

**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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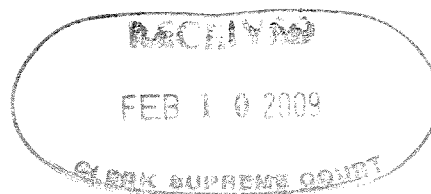
**DEFENDANT-APPELLANT'S REPLY BRIEF**

**ORAL ARGUMENT REQUESTED**

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*February 9, 2009*



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## RESPONSE TO APPELLEES' STATEMENT OF FACTS

Appellees' attempt to "set the record straight" includes an inordinate amount of references to documents that are not part of the evidentiary record. Appellees' heavily rely on a Friend of the Court Recommendation and a Psychological Evaluation to bolster their argument that "the last time the children were in [Tammy's] custodial care, they were neglected by reason of her drug addiction and criminality." *Appellees' Brief* at 42. As discussed *infra*, on page 10, MRE 1101(b)(9) permits the trial court to consider such recommendations, but such consideration does not outweigh the trial court's duty to hear evidence and determine issues. *Duperon v Duperon*, 175 Mich App 77, 79; 437 NW2d 318 (1989); *citing Bowler v. Bowler*, 351 Mich. 398, 405; 88 N.W.2d 505 (1958). Discussing the findings of the FOC and the Evaluator<sup>1</sup> as though they are evidence does not retroactively render the reports admissible.

In addition to devoting multiple pages to reciting portions of inadmissible reports, which gives rise to Sixth Amendment challenges based on Appellant's inability to cross-examine the reporters at trial, Appellees repeatedly describe testimony that does not comport with their appendix citations. For example, citing only page 78a of their appendix, Appellees write "[Tammy] ran off with her boyfriend/drug dealer and was gone for a week or more until her adult son, ex-husband, and Jeffrey Hunter brought her back home." While such a fact, if true, would be shocking, page 78a does not support such an accusation. Later, without citing to the record, Appellees state "there is uncontroverted testimony that [Tammy] disappeared for a week or longer while on an escapade with her drug dealer/boyfriend." *Appellees' Brief* at 39.

As Appellant's six-day absence plays a major part in Appellees' claim that she abandoned her children, their failure to pinpoint a transcript page is telling. **Four witnesses**

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<sup>1</sup> While Appellant disagrees with the use of the FOC and Psychological Evaluator's reports as evidence, it is important to note that despite the Evaluator's individual findings, the Evaluator's final recommendation was in favor of the children's reunification with their mother.

described the incident in question without mention of a drug dealer or an escapade.<sup>2</sup> Out of the four, the only testimony that supports Appellees' factual assertion is that of Appellee Rob, who testified that his brother's house was "in chaos," and that the children were "all in the living room – you know, they were, you know, upset and Tammy was nowhere to be found" (133A). Yet while Rob's testimony evidences Jeff's inability to keep the home from chaos and to keep everyone advised of Appellant's whereabouts, it does little to shed light on Appellant's actions and certainly does not mention drug use or an illicit affair. Such testimonials hardly warrant Appellees' repeated characterization of Appellant's six-day absence from her home (with her husband's consent), as an escapade with a drug dealer/boyfriend or as an act of abandonment.

Appellees continue to describe "actual facts" by stating that the "children's paternal grandparents . . . had been trying to care for the children by bringing over food supplies and sometimes cooking for the children, doing laundry, cleaning, and getting the kids to school." Appellees' citation to Appellee Rob's testimony on page 73a of their appendix is devoid of such information and does not comport with the testimony of the children's paternal grandparent (Rob's mother, Gladys Hunter) that she did not have concerns for the children's safety while they were in Appellant and Jeff's care. (147A). Continuing to supplement the record, Appellees later allege that Appellant used crack cocaine daily. *Appellees' Brief* at 39. As Appellees' own testimony was devoid of any such information, and Appellant and Jeff both testified that their drug use was on a weekly basis (106A, 118-119A), this intensification of facts is presumptively based on a one-paragraph summary contained in the psychological report, which lacks traditional indicia of reliability and, most importantly, is not part of the evidentiary record.

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<sup>2</sup> Defendant Jeffrey Hunter described Appellant's six-day absence as a short-vacation because "she needed to get away for a while." (122A). Appellant testified that Jeff gave her money for her trip (109A), and admitted that she used drugs while she was away (105A), but testified that she went to her mother's house and then to a friend's house. (104A). Further, Appellee Lorie mentioned a "seven day period" but did not mention drugs or drug dealer/boyfriend. (125A). For Appellee Rob's testimony, see above.

In addition to misstating the extent of Appellant's previous drug use, Appellees state that she "went on a crime spree [. . .] [stole] another relative's car to flee from authorities in Indiana [. . .] jumped bail" and was a fugitive. *Appellees' Brief* at 4. Appellees' sole citation is to Appellee Lorie's testimony, which does not mention a relative's car, but does include an admission by Lorie that "I never did hear the whole story actually." *Appellees' Appendix* at 81a, *Appellant's Appendix* at 125A.<sup>3</sup> Further, Appellees claim, without citation, that

In approximately October of 2003, the parents were apprehended and incarcerated [. . .] In approximately February of 2004, Tammy Hunter was again on the run from the law, having jumped bail for a second time for failing to appear in court on earlier criminal charges. She was soon arrested, convicted of her crimes, and sent to prison in August of 2004. *Appellees' Brief* at 5.

As Appellant's "criminality" is a crux of Appellees' argument, there is no excuse for failing to identify a transcript page to support their argument. As stated in the first paragraph in the Statement of Facts in *Appellant's Brief on Appeal*, Appellant was imprisoned in mid-2004. (28-29A, 112A). She was not "jumping bail" or being imprisoned in October of 2003, or in February of 2004. In fact, those dates are completely absent from the record.<sup>4</sup>

Appellees' attempt to enlarge the record by making crucial factual assertions without affiliated record references can only be seen as an attempt to play on this Court's emotions in order to detract from the serious constitutional issues at hand.<sup>5</sup> As such, this Court must disregard Appellees' arguments that are based on factual assertions that are neither true nor supported by references to the record.

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<sup>3</sup> Contrary to MCR 7.308, Appellees' Appendix repeats material included in Appellant's Appendix. Frequent citation to documents and excerpts in their appendix, which are *identical* to those included in Appellant's, is a subtle, but incorrect, assertion that Appellant failed to disclose part of the record.

<sup>4</sup> Those dates are not mentioned in Appellant's sentencing report (28-29A), the Trial Court's bench ruling (49A-55A), the trial court's Opinion and Order (56A-75A), the former guardian ad litem's testimony (136-7A), Appellee Rob's testimony (132A-135A), or Appellee Lorie's testimony (124A-125A).

<sup>5</sup> Factual assertions that are not supported by references to the record represent an improper attempt to enlarge the record. *Coburn v Coburn*, 230 Mich App 118, 123; 583 NW2d 490 (1998), *rev'd on other grounds by Coburn v Coburn*, 459 Mich 874; 585 NW2d 302 (1998); *citing In re Marx's Estate*, 201 Mich 504, 507; 167 NW 976 (1918).

## RESPONSE TO APPELLEES' ARGUMENTS

### I. CONSTITUTIONALITY OF *MASON V SIMMONS*' STANDARD OF FITNESS

Appellees attempt to reframe a Constitutional Due Process issue into a philosophical debate over the relative severity of two similar forms of deprivation. It is obvious that the permanent termination of parental rights is a different deprivation than the granting of sole physical and legal custody to third parties. This is obvious in the same way that garnishment of a few weeks' worth of wages is a different deprivation of property than governmental taking of an entire house;<sup>6</sup> in the same way that being jailed for two days without probable cause is a different deprivation of liberty than being sent to Guantanamo Bay.<sup>7</sup> But the Due Process guarantees in the Michigan and United States Constitutions are not limited to the protection of only the most severe deprivations of liberty. US Const, Am XIV; Const 1963, art 1, §17. Further, even if they were, the Courts have already rejected "the general proposition that a wrong may be done if it can be undone." *Stanley v Illinois*, 405 US 645, 647; 92 S Ct, 1208 (1972).

Appellees' debate over whether a parent at risk of having his parental rights terminated under the Probate Code deserves more protection against Due Process violations than a parent at risk of having a court grant sole legal and physical custody of their children to third parties is an academic distraction. Appellant does not suggest that the same standard and procedure for termination proceedings should be used to determine parental fitness under the Custody Act. Appellant's suggestion, that courts determining fitness under the Custody Act look to the collective body of other similar Acts for guidance on objective criteria, was not a demand that the termination standard in MCL 712A.19b be met in third party custody cases.

Contrary to Appellees' stance, 712A.19b is not representative of "other similar Acts," as

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<sup>6</sup> *Sniadach v. Family Finance Corp. of Bay View*, 395 U.S. 337, 339-40; 89 S Ct 1820 (1969).

<sup>7</sup> *County of Riverside v. McLaughlin*, 500 US 44, 57; 111 S Ct 1661 (1991); and see *Boumediene v. Bush*, 128 S Ct 2229 (2008).

standards in those Acts are not exclusively devoted to terminating a parent's rights. For instance, there are standards for parental fitness used in the initial assertion of jurisdiction (MCL 712A.2), during placement of the children (712A.13a(4)), for review and permanency planning hearings (712A.19), and for returning a child to his family (712A.19a(5)). And those examples are only from Chapter 12A of the Probate Code. The Adoption Code contains standards for assessing the propriety of a prospective home (710.23f) and a procedure for determining the fitness of putative fathers (710.39). Under the Child Protection Act, there are standards to meet in order to justify an investigation (722.628) and, importantly, those used to determine whether to remove the child from the home or assist the family in accessing community services (722.628d).

Of course there should be *something* different between a termination proceeding and a custody proceeding. And there is. But at issue is the definition and use of the word "fit." No one is asking this Court to give parents in custody cases an appointed attorney, or refer the parents to social services, or give them a chance to get their lives together. Rather, Appellant is arguing that in cases where the application of a vague standard leads to bizarre results, the only way to protect the people of this State from subjective and arbitrary deprivations of Constitutional rights is to reject a standard that already led to inconsistent results. *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).*

Other than relying heavily on cases outside of Michigan, Appellees cite MCL 712A.2(b)(2) in an effort to prove that the language used in *Mason* is not unconstitutionally vague. Though 712A.2(b)(2) has survived a constitutional challenge in our Court of Appeals, its constitutionality was upheld under a contextual reading of a number of other sections. *In re Gentry*, 142 Mich App 701, 707-711 (1985). Comparing the one-sentence standard in *Mason* to

712A.2(b)(2), which is a small subsection contained in another subsection, contained in a section of an Act with over fifty such sections, does not further the aims of Appellees.

Further, the non-Michigan cases that Appellees cite are unpersuasive and easily distinguished from the case at hand as none of them involve third party guardians. The North Carolina cases, *Price v Howard* and *Mason v Dwinell*, involved parent-by-estoppel claims founded in the voluntary granting of co-parent status to a third party. *Price*, 484 SEd 528, 529-30 (NC 1997); *Dwinell*, 660 SE2d 58 (NC App 2008). Further, Appellees' overstate the clarity of *Dwinell's* "inconsistent acts" standard, as the only two NC appellate cases that have interpreted the standard have distinguished its application. see *Estroff v. Chatterjee*, 660 SE2d 73 (NC App 2008), and *Heatzig v. MacLean*, 664 SE2d 347 (NC App 2008). Additionally, the Alabama, Mississippi, and Tennessee cases involve modification of current custody orders which were voluntarily entered into during divorce/custody proceedings. As none of these cases involve the interplay between guardianship statutes and domestic relations statutes, and stem from statutory schemes that are markedly different than Michigan's, they cannot be seen as authoritative.

Appellees also argue that Appellant's proposed procedure is a "rigid analysis." Requesting that this Court accept an objective two-part procedure prior to permitting a lower court to engage in a subjective best interests analysis is neither rigid nor complex. If a third party has evidence to support a prima facie case of unfitness based on past conduct, then the parent can be subjected to the intrusion into his privacy to determine whether he is currently unfit. If currently unfit based on objective standards, then the courts can proceed to a best interests trial. This is, by no means, a "rigid analysis." see *Appellees' Brief* at 25.

Further, Appellees admit that "it may take several years for a body of law to develop fleshing-out what is and is not conduct inconsistent with a protected parental interest."

*Appellees' Brief* at 25. Not only does this admission support Appellant's Due Process argument, based on *Mathews v Eldridge*, 424 US 319, 335 (1976), but it highlights what this Court should seek to avoid and what application of the well-settled rule of statutory construction, *in pari materia*, accomplishes. As discussed in Appellant's initial brief, *in pari materia* seeks to consolidate statutes that "relate to the same person or thing, to the same class of persons or things, or have the same purpose or object." *Richardson v. Jackson County*, 432 Mich. 377, 384; 443 N.W.2d 105 (1989). Appellees admit that the Child Custody Act, the Juvenile Code, and the guardianship statutes all "determine whether or not a child lives with his/her parent." see *Appellees' Brief* at 17. Reading these admittedly similar statutes harmoniously solves the Due Process and Equal Protection infirmities that arise when similarly situated parents are held to different standards based on whether third parties choose to take advantage of MCL 722.26c.

## **II. MICHIGAN'S JURISPRUDENCE DOES NOT SUPPORT A WAIVER THEORY**

Michigan's jurisprudence does not support a waiver theory, as was recently shown by the Court of Appeals in *Unthank v. Wolfe*, unpublished per curiam opinion of the Court of Appeals, decided Dec 23, 2008 (Docket No. 284182). In *Unthank*, the lower court considered MCL 710.23d(5) of the Adoption Code and upheld a mother's revocation of her consent for adoption, despite her initial placement of the child with the prospective parents almost six years prior. It is opportunistic for the Appellees to urge this Court to adopt a waiver theory based on the Probate Doctrine of Anticipatory Neglect while simultaneously arguing against the consideration of the Probate Code in developing an objective standard of fitness in third party custody cases.

The irony of Appellees' analogy aside, they incorrectly draw a parallel between the Doctrine and the weight of a prior finding of unfitness in a third party custody case. While a parent's previous actions are relevant in a termination proceeding, the statute cited by Appellees states

that a petition for termination of a parent's rights can be issued if the "department determines that there is a risk of harm to the child **and** . . . [t]he parent's rights to another child were terminated[.]" MCL 722.638(b)(i), *emphasis added*. Similar to Appellant's prayer for relief, the codified Doctrine of Anticipatory Neglect considers a past finding of unfitness **and** current evidence. Appellees' reliance on this Doctrine highlights the disparate treatment of rehabilitated parents subject to Child Protection Laws and rehabilitated parents subject to the Custody Act; whose rehabilitation, under *Mason v Simmons*, has no effect on a court's decision to strip a parent of his Constitutionally protected parental presumption. 267 Mich App 188, 205 (2005).

Further, the Doctrine is used to invoke Probate Court jurisdiction, and is not, itself, a basis for termination. *In re Powers*, 208 Mich App 582, 589; 528 NW2d 799 (1995). Invoking jurisdiction is simply a first step of many in a termination proceeding; similar to the first step of Appellant's proposed procedure where the custody court looks to the past to see if the parent was previously found unfit as a part of a third party's prima facie case. Perhaps unintentionally, by urging this Court to consider Appellant's past actions in a manner similar to how the Probate Court considers previous terminations when utilizing the Doctrine of Anticipatory Neglect, Appellees concur with Appellant's bifurcated approach to parental fitness.

Finally, contrary to Appellees' innuendoes, at no point does Appellant pretend that her children were not impacted by her placement of them with Appellees. While evidence is conflicting over the severity of the past impact, the continuing impact is obvious: the children desire to "move with [Tammy] full time" and engage in behavior that seems "designed to try and affect the outcome of the custody dispute." (46A). If she had lost contact with her children (112A), if she did not have a relationship with her children (62A), or if her children did not want to live with her (46A), then this would be a different case. As it is, the establishment of a limited

guardianship and the subsequent modification of the guardianship cannot be deemed a waiver of a parent's fundamental right to care for his children.

### **III. THE EVIDENCE DOES NOT SUPPORT A FINDING OF PARENTAL UNFITNESS**

Under a contextual reading of *Mason v Simmons*, for a third party to rebut the parental presumption codified in MCL 722.25 and examined in *Heltzel* “the third party must show by clear and convincing evidence that the best interests of the child require maintaining the established custodial environment.” *Mason, supra, citing Heltzel v Heltzel*, 248 Mich App 1 (2001). The trial court in this case followed *Mason*'s mandate that parental unfitness must be proven with clear and convincing evidence.<sup>8</sup> Appellees, in their brief, argue that unfitness should be proven only by a preponderance of the evidence. At no point before the filing of their Supreme Court brief have Appellees argued that a lesser evidentiary burden should be applied in fitness determinations. However, by arguing against the lower court's interpretation and application of *Mason*'s evidentiary burden, Appellees illustrate their implicit agreement that *Mason*'s holding is unclear and should be overturned for vagueness.

Further, Appellees' reliance on MCL 700.5204 is misplaced, as the temporary guardianship in this case was not modified pursuant to said statute.<sup>9</sup> Contrary to Appellees' assertion that the modification of the Hunter guardianship from temporary to full was the equivalent of a previous finding of unfitness, the Probate Court did not make any findings of unfitness prior to the granting of Appellees' petition for appointment as full guardians.

In addition to relying on a questionable interpretation of an inapplicable statute,

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<sup>8</sup> The Court of Appeals decision is silent as to which evidentiary burden must be met.

<sup>9</sup> The SCAO form used by the Judge Moore to appoint Appellees as full guardians lists twelve statutory options for appointment; none of which are MCL 700.5204 (27A). The transcripts from the modification hearing do not mention a statutory basis for the modification. (22-23A). The only statute referenced during the modification process is MCL 700.5101(a)(i-xii), cited by the former GAL, Elissa Ray, in a recommendation. (25A). Said reference is not helpful in this regard, as it is not to a fitness standard, but to the definition of “best interests of the minor” in the Estates and Protected Individual's Code.

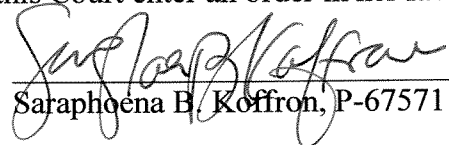
Appellees place excessive reliance on the FOC Recommendation. While the trial court may have considered the report, “[FOC reports] concerning custody may be placed in the court file and considered by the trial court, but may not be admitted into evidence absent the agreement of the parties.” *Duperon v Duperon*, 175 Mich App 77, 79; 437 NW2d 318 (1989).<sup>10</sup> After a timely filed objection to the report, a *de novo* hearing was held and the trial court came to independent conclusions based upon admitted evidence.<sup>11</sup> While Appellant disagrees with the court’s findings, she does not attempt, as Appellees do, to substitute them with the findings of the FOC.

### CONCLUSION

While emphasizing the importance of protecting the children’s best interests, Appellees’ arguments beg the question: what should a parent do when he runs into difficulty? Under the *per se* approach advocated by Appellees, if a troubled parent files a petition for guardianship so that his children can be cared for, then he is forever waiving his constitutionally protected parental presumption. Thousands of Michigan parents utilize guardianships each year. Under the lower courts’ (and Appellees’) interpretation of “inconsistent acts,” each and every parent who tries to protect his children’s best interests by entrusting their care to others would be deemed “unfit.” Accepting a legal framework that *encourages* abandonment by *discouraging* use of Probate Courts leaves children vulnerable. For all the legalese, this Court must find a balance between protecting the welfare of our children and protecting our Constitutions.

As the relief requested on the final page of *Defendant-Appellant’s Brief on Appeal* achieves that balance, Appellant respectfully requests that this Court enter an order in her favor.

Respectfully submitted by,  
February 9, 2009

  
Saraphoena B. Koffron, P-67571

<sup>10</sup> As described at length in *Wagner v. Wagner*, unpublished *per curiam* opinion of the Court of Appeals, Docket No 268250 (decided Aug 17, 2006), the amended Michigan Rule of Evidence 1101(b)(9) “does not state that an FOC report concerning custody may be admitted into evidence.”

<sup>11</sup> see MCL 552.507(5) and *Truitt v Truitt*, 172 Mich App 38, 44; 431 NW2d 454 (1988).