STATE OF MICHIGAN

COURT OF APPEALS

ROBERT HUNTER and LORIE HUNTER,

Plaintiffs-Appellees,

v

TAMMY JO HUNTER,

Defendant-Appellant,

and

JEFFREY HUNTER,

Defendant.

UNPUBLISHED
March 20, 2008

No. 279862
Oakland Circuit Court
LC No. 2006-721234-DC

Before: Saad, C.J., and Borrello and Gleicher, JJ.

GLEICHER, J. (*dissenting*).

I respectfully dissent from the majority's conclusion that "the trial court correctly held that defendant is an unfit parent . . . ." In my view, multiple errors permeate the circuit court's decision that defendant is unfit, requiring reversal of its custody determination.

The circuit court concluded that defendant is an unfit parent without reference to any legal standards or criteria governing its determination of this critical issue. Compounding this error, the circuit court incorporated an impermissible best interests analysis within its evaluation of parental fitness. Further, defendant's frequent, unsupervised, overnight, out-of-state visitation with her children during the year prior to the circuit court's ruling irreconcilably contradicts the circuit court's conclusion that she is unfit. In my view, these errors, which are of constitutional dimension, reflect a fundamentally flawed legal analysis and constitute an abuse of discretion.

I. Facts and Proceedings

In 2002, defendant and her then-husband, Jeff Hunter, lived in Indiana with their four young children, ranging from two to nine years in age.[1] The record reveals no evidence that Indiana child welfare authorities ever investigated or sought jurisdiction of defendant's family. At some point, defendant and Jeff began using crack cocaine. In August 2002, defendant left her four children in Jeff's care and did not return home for six days. In her absence, Jeff contacted his brother and sister-in-law in Michigan, plaintiffs Robert and Lorie Hunter, and requested their assistance. Robert drove to Indiana, collected the children, and returned to Michigan. In October 2002, defendant and Jeff retrieved their children, claiming that they had successfully overcome their drug addictions. A short time later, however, plaintiffs learned that defendant and Jeff had relapsed, and were again using cocaine. Plaintiffs drove to Indiana and brought the children back to Michigan. Robert testified that he and Lorie told defendant and Jeff "they had to give us the kids and sign … guardianship papers." Defendant signed the papers establishing a limited guardianship.

In May 2003, defendant and Jeff petitioned the Oakland Circuit Court requesting the termination of plaintiffs' guardianship. Defendant failed to appear at a June 2003 hearing, however, because she was again using cocaine. On July 1, 2003, the circuit court appointed plaintiffs the children's coguardians. Defendant's life further deteriorated when she was incarcerated in August 2004. She was released from prison in April 2005, and three months later filed a petition in the Oakland Circuit Court seeking an opportunity to visit her children.[2]

Before allowing defendant any visitation, the circuit court required that defendant verify her drug-free status since her release from prison, undergo biweekly drug testing, attend Alcoholics Anonymous or Narcotics Anonymous meetings, and maintain weekly telephone contact with her children. Defendant complied with these requirements. On November 9, 2005, the circuit court ordered that she pay child support, and permitted supervised visits. At a review hearing conducted six months later, the circuit court noted that defendant's visitation had gone well, and that she regularly paid child support. The circuit court expanded her parenting time, awarding defendant unsupervised weekend visits in Michigan during May and June 2006, and overnight, unsupervised visits in Indiana one weekend a month, commencing in July 2006. The circuit court continued defendant's child support obligation, ordered her to submit to weekly drug screens, and additionally commented as follows:

> And the law in Michigan is very clear. That is, that parents are supposed to raise their kids. And if Mother becomes competent and has the ability to raise her children, then the law says I have to give them back to their mother. If she isn't competent, and can't raise them, then we continue the guardianship. So I

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[1] Defendant has two older children fathered by a different man. An adult son of defendant's consistently testified favorably concerning her throughout the proceedings discussed in this opinion.

[2] Defendant and Jeff Hunter divorced at some point before September 2005.

> can't predict what the future is, but these kids are not going to live indefinitely with their guardian if Mother is a competent parent, because the law prohibits it. And I have to follow the law. We all do.

On May 23, 2006, plaintiffs filed the instant custody action, seeking legal and physical custody of the children.

Early in the litigation, the parties stipulated that a friend of the court referee would make a preliminary determination whether an established custodial relationship existed with either plaintiffs or defendant, and whether defendant "is a fit parent," using this Court's decision in *Mason v Simmons*, 267 Mich App 188, 206; 704 NW2d 104 (2005), "as its guide." Before the referee rendered a decision and throughout 2006, defendant enjoyed monthly, unsupervised, weekend visits with her children in Indiana, in addition to monthly, unsupervised weekend visits in Michigan. On December 4, 2006, the referee concluded that defendant was not a fit parent and that an established custodial environment existed with plaintiffs. Defendant filed objections to the referee's report, and requested a de novo hearing.

Ten days after its receipt of the referee's report, the circuit court increased the frequency of defendant's Indiana weekend visits. In February 2007, the circuit court ordered defendant to attend parenting classes, submit to twice weekly random drug screens, "participate in outpatient substance abuse counseling," and attend family counseling sessions with the children and her live-in boyfriend. Once again, defendant complied perfectly with these requirements.

The parties appeared before the circuit court on May 29, 2007 for the de novo evidentiary hearing. The circuit court judge who had handled the case continuously since 2002 recused himself, explaining only that "[o]ne of the parties was totally opposed to what the Court had suggested . . . ." On June 14, 2007, a different circuit court judge commenced the evidentiary hearing.

Several witnesses at the hearing recapitulated the 2002 and 2003 circumstances that led to plaintiffs' guardianship. Defendant testified that she had remained drug-free since August 2004, and supplied the court with a compendium of negative drug screen reports. Defendant also introduced a report regarding her parenting class, which stated that defendant "was a pleasure to have in the group, she added dialogue and expressed her concerns about parenting in a very effective and positive manner." Another exhibit attested to defendant's success in a drug abuse recovery program. Defendant testified that she earned $10.50 an hour as an assistant sales manager at a retail store, and lived with her boyfriend, Guy McConnell, in a four-bedroom home in Indiana. A family therapist who evaluated the children pursuant to a circuit court order testified that the children were "attached" to defendant and "have a preference to move with her full time." None of the evidence suggested that defendant currently used drugs, neglected or abused the children in any manner, or had violated any orders of the court.

In a bench ruling, the circuit court concluded that defendant is not a fit parent. The entirety of the circuit court's bench ruling on this issue follows:

> Now, as to the issue of mom's fitness.
>
> I believe that mom is a very nice person.

That she loves these children very dearly and I think they love her.

And I'm impressed by the progress that she has made.

But I don't believe that her love for the children is equivalent to being a fit parent.

When we look at the definition of fitness, it's not about whether she's a nice person, it is not about whether today she has made progress – and, again, she has made progress – it is about what happened in conjunction with these kids.

And in 2002 the parents were drug addicted.

They could not provide a home for the children and the family intervened and rather than having CPS involvement and have these children go to foster care the family took over and stepped in and provided a stable and loving home for these four kids, it doesn't happen very often and it's wonderful when that does happen and I think, again, these kids are doing as well as they are today because of that intervention.

And mom has made progress but there are still numerous questions and numerous issues.

These kids have never really lived with her for the last five years.

And in Dr. Price's report he talks about that, that they regard going to mom's as vacation time.

They have not had to do the grueling, day to day, sort of parenting and be tested that way so we can make some determination about what the current situation is.

And mom lives with a man, who seems like a very nice individual also, a hard working person, but they live in an out of wedlock relationship and exposing the children to an out of wedlock relationship, given all of the other instability of their lives at this point is questionable judgment.

I heard his testimony that he's listed her as a beneficiary on his life insurance and he expects that he will leave her his assets should he pass away.

But the truth of the matter is she has no legal rights as a live together person.

There is a reason that we have marriage in this society and marriage protects her.

The relationship she is in gives her no protection and if at any time Mr. McConnell wants to tear up the letter, change the beneficiary, move out, he, of course is free to do so, as she is, and there are no legal ramifications to that.

> So she is not really very well protected and without his assistance she cannot maintain the children.
>
> She's been in a home for six moths; that's a lease home she admitted herself that she could not possibly maintain the children financially without Mr. McConnell being there and without his financial assistance.
>
> So I think she has made terrific strides but I don't think she's at a point yet where we can say she is able to provide a stable and secure home for these four children, who have been out of her care for five years.
>
> So I don't believe that's the definition of fitness.

The circuit court additionally concluded that an established custodial environment existed in plaintiffs' home. The parties then undertook a best interests hearing, the result of which is summarized in the majority opinion.

II. Governing Constitutional Principles

The interest of a parent in the care, custody and control of her children is one of the oldest fundamental liberty interests recognized by the United States Supreme Court. *Troxel v Granville*, 530 US 57, 65; 120 S Ct 2054; 147 L Ed 2d 49 (2000). In 1944, the United States Supreme Court observed, "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince v Massachusetts*, 321 US 158, 166; 64 S Ct 438; 88 L Ed 645 (1944). Almost 30 years later, in *Stanley v Illinois*, 405 US 645, 651; 92 S Ct 1208; 31 L Ed 2d 551 (1972), the Supreme Court reaffirmed and emphasized the constitutionally protected rights of natural parents: "It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children 'come(s) to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.'" (Citation omitted).

The Michigan Supreme Court has its own jurisprudence reflecting the special and highly protected nature of the relationship between a natural parent and his or her children. "It is a well-established principle of law that the parents, whether rich or poor, have the natural right to the custody of their children. The rights of parents are entitled to great consideration, and the court should not deprive them of custody of their children without extremely good cause." *Herbstman v Shiftan*, 363 Mich 64, 67; 108 NW2d 869 (1961). This Court, too, of course recognizes the preeminence of the parent-child relationship. "The fundamental liberty interest of parents with regard to their children permeates Michigan laws." *Ryan v Ryan*, 260 Mich App 315, 333; 677 NW2d 899 (2004).

Troxel, *supra*, is the most recent pronouncement of the United States Supreme Court regarding parental rights. In *Troxel*, a plurality of the Supreme Court struck down Washington's grandparent visitation statute, strongly affirming the constitutional rights of parents. The Supreme Court explained that "so long as a parent adequately cares for his or her children, (*i.e.*, is fit), there will normally be no reason for the State to 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." *Troxel*, *supra* at 68-69.

Had the circuit court in the instant case determined defendant to be a fit parent, pursuant to *Troxel* she would have been entitled to the constitutionally mandated, strong presumption that the best interests of her children would be served by transferring their custody to her. See also MCL 722.25(1), which provides 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."

III. Parental Fitness

The circuit court deprived defendant of her constitutional right to the custody of her children based on a finding that she is "unfit," according to *Mason*, *supra*. In *Mason*, this Court considered a custody dispute between a third party and the child's natural parent, and held that an unfit parent does not enjoy the constitutional and statutory presumptions that a child's best interests are served by placement in parental custody. *Id*. at 190-191. The Court in *Mason* did not explore or elucidate the definition of "unfitness." Rather, *Mason* dealt with that issue in a single, conclusory sentence: "If a parent is unfit or fails to adequately care for a child, i.e., neglects or abandons a child, those presumptions are extinguished." *Id*. at 200.

That explanation of the term "unfitness" may have sufficed given the facts presented in *Mason*,[3] but it does not provide adequate guidance in this or any other case. In my view, the core constitutional principles underlying parental custody rights mandate the application of an *objective* and *principled* standard of fitness that provides meaningful guidance to other courts that must apply it. Because parents have a vital, constitutionally protected right to live with their children, constitutionally adequate procedures must attend any curtailment of that right. Minimal notions of procedural fairness require that a decisionmaking structure, some rules, factors or guidelines, govern a court's parental fitness determination. Without these controls, a constitutional right easily may be infringed on the basis of the purely subjective, potentially capricious viewpoint of a single judge.

To discern the appropriate legal meaning of "fitness" in the context of a custody dispute between a parent and third parties, the rational starting point is the seminal case of *Stanley*, *supra*. In *Stanley*, the United States Supreme Court analyzed a statutory presumption in Illinois that unwed fathers were unfit to raise their children, and concluded that parents have a constitutional entitlement to a hearing addressing their fitness before their children may be removed from their custody. *Id*. at 649. The Supreme Court did not question "the assertion that neglectful parents may be separated from their children," and specifically referenced an Illinois

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

statute allowing state wardship when "the present parent(s) or guardian does not provide suitable care." *Id*. at 649, 652.[4] Thus, the standard of "unfitness" inherently recognized in *Stanley* flowed directly from the state law governing child neglect proceedings.

A decade after its decision in *Stanley*, the United States Supreme Court examined the process that is constitutionally required when a state initiates a proceeding to terminate parental rights. In *Santosky v Kramer*, 455 US 745, 753; 102 S Ct 1388; 71 L Ed 2d 599 (1982), the Supreme Court observed that "[t]he 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." The Supreme Court held in *Santosky* that a state must establish by at least clear and convincing evidence constitutionally sufficient grounds for termination before it may terminate parental rights. *Id*. at 768-770.

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. This Court has stated that "while custody decisions are modifiable there is an important liberty interest in the development of the parent-child relationship." *Molloy v Molloy*, 247 Mich App 348, 354-355; 637 NW2d 803 (2001), vac'd in part on other grounds 466 Mich 852 (2002). In a custody proceeding such as this one, I believe that the due process requirements of *Santosky* mandate clear and convincing evidence of parental unfitness, and a legal analysis governed by objective, meaningful standards susceptible of review.

One of the most basic rules of due process is that a party at risk of losing a protected liberty interest be informed of the criteria that guide a court's decisionmaking process. "[T]he Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them.'" *Zinermon v Burch*, 494 US 113, 125; 110 S Ct 975; 108 L Ed 2d 100 (1990), quoting *Daniels v Williams*, 474 US 327, 331; 106 S Ct 662; 664; 88 L Ed 2d 662 (1986). In deciding that defendant is unfit, the circuit court did not rely on or reference any legislative or judicially created standards. The circuit court merely referenced that "[w]hen we look at the definition of fitness, it's not about whether she's a nice person, it is not about whether today she has made progress . . . ." Unfortunately, the circuit court never examined what the definition of fitness *is* about, and neither does the majority. Without reference to any objective, defined criteria governing a determination of fitness, I believe that the circuit court's decision qualifies as constitutionally deficient. In the absence of a legal framework for evaluating parental fitness, it is also impossible for this Court to determine whether unfitness has been clearly and convincingly established.

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[4] "Under Illinois law … while the children of all parents can be taken from them in neglect proceedings, that is only after notice, hearing, and proof of such unfitness as a parent as amounts to neglect, an unwed father is uniquely subject to the more simplistic dependency proceeding." *Id*. at 650.

The Michigan Supreme Court addressed a similar problem in *In re JK*, 468 Mich 202; 661 NW2d 216 (2003). The minor child's mother in that case had a history of marijuana abuse, and commenced inpatient substance abuse treatment when the circuit court assumed temporary jurisdiction of her child. *Id*. at 204. The mother successfully completed the treatment and agreed to a parent-agency agreement requiring her to remain drug-free, and to obtain housing and employment. The mother complied with the parent-agency agreement requirements. Nevertheless, the circuit court terminated her parental rights, finding that she and the child had not properly bonded. *Id*. at 204-208. The Supreme Court reversed, asserting that a "parent's *compliance* with the parent-agency agreement is evidence of her ability to provide proper care and custody" (emphasis in original), and that the mother's compliance "negated any statutory basis for termination." *Id*. at 214. In a footnote, the Supreme Court added the following:

> If the agency has drafted an agreement with terms so vague that the parent remains 'unfit,' even on successful completion, then the agreement's inadequacies are properly attributable to the agency and cannot form the basis for the termination of parental rights.

Id. at 214 n 20.

In the instant case, the circuit court denied defendant the custody of her children by concluding that she is "unfit," without reference to a single standard of fitness or a legal framework for this discussion. In my view, the circuit court's ungrounded determination of defendant's unfitness is directly analogous to a termination of parental rights based on a failure to comply with a vague parent-agency agreement. Because no identifiable standards, rules or statutory provisions guided the circuit court's fitness determination, the decision should not form the basis for denying defendant's constitutionally protected custody rights. Further, despite defendant's undeniable compliance with every requirement placed on her by the circuit court during the preceding year, including her uneventful, extensive and unsupervised Indiana parenting time, and the utter absence of any evidence of neglect or abuse of her children, the circuit court still characterized her as "unfit." In my view, these facts are functionally equivalent to those of *In re JK*, and are susceptible to only one rational conclusion: no legal or factual basis existed for finding defendant unfit.

When using the term "parental unfitness" in the custody context, the Michigan Supreme Court has referenced the statutory criteria in MCL 712A.19b(3), utilized in parental rights termination cases. *In re Clausen*, 442 Mich 648, 687 n 46; 502 NW2d 649 (1993). In my view, the detailed, comprehensive, legislatively created fitness criteria contained within the Juvenile Code provide appropriate guidance to a court evaluating potential parental unfitness in a third-party custody case, and should have been used by the circuit court in this case. Had it properly considered and applied the criteria contained within MCL 712A.19b, the circuit court would have afforded defendant the presumption that her children's best interest would be served in her custody, and this Court's holding in *Heltzel v Heltzel*, 248 Mich App 1, 27-28; 638 NW2d 123 (2001), would control the result:

> [T]o properly recognize the fundamental constitutional nature of the parental liberty interest while at the same time maintaining the statutory focus on the decisive nature of an involved child's best interests, custody of a child should be awarded to a third-party custodian instead of the child's natural parent only

> when the third person proves that all relevant factors, including the existence of an established custodial environment and all legislatively mandated best interest concerns within § 3, taken together clearly and convincingly demonstrate that the child's best interests require placement with the third person. Only when such a clear and convincing showing is made should a trial court infringe the parent's fundamental constitutional rights by awarding custody of the parent's child to a third person.[5]

IV. The Great Weight of the Evidence

As discussed above, I believe that the circuit court committed clear legal error on a major issue by concluding that defendant is unfit, because this conclusion lacks any legal mooring and is directly contradicted by her perfect compliance with every requirement that the court imposed on her. I would reverse on this basis alone.

I am also convinced, however, that the circuit court's findings of fact are against the great weight of the evidence, and that the circuit court palpably abused its discretion in its custody determination. The circuit court's factual findings regarding defendant's fitness appear entirely within the bench opinion quoted above. The circuit court's written opinion discusses only the best interest factors, and does not include an analysis of parental fitness.

The facts referenced in the circuit court's bench opinion include defendant's previous drug abuse, her cohabitation with McConnell, her failure "to do the grueling, day to day, sort of parenting and be tested that way," and her inability to pay the rent on her home without McConnell's financial assistance. None of these facts establish adequate grounds to deny defendant her constitutional right to the presumption that her custody serves her children's best interests, because none of them, singly or collectively, establish her unfitness.

The circuit court began its bench opinion by referencing the fact that "in 2002 the parents were drug addicted." At the time of the evidentiary hearing, however, defendant was indisputably drug-free, and had not used drugs for almost three years. The fitness question presented to the circuit court, *as stipulated by the parties*, was phrased in the present tense: whether defendant "*is* a fit parent." (Emphasis added). While defendant's previous drug use may have constituted relevant background information, it could not serve as clear and convincing evidence of her current unfitness. Furthermore, to allow defendant's misconduct between 2002 and 2004 to weigh heavily in a 2007 proceeding is to permanently foreclose her any meaningful opportunity to obtain custody of her children, despite her concerted and earnest efforts to improve her life and to follow all court-imposed requirements. The circuit court's myopic emphasis on defendant's past malfeasance also erases the significance of her perfect compliance with every requirement placed on her by the court. Regardless of how well she comports herself today, if her past is allowed to control the present, defendant is doomed to visiting rather than living with her children.

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[5] "[I]t is plain that where the burden of proof lies may be decisive of the outcome." *Speiser v Randall*, 357 US 513, 525; 78 S Ct 1332; 2 L Ed 2d 1460 (1958).

Similarly, defendant's cohabitation with McConnell is relevant evidence, but of minimal significance. In *Fletcher v Fletcher*, 447 Mich 871, 887; 526 NW2d 889 (1994), our Supreme Court specifically addressed to what extent cohabitation is an indicator of parental fitness, and concluded as follows:

> Extramarital relations are not necessarily a reliable indicator of how one will function within the parent-child relationship. While such conduct certainly has a bearing on one's spousal fitness, it need not be probative of how one will interact with or raise a child. Because of its limited probative value and the significant potential for prejudicially ascribing disproportionate weight to that fact, extramarital conduct, in and of itself, may not be relevant to [MCL 722.23(f)].

Defendant's cohabitation with McConnell thus does not amount to clear or convincing evidence that she is unfit, although it may have been an appropriate fact for consideration in the court's best interests analysis.

The circuit court's reliance on the fact that defendant has not performed the "grueling, day to day" work of parenting also has only slight evidentiary value. Defendant has not parented full-time because the circuit court has not permitted her to do so, despite her persistent requests for increased visitation. Indeed, defendant's request for weekend visitation in Indiana precipitated this lawsuit. In my view, the circuit court inappropriately relied on defendant's lack of custody as a factor rebutting her fitness. See, e.g., *In re Mathers*, 371 Mich 516, 535; 124 NW2d 878 (1963), in which our Supreme Court aptly and astutely recognized the following:

> How can it be said that a mother who rehabilitates herself and then wages an 8-year battle for her own flesh and blood has committed some unpardonable sin which now makes the State master of her destiny and that of her child? Even more unjust would it be for us to say that because 8 years have been necessary to litigate the matter, the door is now barred because mother and child thusly have been too long separated.

Additionally, I believe that the circuit court's citation of defendant's inability to afford to live in her four-bedroom home without McConnell's assistance constituted an improper factor in the court's fitness analysis. The friend of the court referee who conducted the initial evidentiary hearing noted in her written opinion that defendant lived with McConnell in a two-bedroom apartment, and "is listed on the lease." The referee deemed defendant's living arrangement inappropriate, due to the lack of separate bedrooms for her children. Defendant and McConnell subsequently rectified this problem by renting a four-bedroom home. Instead of recognizing this effort as evidence of defendant's fitness, the circuit court concluded that because she could not afford the rent payment without McConnell's assistance, defendant was unfit to parent her children.

In my view, defendant's inability to pay the entirety of the rent on her home has nothing to do with her fitness to parent. She is gainfully employed in a stable job, and her employer attested in his affidavit to a recent promotion. The employer's affidavit continued, "She is a stable and reliable employee. She has not missed any scheduled days of work and arrives to work on time. She is pleasant to customers, has a good work ethic, and is consistently entrusted

with handling money. Ms. Hunter's overall job performance is excellent." These facts do not reasonably support the circuit court's finding that defendant is unfit because she lives in a home that she could not currently afford on her own, a home that otherwise undeniably qualifies as suitable. Defendant's employment and suitable housing demonstrate that she *is* fit. The *potential* instability of her living arrangement may be pertinent in a best interests analysis, but it does not supply clear and convincing evidence of unfitness to parent. Because the record contains no actual evidence of current or imminent instability,[6] I believe the circuit court clearly erred in concluding that defendant's living situation rendered her unfit.

In my view, the circuit court also failed to recognize a critical fact that should have weighed heavily in its determination of fitness. In 2002, defendant voluntarily relinquished custody of her four children because she knew that her drug habit impaired her ability to properly parent them. Defendant undisputedly intended the guardianship to be a temporary arrangement. This Court has repeatedly reaffirmed that a parent who voluntarily and temporarily gives up custody to protect her children's best interests should not suffer a penalty for this election. *Speers v Speers*, 108 Mich App 543, 547; 310 NW2d 455 (1981). Indeed, "we encourage such a practice . . . ." *Theroux v Doerr*, 137 Mich App 147, 150; 357 NW2d 327 (1984). "[A] parent's decision to place a child in a home where it will receive proper care evidences concern for the child, not neglect or abandonment." *In re Nelson*, 190 Mich App 237, 241; 475 NW2d 448 (1991).

My review of the pertinent evidence reveals that its great weight reflects present parental fitness, not the opposite.

V. Palpable Abuse of Discretion

An abuse of discretion occurs when a trial court's decision falls outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). In addition to the legal errors discussed in sections III and IV of this opinion, I believe that the circuit court's decision that defendant is unfit falls outside the range of reasonable and principled outcomes because it was not guided by objective norms, but instead was infected with the improper considerations discussed *supra.*

Furthermore, the circuit court found defendant unfit, despite its awareness that she and her children spent weekends together in Indiana every month, without outside supervision. Even after finding defendant an unfit parent, the circuit court permitted her four "uninterrupted weeks of summer parenting," and in odd years, holiday custody.

These facts belie the presence of parental unfitness. Regardless of the definition of fitness actually utilized by the circuit court, an unfit parent would not receive extensive and unsupervised parenting time in another state. Because the circuit court's parenting time order

[6] Indeed, the evidence revealed the contrary. Defendant and McConnell testified to a stable, two-year-long relationship, in which they pooled their finances and shared expenses.

cannot be logically reconciled with its finding that defendant is unfit, I believe that the circuit court's unfitness ruling is fundamentally unreasonable and constitutes an abuse of discretion.

VI. Conclusion

In my view, the statutory grounds for the termination of parental rights provide an objective basis for determining parental fitness and defined criteria for gauging whether a parent has failed to adequately care for a child. An essential component of the legislative scheme governing termination of parental rights is the recognition that parents can change. If a child is temporarily removed from parental custody and placed in foster care, the Legislature generally affords at least one year for parental remediation of the conditions that brought a child into care, unless the parent has killed or seriously physically abused his child, or has had parental rights to other children involuntarily terminated. MCL 712A.19a(1), (2). And decisions regarding termination generally focus on the conditions that exist at the time of the termination hearing. See MCL 712A.19b(3)(c).[7] These provisions reflect the Legislature's goal of familial reconciliation. Proper application of the law mandates a conclusion that defendant is a fit parent, and entitled to the strong presumption that her children's best interests are served by their placement in her custody. I would remand this case with instructions to "give defendant's fundamental liberty interest in childrearing appropriate consideration," on the basis of up-to-date-information. *Heltzel*, *supra* at 24.

/s/ Elizabeth L. Gleicher

[7] See also *Fletcher*, *supra* at 889, which emphasizes the importance of reliance on current, up-to-date information in a change of custody evaluation.