

IN THE MICHIGAN SUPREME COURT
Appeal from the Michigan Court of Appeals

In re Guardianship of Versalle, Minors

MSC No. 1624434-5
COA No. 351758; 351757

Muskegon County Probate
LC Nos. 19-2586-GM; 19-2589-GM

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BRIEF OF AMICI CURIAE
THE FAMILY LAW SECTION OF THE STATE BAR OF MICHIGAN
and
LEGAL SERVICES ASSOCIATION OF MICHIGAN
IN SUPPORT OF GRANTING LEAVE TO APPEAL

Submitted by:

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THIS APPEAL INVOLVES A RULING THAT A PROVISION OF THE
CONSTITUTION, A STATUTE, RULE OR REGULATION, OR OTHER
STATE GOVERNMENTAL ACTION IS INVALID.

*This brief reflects the position of the majority of the Family Law Section
of the State Bar of Michigan, taken in accordance with its bylaws
regarding the following identified matters. The position taken does not
necessarily represent the policy position of the State Bar of Michigan.*

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STATEMENT OF JURISDICTION

Per MCR 7.303(B)(1), the Michigan Supreme Court has jurisdiction to review a case after it has been decided by the Court of Appeals. The Court of Appeals issued a published decision on October 15, 2020.

On January 5, 2021, Respondent-Appellant Adam Versalle filed an application for leave to appeal per MCR 7.305.

On June 25, 2021, this Court issued an Order for oral argument on the application for leave, inviting the Family Law Section and the Children's Law Section of the State Bar of Michigan to file amicus briefs.

STATEMENT OF INTEREST OF AMICUS CURIAE (FLS)¹

The Family Law Council (“The Council”) is the governing body of the Family Law Section of the State Bar of Michigan. The Section is comprised of over 2,500 lawyers in Michigan practicing in, and committed to, the area of family law.

The Section members elect the members of the Council. The Council provides services to its membership in the form of educational seminars, monthly Family Law Journals (an academic and practical publication reporting new cases and analyzing decisions and trends in family law), advocating and commenting on proposed legislation relating to family law topics, and filing Amicus Curiae briefs in selected cases in the Michigan Courts.

The Council, because of its active and exclusive involvement in the field of family law, and as part of the State Bar of Michigan, has an interest in the development of sound legal principles in the area of family law.

The instant case calls for the review of the constitutionality of statutes and caselaw affecting the parent-child relationship, which are topics of interest to the Family Law Section. The Family Law Section presents its position on the issues as invited by this Court in its June 25, 2021, Order granting leave to appeal.

¹ Disclosure per MCR 7.312(H)(4): Neither counsel for either party authored this brief in whole or in part. Neither counsel for either party, nor either party, made a monetary contribution intended to fund the preparation or submission of the brief.

**STATEMENT OF INTEREST OF AMICI CURIAE (LSAM)
LEGAL SERVICES ASSOCIATION OF MICHIGAN**

Legal Services Association of Michigan (“LSAM”) is a Michigan nonprofit organization incorporated in 1982. LSAM’s members are twelve of the largest civil legal services organizations in Michigan and collectively provide legal services to low-income individuals and families in more than 50,000 cases per year.²

LSAM members have broad experience with a variety of family law cases where a low-income parent’s rights to custody of his or her child are at stake—these involve custody and parenting time cases, third-party custody actions, minor guardianship cases, child abuse and neglect cases, paternity proceedings, and adoption proceedings. LSAM members share a deep institutional commitment to ensuring that the rights of low-income families, parents, and children are respected in these proceedings. Almost all LSAM members work daily—e.g., in public benefits, family law, and housing cases—with low-income families that are involved in and impacted by guardianships, divorce and custody, or similar family law proceedings. LSAM members are institutionally interested in and committed to providing fair and equal access to the justice system for low-income individuals.

LSAM has filed amici curiae briefs in federal and state appellate courts. They use a highly selective process to determine their participation as amici. They consider whether a case is consistent with their missions, its potential widespread impact in advancing the interests of Michigan’s indigent families, foundation in existing law or a good faith extension of the law, and the reasonable prospects of prevailing.

² LSAM’s members are: the Center for Civil Justice, Lakeshore Legal Aid, Legal Aid and Defender, Legal Aid of Western Michigan, Legal Services of Eastern Michigan, Legal Services of Northern Michigan, Michigan Advocacy Program, Michigan Indian Legal Services, Michigan Migrant Legal Assistance Program, Michigan Legal Services, Michigan Poverty Law Program, and the University of Michigan Clinical Law Program.

INTRODUCTION

The United States Supreme Court and the Michigan Supreme Court have repeatedly declared, recognized, and emphasized that parents have a fundamental liberty interest in the care and custody of their children. Like other recognized liberty interests, the right to parent one's children is protected by the Due Process Clause of the Fourteenth Amendment of the US Constitution. These due process rights extend to all parents, and require fundamentally fair procedures that ensure governmental interference with this personal right is limited to only the most compelling of circumstances.

Over the course of the last fifty years, this Court and the Supreme Court have developed a body of caselaw to protect against the deprivation of the most fundamental of personal rights. Clear protective boundaries have been drawn to protect the parent-child relationship.

The evolution of our caselaw generally follows two paths. One path pertains mostly to cases involving neglect, abuse, and the permanent termination of parental rights by the State to protect children from harm. The other path largely concerns the need for constitutionally sound procedures to repel efforts of third parties to gain custody, visitation, or decision-making authority over the children of others based upon a broad "best interests of the child" standard.

A vast majority of the latter line of cases concern application of the Child Custody Act. This case does not. This case involves the grant of a guardianship to a grandmother under a statute that, as argued herein, fails to provide sufficient protections to the constitutional rights of parents.

It is the position of the Family Law Section of the State Bar of Michigan that the guardianship statute at issue is unconstitutional as written, and that the Court of Appeals' review of the grant of guardianship in this matter was not only erroneous but in conflict with the constitutional mandates of both this Court and the United States Supreme Court.

STATEMENT OF QUESTIONS PRESENTED PER ORDER OF THIS COURT

- 1) Is MCL 700.5204(2)(b) unconstitutional because it does not allow for a presumption that a fit parent's decision is in the best interest of the child, see *Troxel v Granville*, 530 US 57 (2000)?

Respondent-Appellant answers yes.

Petitioner-Appellee answers no.

Family Law Section answers yes.

Court of Appeals answers no.

Trial Court answers no.

- 2) Did the Muskegon Probate Court err by granting petitioner guardianship in this case?

Respondent-Appellant answers yes.

Petitioner-Appellee answers no.

Family Law Section answers yes.

Court of Appeals answers no.

Trial Court answers no.

STATEMENT OF ADDITIONAL QUESTIONS PRESENTED

- 3) Did the Court of Appeals in this case exceed its authority and violate established constitutional precedent when holding that a parent is unfit if they do not grant legal authority to a third person with whom their child resides, and that the parental presumption is only afforded to fit parents?

Respondent-Appellant answers yes.

Petitioner-Appellee answers no.

Family Law Section answers yes.

Court of Appeals answers no.

Trial Court did not address.

- 4) Are there other aspects of MCL 700.5204(2)(b) that require interpretation in order to resolve conflicting laws and ambiguities, and to aid this Court in the analysis of the constitutional questions herein?

Respondent-Appellant answers yes.

Petitioner-Appellee answers no.

Family Law Section answers yes.

Court of Appeals did not address.

Trial Court answers did not address.

STATEMENT OF MATERIAL FACTS

Unmarried parents, Adam Versalle and Samantha Elliott, had joint legal and physical custody of their two children until Ms. Elliot's death in 2015.³ After her death, Versalle was not able to provide stability for the children. He voluntarily placed the children with his mother (Petitioner), which enabled them to remain in the same school district.⁴ The children primarily resided with Petitioner during school months from July 2015 to June 2019, and visited with Versalle.⁵

During that time, Versalle would give oral permission to Petitioner to sign his name on school and medical forms for the children when such authorization was necessary.⁶ At some point Versalle established a residence in Texas with the intent to create a stable home environment and be reunited with his children.⁷ Per Petitioner's testimony, she asked Versalle if he would provide her with legal authority over the girls, and he refused, stating "you are not going to take my daughters away from me."⁸

On May 9, 2019, Petitioner initiated a guardianship action in the Muskegon Probate Court, pursuant to MCL 700.5204(2)(b), alleging that Versalle was permitting the children to reside with her but had not given her legal authority for their care and maintenance. On June 15, 2019, Petitioner released the children to Versalles to travel to his home in Texas, believing they would be back in a few weeks.⁹ But they did not return.

The initial guardianship hearing was held on August 12, 2019.¹⁰ No testimony was taken at that time. Despite no evidence having been presented, and despite the children being in the care of Versalle for about

³ *Respondent-Appellant's Brief on Appeal*, at 4.

⁴ *Transcript*, at 79-80 (Trial court rulings); *Transcript*, 29-30 (Petitioner testimony).

⁵ *Transcript*, at 30-31 (Petitioner testimony).

⁶ *Transcript*, at 22 (Petitioner testimony).

⁷ *Respondent-Appellant's Brief on Appeal*, at 4.

⁸ *Transcript*, at 23 (Petitioner testimony).

⁹ *Transcript*, at 25 (Petitioner testimony).

¹⁰ *Register of Actions*, #18.

six weeks prior to the August 12, 2019, hearing, Petitioner was granted temporary guardianship pending further hearing. Versalle did not adhere to this order, and the children remained in his care.

A second hearing was held August 28, 2019. Petitioner testified and presented testimony of her long-time friend, June Martinez.¹¹ As the hearing notice did not state that it was an evidentiary hearing, Versalle did not come from Texas to attend and, instead, appeared through counsel. Though Versalle did not testify, the caseworker who performed a home study did. She recommended denial of the guardianship petition.¹²

After hearing testimony and arguments, the trial court issued oral rulings. Relative to the quality of Versalle's home environment in Texas, the court stated:

I don't know if they're living in a 5,000-square-foot mansion or if they're living in a cardboard box. I have absolutely no idea what the living circumstances of these children is.

Transcript, at 83 (Decision).

Nonetheless, the trial court found that the children's welfare would be served by appointing Petitioner as their guardian and entered orders to that effect. In doing so, the trial court admitted it had "no idea if this serves the best interests of these children for him to be — for these children to be in his care and custody at this time."¹³

Versalle appealed to the Court of Appeals. In affirming the trial court, the Court of Appeals held that (1) Versalle was an unfit parent for not giving Petitioner legal decision-making authority during the time he had permitted the children to reside with her; (2) as an unfit parent he was not entitled to have his parental decisions afforded any special weight, (3) the guardianship was to continue.

¹¹ *Transcript*, at 57-58 (Martinez testimony).

¹² *Transcript*, at 12 (Caseworker Schalk testimony).

¹³ *Transcript*, at 85-86 (Trial court rulings).

SUMMARY OF RELEVANT STATUTORY CODES

There are three main bodies of statutory laws governing whether a child should live with their parent(s) or a third party, those being:

- The neglect and abuse portion of the Probate Code, 1939 PA 288, which begins at MCL 712A.2, referred to herein as the “juvenile code;”
- The minor guardianship portion of the Estates and Protected Individuals Code, 1998 PA 386, which begins at MCL 700.5101 and ends at MCL 700.5219, referred to herein as the “guardianship code;” and
- The “Child Custody Act,” 1970 PA 91, which begins at MCL 722.21 and ends at MCL 722.31, referred to herein by its name or as “CCA.”

The general intent of these statutory codes are similar, in that they all seek to promote the best interests of children and protect them from harm. All three can result in the removal of children from a parent’s care, custody, and control. Yet, they remain distinct in various ways.

The procedures for when a parent can get their child back—if ever—are different depending on which code the case fits in. However, despite procedural differences between the codes, there is no practical difference to a parent between not being able to live with their child because a judge granted a third party’s request to be guardian, versus a judge granting a third party custody under the CCA, versus a judge placing a child in the custody of a third party under the juvenile code.

The statute in question, MCL 700.5204(2)(b), is a part of the guardianship code. It provides:

(2) The court may appoint a guardian for an unmarried minor if any of the following circumstances exist:

...

(b) The parent or parents permit the minor to reside with another person and do not provide the other person with legal authority for the minor’s care and maintenance, and the minor is not residing with his or her parent or parents when the petition is filed.

Though §700.5204(2) does not specify any hearing or other procedural requirements, a separate section —§700.5213— details the procedure for the appointment.¹⁴ A guardian may be appointed if, upon a hearing,¹⁵ the court is convinced that the requirements of §700.5204 are met and that a guardianship serves the child’s welfare. Notably, the term “welfare” is not defined anywhere in the guardianship code. Nor does §700.5213 specify what evidentiary standard of proof is required.

The “best interests of the child” for guardianship purposes is defined in §700.5101. This standard is not required for the appointment of a guardian, but is used in §700.5209 to enable a court to continue a guardianship upon a parent’s petition to terminate one already in place. Notably, the “best interests” definition in §700.5101 is nearly identical to the “best interests” factors in §722.23 of the CCA. Despite this similarity, the guardianship code does not contain a corollary to the constitutionally based “parental presumption” in §722.25 of the CCA, which requires courts to presume it is best for a child to reside with their parent(s).

A guardianship suspends a parent’s rights to the care and custody of their children and —per §700.5215— grants the guardian “the powers and responsibilities of a parent who is not deprived of custody[.]” This includes authority over the minor’s person, effects, education, medical care, and other matters such as consenting to the minor’s marriage.

Parents are able to petition the court to terminate a guardianship already in place. The procedures for doing so are listed in §700.5208, and §700.5209 details the actions a court can take when a petition to terminate is filed. Subpart 2(b) of §700.5209 enables a judge to deny a parent’s request to terminate the guardianship if the judge believes it is in the

¹⁴ These are distinct from the procedure and appointment conditions for limited guardianships, which are found at §§700.5205-5206. The procedures for reviewing existing guardianships are at §700.5207.

¹⁵ Presumably, relief can also be granted on an ex parte basis per MCR 3.207.

child's best interests to do so. There is no specification as to which party is responsible for convincing the court what is best for the children. Without such specification, the parent, as the moving party, bears the burden of proof. There is also no specification within the statute as to what evidentiary standard is required to extend or terminate a guardianship over a parent's objection.

As the right to parent one's child is protected by the Due Process Clause of the Fourteenth Amendment to the Constitution, and as guardianships suspend a parent's exercise of that right, statutes that grant guardianships must be comply with specific due process requirements to minimize the risk that a parent's rights will be erroneously deprived.

This case explores whether the method and standards for appointing a guardian over a minor pursuant to §700.5204(2)(b) appropriately safeguard against the erroneous deprivation of a parent's rights. It is the position of the Family Law Section that said statute is unconstitutional facially and in its application.

ARGUMENT

I. MCL 700.5204(2)(b) is unconstitutional.

A. *DeRose v DeRose* and the invalidation of a statute that was, per *Troxel v Granville*, constitutionally offensive.

The landmark United States Supreme Court decision of *Troxel v Granville* was issued in 2000. The Court in *Troxel* held that the due process clause of the Fourteenth Amendment to the United States Constitution requires trial courts to give “special weight” to parental decisions.¹⁶ It proclaimed that parental decisions cannot be supplanted by a judge’s subjective determination of a child’s “best interests,” and that to afford proper deference to these fundamental rights, courts are prohibited from usurping a parent’s power “simply because a state judge believes a ‘better’ decision could be made.”¹⁷

A few years later, in *DeRose v DeRose*, this Court was presented with the question of whether the 1996 version of the grandparenting time statute (MCL 722.27b) was constitutionally sound. Applying *Troxel*, this Court reiterated that due process requires “that a trial court accord deference to the decisions of fit parents regarding third-party visitation.”¹⁸ The statute was deemed “constitutionally deficient” on its face because “there is no indication that the statute requires deference of any sort be paid by a trial court to the decisions fit parents make for their children.”¹⁹

In dissent, Justice Weaver encouraged the legislature to amend the statute to remedy the statute’s constitutional flaws, which she summarized as follows:

¹⁶ *Troxel v Granville*, 520 US 57, 69 (2000); referenced in *Hunter v Hunter*, 484 Mich 247, 262 (2009).

¹⁷ *Troxel v Granville*, 530 US at 73 (2000).

¹⁸ *DeRose v DeRose*, 469 Mich 320, 332 (2003).

¹⁹ *DeRose v DeRose*, 469 Mich at 334 (2003).

While Michigan's statute is narrower than the statute at issue in *Troxel*, the statute is, nonetheless, flawed for the following reasons: **(1)** the statute does not provide a presumption that fit parents act in the best interests of their children, **(2)** the statute fails to accord the fit parent's decision concerning visitation any "special weight," and **(3)** the statute fails to clearly place the burden in the proceedings on the petitioners, rather than the parents.

DeRose v DeRose, 469 Mich at 335–6 (2003).

Within a year, the legislature amended §722.27b, incorporating the Justice Weaver's suggested changes.

B. MCL 700.5204(2)(b) contains the same fatal flaws as the statute in DeRose and, as such, is likewise unconstitutional.

MCL 700.5204(2)(b) is flawed for the same three reasons that the prior grandparenting time statute was held unconstitutional in *DeRose*. First, it does not provide any presumption that fit parents act in best interests of their children. Unlike the Child Custody Act, which contains a statutory rebuttable presumption that a child's best interests are served by awarding custody to their parent(s), there is no such language in §700.5204 nor the rest of the applicable portions of the guardianship code.

Second, neither §700.5204—nor other portions of the guardianship code that come into effect due to the standing conferred under §700.5204(2)(b)—contain any language that requires deference to the decisions of fit parents. This opened the door to the Court of Appeals' decision in this matter, which failed to apply any deference to the decision of Mr. Versalle.

Third, the guardianship code does not clearly place the burden of proof upon the third party at the time of the initial grant of guardianship (§700.5213), at reviews (§700.5207), or upon a petition to terminate the guardianship (§§700.5208-09). Without specification otherwise, the default practice of the moving party bearing the burden of proof and persuasion lies with the parent if they petition to terminate the guardianship. As

detailed in *Heltzel v Hetzel*, any statute which permits the placement of “the ultimate burden of persuading the court” upon a parent in a contest with a third party is constitutionally offensive.²⁰

In addition to the above, the guardianship code does not establish whether the petitioner must prove that the circumstances detailed in §700.5204(2)(b) have been met with clear and convincing evidence, or by a preponderance. This is violative of the US Supreme Court’s 1982 opinion in *Santosky v Kramer*,²¹ where the Supreme Court invalidated a New York Statute that permitted the termination of parental rights based only upon a preponderance of the evidence standard. In doing so, the Supreme Court articulated that the clear-and-convincing standard is necessary when liberty interests are at stake, though States are permitted to place more precise burdens that are equal to or greater than that standard.²² The provisions detailing the procedure for guardianship review hearings and hearings on petitions to terminate, found in §700.5207 and §700.5209, respectively, are similarly defective and non-specific as to either party’s evidentiary burden.

Though guardianship proceedings are not the same as proceedings under the juvenile code, a parent’s fundamental rights are nonetheless at stake. As articulated by Justice Cavanagh in the concurrence to the Order denying leave in *In re Orta*:²³

[T]his interest can be infringed whenever a child is removed from a parent's care, regardless of whether the child is removed pursuant to a neglect or abuse proceeding instituted by the state or via placement with a private guardian with the state's approval.

Declaring a statute unconstitutional is, undeniably, an act of major significance. After all, acts of the State’s legislature “are to be presumed

²⁰ *Heltzel v Heltzel*, 248 Mich App 1, 6 (2001).

²¹ *Santosky v Kramer*, 455 US 745, 753-754 (1982).

²² *Santosky v Kramer*, 455 US at 769-770 (1982).

²³ *In re Guardianship of Orta*, 962 NW2d 844, 848 (Mich, 2021).

constitutional until the contrary is shown.” Courts are to employ “every possible presumption” to preserve the constitutionality of statutes. But presumptions are, nonetheless, presumptions.

Presumptions cannot overcome constitutional commands.²⁴ As stated by Justice Markman in concurrence in *Blank v Department of Corrections*, “[t]here is no rule of construction of which I am aware that requires the original meaning of a constitutional provision to yield in order to save a statute.”²⁵

Petitioner-Appellee’s request for this Court to deny leave to appeal is a request for this Court to ignore clear constitutional defects. They request that this Court affirm the interpretation-gymnastics within the Court of Appeals’ decision to save a statute that unequivocally fails to meet the standards set forth previously by this Court and the Supreme Court.

C. Invalidating MCL 700.5204(2)(b) does not invalidate the entirety of the guardianship code.

Given the constitutional infirmities described above, one might question if this Court needs to invalidate the entirety of the guardianship code. The answer is no.

As an initial matter, invalidation of §700.5204(2)(a) has no effect upon a probate court’s authority to grant a limited guardianship. The portions of the guardianship code pertaining to limited guardianships provide a clear solution for third parties who have the consent of a child’s parent(s) but need legal authority for decision-making on a short term and long-term basis.

In further explanation: there are only three ways for the court to grant an involuntary guardianship. The first, in §700.5204(2)(a), is not

²⁴ *Republic of Austria v. Altmann*, 541 US 677, 692-693 (2004).

²⁵ *Blank v Dept of Corr*, 462 Mich 103, 146, fn 16 (2000).

flawed because it only pertains to parents who have had their rights terminated or suspended. A parent whose rights have been terminated is per §712A.2(b) of the juvenile code are unfit.²⁶ As *Troxel* only requires deference for fit parents, the decisions of parents whose rights have been terminated are not afforded deference.²⁷ Similarly, §700.5204(2)(c) is not flawed because it pertains to a narrow set of circumstances for a child born out of wedlock, whose custodial parent is dead or missing, and whose other parent lacks legal custody. The constitutionality of not deferring to a parent's decisions in such a situation is similar to the reasoning in the 1983 US Supreme Court case of *Lehr v Robertson*. In *Lehr*, a putative father took no steps to establish a relationship (legal or otherwise) with his biological child until after a petition for stepparent adoption was filed. In *Lehr*, the Supreme Court held that the Constitution does not “automatically compel a state to listen” to the opinion of a parent who was “presumptively capable of asserting and protecting their own rights” but chose not to.²⁸

Due to the foregoing, the three constitutional flaws identified in *DeRose* that pervade the appointment procedures in §700.5213, the review procedures in §700.5207, and the procedures upon a petition to terminate the guardianship in §§700.5208-09, are only problematic for parents whose guardianships stem from §700.5204(2)(b). As such, this court need not invalidate an entire statutory scheme, but rather only one offensive run on sentence.

²⁶ *In re Sanders*, 495 Mich 394, 407-408 (2014); and see *Lehr v Robertson*, 463 US 248 (1983).

²⁷ *Troxel v Granville*, 530 US at 57-58 (2000).

²⁸ *Lehr v Robertson*, 463 US 248, 262-265 (1983).

D. *The ability of parents to petition to terminate a guardianship at a later date does not ameliorate the constitutional defects of MCL 700.5204(2)(b).*

In 2014, this Court, in *In re Sanders*, evaluated the “one parent doctrine” which allowed courts to exercise jurisdiction over a child when only one parent is adjudicated as unfit. *Sanders* involved the placement of two boys into the care of third parties due to their mother’s drug use. The boys’ father requested an initial adjudication as to fitness, which was denied. He unsuccessfully moved for a change in placement, so the boys could be with him. The Department of Human Services argued that if the father complied with case service plans or court orders then he could, in time, have his rights restored to him. This Court found DHS’s argument unconvincing, describing it as putting the “plow before the mule.”²⁹

The Supreme Court, in *Stanley v Illinois*, was faced with a similar argument from the State of Illinois, where the State argued that no harm resulted from the limitation on the father’s ability to raise his children after his parental rights were terminated because he could regain custody as a guardian or through adoption proceedings.³⁰ This Court, in applying *Stanley*, explained that “a fix at the back end is not sufficient to justify a lack of progress at the front end[,] [r]ather, the state must adjudicate a parent’s fitness *before* interfering with his or her parental rights.”³¹

As is clear from *Sanders* and *Stanley*, when fundamental liberty interests are at stake, the ability of a parent to get their child back at a later time does not excuse the initial abrogation of their right to parent. Delays are unacceptable. As such, contrary to the Petitioner-Appellee’s arguments, the constitutional defects of MCL 700.5204(2)(b) are not cured by the placement of a clear and convincing burden upon the guardians

²⁹ *In re Sanders*, 495 Mich 394, 419–20 (2014).

³⁰ *Stanley v Illinois*, 405 US 645, 647 (1978).

³¹ *In re Sanders*, 495 Mich at 420 (2014), emphasis original.

after a motion to terminate filed by the parent(s). As stated by this Court in *Sanders*, “[t]he Constitution demands more.”³²

II. The Court of Appeals exceeded its authority, and acted contrary to precedent, when creating a new standard for parental fitness.

A. The Court of Appeals created a new parental fitness standard which disadvantages lower income parents.

The Court of Appeals’ opinion in this case provides that a parent is unfit if they permit their child to reside with a third party but do not provide the third party with “legal authority” for the minor’s care.³³ The only such “legal authority” identified in the opinion is the execution of a Power of Attorney form that delegates parental powers to a third party (despite the absence of any such limitation in the statute).³⁴ This ruling neither permits nor requires a trial court to consider other steps a parent has taken to provide for the minor child while residing with a third party.

The effect of this ruling is that a parent’s fitness, and thereby their right to have decisions accorded deference by courts, evaporates if they fail to sign a piece of paper. A piece of paper that, in reality, most non-lawyers have probably never heard of. A piece of paper that, by another statute,³⁵ only lasts for six months.

³² *In re Sanders*, 495 Mich at 420 (2014).

³³ *In re Guardianship of Versalle, Minors*, 334 Mich App at 183 (Oct 2020).

³⁴ *In re Guardianship of Versalle, Minors*, 334 Mich App at 186 (Oct 2020).

³⁵ MCL 700.5103.

B. The Court of Appeals' new fitness standard violates established precedent.

In creating this de facto fitness determination, the Court of Appeals exceeded its authority in a manner inconsistent with the following four precedential opinions as to the constitutionality of fitness determinations.

The first case it contravenes is the Supreme Court opinion in *Santosky v Kramer*.³⁶ *Santosky* recognized that a parent's "deeply rooted" fundamental liberty interest in the care, custody, and management of their child "does not evaporate simply because they have not been model parents." *Santosky* concerned allegations of permanent neglect and termination of parental rights. The Supreme Court held that even in light of such extreme facts, parents' rights required formal adjudication and heightened evidentiary standards prior to the state infringing on their right to direct the care, custody, and control of his or her children." The Court of Appeals' decision in this matter deems a parent unfit for failing to execute a power of attorney form (regardless of the reasons why, and regardless of whether the children's needs are being met). It then uses that pre-filing status to bestow authority upon the court to place children in the care of a third party over the parent's objection, in direct violation of *Santosky*.

The second precedent that is violated by the Court of Appeals' new fitness standard is the Supreme Court opinion in *Stanley v Illinois*. *Stanley* reviewed an Illinois statute which made children of unwed parents wards of the State upon the death of their mother, irrespective of the circumstances of the father. The Supreme Court in *Stanley* held that parents are entitled to a hearing as to parental fitness before being separated from their children or deprived of rights on the basis of unfitness. In *Stanley*, the Supreme Court cautioned against concluding

³⁶ *Santosky v Kramer*, 455 US 745, 753 (1982), quoted by *In re Sanders*, 495 Mich 394, 410 (2014).

that a parent is unfit because they do not perform a certain task, explaining the importance of individualized determinations as follows:

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.**

Stanley v Illinois, 405 US 645, 656-658 (1978), *emphasis added*.

The third case that the Court of Appeals in this matter runs afoul of is this Court's 2014 case of *In re Sanders*.³⁷ In *Sanders*, this Court held "that due process requires a specific adjudication of a parent's unfitness before the state can infringe the constitutionally protected parent-child relationship." The Court of Appeals' decision in this case, when applied, results in a potential guardian having standing to file for guardianship based upon a presumption of unfitness created without any regard for the actual circumstances of the child or parent(s). This is a dangerous precedent for all parents, especially those who face domestic violence situations or lack stability in housing or employment.

Fourth, the Court of Appeals decision is contrary to this Court's decision in the 2009 case of *Hunter v Hunter*.³⁸ A section of the Child Custody Act (MCL 722.25) was the focal point of *Hunter*. Said statute established a legal presumption, in CCA cases, that best interests of children are served by awarding parents custody in disputes with third parties. Per *Hunter*, custody of a child can be awarded to a third party (over the objection of a 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

³⁷ *In re Sanders*, 495 Mich at 422-23 (2014).

³⁸ *Hunter v Hunter*, 484 Mich 247, 271 (2009).

[MCL 722.23], taken together clearly and convincingly demonstrate that the child's best interests require placement with the third person.”³⁹

In *Hunter*, this Court explicitly found that because “a natural parent’s fitness is an intrinsic component of a trial court’s evaluation of the best interest factors in §722.23,” the constitutional safeguard of §722.25 was not conditional upon a parent’s fitness. In making that holding, *Hunter* specifically reversed a prior decision of the Court of Appeals which had stripped parents of the protections of §722.25 due to “unfitness.” This Court rejected the Court of Appeals having “created [a] new standard out of thin air.”⁴⁰

In this case, the Court of Appeals held that the protections of §722.25 are applicable in guardianship matters.⁴¹ Though the Family Law Section does not believe an otherwise unconstitutional statute can be saved by borrowing from a neighboring public act, the Family Law Section has no quarrel with the effect of that position as it is merely another verbalization of existing constitutional law. That holding, however, was followed by a proclamation that parents are not entitled to those constitutional protections if they are unfit. This secondary proclamation, which strips parents of the effect of §722.25 on the basis of unfitness, is directly at odds with *Hunter* and is thus constitutionally offensive.

³⁹ *Hunter v Hunter*, 484 Mich 247, 260 (2009), *emphasis added*.

⁴⁰ *Hunter v Hunter*, 484 Mich 247, 272 (2009).

⁴¹ Notably, the *Hunter* Court specifically stated that its decision “should not be read to extend beyond CCA cases that involve conflicting presumptions or to cases that involve parental rights generally but are outside the scope of the CCA.” *Hunter*, 484 Mich at 276.

C. The Court of Appeals decision disparately impacts low income parents by deeming them unfit without due consideration of the facts and conditions faced by many low income parents.

As discussed above, the Court of Appeals decision in this matter would set a new precedent for determining whether a parent is unfit. This is a new precedent where deference to a parent's constitutional rights hinges on whether they sign a delegation of parental powers form or initiate a limited guardianship irrespective of circumstances that exist for the child at the time of the determination.

In addition to the constitutional problems with the Court of Appeals decision, detailed above, the decision disparately impacts parents who cannot afford counsel. Without the ability to afford counsel, lower income parents will not be informed as to:

- What a power-of-attorney for the delegation of parental powers is;
- What—under the published decision in this case—the consequences of not signing a delegation of parental powers are;
- How long a child must reside with a third party for that residency to be considered “long term” or “permanent” [which is not clear, as discussed herein];
- The risk of a third party obtaining guardianship if there is no “legal authority” granted, regardless of any other steps the parent takes to remain involved with their child; and
- The risk of a third party guardian gaining standing to initiate a child custody action and gain custody of the child.

None of the answers to these questions are intuitive. They are not something that people learn about unless they get a degree in social work or the law. Even parents who are well educated could nonetheless be left unaware of how to protect their rights because a plain reading of the guardianship code does not give any clues as to what “legal authority” or “reside” means in the context of a guardianship under §700.5204(2)(b). Reviewing the delegation of parental powers statute, §700.5103, would

likewise not elucidate the standard because that statute uses the term “powers” and does not even contain the words “legal authority.”

A parent who seeks to place their child with a third party will be better able to defend their constitutional rights if they have the advice of counsel, because a lawyer would presumably advise their client about the risks listed above. The importance of legal advice was emphasized by the United States Supreme Court in *Miranda v Arizona* when it articulated the requirement for persons subject to arrest—regardless of the length of the detainment—to be given *Miranda* warnings. The *Miranda* warning is meant to ensure that any waiver of a person’s fundamental right against self-incrimination is made knowingly and intelligently.⁴² Without such a warning, a person’s constitutional right against self-incrimination is not adequately safeguarded.

The fundamental right to raise one’s children is just as constitutionally protected as the right against self-incrimination. As such, if an arrestee cannot be deemed to have waived their constitutional right against self-incrimination without proof that said waiver was made knowingly and intelligently, then it is axiomatic that a parent must not be deemed to have waived their fundamental right to raise their children without proof that they were aware of the State’s expectations.

Guardianship proceedings are frequently initiated by self-represented parties, many of whom are unable to afford counsel. Though SCAO provides court-approved forms for all aspects of guardianship proceedings, which make it easier for parties to self-represent, there is nonetheless no explanation offered to parents to safeguard their constitutional rights.

The decision of the Court of Appeals in this case is fundamentally flawed because it, essentially, means that a parent has waived their right

⁴² *Miranda v Arizona*, 384 US 436, 444 (1966).

to the care and custody of their children based on a failure to sign a delegation form, without any evaluation of whether the parent had any knowledge of the State's expectation to do so.

Parents who are lower income, who may not be able to afford counsel, are at greater risk of an erroneous deprivation of their right to parent than parents who can afford counsel. Though facially neutral, §700.5204(2)(b), as interpreted by the Court of Appeals in this matter, has a discriminatory disparate impact if its application negatively impacts one group more than another and cannot be justified by any State need.⁴³ This Court should grant leave in this matter to determine what safeguards are necessary to adequately safeguard parental rights in a manner that minimizes the disparate negative impact on lower income parents.

III. The Muskegon Probate Court erred in appointing Petitioner as the guardian of the Versalle children.

Analyzing the statute as written—and ignoring the positions herein as its constitutional deficiencies—the Muskegon Probate Court nonetheless erred in applying the guardianship code in four ways.

First, testimony was presented by Petitioner that she had asked Versalle if he would provide her with legal authority over the girls. As Petitioner testified, Versalle refused, stating “you are not going to take my daughters away from me.”⁴⁴ No documentary evidence of Versalle's intent was presented or admitted into evidence. The trial court, in issuing its oral rulings, stated that Versalle “may have agreed, he may not have agreed. Don't know.”

The term “permit to reside” in the context of §700.5204(2)(b) has been interpreted to mean physicality and an intent to establish a residence for the children in the home of another. In the absence of evidence of any

⁴³ See *Alspaugh v Comm on Law Enf't Standards*, 246 Mich App 547, 564 (2001).

⁴⁴ *Transcript*, at 23 (Petitioner testimony).

intent of Versalle for the children to continue residing with Petitioner for a considerable length of time going forward, the trial court could not logically determine whether the first requirement of §700.5204(2)(b) was met and, as such, establishing a guardianship upon that code was in error.

Second, there was no evidence presented that Petitioner was unable to obtain medical or education services for the children. Though Versalle did not sign a formal power of attorney, Petitioner testified that Versalle's oral authorizations had been sufficient to facilitate the children's medical care and see to their educational needs.⁴⁵

Third, §700.5213 establishes a procedure for court appointment of a guardian. Per §700.5213(2), the court shall make an appointment only if "the minor's welfare will be served by the requested appointment." The Dispositional rulings of the trial —such as rulings that the appointment of the guardian is in a child's welfare— are subject to the abuse of discretion standard of review.⁴⁶ Per published precedent, a probate court "abuses its discretion when it chooses an outcome outside the range of reasonable and principled outcomes."⁴⁷

When issuing his rulings, the judge admitted that he had no information about the children's circumstances as of the time of the hearing.⁴⁸ Though "welfare" is not defined within the guardianship code, it is axiomatic that such a dispositional ruling needs to be based upon findings of fact supported by evidence in the record. It is a mistake to do otherwise. In light of the limited evidence presented, and the judge's statements as to the lack of information about the children's circumstances at the time of the hearing (or in the month and a half before the hearing) it was a clear abuse of discretion to grant the guardianship.

⁴⁵ *Transcript*, at 22-23 (Petitioner testimony).

⁴⁶ *In re Bibi Guardianship*, 315 Mich App 323, 328-329 (2016).

⁴⁷ *Id.*

⁴⁸ *Transcript*, at 83-86 (Decision).

Finally, the Court noted in its rulings that it had no information as to the children's welfare at the time of the hearing. It is an error to make a discretionary finding as to whether placement with a third party is in the child's welfare when no evidence as to the child's current circumstances are available for review.

IV. Other aspects of MCL 700.5204(2)(b) require interpretation in order to resolve conflicting laws and ambiguities, and to aid the analysis of the constitutional questions herein.

A. The interpretation of "reside"

The guardianship code does not define the term "resides." In a prior matter involving the interpretation of §700.5204(2)(b), that being *Deschaine v St Germain*, the Court of Appeals interpreted the word "reside" in §700.5204(2)(b) as meaning "permanently reside." The Court of Appeals in this case followed that definition without analysis.

The Family Law Section agrees with the Court of Appeals in this case that the word "reside" within the context of §700.5204(2)(b) must include an intent to for the children remain with the third party permanently or for a considerable amount of time. A less rigorous definition of the word "reside" —such as that found in relation to the CCA— fails to consider a parent's intent and threatens to create the kind of broad overreach struck down in *Troxel*. Further, such an interpretation would align with neighboring subparts (a) and (c) due to it being similar to abandonment.

However, the Court of Appeals decision in this case analyzed Versalle's claim based upon caselaw concerning, and statutes within, the Child Custody Act. Doing so while simultaneously using a definition of residence which is inconsistent with the CCA is confusing for practitioners and creates opportunities for creative lawyering in subsequent cases.

For instance, this Court recently held, in *Grange Ins Co of Michigan v Lawrence*, that "residences" lack the permanence of domiciles due to

residences being, at times, temporary in nature.⁴⁹ As further example, §722.31, within the Child Custody Act, contemplates multiple legal residences while §722.26a(3) describes children residing alternately with each parent.

The Family Law Section encourages this Court to grant leave to explore whether there is a conflict in the interpretation of the term “reside” in the varying statutory schemes involving children and, if so, which definition applies in guardianship matters. Such a determination would not only resolve discrepancies in the application of various statutes, but it would greatly aid in the review of the constitutional questions herein as the State’s interest in protecting children depends upon the nature of the harm presented, and there is certainly a difference between temporary placements and abandonment.

B. The interpretation of “permit” as meaning “permit at the time the petition is filed” is problematic.

As this Court reiterates time and again, courts “must give effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory.”⁵⁰ If a statute’s meaning is plain, then the court is to enforce the statute as written (so long as it is not unconstitutional, of course).⁵¹ If a statute’s meaning is not clear, then courts can employ rules of statutory construction to discern the meaning.

However, courts are never allowed to add words to, or redraft, statutes to save them from constitutional invalidation. As stated by this

⁴⁹ *Grange Ins Co of Michigan v Lawrence*, 494 Mich 475, 494–95 (2013)

⁵⁰ *Johnson v Recca*, 492 Mich 169, 177 (2012), quoting *State Farm Fire & Cas Co v Old Republic Ins Co*, 466 Mich 142, 146 (2002).

⁵¹ See *Grossman v Brown*, 470 Mich 593, 598 (2004).

Court in 2000, doing so breaches “the constitutional division of powers between the Legislature and the judiciary.”⁵²

The statutory language of §700.5204(2)(b) enables a court to appoint a guardian if the “parent or parents permit the minor to reside with another person[.]” The Court of Appeals, in the 2003 case of *Deschaine v St. Germain*,⁵³ turned to the legislative history of §700.5204(2)(b) to interpret “reside.” The court concluded that because the prior version of the statute was worded “have permitted” and the current version is worded with the present tense “permit,” that the court has jurisdiction if the parent permits the child to reside with the third party at the time of filing.

The interpretation of §700.5204(2)(b) in *Deschaine*, that the term “permit” means “permit at the time of filing,” is not supported by the plain language of the statute. There is nothing in the statute to suggest that the parental permission is to be at the time of the petition rather than at the time of the hearing. As such, *Deschaine’s* interpretation of §700.5204(2)(b) needs to be analyzed to determine if it helps or hurts the constitutional review of this statute.

C. The lack of an objective “child welfare” standard.

As noted above, if the requirements of §700.5204 are met, then the trial court must issue a determination as to whether the child’s welfare will be served by the requested appointment. “Welfare” is overly broad and non-specific. While there are some unpublished cases that affirm the application of the best interests analysis of §700.5101 as a substitute for a “welfare” analysis in guardianship matters, there is no firm guidance on the matter.

The Family Law Section encourages this Court to grant leave to interpret the use of “welfare” in the context of the guardianship code and,

⁵² *Robinson v City of Detroit*, 462 Mich 439, 473 (2000).

⁵³ *Deschaine v St Germain*, 256 Mich App 665, 673, fn 10 (2003).

upon doing so, determine whether that affects its constitutional review of §700.5204(2)(b).

REQUESTED RELIEF

The Family Law Section requests that this Court consider the arguments detailed herein and grant leave to appeal based upon the following grounds:

- 1) The constitutionality of MCL 700.5204(2)(b) has significant public interest as it potentially infringes on the due process rights of Michigan parents;
- 2) The interpretation of MCL 700.5204(2)(b) involves issues of major significance to the state's jurisprudence;
- 3) The decision of the Court of Appeals conflicts with multiple Supreme Court decisions and other decisions of the Court of Appeals;
- 4) The decision of the Court of Appeals in this case erroneously establishes a parental unfitness standard out of thin air, similar to the Court of Appeals decision in *Mason v Simmons* which was reversed by this Court in *Hunter v Hunter*.

If leave is granted, then upon further review, the Family Law Section requests this Court ultimately hold that:

- 1) MCL 700.5204(2)(b) is unconstitutional.
- 2) The Muskegon Probate Court erred by granting the petitioner guardianship in this case.
- 3) Terminate all existing guardianship orders currently in place.

Respectfully submitted,
AUSTIN+KOFFRON

Dated: November 5, 2021

By: /s/ Saraphoena B. Koffron
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CERTIFICATE OF COMPLIANCE WITH AO 2019-6

There are 8,898 total words in this amicus brief, 7,562 of which are countable words. The font is 12 point Arial.

Respectfully submitted,
AUSTIN+KOFFRON

Dated: November 5, 2021

By: /s/ Saraphoena B. Koffron
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