

STATE OF MICHIGAN
IN THE SUPREME COURT

ROBERT HUNTER and LORIE HUNTER,

Plaintiffs-Appellees,

Supreme Court No. 136310

Court of Appeals No. 279862

TAMMY JO HUNTER,

Circuit Court No. 2006-721234-DC

Defendant-Appellant,

and

JEFFREY HUNTER,

Defendant.

_____/

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BRIEF OF AMICUS CURIAE
AMERICAN CIVIL LIBERTIES UNION FUND OF MICHIGAN

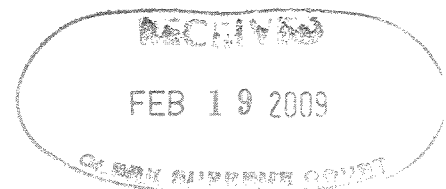


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STATEMENT OF BASIS OF JURISDICTION

Amicus Curiae adopts the Statement of Basis of Jurisdiction set forth in Defendant-Appellant's brief.

STATEMENT OF QUESTION INVOLVED

Does depriving a parent of the presumption of custody without clear and convincing evidence that the parent is unfit, and without objective, meaningful safeguards, violate the parent's fundamental rights to her child?

Amicus Curiae answers, "yes."

STATEMENT OF INTEREST OF AMICUS CURIAE

The American Civil Liberties Union of Michigan is the Michigan affiliate of a nationwide nonpartisan organization of nearly 500,000 members dedicated to protecting the fundamental liberties and basic civil rights guaranteed by the United States Constitution. The American Civil Liberties Union Fund of Michigan, the legal and educational division of the Michigan ACLU, frequently provides direct representation or files *amicus curiae* briefs in state and federal court on a wide range of civil liberties and civil rights cases. Among the rights that the ACLU vigorously seeks to protect is the fundamental right of parents to make decisions concerning the care and custody of their children.

STATEMENT OF FACTS

The facts are adequately set forth in the Court of Appeals decision, particularly in Judge Gleicher's dissent.

INTRODUCTION AND SUMMARY

There is no right more fundamental than a parent's right to custody of her child. In a custody dispute between a parent and a third party, there is a strong presumption that the parent will be awarded custody. That presumption cannot be overcome absent a finding by clear and convincing evidence that the parent is unfit. When making a determination of fitness, the court must utilize objective standards and meaningful procedural safeguards. As Judge Gleicher convincingly writes in her Court of Appeals dissent, the appropriate standard for determining whether a parent is fit is the same standard used in termination of parental rights cases.

The Court of Appeals decision in *Mason v. Simmons*, 267 Mich App 188 (2005), is faulty because the panel applied an unconstitutional standard in determining when a parent is fit. By applying the *Mason* analysis to the facts of this case, the trial court and the Court of Appeals committed constitutional error and the decision of the Court of Appeals must be reversed.

ARGUMENT

DEPRIVING A PARENT OF THE PRESUMPTION OF CUSTODY WITHOUT CLEAR AND CONVINCING EVIDENCE THAT THE PARENT IS UNFIT, AND WITHOUT OBJECTIVE, MEANINGFUL SAFEGUARDS, VIOLATES THE PARENT'S FUNDAMENTAL RIGHTS TO HER CHILD.

The constitutional right to parent has been described by the United States Supreme Court as "perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel v Granville*, 530 US 57, 65; 120 S Ct 2054 (2000). The Court recognized this right in the 1920s cases of *Meyer v Nebraska*, 262 US 390; 43 S Ct 625 (1923), where the Court struck down a state law barring the teaching of children in any

language other than English, and *Pierce v Society of Sisters*, 268 US 510; 45 S Ct 571 (1925), where the Court held unconstitutional a state law prohibiting parents from enrolling their children in private schools. Once parental rights have been established by birth or adoption, they can only be terminated by clear and convincing evidence of parental unfitness. *Santosky v Kramer*, 455 US 745, 769; 102 S Ct 1388 (1982).

In *Troxel*, the United States Supreme Court struck down a Washington state grandparent visitation statute as unconstitutional because it failed to require the trial court to accord deference to the decisions of fit parents regarding third party visitation. The plurality in *Troxel* began its analysis by stating that “it cannot be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody and control of their children.” *Troxel*, 530 US at 66. The Court acknowledged the “traditional presumption that a fit parent will act in the best interest of the child” and held that a court should not “inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent’s children.” *Id.* at 68-69.

In *DeRose v DeRose*, 469 Mich 320; 666 NW2d 636 (2003), this Court, applying the holding of *Troxel*,¹ held that the Michigan grandparent visitation statute MCL 722.27b, was unconstitutional, because, like the Washington state statute involved in *Troxel*, it failed to require the trial court to accord deference to the decisions of fit parents regarding grandparent visitation. In light of the *Troxel* decision, this Court reaffirmed that parents have a fundamental right to raise their children. *DeRose supra* at 332.

¹ In *DeRose*, this Court concluded that the holding of the Supreme Court in *Troxel* was based on the principles found in the plurality opinion of Justice O’Connor, as well as the opinions of Justices Souter and Thomas, *DeRose supra* at 331.

A. The standard for determining parental fitness set forth in *Mason v Simmons* violates the Due Process Clause of the Fourteenth Amendment of the Constitution.

The Michigan Court of Appeals in *Mason v Simmons*, 267 Mich App 188; 704 NW2d 104 (2005), deprived a parent of his fundamental right to parent his child by finding him unfit under a legal analysis incompatible with the Due Process Clause of the Fourteenth Amendment. The *Mason* court's determination of whether a parent is "fit" was not based on the traditional method of finding fitness in the context of termination of parental rights with its extensive procedural protections. Rather, the court determined "fitness" without any standard of proof or deference to the fundamental right to parent. The application of the *Mason* "fitness test," if it can be called that, operates to deprive parents of their constitutional right to custody of their children without due process of law. Moreover, the application of the *Mason* fitness test in the present case clearly illustrates the risk of the unconstitutional deprivation of rights without reference to any articulated standards. This Court should overrule *Mason* because it fails to articulate either a definition or a standard of proof for determining parental fitness.

The trial court in *Mason* was faced with the decision of whether to grant custody to a parent who had minimal contact with the child or to a relative who had been caring for the child for three years prior to the father's request for custody. *Mason*, 267 Mich App at 191-192. The child lived with her mother in Detroit until her death when the child was five years old. The father had some contact with the child before the mother's death, although the extent of this contact was not clear from the record. He had not, however, established paternity or any legal rights or responsibilities relating to the child. When the mother died, the child's half-sister petitioned for and was granted guardianship. She

moved the child to Lansing to live with her and, for the next three years, the father had no contact whatsoever with the child. When the guardian sought medical coverage through the Family Independence Agency, the state filed a paternity action seeking child support. Shortly after that time, the father requested custody. *Id.* at 191.

Before making a custody determination based on Michigan's Child Custody Act, the trial court ruled that "given defendant's neglect of [the child] after her mother died, [the father] was not entitled to the strong statutory presumption in favor of a fit parent under which the court must presume that awarding custody to the parent is in the child's best interests." *Id.* at 193. As a result, the trial court shifted the burden of proof to the parent and required that he "show by a preponderance of the evidence that a change in custody to the father was in the best interests of the child." *Id.* at 193.

The Court of Appeals in *Mason* found that constitutional deference was not due to a parent whose "conduct is inconsistent with a parent's protected interest in a child" without citation to any case law, statute or constitutional provision. This "fitness standard" is no standard at all. Although *Mason* references a parent who is "found to be unfit, or to have neglected or abandoned" his child, the court applied this "standard" without any adherence to the extensive statutory scheme already in place under the probate code for finding parental unfitness in the context of termination of parental rights. MCL 712A *et seq.* As set forth below, the *Mason* "analysis" – or lack thereof – violates the Due Process Clause.

The nature of the process due in abridging the fundamental right to parent turns on a balancing of the "three distinct factors" specified in *Mathews v Eldridge*, 424 US 319, 335; 96 S Ct 893 (1976): (1) the private interest that will be affected by the official

action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional substitute procedural safeguards; and, (3) the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail. *Santosky supra* at 754.

Applying the first *Mathews* factor, it is clear that the interest at stake is fundamental. The United States Supreme Court has historically recognized "that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment." *Santosky supra* at 753. It is "plain beyond the need for multiple citation that a natural parent's desire for and right to the companionship, care, custody and management of his or her children is a right far more precious than any property right." *Santosky supra* at 758-759 (quoting *Stanley v Illinois*, 405 US at 651; 92 S Ct 1208 (1972), and *Lassiter v Department of Social Services*, 452 US 18, 27; 101 S Ct 2153 (1981) (internal quotations omitted). The rights to conceive and to raise one's child have been deemed 'essential,' and 'basic civil rights of man.' *Stanley supra* at 651. Thus, it cannot be doubted that a fundamental right of the highest importance is at issue here.

Second, the risk of erroneous deprivation of the fundamental right to parent in applying *Mason's* standard of parental fitness is significant. The lower courts in *Mason* provided no procedural protection for the fundamental right to parent. The Court of Appeals held that "when a parent's conduct is inconsistent with the protected parental interest, that is, the parent is not fit, or has neglected or abandoned the child" the parent is not entitled to the presumption of parental custody. *Mason supra* at 206. This finding of

“unfitness” was conducted as part of an analysis regarding the “best interests” of the child and the parent was afforded no procedural protections. *Id.* at 191-194. Neither the trial court nor the Court of Appeals articulated any standard by which the parent’s fitness should be evaluated.

The constitutional right to parent requires that parental rights can be terminated only upon a finding of parental unfitness by clear and convincing evidence. As the United States Supreme Court stated in *Santosky*, “[t]he fundamental liberty interest of natural persons in the care, custody, and management of their child does not evaporate because they have not been model parents or have lost temporary custody of their children to the State.” *Santosky*, 455 US at 745. The fact that important liberty interests of the child and third party custodians may also be affected by the proceedings does not justify denying the natural parents constitutionally adequate procedures. Nor can the State refuse to provide natural parents adequate procedural safeguards on the grounds that the family unit is already broken down. *Id.* at 754. Indeed, this Court recognized that “the fundamental right of a parent and child to maintain the family relationship can be overcome only by clear and convincing evidence.” *In re JK*, 468 Mich 202, 213; 661 NW2d 216 (2002).

As the Court made clear in *Santosky*, a well-defined standard of proof is critical to the preservation of fundamental rights.

The function of the standard of proof, as that concept is embodied in the Due Process Clause and the realm of factfinding, is to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication. The minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants. [455 U.S. at 745-55.]

Imprecise and subjective standards leave decisions unusually open to subjective values of the judge. *Id.* at 762. Because parental rights are often at risk where parents are “poor, uneducated and members of minority groups, such proceedings are often vulnerable to judgments based on cultural or class bias.” *Id.* at 763.

The *Mason* standard for parental fitness is no standard at all. It gives lower courts no clear standard of proof to apply to facts, no procedures to follow and no guidance as to what facts should be considered. The mere statement that a parent is not fit if she has acted “inconsistent with the parental interest” tells the factfinder nothing about the standard of proof in the proceeding or what evidence would support such a finding.

The constitutional right to parent mandates that the standard for termination of parental rights apply to a court decision denying custody to the natural parent. As Judge Gleicher observed in her dissent: “Although *Santosky* involved the evidentiary standards attending a termination of parental rights procedure, I believe that its holding also implicates the instant case, because defendant’s liberty interest in the custody of her children approximates the liberty interest implicated in termination proceedings.” *Hunter v Hunter*, unpublished opinion of the Court of Appeals, decided March 20, 2008 (Docket No. 279862); 2008 WL 7471126 *21.

The Court in *Santosky* discussed the various standards of proof that could be applied by a fact-finder. The preponderance standard should be applied in matters, such as civil disputes over money damages, where society has a minimal concern with the outcome and the litigants should share equally in the risk of error in the proceeding. On the other hand, courts must apply the “beyond a reasonable doubt” standard in cases, such

as criminal cases involving physical loss of liberty, because of the gravity of the private interest at stake, society's interest in avoiding erroneous convictions and the judgment that the State should bear the risk of such errors. *Santosky*, 455 US at 755.

The United States Supreme Court has mandated an intermediate standard of proof, that of clear and convincing evidence, when an individual interest at stake is both "particularly important" and "more substantial than mere loss of money." *Addington v Texas*, 441 US 418, 424; 99 S Ct 1804 (1979). The Court has imposed this standard where the proceedings threaten the individual with "a significant deprivation of liberty" or "stigma." *Santosky*, 455 US at 756, quoting *Addington supra* at 425, 426. Examples of such proceedings include civil commitment, deportation, and denaturalization. *Santosky supra* at 756-757, quoting *Addington, supra* (civil commitment); *Woodby v INS*, 385 US 276 (1966) (deportation); *Chaunt v United States*, 364 US 350; 81 S Ct 147 (1960) (denaturalization).

Although the fitness finding in *Mason* is not as permanent and final as a finding in termination of parental rights proceedings, the significant loss of parental rights is at least as important and worth protecting as the other rights protected by the clear and convincing evidence standard. The loss of the parental relationship to both parent and child simply cannot be measured. *Santosky supra* at 761. Time lost with a child or parent will never be recovered. The *amicus curiae* agree fully with Judge Gleicher's dissent in this case. Denying the natural parent the custody of her children deprives her of the most important attribute of the right to parent, the right to the care, custody and management of her children. The *amicus curiae* submits, therefore, that absent a finding of parental unfitness by clear and convincing evidence, the presumption that it is in the

child's best interest to remain in the natural parent's custody must stand.

Moreover, the *Mason* court found a parent to be unfit in the context of a hearing regarding the "best interests" of the child. This Court has found that "[a] due process violation occurs when a state-required breakup of a natural family is founded solely on a "best interest" analysis that is not supported by the requisite proof of parental unfitness." *In re JK*, 468 Mich 202, 210; 661 NW2d 216 (2002) (quoting *Quilloin v Walcott*, 434 US 246, 255; 98 S Ct 549 (1978)). The court may not simply lump the determination of whether a parent is "fit" into the decision regarding which placement is in the child's "best interest."

The lack of a standard of proof or any procedural protections creates a significant risk of deprivation of the fundamental right to parent. This case illustrates that risk plainly. Neither the trial court nor the Court of Appeals purported to make a finding that there was clear and convincing evidence in the record that would establish that Tammy Joe Hunter was an unfit parent, so that her parental rights could be terminated. Nor could such a finding possibly be made from the evidence in the record. As Judge Gleicher pointed out, at the time of the evidentiary hearing, Ms. Hunter was drug-free and had not used drugs for almost three years. She had made concerted and earnest efforts to improve her life and had followed all the court-imposed requirements. She is gainfully employed in a stable job and has recently received a promotion. She has made suitable housing arrangements for her children. She has had extensive and unsupervised parenting time in Indiana, and there is a complete absence of any evidence of neglect of her children. 2008

WL 747126 *16-17. Indeed, there is no evidence at all in the record, let alone clear and convincing evidence, that would support a finding that she is an unfit parent.²

Clearly, the risk of error created by *Mason's* determination of parental fitness without an articulated standard or requirement of clear and convincing evidence is constitutionally unacceptable.

Finally, applying the third *Mathews* factor, the governmental interest in applying a vague and ambiguous standard for parental fitness is relatively slight compared to the fundamental right of parents. Here, the governmental interest is that of *parens patriae*, to preserve and promote the welfare of the child. However, the State does not advance this goal when it needlessly separates children from the custody of fit parents. *Stanley v Illinois*, 405 US 645, 652-3; 92 S Ct 1208 (1972). Courts must presume that a fit parent will act in the best interests of his or her child, *Troxel*, 530 US at 69, and, therefore, parents and their children share the vital interest in preventing erroneous termination. *Santosky*, 455 US at 760-61. Thus, the harm to the State of imposing an identifiable and well-articulated standard of proof and framework for determining parental fitness is negligible.

²In this connection, the Court of Appeals and the trial court found that Ms. Hunter was not a "fit" parent because of her past behavior and voluntary relinquishment of custody, stating that: "There is no requirement that the trial court limit its inquiry to conduct occurring in the near past. Rather, to evaluate the children's best interests, it is necessary for the trial court to consider all actions that are relevant to a party's ability to parent." 2008 WL 747126. As the United States Supreme Court made clear in *Santosky*, the constitutional standard for termination of parental rights is indeed limited to the question of whether the person is presently a fit parent. And, of course, a person's right to parent her children cannot constitutionally depend on a court's determination that it is in the "best interests" of her children that she do so.

B. Parental Fitness Should Be Determined Under The Established Statutory Scheme of the Probate Code and Should Include Evidence of Current Fitness.

As discussed by Judge Gleicher in her well-reasoned dissent in the Court of Appeals, the *Mason* court found a parent “unfit” without application of an objective and principled standard. *Hunter*, WL 747126 *20. In *Stanley v Illinois*, the United States Supreme Court concluded that “parents have a constitutional entitlement to a hearing addressing their fitness before their children may be removed from their custody.” *Stanley*, 405 US at 645, 649. The standard of “unfitness” inherently recognized in *Stanley* flowed directly from the state law governing child neglect proceedings.” *Hunter, supra* at, 20 (Gleicher, dissenting).

Here, a logical source of an appropriate standard of parental fitness in custody cases is the Probate Code’s standard for termination of parental rights. Application of the definition and standard of proof set forth in Section 712A.19b(3) of the Probate Code would provide an objective and defined criteria susceptible of appellate review that would meet constitutional requirements. MCL 712A.19b.

The *amicus curiae* agrees with Judge Gleicher’s conclusion that “the detailed, comprehensive, legislatively created fitness criteria contained within the [Probate] Code provide appropriate guidance to a court evaluating potential parental unfitness in a third-party custody case . . .” *Hunter, supra* at 22. Application of MCL 712A.19b(3) would allow the trial court to look to both the past actions of the parent and the parent’s attempts to rectify the circumstances that originally led to a child being placed in the custody of a third party. Moreover, this statute requires that the court find evidence of unfitness by clear and convincing evidence, thus meeting the standard of proof required in the United

States Supreme Court in *Santosky*.

C. Fit Parents Should Be Awarded Custody Over Third Parties.

In the present case, the Court of Appeals and the trial court committed egregious error by completely ignoring the fact that Tammy Jo Hunter was the mother of the children and so possessed the fundamental right to parent, a most important attribute of which is the care, custody and control of those children. Indeed, nowhere in the majority opinion of the Court of Appeals is there any mention of the constitutional right to parent or of the United States Supreme Court's decision in *Troxel* or of this Court's decision in *DeRose*. Because the Court of Appeals and the trial court completely ignored the constitutional right to parent, they treated this case as if it involved a simple custody dispute between parties with an equal entitlement to custody of the children, and then went on to find that the "best interests of the children" dictated that Tammy Jo Hunter's children remain in the custody of the third party custodian rather than be returned to the custody of their mother. Throughout its opinion, the Court of Appeals applied the statutory "best interests of the child factors" of MCL 722.23, as if were dealing with a custody dispute between two parents or between two non-parents when no parent was available to take custody of a child.

As a constitutional matter, a court cannot place the burden of proof on a parent to establish it is in the child's best interest to remain in his custody when there is a custody dispute between a parent and a third party. *Troxel* and *DeRose*. In addition, a court cannot "force the breakup of a natural family, over the objections of the parents and their children without some showing of unfitness and for the sole reason that to do so was

thought to be in the children’s best interests.” *Quilloin*, 434 US at 255. Rather, the court must give substantial deference to the fundamental right of parents and return custody to a fit parent.

The Child Custody Act of 1970, MCL 722.21, *et seq.*, contains two conflicting provisions. What is known as the “parental presumption” is the requirement that

[i]f 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).]

The Custody Act also provides

The court shall not modify or amend its previous judgments or orders or issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child. [MCL 722.27(1)(c).]

The court of appeals in *Heltzel* interpreted the two clauses together holding that “in a dispute between a fit, natural parent and a third party with an established custodial environment, the parental presumption of MCL 722.25(1) must be given priority over the established custodial environment presumption of MCL 722.27(1)(c).” 248 Mich App at 27. Although *Heltzel* attempts to apply the clear constitutional rights defined by *Troxel*, it fails to give sufficient deference to the fundamental right of a fit parent.

As discussed above, the United States Supreme Court has repeatedly recognized a liberty interest in “the care, custody, and control of their children.” *Troxel*, *supra* at 65. This liberty includes “the right of parents to establish a home and bring up children and to control the education of their own.” *Id.* quoting *Meyer v Nebraska*, 262 US 390, 399, 401, 42 SCt 625 (1923). In *Prince v Massachusetts*, 321 US 158, 64 SCt 438 (1944), the

Supreme Court again confirmed that there is a constitutional right to direct the upbringing of one's own child holding "[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents . . ." *Troxel, supra* at 65-66.

Thus, the United States Supreme Court has made it clear that if a parent is "fit," she has the right to custody of her children. The Court has not discussed a liberty interest in visiting a child or having a relationship with him. To the contrary, the Court has held that a finding of unfitness, rather than a weighing of the "best interests" of the child is required before denying a parent this right. *Quilloin, supra* at 255.

For the reasons stated above, *Heltzel* should be overturned and a rule established that where a custody dispute arises between a fit parent and third parties, the fit parent shall be awarded custody.

CONCLUSION

The only question properly before the trial court and the Court of Appeals was whether the *Santosky* standard for parental fitness was satisfied, that is, whether there was clear and convincing evidence in the record that would establish that Tammy Jo Hunter was presently an unfit parent, such that her parental rights could be terminated. The trial court in this case, by finding Tammy Jo Hunter "unfit" without due process and without a clear and convincing evidence sufficient to terminate her parental rights, clearly violated her constitutional right to parent. Regardless of her past conduct, and regardless of whether the trial judge concluded that it was in the "best interests of the children" to remain in the custody of third party custodians instead of being in the custody of their mother, Tammy Jo Hunter is the mother of the children. Absent a determination by clear and convincing evidence that she is an unfit parent such as to justify termination of her

that a finding of unfitness, rather than a weighing of the “best interests” of the child is required before denying a parent this right. *Quilloin, supra* at 255.

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Respectfully submitted,



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