent must be denied rights that otherwise would have been protected. Sometimes a nonparent in a sense 'prevails' in such actions but that has been in the context of adoption by a stepfather who is married to the child's natural mother or legitimization of the status of the natural mother's husband, who is not the biological father." *Id* at 683-684, *omitting footnotes*.

Indeed, *Clausen* noted instead that review of the cases established that an unwed father who has not had a custodial relationship with a child nevertheless has a constitutionally protected interest in establishing that relationship. *Id* at 684 (restating conclusion of Iowa court).

**B. ONLY A FINDING OF UNFITNESS PROTECTS THE FUNDAMENTAL LIBERTY INTEREST**

[1] See also *Santosky v Kramer,* 455 US 745, 753, 102 S Ct 1388, 71 L Ed 2d 599 (1982) ("the fundamental liberty interest of natural parents in the *care, custody, and management* of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State").

Because a fundamental right (i.e. custody and control of one's child) is involved, a strict scrutiny test is applicable. *Troxel,* 530 US at 80 (Concurring Opinion of Justice Thomas). The "Fourteenth Amendment forbids the government to infringe ... 'fundamental' liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Washington v. Glucksberg*, 521 US 702, 721; 117 S Ct 2258 (1997). In cases involving interference with the parent-child liberty interest, the compelling interest of the State is protection of a child from harm. An unfitness standard is the application of this compelling State interest. This Court in *Clausen* found unfitness the appropriate standard for state disruption of the mutual parent-child liberty interest in a custody case:

> The ***mutual*** rights of the parent and child come into conflict only when there is a showing of parental unfitness. As we have held in a series of cases, the natural parent's right to custody is not to be disturbed absent such a showing, sometimes despite the preferences of the child. *Clausen* at 687; fn. 46 (Emphasis added).
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> "While a child has a constitutionally protected interest in family life, that interest is not independent of its parents' in the absence of a showing that the parents are unfit." *Clausen* at 657.

The Supreme Court in *Troxel* articulated a Constitutionally-based presumption that *fit* parents are presumed to know what is best for their own children and are in the best position to make decisions which promote and protect their children's interests free from state intrusion. "There is a presumption that fit parents act in their children's best interest." Id. at 58:[2] "[T]here is normally no reason for State to inject itself into the private realm of the family to further question fit parent's ability to make the best decision regarding their children." *Id.* *Troxel* continued:

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2 *Troxel*, citing *Parham v J.R.* 442 U.S. 584, 602 and *Reno v Flores*, 507 U.S. 292, 304.

> First, the Troxels did not allege, <u>and no court has found, that Granville was unfit parent. That aspect of the case is important, for there is a</u> **<u>presumption that that fit parents act in the best interests of their children</u>**. *Emphasis added.*

The primary protection of the natural parent-child liberty interest is that parental custody may not be disturbed absent a showing that the parent is unfit. <u>See</u> e.g. *Parham v JR*, *supra,* 442 US 584 (1979); *Stanley v Illinois*, 405 US 645, 651 (1972).[3] The underlying message of *Troxel* and *Clausen* is that if parents are capable, i.e. fit, to adequately care for their children, they, not the State, make decisions concerning their children.

A fitness standard directly addresses the relationship between parent and child and recognizes both the liberty and other interests attached to the natural parent-child relationship, as well as the societal interests in preserving that relationship. As opposed to a subjective and wide-ranging best interest comparative standard (typically used between divorcing parties on an equal constitutional footing)[4], the more objective fitness test focuses on the parent and is not a

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[3] In *Stanley*, the Supreme Court reversed and remanded a decision where a parent was denied custody pursuant to an Illinois Dependency Statute where there was no finding of parental unfitness. There, an unwed father's access to his children was severely limited under an Illinois dependency statute due to the death of the children's mother; the father was left with only the opportunity to act as a guardian for his own children. There was no finding of parental unfitness, and the case was not a parental termination proceeding. The Court found that the dependency statute "empowers state officials to circumvent neglect proceedings." *Stanley*, 405 US at 649. The Supreme Court held that the constitutional protections were not satisfied by the suggestion that the father could have regained custody through adoption or guardianship proceedings. The Court, in finding due process and equal protection violations, stated that "such restricted custody and control" of children pursuant to a guardianship statute was not full parenthood and constituted a violation of the parent-child relationship. 405 US at 648-649. *Stanley* supports Appellant's argument that due process protections apply in a custody context, not just termination proceedings. See *Clausen, supra.*

[4] "The best interests of the child is a highly contingent social construction. Although we often pretend otherwise, it seems clear that our judgments about what is best for our children are as

comparison with other proposed custodians. A best interest analysis is not proof of parental unfitness because it fails to address the specific relationship or mutual due process liberty interest between the parent and child. Justice Souter, in his concurring opinion, reiterated that the Washington statute allows any third person to receive visitation "subject only to a free-ranging best-interests-of a child standard."[5] *Troxel,* at 530 US at 76-78. While an unfitness standard will always contain some subjectivity, by definition it involves an individualized focus on the parent-child relationship.

*Troxel* concluded that the case before it was nothing more than a disagreement between the trial court and the mother over what constituted her children's best interests. The trial court in *Troxel* was improperly vested with the broad power to substitute its judgment for that of fit parents, determined only by what it considers is in the best interest of the children. Id. at 70-73.

> "The [trial] judge's comments suggest that he presumed the grandparents' request should be granted unless the children would be "impact[ed] adversely." In effect, the judge placed on Granville, the fit custodial parent, the burden of disproving that visitation would be in the best interest of her daughters. The judge reiterated moments later: "I think [visitation with the Troxels] would be in the best interest of the children and I haven't been shown it is not in [the] best interest of the children.

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much the result of political and social judgments about what kind of society we prefer as they are conclusions based upon neutral or scientific data about what is Abest@ for children. The resolution of conflicts over children ultimately is less a matter of objective fact-finding that it is a matter of deciding what kind of children and families, what kind of relationships B we want to have.@ Weaver-Catalana, Bernadette "*A Conflict of Best Interests*,@ 43 Buffalo Law Review 583 (Fall 1995) (emphasis added).

[5]" I see no error in the second reason, that because the state statute authorizes any person at any time to request (and a judge to award) visitation rights, subject only to the State's particular best-interests standard, the state statute sweeps too broadly and is unconstitutional on its face." *Id.* at 530 US at 76-77.

> The decisional framework employed by the Superior Court directly contravened the traditional presumption that a fit parent will act in the best interest of his or her child …" Majority Opinion, O'Conner, J., 530 US at 69-70. (Emphasis added).

*See Roth v. Weston*, 789 A.2d 431, 259 Conn. 202 (2002) (Connecticut Supreme Court reversing judgment allowing maternal grandmother's and aunt's visitation of father's children, since father was not shown unfit). The *Roth* court also equated best interests with inappropriate substitution of judgment, stating "it allows parental rights to be invaded by judges based solely upon the judge's determination that the child's best interests would be better served if the parent exercised his parental authority differently." *Id.,* 259 Conn. at 223.

The *Roth* court continued,

> "The constitutional issue, however, is not whether children should have the benefit of relationships with persons other than their parents or whether a judge considers that a parent is acting capriciously. In light of the compelling interest at stake, the best interests of the child are secondary to the parents' rights. *Brooks v. Parkerson*, 265 Ga. 189, 194, 454 S.E.2d 769, cert. denied, 516 U.S. 942, 116 S.Ct. 377, 133 L. Ed.2d 301 (1995) (finding it "irrelevant" to constitutional analysis that visitation may be in best interest of child); *Rideout v. Riendeau*, supra, 761 A.2d 301 ("something more than the best interest of the child must be at stake in order to establish a compelling state interest"); *In re Herbst*, 971 P.2d 395, 399 (Okla. 1998) (noting that court does not reach best interest analysis without showing of harm; absent harm, no compelling interest); *Hawk v. Hawk*, 855 S.W.2d 573, 579 (Tenn. 1993) (holding that best interest of child is not compelling interest warranting state intervention absent showing of harm). Otherwise, "[the best interest] standard delegates to judges authority to apply their own personal and essentially unreviewable lifestyle preferences to resolving each dispute." *Rideout v. Riendeau*, supra, 310. *Roth,* at 224.

## C. LACK OF APPROPRIATE STANDARDS IN *MASON V SIMMONS* AND THE INSTANT CASE:

The Child Custody Act, MCL 722.21, *et seq*., governs child custody disputes and sets out presumptions and standards by which competing custody claims are to be judged and sets forth the procedures and the forms of relief available. Sec. 25 of the Act sets out the applicable standards to

be applied, including the last line, that addresses cases between parents and non-parents and references the Constitutional presumption in favor of natural parents:

> 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).

*Mason v Simmons*, 267 Mich App 188 (2005) was a third party custody case discussing parental unfitness. As a preliminary matter, the Court of Appeals in *Mason* noted that the essential premise of the fundamental constitutional right to raise one's children is "that the parent is fit." *Id.* at 203. *Mason* found that the parental presumption described in *Troxel* applies only to fit parents.

*Mason* also found that the burden was on third parties to show that a parent is "unfit" [consistent with *Troxel*'s discussion of the burden] and upheld a trial court determination that the natural father in that case was unfit. However, in applying *Mason* here, the trial court essentially created its own version of fitness, and did not rely on any specific standards of fitness and harm, despite the availability of such standards in the Probate or Juvenile Codes. *Mason* basically redefined unfitness to include "when a parent's conduct is inconsistent with the protected parental interest." *Id.* at 206.[6] This phrase means essentially anything a trial court may want it to mean. It allows a trial court to substitute what it thinks is "best" for a child under the guise that a parent acts inconsistently with how a trial court believes a parent should act, in violation with *Troxel.* Unfettered discretion in determining what are "inconsistent acts" raises the specter of cultural, class, life-style and other types

[6] While *Mason's* articulation of or redefining of unfitness is in error, that does not necessarily mean the result in that case is incorrect. See Issue III, discussing *Mason.*

of bias and prejudice and also ultimately results in the very substitution of judgment condemned in *Troxel*.

Like in *Mason*, the instant case also involves a highly subjective determination of unfitness by the trial court in absence of any uniform standards. This amounts to the impermissible substitution of judgment by a trial court condemned in *Troxel*. Although ostensibly calling Ms. Hunter unfit (indicating a more objective finding), the trial court actually inserted its own broad considerations, including that Ms. Hunter abandoned her children by establishing a guardianship (something actually encouraged by the law and addressed in Issue III, *infra)*, that she was low-income, and that she did not "own a car."

It is imperative that courts rely on consistent and uniform standards in defining what constitutes unfitness. This satisfies general concepts of due process notice, and provides for a more uniform body of law. The courts and parties must be aware of the standards that exist, and then apply the particular facts of a case to those standards. Doing the reverse by examining factual circumstances then creating *ad hoc* standards (based perhaps on preconceived notions of how parents should act) violates due process guarantees related to fair trials. The focus of *Troxel* was to provide for a some standardized, objective, and *compelling* basis for state intervention into the protected and private realm of family life.

To satisfy the constitutional criteria sufficient to justify state intervention into the fundamental parent-child liberty interest, the appropriate standard for parental unfitness must be objective. The best example of such a standard in current law is found in MCL 712A.1 *et seq*., which incorporates standards of parental unfitness and is significantly more objective than the best interest

analysis used in the Child Custody Act. Other examples are found in the Child Protection Laws, MCL 722.621, *et seq*, and are listed in Appellant's brief. An objective standard like that found in the Probate Code recognizes the liberty interest attached to the parent-child relationship.

*Roth*, *supra*, states that the only level of emotional harm that could justify court intervention is one that is akin to the level of harm that would allow the state to assume custody under Connecticut General Statutes §§ 46b-120 and 46b-129 — namely, that the child is "neglected, uncared-for or dependent."

Appellees argue that it is irrelevant whether a parent's conduct consists of good acts or bad acts. This approach would result in parents losing custody when they appropriately seek a guardianship or other legally sanctioned placement to protect or provide to their children. Michigan's statutory scheme concerning children has long encouraged parents to temporarily relinquish custody when they run into difficulty, *Straub v Straub,* 209 Mich App 77, 81; 530 NW2d 125 (1995)(encouraging parents to transfer custody when in difficulty).

Appellee states that it may take a period of years to create case law defining "inconsistent conduct" with regard to parental responsibilities. As the existing standards defining unfitness and harm already provide for judicial discretion in individualized cases, such a "fleshing out" of an appropriate standard is unnecessary and does little to further the interest of either the parties or the children place in the middle of long-developing case law. This is a waste of judicial resources where the courts have established case law under a variety of Michigan statutes concerning unfitness and harm relating to parental custody. It is not the role of the trial court to engage in judicial legislation

where we already have objective, appropriate standards for unfitness that fully address the issues involved in these cases.

**D. <u>CONCLUSION</u>:**

Upholding *Mason* and the lower court's application of Mason in this case will undoubtedly require the appellate courts to address this issue over and over again in order to consolidate the myriad decisions that will attempt to define "inconsistent acts" or *ad hoc* unfitness. Without clearer standards, future trial courts will not be able to properly adjudicate allegations of unfitness (including how to define abandonment, etc) against natural parents. This will result in *ad hoc*, divergent, and highly subjective determinations of unfitness that will ultimately fail to protect the fundamental due process liberty interest existing between parent and child. A pivotal point in *Troxel* is that the a court should not be substituting its judgment for that of a fit parent. Allowing trial courts such broad leeway in defining harm or unfitness amounts to the same substitution of judgment and permits *ad hoc* decision making outside the scope of Michigan's statutory scheme concerning children.

**II. UNDER *TROXEL* AND *CLAUSEN*, SECTION 25 OF THE CHILD CUSTODY ACT MUST BE CONSTRUED IN A CONSTITUTIONAL MANNER. THE PARENTAL PRESUMPTION IS BASED ON THE *FITNESS* OF THE PARENT. CLEAR AND CONVINCING EVIDENCE UNDER THE BEST INTEREST FACTORS IS NOT CONSTITUTIONALLY SUFFICIENT TO OVERCOME THE PARENTAL PRESUMPTION.**

Section 25 of the Child Custody Act, MCL 722.25, sets out the standards to be applied in custody proceedings, and refers to the parental presumption. Sec. 25 provides that:

> 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).

Sec. 25 must be interpreted in light of the later decisions of *Troxel* and *Clausen* concerning the fundamental due process liberty interest existing between fit parents and their children.

The Court of Appeals in *Heltzel v Heltzel*, 249 Mich App 1, 638 NW2d 123 ( 2001), construed Sec. 25 and improperly held that "clear and convincing" evidence is the applicable protection of a fit parent's fundamental right to custody and that the burden is on third persons to show by "clear and convincing" evidence that it is in the best interest of a child to award custody to the third persons. Ruling “clear and convincing evidence” to be akin to a substantive test is error, violating this Court's determination in *In re Martin*, 450 Mich 204, 219, n. 12; 538 NW2d 399 (1995)(discussing application of the clear and convincing level of proof to the best interest test in right to die cases):

> "Contrary to a growing misconception ... we view the clear and convincing standard not as a decision-making standard, but as an evidentiary standard of proof that applies to all decisions…" (Emphasis added).

Clear and convincing evidence represents the level of proof required, not the substance to be proven. Clear and convincing evidence as a standard cannot stand alone and must be applied to substantive tests, including fitness determinations. See *In the Matter of AMB*, 248 Mich App 144, 640 NW2d 262 (2001)(discussing application of clear and convincing evidence as a level of proof applied to substantive standards).

In *Roth*, *supra,* the Connecticut Supreme Court found that a strong substantive standard (harm) was necessary, and that it must be proved by clear and convincing evidence. Clear and convincing evidence enhances the harm standard that was read into the statute by the court, but does not substitute for a substantive standard.

Clear and convincing evidence alone is inapplicable as a substantive test and is insufficient protection for "perhaps the oldest" of our fundamental rights: the mutual liberty interest that exists between parent and child. *Troxel*, supra. In applying clear and convincing evidence, the *Heltzel* Court admittedly relied on prior cases which did not address Constitutional issues. The presumption contained in Troxel --- that fit parents make decisions, including **decisions regarding custody,** is a substantive, Constitutionally based presumption which must be overcome by a substantive unfitness test.

*Heltzel* simply leaves best interests as the substantive test for determining third party claims. As set out in Issue I, the best interests test as a substantive test is insufficient to protect the fundamental constitutional parent-child liberty interest under *Troxel.* The *Mason* decision relies on

*Heltzel* and continues the misconception that the presumption in section 25 is satisfied when the third parties show by clear and convincing evidence that they prevail under the best interest factors. While *Mason* also claims to use unfitness (to determine whether a parent is entitled to the *Heltzel* version of the presumption), it does not use the appropriate standards to do so as discussed in Issue I.

In order to be considered Constitutional, section 25 must be read as including a presumption of Constitutional weight as set out in *Troxel* - in other words, that the presumption that *fit* parents are entitled to custody can only be overcome by a finding, based on clear and convincing evidence, that the parents are unfit. See also *Clausen, supra* ("[t]he ***mutual*** rights of the parent and child come into conflict only when there is a showing of parental unfitness. *As we have held in a series of cases, the natural parent's right to custody is not to be disturbed absent such a showing*, sometimes despite the preferences of the child." *Clausen* at 687; fn. 46 (Emphasis added).

As further discussed in Issue I, a finding of unfitness in this custody context, must be based on the appropriate and objective standards existing in Michigan's extensive statutory scheme concerning children.

In order to be Constitutional, sec. 25 must be interpreted to be consistent with Troxel and Clausen, requiring proof of parental unfitness/harm based on clear and convincing evidence. The parental presumption, which is Constitutionally based, will always overcome the lesser, statutory presumption in favor of an established custodial environment with a third party. Third persons have no inherent rights to custody or visitation; any third party rights are creations of statute. See *Troxel; Frame v Nehls*, *supra*, (grandparents are not a protected class and grandparent visitation is not a

protected interest) Under sec. 25, the third party has the burden of showing, by clear and convincing evidence, that a parent is unfit to overcome the parental presumption. See *Troxel*. If this showing cannot be made, the parental presumption controls and custody should rest with the natural parent. If a third party can make the requisite showing of unfitness/harm by clear and convincing evidence, the trial court can then engage in a best interest analysis under the Child Custody Act.

## III. CONSIDERATIONS RELATED TO A PARENT'S CURRENT, NOT PAST, FITNESS AT THE TIME HE OR SHE SEEKS CUSTODY ARE RELEVANT TO A PROPER FITNESS DETERMINATION.

### A. PARENTAL FITNESS SHOULD BE BASED ON CURRENT EVIDENCE

Parental ties with a child involves a fundamental right that is constitutionally protected and cannot be severed on the basis of speculation as to whether a parent is unfit. The trial court's approach creates a crucial problem. If courts are permitted to permanently remove a child from his or her parent based only on past conduct, instead of current evidence of unfitness, the law would condone an automatic presumption that a parent will always remain unfit if that parent is ever under the jurisdiction of the probate court in an abuse and neglect case. This proposition treads dangerous waters as it is one that not only disregards the fundamental rights of parents to provide for the care and custody of their minor children, but also contravenes the purpose of the Juvenile Code.

A review of the reasoning behind child welfare law and how it is commonly applied can provide this Court with relevant guidance as to whether the court should have required evidence of current parental unfitness in the instant third-party case. The statutory framework provided by the Juvenile Code to allow termination of parental rights in certain instances specifically recognizes that unfit parents can become fit after receiving services to address the issues that brought them within the jurisdiction of the Probate Court.

The procedure prescribed by the legislature for termination of parental rights expressly requires that the court take jurisdiction and that the Department of Human Services must make reasonable efforts to prevent a child's removal from the home, but must also provide services to the

family in an effort to reunify.[7] If the parent does not comply with services or make an effort to address the problems that brought the family within the Probate Court's jurisdiction, then a termination petition can be filed.[8] Once the petition is filed, there is a trial where the Petitioner must show by clear and convincing evidence, the next most onerous standard next to reasonable doubt, that one of the statutory grounds for termination is met. A look at several of the grounds for termination in context with the entire statute provides clarity that the legislature intended the clear and convincing standard to be met by evidence that one of the grounds for termination currently exists, meaning the parent is currently unfit.

For example, a probate court may terminate parental rights under the Juvenile Code if the conditions that led to the initial disposition order (i.e., conditions rendering the parent unfit or child at risk of harm) and the conditions that led to adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age. MCL 712A.19b(3)(c)(i). The language of this statutory ground indicates that the conditions relating to unfitness "continue to exist," and further requires that the inquiry must be based on an evaluation of conditions concerning parental fitness present at the time of the termination hearing, not in the past. *In re Sours*, 459 Mich 624, 626; 593 NW2d 520 (1999). This means that the statutory ground for termination is currently present. The purpose of these laws is to

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[7] Michigan Statute provides that reasonable efforts to reunify the child and family must be made in all cases. MCL 712A.19a(2). Where a child is in foster care, the agency must make reports in writing to the court demonstrating what efforts were made to prevent the child's removal from his or her home and the efforts made to rectify the conditions that caused the child's removal from the home. MCL 712A.18f(1), (3), (5).

[8] In some cases DHS is not required to make reasonable efforts toward reunification, but those instances are not represented by the facts of this case. MCL 712A.18f(3)(d).

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).

The Court of Appeals has consistently applied this requirement of current evidence of unfitness before a parent child relationship can be indefinitely terminated. Some recent examples include a case where the Court of Appeals found that the petitioner had not established MCL 712A.19b(3)(c)(i) by clear and convincing evidence. *Id* at 5. It reasoned that the only basis for obtaining jurisdiction with regard to the father was his lack of suitable housing or employment, and there was no evidence that the father could not obtain housing within a reasonable time, the trial court's conclusion to the contrary was "mere conjecture." *Id.* "Such unfair conjecture, however, is insufficient to overcome the hurdle of clear and convincing evidence and "'this court will not sanction termination of [respondent father's] parental rights on this basis.'" *Id*, quoting, *In re Sours*, *supra* at 624.

This proposition was also applied in *In re ARP*, an unpublished per curiam opinion of the Court of Appeals, issued December 23, 2008 (Docket No. 285207), where the Court reversed an order terminating respondent's parental rights where there was no current evidence regarding respondent's disposition to repeat abusive behavior or other evidence placing his parenting skills into question. *Id* at 5. The Court reasoned that without such evidence, the trial court impermissibly used speculation rather than clear and convincing evidence. *Id* at 5, citing, *In re Hulbert*, 186 Mich App 600, 605; 465 NW2d 36 (1990).

The requirement that a trial court rely on current evidence is corroborated in custody decisions: See, e.g., *Fletcher v Fletcher*, 447 Mich 871, 889, 526 NW2d 889 (1994) (remanding with instructions that the trial court consider evidence of circumstances that occurred during the appeal); *Theroux v Doerr,* 137 Mich App 147, 150, 357 NW2d 327 (1984)(approving return of custody after parent temporarily placed child with other).

Judge Gleicher's dissent in *In re Roe*, 288 Mich App 88; __NW2d__ (2008), is a proper articulation of the severe implications of terminating parental rights by presumption, rather than by applying evidence current parental unfitness. Specifically, Judge Gleicher in discussion the United States Supreme Court decision in *Stanley v Illinois* (analyzing an Illinois law that created an automatic presumption of unfitness in certain cases) stated,

> In *Stanley v Illinois*, 405 US 645, 651; 92 S Ct 1208; 31 L Ed 2d 551 (1972), the United States Supreme Court examined the constitutionality of an Illinois law, under which "the children of unwed fathers become wards of the State upon the death of the mother." *Id.* at 646. Peter Stanley claimed that "he had never been shown to be an unfit parent," and had been unconstitutionally deprived of his children absent a showing of unfitness. *Id.* Illinois responded that "unwed fathers are presumed unfit to raise their children and that it is unnecessary to hold individualized hearings to determine whether particular fathers are in fact unfit parents before they are separated from their children." *Id.* at 647. The Supreme Court observed that the Illinois dependency proceeding involving the Stanley children "has gone forward on the presumption that [Stanley] is unfit to exercise parental rights." *Id.* at 648. Regarding the implicit presumption of unfitness contained within Illinois law, the Supreme Court explained, "Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand." [*Id.* at 656-657.]

Applying *Stanley* to the termination of respondent's parental rights in *Roe*, the dissent continued:

> Unlike Peter Stanley, respondent *was* previously judged unfit. Unquestionably, the circumstances surrounding Daniel's death and the termination of her rights to Aliyah constitute relevant evidence regarding respondent's current parenting abilities. The circuit court, however, utilized a presumption of unfitness predicated solely on historical evidence to "disdain[] present realities in deference to past formalities." Perhaps a fuller record might reveal that respondent *is* completely unfit to parent Ashtyn and that, in respondent's custody, Ashtyn likely would suffer serious emotional or physical harm. But a court lacks the ability to reach these conclusions with certainty beyond a reasonable doubt by relying solely on a presumption that respondent's past.

This Court should recognize this reasoning as an appropriate way to recognize and protect a parent's fundamental rights in a third party custody case, while also affording parents with an opportunity to change for the better and reunite with their children. It serves the purpose of laws that provide for limited guardianship placement plans to be used in lieu of termination proceedings, encourages parents to seek solutions to provide for the safety of their children while they seek treatment, and affords each party protections of Due Process.

Additionally, a requirement of a current showing of parental unfitness primary to severing parental ties, does not place children at risk because it logically requires a simultaneous showing of parental fitness. For instance, in cases like this one, where a parent has demonstrated that she has successfully rehabilitated herself, the conditions which made her unfit are obviously remedied. Given those remedial measures and the showing of fitness demonstrated by the record before this Court, there is no danger the child would be harmed.

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.

This Court has upheld "the ancient policy of law and society of keeping children with their natural parents [and] if a child is temporarily removed from such custody to return it to its family whenever feasible." *In re Mathers*, 371 Mich 516; 124 NW2d 878 (1963) (in construing neglect under the probate statute, the Court determined that the mother had not neglected her child and restored custody after an eight year separation). Whether rich or poor, parents have a natural right to the custody of their children; because parents' rights are entitled to great consideration, parents cannot be deprived of custody without "extremely good cause." *Herbstam v Shiftan*, 363 Mich 64, 67; 108 NW2d 869 (1961) (daughter returned to Plaintiff father four years after he had voluntarily placed her with relatives).

A parent facing hard times who has to make the difficult decision to place children with a third party custodian under Michigan's guardianship laws is doing exactly what the Legislature intended when it enacting such laws: ensuring the safety of her children during the time she is unable to parent her children. The Legislature did not create guardianship or other laws to punish parents who have the foresight to think about their children's needs above their own. As such, this Court should not interpret Section 25 of the Child Custody Act as a mechanism to punish parents who act in the best interests of their children by placing them with third party custodians. This is

exactly what we want parents to do when they are unable to parent, rather than abandon their children in the streets, turn them over to the State, or otherwise abuse and neglect them. By availing herself to Michigan's guardianship laws and voluntary relinquishing her children, parents such as Ms. Hunter in this case should not be punished by a holding that the decision to temporarily suspend parental rights amounts to a waiver of the parent's constitutional rights. Indeed, the only way that the parent should be able to voluntary waive her constitutional rights of care, custody and control of her children is through termination proceedings – either by the parent's voluntary termination of parental rights or through the parent's acts of abuse and neglect.

**B. A PARENT DOES NOT WAIVE HER SUBSTANTIVE DUE PROCESS RIGHTS TO PARENT HER CHILDREN BY VOLUNTARILY PLACING THE CHILDREN WITH A THIRD PARTY.**

Appellees argue that that a parent can somehow waive his or her fundamental liberty interest through a guardianship or other actions to temporarily place children, however, they have failed to cite any supporting law. Further, there cannot be an implicit or presumed relinquishment of a fundamental constitutional right. This Court, in *People v Grimmet*, 388 Mich 590, 598, 202 NW2d 278 (1972), stated:

> Waiver, is defined in *Johnson v Zerbst*, 304 US 458, 464, 58 S Ct 1019, 82 L Ed 1461 (1938), as "an intentional relinquishment or abandonment of a known right or privilege." The court added "courts indulge every reasonable presumption against waiver" of fundamental constitutional rights and *** we "do not presume acquiescence in the loss of fundamental rights." Thus, waiver consists of two separate parts: 1) a specific knowledge of the constitutional right; and 2) an intentional decision to abandon the protection of the constitutional right. Both of these elements must be present and if either is missing there can be no waiver and no finding of consent. (emphasis added).

There has been no explicit or implicit waiver of Appellant's fundamental parental liberty interest. There is absolutely no indication that Ms. Hunter specifically knew of her constitutional right or that

she made an intentional decision to abandon voluntarily the protections of the mutual parent-child liberty interest as allowed under Michigan law. Further, any voluntary *relinquishment* of parental rights is governed by the Adoption Code, MCL §710.21 and other statutory provisions. T]he Legislature enacted specific and detailed legislation governing the voluntary *suspension* of parental rights through guardianship proceedings. *Bowie v Arder*, 441 Mich 23, 54, fn. 25, 479 NW2d 650 (1992)(parent cannot generally consent to a third person becoming a parent; court is without jurisdiction over such arrangements).

**RELIEF**

The Family Law Section of the State Bar of Michigan supports the relief requested by Appellant in this matter and further, respectfully requests that this Court consider the positions taken in this amicus curiae brief.

Respectfully submitted,

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