

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

Oakland Probate No. 2002-285,883A-GM

and

JEFFREY HUNTER,
Defendant

**BRIEF OF *AMICI CURIAE* CALIFORNIA WOMEN'S LAW CENTER,
CONNECTICUT WOMEN'S EDUCATION AND LEGAL FUND,
NORTHWEST WOMEN'S LAW CENTER, AND THE WOMEN'S LAW PROJECT
IN SUPPORT OF APPEAL OF DEFENDANT-APPELLANT TAMMY JO HUNTER**

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STATEMENT OF INTEREST OF AMICI CURIAE

Amici curiae California Women's Law Center, Connecticut Women's Education and Legal Fund, Northwest Women's Law Center, and the Women's Law Project are public interest advocacy organizations committed to equality for women. Equal and fair treatment under the law with respect to one's children is an essential aspect of equality for women. *Amici* share an interest in the proper interpretation and balanced application of the law to prevent the arbitrary and unjustly prejudicial deprivation of custody to mothers based on gender, race, ethnicity, and socioeconomic status. *Amici* file this brief in support of appellant-defendant Tammy Jo Hunter to provide the Court with additional information regarding the inappropriateness of the circuit court's consideration of unmarried cohabitation, income, and past conduct when it awarded custody of her children to third parties.

The **California Women's Law Center** (CWLC) is a private, nonprofit public interest law center specializing in the rights of women and girls. Established in 1989, CWLC works in the following priority areas: Sex Discrimination, Women's Health, Race and Gender, Women's Economic Security, Exploitation of Women, and Violence Against Women. Since its inception, CWLC has placed a strong emphasis on eradicating sex discrimination and ensuring economic security for women. CWLC has authored numerous *amicus* briefs, articles, and legal education materials on these issues. Therefore, CWLC has the requisite interest and expertise to join the *amici* brief in this case.

The **Connecticut Women's Education and Legal Fund** (CWEALF) is a non-profit women's rights organization dedicated to empowering women, girls, and their families to achieve equal opportunities in their personal and professional lives. CWEALF defends the rights of individuals in the courts, educational institutions, workplaces, and in their private lives. Since

1973, CWEALF has provided legal education and advocacy and conducted public policy work to advance women's rights.

The **Northwest Women's Law Center** (NWLC) is a regional nonprofit public interest organization that works to advance the legal rights of all women through litigation, legislation, education and the provision of legal information and referral services. Since its founding in 1978, the NWLC has participated as counsel and as *amicus curiae* in cases throughout the Northwest and the country and is currently involved in numerous legislative and litigation efforts. The NWLC has been a leader for more than twenty years in shaping the development of family law and ensuring its fair and equitable application to women.

The **Women's Law Project** (WLP) is a private non-profit law firm with offices in Philadelphia and Pittsburgh, Pennsylvania. Founded in 1974, the Women's Law Project works to advance the legal and economic status of women and their families through litigation, public policy development, education, and one-on-one counseling. Primary among the many areas of the WLP's advocacy are issues affecting the relationship between women and children, including family law issues relating to custody, support, and domestic violence and economic issues relating to support of the family. The WLP's far-reaching family law advocacy agenda includes original litigation and participation as *amicus curiae* in numerous family law cases as well as extensive advocacy to reduce barriers to justice in family court through publications such as *Report to the Community: Access to Justice in the Domestic Relations Division of Philadelphia Family Court* (2003) and *Deciding Child Custody When There is Domestic Violence: A Benchbook for Pennsylvania Courts* (Rev'd 2008), and development of informational materials for *pro se* litigants. The WLP's telephone counseling service also responds to thousands of family law inquiries annually.

SUMMARY OF ARGUMENT

Amici urge this Court to reverse the decision below and to enunciate objective criteria for evaluating custody cases between natural parents and third parties, criteria that comports with parents' constitutionally protected liberty interest in raising their children. The circuit court's decision, affirmed by the Court of Appeals, applied an *ad hoc* analysis that deprived a mother of custody of her four children largely due to her unmarried partnership, economic circumstances, and past conduct. Many jurisdictions across the country have prohibited or discouraged courts from considering these subjective, irrelevant factors even in custody cases between parents, where the constitutionally protected parental rights between the two parties is the same. The consideration of these factors in cases involving third parties, such as the instant case, where the Constitution mandates a presumption in favor of the parent, is even less supportable. Neither unmarried cohabitation nor low-income status is *per se* harmful to children. Focusing too heavily on past conduct when a parent's present circumstances have changed offers little probative value regarding a current custodial fitness determination and frustrates Michigan's interest in encouraging parents with substance use disorders to seek rehabilitation.

Reliance on such subjective, irrelevant factors in a custodial fitness determination increases the risk of a discriminatory impact of the law, potentially subjecting tens of thousands of parents in Michigan to deprivation of custody of their children due to circumstances beyond their control. A parent's unmarried cohabitation, low income status, and past conduct when her present situation has changed are neither against the "best interests" of her children nor a reliable sign of parental "unfitness." *Amici* respectfully request this Court rule in favor of Defendant/Appellant.

ARGUMENT

INTRODUCTION

The circuit court below awarded custody to third parties based on the improper conclusion that the mother, Ms. Tammy Jo Hunter (Ms. Hunter) is unfit because of her unmarried cohabitation with her long term partner, comparatively lower income, and past conduct. In relying on these factors, the court rendered a verdict of unfitness based on assumptions and speculation rather than objective evidence of unfitness. The trial court seriously abused its discretion by applying subjective moral reasoning, unfounded economic factors, and irrelevant past conduct in a custody hearing to deprive a mother of her constitutionally protected right to live with her four children. *Amici* urge this Court to reverse the decision below and enunciate clear objective criteria in custody cases between natural parents and third parties. If the arbitrary analysis applied by the circuit court is affirmed, tens of thousands of parents in Michigan are vulnerable to deprivation of custody of their children.

I. THIRD PARTIES CANNOT DEPRIVE A PARENT OF HER FUNDAMENTAL RIGHT TO RAISE HER CHILDREN IN THE ABSENCE OF OBJECTIVE EVIDENCE OF UNFITNESS.

A parent's fundamental right to raise his or her children is well-established under Michigan jurisprudence and the United States Constitution. In *Herbstman v. Shiftan*, this Court concluded:

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.

363 Mich 64, 67; 108 NW2d 869 (1961); see *Hunter v. Hunter (Dissent)*, unpublished *per curiam* opinion of the Court of Appeals, decided March 20, 2008 (Docket No. 279862),

Appellant’s App. 91A [hereinafter Dissent]. Similarly, the United States Supreme Court recognizes “a fundamental liberty interest of natural parents in the care, custody, and management of their child,” grounded in the Fifth and Fourteenth Amendments to the Constitution. See *Santosky v. Kramer*, 455 US 745, 753; 102 S Ct 1388; 71 L Ed 2d 599 (1982) (holding that due process requires that parental rights not be terminated without clear and convincing evidence); *Stanley v. Illinois*, 405 US 645, 651; 92 S Ct 1208; 31 L Ed 2d 551 (1972) (concluding that an unmarried father could not be deprived of custody after the death of the mother without a hearing). A parent’s fundamental liberty interest to raise her children was most recently recognized by the U.S. Supreme Court in *Troxel v. Granville*, in which a plurality of the Supreme Court invalidated a visitation statute that too broadly permitted “any person” to petition for visitation at “any time,” because, as Justice O’Connor explained, “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.” 530 US 57 at 68-69; 120 S Ct 2054; 147 L Ed 2d 49 (2000).

Acknowledging the importance of a parent’s liberty interest in custody cases between a parent and a third party, many jurisdictions require third parties to meet a standard of proof of unfitness that is higher than the best interest analysis customarily applied to custody determinations between two parents. See, e.g., *Fish v. Fish*, 285 Conn 24, 56; 939 A2d 1040 (2008) (“The statutory presumption in favor of parental custody may be rebutted only in exceptional circumstances and only upon a showing that it would be clearly damaging, injurious, or harmful for the child to remain in the parent’s custody... Such a standard is not constitutionally infirm or susceptible to the criticism sometimes leveled against the ‘best interests

of the child’ test because it does not allow the court to apply its own ‘personal and essentially unreviewable lifestyle preferences.’”); *Powell v. Orr*, 182 Ga App 622; 356 SE2d 562 (1987) (“Custody may not be granted to a third party unless a finding has been made upon clear and convincing evidence that the parent is unfit.”); *Tedesco v. Tedesco*, 111 Md App 648, 657; 683 A2d 1133 (1996) (“in parent-third party custody disputes, an inquiry into the best interest of a child will only be conducted when evidence attesting to a parent’s lack of fitness or to exceptional circumstances injurious to the child has been presented.”); *In re Marriage of Hruby and Hruby*, 304 Ore 500, 510; 748 P2d 57 (1987) (“the ‘best interests of the child’ standard... is not applicable to custody disputes between natural parents and other persons.”). In many jurisdictions, not only is the appropriate standard higher than a best interest analysis, but the burden of proof is also heightened from preponderance of the evidence to clear and convincing evidence. See, e.g., *Powell, supra*.

Under the applicable constitutionally-mandated fitness standard, unmarried cohabitation, income status, and a parent’s past conduct – all of which would be inappropriate grounds for a ruling even under a lower best interests analysis – are wholly irrelevant in a custody contest in which a third party seeks to deprive a parent of her fundamental interest in custody of her child.

II. A PARENT’S UNMARRIED COHABITATION IS IRRELEVANT TO HER ABILITY TO RAISE HER CHILDREN WITHOUT A SPECIFIC SHOWING OF HARM AND IS A POTENTIALLY DISCRIMINATORY FACTOR.

Contrary to legal trends across the country and sociological research casting doubt on the relevance of unmarried cohabitation in custody proceedings, the circuit court found that “exposing the children to an out of wedlock relationship, given all of the other instability of their lives at this point is questionable judgment.” (53A). In doing so, the circuit court assumed,

incorrectly, that unmarried cohabitation is inherently harmful to children and applied its personal moral viewpoint instead of applying appropriate legal standards. The court thereby abused its discretion.

As the number of cohabitating households across the United States grows, sociological research suggests that the mere fact of unmarried cohabitation is not harmful to children.¹ For those cohabitating families with children, social science research suggests that there are “few differences in parenting between cohabiting and married families,” countering the traditional assumption that marriage itself is an important factor in successful parenting.² Thus, any perceived differences in educational outcomes and other indicators of achievement between children in cohabitating and married households are likely not causally related to marriage. Rather, such differences are likely the result of confounding variables, such as instability.³ In sum, cohabitation *per se* has not been shown to be harmful to children; rather, as with married parents, the children’s outcome is related to family stability, parenting style, and other personal characteristics.

The circuit court thus failed to make the appropriate relevant determination here: whether the specifics of Ms. Hunter’s relationship with Mr. McConnell demonstrated her unfitness to parent and indicated a likelihood of harm to the children. Instead, the circuit court presumed, without justification under Michigan law or social science, that Ms. Hunter’s relationship with Mr. McConnell showed “questionable judgment” based on the mere fact of the unmarried nature of their otherwise stable relationship. Permitting courts to exercise discretion of that latitude – to

¹ Between 1990 and 2000, the number of cohabitating families jumped from 3.2 million to 5.5 million. U.S. Census Bureau, Census 2000, *Unmarried-partner households* (PCT14) (2000).

² Gibson-Davis, *Family Structure Effects on Maternal and Paternal Parenting in Low-Income Families*, 70 J. MARRIAGE & FAMILY 452, 462 (2008).

³ See *id.* (discussing the limitations of earlier sociological research regarding cohabitation); Artis, *Maternal Cohabitation and Child Well-Being Among Kindergarten Children*, 69 J. MARRIAGE & FAMILY 222, 227 (2007) (finding no differences between cohabitation and married families when confounding variables are controlled).

make individual morality determinations unfounded in law or public policy – may result in arbitrary determinations of custodial fitness.

The absence of a societal consensus regarding the morality of cohabitation is one of the reasons the American Law Institute (ALI) omitted cohabitation as a crime in its Model Penal Code in 1962, prompting most states to de-criminalize cohabitation.⁴ The advisory committee explained, “In a heterogeneous community such as ours, different individuals and groups have widely divergent views of the seriousness of various moral derelictions.”⁵ While morality is one of many factors to consider in a best interests analysis between parents under Michigan’s Child Custody Act, MCL 722.23(f), such a vague notion is not an appropriate factor to take into consideration when determining whether to override a parent’s fitness in favor of a third party, particularly when the conduct at issue is not indisputably immoral and there is no evidence of a specific harm. Cohabitation is not *per se* harmful to the couples participating in the unmarried union; nor, as sociological research has established, is it harmful to the children “exposed” to it. See, e.g., *In re Marriage of Thompson*, 96 Ill 2d 67, 78; 449 NE2d 88 (1983) (clarifying that Illinois courts cannot presume that unmarried cohabitation causes harm to children).

Furthermore, without analyzing the stability of Ms. Hunter’s and Mr. McConnell’s relationship, the circuit court expressed concern that cohabitation does not “protect” Ms. Hunter in the event that she separates from Guy McConnell, stating, “[t]he relationship she is in gives her no protection and if at any time Mr. McConnell wants to tear up [the document naming Ms. Hunter as the beneficiary of his life insurance policy], change the beneficiary, move out, he, of course, is free to do so... and there are no legal ramifications to that.” (53A). While it is correct

⁴ Michigan is one of a small minority of states to categorize a narrow subset of cohabitation, i.e. “lewd[] and lascivious[]” cohabitation, as a misdemeanor under MCL 750.335; MSA 28.567; however, this Court referred to this statute as “antiquated and rarely enforced.” *McCready v. Kerr*, 459 Mich 131, 136; 586 NW2d 723 (1998).

⁵ Margaret M. Mahoney, *Forces Shaping the Law of Cohabitation For Opposite Sex Couples*, 7 J. L. FAM. STUD. 135, 146 (2005) (quoting the advisory committee’s Model Penal Code Tentative Draft No. 4 1955).

that the dissolution of a relationship between unmarried cohabitants does not have *the same* legal ramifications as divorce, the law in many states, including in Michigan, has started responding to the growing prevalence of cohabitation as an alternative to marriage. Since California's landmark decision in *Marvin v. Marvin*, which applied contract law principles to enforce implied agreements between former unmarried cohabitants, courts across the country have granted some degree of legal recourse when cohabitating relationships end.⁶ 134 Cal Rptr 815; 557 P.2d 106 (1976).

In Michigan, while unmarried former partners do not have enforceable property rights upon dissolution, courts will enforce express or implied agreements between former partners. *Featherstone v. Steinhoff*, 226 Mich App 584, 588; 575 NW2d 6 (1997) (“This Court will... enforce an agreement made during the [unmarried] relationship upon proof of additional independent consideration”). Therefore, the circuit court's conclusion that there are *no* legal protections if an unmarried partnership dissolves was incorrect, particularly since the circuit court made no inquiry into whether any express or implied agreements existed or whether Ms. Hunter and Mr. McConnell were planning or willing to enter into any agreements that could bear on Ms. Hunter's financial resources to parent her children. Ms. Hunter and Mr. McConnell's relationship exhibits signs of stability in that they have been partners for more than two years and plan to marry. Furthermore, Mr. McConnell has listed Ms. Hunter as the beneficiary on his life insurance policy and he plans to leave his assets to Ms. Hunter if he passes away. (53A). If their union dissolves, as unmarried *and married* unions do, the law affords Ms. Hunter some recourse based on either an express or implied cohabitation agreement.

⁶ See Matthew Bender & Co., FAMILY LAW AND PRACTICE § 65.02 (revised ed. 2008) (“Over the past 25 years, judicial recognition of unmarried cohabitants' rights (and responsibilities) has steadily increased, and courts and legislatures have established principles that apply to unmarried cohabitants. Consequently, some of the legal distinctions between couples in formal, legal marriages and those in informal, de facto relationships have become blurred, and arguably less meaningful.”)

Since unmarried cohabitation in and of itself has not been shown to harm children and has become less distinguishable legally from marriage in some important ways, a parent's cohabitation is irrelevant in unfitness determinations unless the cohabitating partner's presence in the home creates an environment that is specifically harmful to the children.⁷ The circuit court did not make any specific findings that Mr. McConnell's presence in the home would be harmful to the children. To the contrary, the circuit court arrived at its tenuous conclusion that exposing the children to Mr. McConnell and Ms. Hunter's two-year relationship shows "questionable judgment," while simultaneously praising Mr. McConnell as a "very nice individual" and a "hard working person." (53A).

Further, this Court has recognized the limited significance of extramarital relations in best interest analyses. In *Fletcher v. Fletcher*, this Court concluded:

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.

447 Mich 871, 887; 526 NW2d 889 (1994); See Dissent, *supra* at 100A (citing *Fletcher* for the proposition that "defendant's cohabitation with McConnell is relevant evidence, but of minimal significance."). If an extramarital relationship, which is similar to unmarried cohabitation in that it is an intimate relationship outside of the legal sanction of marriage, has only minimal significance in a *best interest* analysis between parents, then it has no relevance in a *fitness* determination between a parent and a third party.

⁷ See Katz, et al. *Chapter 10 Custody Disputes Between Parents*, 1-10 CHILD CUSTODY AND VISITATION § 10.12 (2008) ("Generally, a parent's sexual conduct is irrelevant unless it is shown to have an adverse effect on the child or the parent-child relationship.").

In 2002, the American Law Institute (ALI) adopted the Principles of the Law of Family Dissolution: Analysis and Recommendations (Principles),⁸ cautioning courts against “exaggerating the significance of parental practices of which they disapprove.”⁹ The Principles list extramarital relations, including unmarried cohabitation, as a “prohibited factor” in custody determinations.¹⁰ The Principles recommends following the rule applied in most jurisdictions, which is to consider extramarital relations only if there is a specific showing of harm to the child beyond the child’s mere awareness of the relationship.¹¹

One of the reasons the ALI cited for its decision to prohibit consideration of extramarital relations in custody proceedings is the potential for discrimination that could result when a custodial determination depends entirely on a particular judge’s personal morality.¹² Historically, there has been a double-standard regarding proper sexual conduct by which courts have viewed women’s extramarital sexual conduct more harshly than they have viewed similar conduct by men.¹³ Thus, sanctioning the circuit court’s view of unmarried cohabitation as “questionable judgment” without any findings as to how it could harm Ms. Hunter’s children may open the door to widespread reliance on a factor that courts across the country have previously applied in a gender-biased manner.

⁸ American Law Inst., Principles of the Law of Family Dissolution: Analysis and Recommendations (2002) [hereinafter Principles].

⁹ *Id.* § 2.12 cmt. f.

¹⁰ *Id.* § 2.12(1)(e).

¹¹ *Id.* § 2.12 reporter’s note to cmt. f (“The majority rule today, however, is that sexual conduct may be considered only to the extent that it has an adverse impact on the child’s welfare,” citing *Lackey v. Fuller*, 755 So2d 1083, 1087 (Miss 2000), *Foreng v. Foreng*, 509 NW2d 38, 40 (ND 1993), and *Kenneth L. W. v. Tamyra S. W.*, 408 SE2d 625, 628 (W Va 1991)).

¹² *Id.* § 2.12 reporter’s note to cmt. c (“Some courts also judge the extramarital affairs of mothers under stricter standards than those of fathers,” citing *Linda R. v. Richard E.*, 561 NYS2d 29, 31 (App Div 1990) and *Price v. Price*, 149 Vt 118; 541 A2d 79 (1987)).

¹³ *Id.*

III. A PARENT'S RELATIVE ECONOMIC STATUS IS IRRELEVANT TO A FITNESS DETERMINATION ABSENT EVIDENCE OF INABILITY TO PROVIDE BASIC NECESSITIES.

In custody cases between natural parents and third parties, a parent's low-income status should not trump her constitutionally-protected fundamental right to raise her children. A parent's low-income status does not, alone, indicate a parent's fitness and the use of such a potentially discriminatory factor may disproportionately impact certain socioeconomic groups, including women. Further, in this case, contrary to the court's determination that Ms. Hunter's modest income is a negative indicator of her parental fitness, the great weight of the evidence demonstrates that Ms. Hunter is financially capable of caring for her children.

A parent's income has not been shown to determine how well a parent will raise her children. Social science research suggests that low-income families raise well-adjusted children so long as a child's basic needs are met.¹⁴ A study on the parenting style of single mothers above, near, and below the poverty line found that "the initial evidence suggests poor single mothers, despite their economic burden, manage their parenting equally well compared to their non-poor single-mother counterparts. Specifically, the analyses make clear poverty is not associated with variability in parenting of single mothers in terms of style, quality relations, or monitoring."¹⁵

There are several jurisdictions that prohibit or discourage giving undue weight to economic circumstances in custody cases.¹⁶ *See, e.g., Spoor v. Spoor*, 641 N.E.2d 1282, 1284-86 (Ind. Ct. App. 1994) (concluding, in a case between two parents, that "[the father's] higher salary

¹⁴See Bulanda, *Beyond Provisions: The Relationship Between Poverty Status and Parenting Among Single Mothers*, 42 Marriage & Family Rev. 63 (2007).

¹⁵*Id.* at 80.

¹⁶See Principles, n 8 *supra*, citing Frantz, *Eliminating Consideration of Parental Wealth in Post-Divorce Child Custody Disputes*, 99 MICH. L. REV. 216, 224 (2000) ("When disputes are between parents and nonparents, courts emphatically refuse to consider wealth.").

and the stability offered in the... home... cannot form the basis for modification of custody.”); *In re Marriage of Gravatt*, 371 NW2d 836, 840 (Iowa Ct App 1985) (stating, in a case between two parents, that “poverty alone has never been accepted as a sound basis for declining to give either parent the custody and control of the issue of the marriage, providing they are otherwise equipped and the child’s welfare would not be jeopardized.”); *Burchard v. Garay*, 229 Cal Rptr 800; 724 P2d 486 (1986) (“There is no basis for assuming a correlation between wealth and good parenting or wealth and happiness,” but noting that the court can mitigate income disparities between parents through child support).

Just as consideration of comparative economic circumstances should be prohibited in a best interests analysis between two parents who presumably have the same constitutional right to raise their children, a parent’s economic circumstances should have no place in a custody case between a parent and a third party unless the parent is unable to provide for a child’s basic necessities. For example, in *In re A. J. M.*, a case in which a third party challenged a mother for custody of her four year old child, the Georgia Court of Appeals reversed the lower court’s grant of custody to the third party where the mother “furnished ‘necessaries’” for her children. 169 Ga App 477, 479; 313 SE2d 495 (1984). As the Court explained, “The record perhaps does show that cleaner, nicer, and better clothing might have been furnished by one in a more financially advantageous situation. However, there is no evidence that the child suffered from hunger, exposure, or lack of appropriate medical care.” *Id.*

Here, contrary to the circuit court’s determination that Ms. Hunter’s modest income is a negative indicator of her parental fitness, the great weight of the evidence demonstrates that Ms. Hunter is financially capable of caring for her children. The circuit court erroneously concluded that Ms. Hunter “admitted... that she could not possibly maintain the children financially without

Mr. McConnell being there and without his financial assistance.” (53A). In actuality the court’s question to Ms. Hunter was limited to whether she could afford her current residence if she and her partner separated. Ms. Hunter’s response, “Probably not without assistance but Guy and I are in a very stable relationship…” indicated only that she might not be able to afford the specific residence in which she and her partner currently lived and that her relationship with Mr. McConnell was stable. (107A). The circuit court distorted the first part of her answer and ignored the second part. While she might not be able to afford the rent on the specific 2,000 square foot, four bedroom home she and her partner lived in without her partner’s contribution, there is no evidence that she would not be able to afford a suitable home for herself and her children. Ms. Hunter is employed full-time with a salary above the minimum wage in both Michigan and Indiana, where she lives.¹⁷ In addition, her two-year relationship with her partner is stable, rendering the question irrelevant. Ms. Hunter’s inability to pay the rent on their current residence after the hypothetical dissolution of her relationship with Guy McConnell does not make Ms. Hunter an unfit parent.

Furthermore, Ms. Hunter’s access to family support, including from her partner, may mitigate potential negative effects of her limited financial resources on her children. It is common for individuals in unmarried partnerships to pool financial resources, and they have the option in Michigan of entering into an enforceable cohabitation agreement.¹⁸ In the event Ms. Hunter and Mr. McConnell’s relationship ends, Ms. Hunter’s relatives are available for support. Immogene Montgomery, Ms. Hunter’s mother, testified that she is part of Ms. Hunter’s support system, and April Bristow, Ms. Hunter’s sister, testified that “our family as a whole will make

¹⁷ Ms. Hunter earns \$10.50 per hour. (48A). The minimum wage in Michigan is \$7.40, and the minimum wage in Indiana is \$6.55. U.S. Dep’t of Labor, Minimum Wage Laws in the States - July 24, 2008, <http://www.dol.gov/esa/minwage/america.htm> (accessed Dec. 31, 2008).

¹⁸ See Manning, *Children’s Economic Well-Being in Married and Cohabiting Parent Families*, 68 J. Marriage and Family 345, 346 (2006).

sure that Ms. Hunter and the children are taken care of” if Ms. Hunter and Mr. McConnell’s relationship ends. (139A, 145A). By emphasizing both Ms. Hunter’s low-income status and cohabitation as indications of her parental unfitness, the circuit court placed Ms. Hunter in a no-win situation where she was penalized for improving her family’s economic circumstances by entering into a stable, but unmarried relationship.

The circuit court’s analysis, which elevated income to a nearly-dispositive level, has ominous implications for scores of women and ethnic minorities living in Michigan, groups that are disproportionately below the poverty line. Nationally,

[P]overty rates are highest for families headed by single women, particularly if they are black or Hispanic. In 2007, 28.3 percent of households headed by single women were poor, while 13.6 percent of households headed by single men and 4.9 percent of married-couple households lived in poverty.¹⁹

Similarly, in Michigan, women and ethnic minorities are also disproportionately represented below the poverty line.²⁰ Moreover, despite legal efforts to correct such disparities, there still exist extensive explicit and implicit discriminatory employment and societal norms that continue to limit women and ethnic minorities’ ability to increase their nominal pay. *See, e.g., Mazurkiewicz v. Mazurkiewicz*, 164 Mich App 492, 500; 417 NW2d 542 (1987) (“[P]lacing undue reliance on [father’s income] is unfair because in most cases the mother, as homemaker, will be disadvantaged.”). In Michigan, women earn only 71.8% of men’s earnings.²¹ Such limitations on earnings force women and ethnic minorities to more heavily rely on, for example,

¹⁹ Nat’l Poverty Ctr of the Univ. of Michigan, Poverty in the United States, <http://www.npc.umich.edu/poverty> (accessed Dec. 30, 2008).

²⁰ In 2005-2007, 30.6% of female-headed households were below the poverty line. U.S. Census Bureau, American Community Survey, http://uwsem.org/research/2006_09_27b.html (accessed Dec. 30, 2008). Similarly, in 2005, almost a third of African Americans lived in poverty. United Way for Southeastern Michigan, Income down across state: Poverty increasing and spreading throughout the tri-county, http://uwsem.org/research/2006_09_27b.html (accessed Dec. 31, 2008).

²¹ U.S. Census Bureau, American Community Survey Reports, ACS-09, “Income, Earnings, and Poverty Data from the 2007 America Community Survey” (2008).

social support networks, which are far more opaque to courts than stated earnings. Thus, weighing relative economic circumstances in parental fitness determinations would place many low-income ethnic minorities and single women at risk of losing custody of their children for reasons that may be largely out of their control and unrelated to their parental fitness, particularly in cases where the third-party challengers belong to racial or socio-economic groups that do not labor under the same historical financial obstacles as the parent's group.

IV. A PROPER FITNESS DETERMINATION MUST EVALUATE A PARENT'S CURRENT BEHAVIOR AND NOT RELY ON PAST CONDUCT.

Ms. Hunter has been a drug-free, law-abiding citizen with stable employment for several years. Denying custody to a mother like Ms. Hunter, who has successfully taken numerous positive steps to overcome her personal struggles with drug addiction and a brief incarceration for theft, undercuts Michigan's interest in rehabilitation. The ideal of rehabilitation lies in Michigan's Constitution, which permits indeterminate criminal sentencing that considers an offender's rehabilitative potential. Mich. Const. Art. 4, § 45 ("The legislature may provide for indeterminate sentences as punishment for crime and for the detention and release of persons imprisoned or detained under such sentences."); *People v. Lorentzen*, 387 Mich 167, 179; 194 NW2d 827 (1972) ("Michigan has long recognized rehabilitative considerations in criminal punishment by sanctioning indeterminate sentences."). The purpose of indeterminate sentences, according to this Court in *In re Manaca*, is to serve as "an incentive to law breakers, who have been convicted of crime, to reform and become good citizens." 146 Mich 697, 701; 110 NW. 75 (1906). Michigan's interest in rehabilitation also extends to individuals battling substance abuse. See, e.g., the Public Health Code, MCL 333.6131 (permitting spending of public funds for, *inter alia*, treatment of substance abusers) and MCL 333.6203 (defining duties of Office of Substance

Abuse Services, including developing annual comprehensive plans for “the prevention and control of substance abuse and the diagnosis, treatment, and rehabilitation of individuals who are substance abusers.”). This Court should further Michigan’s interest in rehabilitation by requiring weight be given to Ms. Hunter’s successful recovery and current conduct when determining the custody of her children.

Here, the great weight of the evidence demonstrates that Ms. Hunter has “reformed” and “become [a] good citizen[.]” Ms. Hunter’s personal circumstances have changed dramatically since 2002, when she became dependent on drugs and voluntarily agreed to a limited guardianship of her children by her brother-in-law and his wife to minimize the effect of her drug addiction on their well-being. (18A). Ms. Hunter began transforming her life by completing parenting and drug therapy programs. (31A, 44A, 45A). After her release from prison, Ms. Hunter passed weekly drug tests, paid child support, and attended support meetings. *Id.* By the time the her brother-in-law and his wife filed for full custody, alleging that Ms. Hunter is an unfit parent, Ms. Hunter had successfully overcome the personal challenges that caused her to relinquish custody of her children in the first place.

Nonetheless, under the circuit court’s analysis, Ms. Hunter remains “unfit” based largely on pre-reform conduct. As the Dissent to the Court of Appeals decision in this case explained:

[T]o 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... 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.

(99A). Rather than meeting Michigan’s interest in supporting the rehabilitation of former offenders and those recovering from substance use disorders, the circuit court’s undue emphasis

on Ms. Hunter's past creates a disincentive for those parents facing similar challenges in their lives. The circuit court and Court of Appeals have given other parents in Ms. Hunter's situation a strong disincentive – loss of custody and an indelible “unfitness” label – against completing rehabilitative programs and thereby taking voluntary, affirmative steps to responsibly care for their children. Struggling parents are thus discouraged from reuniting with their children since their past will always be held against them no matter how successful they are at “reform[ing] and becom[ing] good citizens.”

The court's undue emphasis on Ms. Hunter's past conduct despite her dramatically improved present circumstances raises the question of whether permitting such an analysis serves the interests of children and families or whether such an analysis functions primarily as continued punishment of rehabilitated former offenders. Ms. Hunter has served her sentence, temporarily forfeiting custody of her children until she completed rehabilitation, and has transformed her life. Thus, permitting courts to emphasize her prior conduct unless relevant to current circumstances would function as an unfairly punitive and *post hoc* extension of her punishment, contrary to basic principles of justice.

Furthermore, permitting courts to effectively re-punish parents for their past conduct will disproportionately impact disadvantaged socioeconomic groups that are over-represented in prisons and drug rehabilitation programs. For example, even though less than twenty percent of Michigan's population is non-white, more than half of all admittees to cocaine drug rehabilitation programs in Michigan in 2007 were non-white.²² Similarly, non-white ethnic minorities enter drug treatment programs for marijuana, heroin and opiates at rates well above

²² U.S. Dep't of Health & Human Services, Treatment Episode Data Set (TEDS) (2008), <http://www.dasis.samhsa.gov/teds06/teds2k6aweb508.pdf>.

their white counterparts.²³ Thus, any undue emphasis placed upon past conduct would not only be unfair, but would exacerbate existing socioeconomic disparities.

When circumstances have changed, a parent's present situation may be more predictive of her parental fitness than her past conduct. See, e.g., *In re Marriage of Starks*, 259 Mont 138, 145; 855 P2d 527 (1993). Ms. Hunter is not the same parent today that she was in 2002. She is drug-free, employed full-time, and has passed every parenting goal the probate court set for her in order to increase visitation and ultimately to regain custody of her children. The recidivism rate for all adults falls over time.²⁴ For Ms. Hunter, who has not relapsed for several years, there is a greater likelihood she will continue in her recovery because the well-being of her children is an important motivation. Social science research indicates that child custody is an important incentive for parents to remain drug-free and to refrain from criminal activity. According to Carlson et al.,

Substance-abusing mothers have reported that awareness of the impact of their substance abuse on their children intensified their own concern, fear, and guilt, strongly motivating them toward change.²⁵

For Ms. Hunter, her children were a major source of her motivation to change her lifestyle, as she “express[ed] a deep desire to be reunited with her children” while participating in a drug

²³ *Id.*

²⁴ See Florida Dep't of Corrections, Recidivism Report: Inmates Released from Florida Prisons 8 (2001), <http://www.dc.state.fl.us/pub/recidivism/2001/full.pdf>.

²⁵ Carlson, et al., *A Pilot Study of Reunification Following Drug Abuse Treatment: Recovering the Mother Role*. 36 J. DRUG ISSUES 877, 878 (2006); see Wilke, Kamata, & Cash, *Modeling Treatment Motivation in Substance-Abusing Women with Children*, 29 CHILD ABUSE & NEGLECT 1313, 1313 (2005) (“[L]osing custody of children, particularly with little expectation that they will be reunified, may serve as a detriment to motivation [for mothers in drug treatment].”); but cf. Collins, Grella, & Hser. *Effects of Gender and Level of Parental Involvement Among Parents in Drug Treatment*, 29 AM. J. DRUG & ALCOHOL ABUSE. 237, 257 (2003). (while these researchers found that parental involvement with children is “a positive force for substance abusers” while in drug treatment, they did not find that parental involvement affected parental drug/alcohol abuse post-treatment; however, these researchers did not assess changes in the level of parental involvement post-treatment, such as increased contact with children or loss of custody).

treatment program. (45A). Now, despite having overcome her personal struggles, Ms. Hunter has been denied custody as a result of those prior struggles.

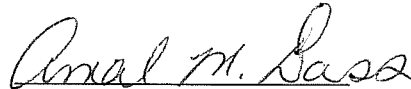
In deciding custody, courts in other states have looked to current circumstances to guide their determinations. See, e.g., *Keel v. Keel*, 225 Va 606, 613; 303 SE2d 917 (1983) (“The correct test requires an analysis of the circumstances of both parents and the children. In addition, it is concerned with positive as well as negative changes.”); *In re Marriage of LaMusga*, 12 Cal Rptr 3d 356, 1094; 88 P3d 81 (2004) (“[T]he superior court’s function in determining custody is not to reward or punish the parents for their past conduct”). Some states have held that evidence of past conduct is irrelevant unless a showing is made relating the past conduct to current circumstances. See, e.g., *In re Marriage of Starks*, *supra* (upholding trial court’s exclusion of testimony regarding conduct before the dissolution of the marriage seven years prior because “the evidence was too remote to have significant probative value in regard to the question of custodial fitness.”). In short, other jurisdictions have taken steps to *remove* from consideration irrelevant facts that would lead to punitive, arbitrary or discriminatory rulings, and have relied chiefly upon present circumstances to guide them. *Amici* urge this Court do the same.

CONCLUSION

Cohabitation, income and past conduct are not the proper factors to consider when determining whether a natural parent is fit to regain or to maintain custody as against a third party. Neither cohabitation nor low income status by itself has been shown either to harm children or to impair a parent’s ability to raise a child, and permitting consideration of either as a *per se* negative factors creates a risk of arbitrary and discriminatory application of the law. This Court should require courts to focus on a parent’s current fitness at the time he or she seeks custody and should prohibit courts from considering a natural parent’s past conduct, economic

circumstances, or cohabitation without evidence of current harm when deciding whether to override a parent's constitutionally-protected right to raise her children.

Respectfully Submitted,



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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,

v

TAMMY JO HUNTER,
Appellant/Defendant

and

JEFFREY HUNTER,
Defendant

Supreme Court No 136310

Court of Appeals No. 279862

Oakland Circuit No. 2006-721234-DC

Oakland Probate No. 2002-285,883A-GM

PROOF OF SERVICE

I hereby certify that two (2) copies of the *Amici Curiae* Brief of the California Women's Law Center, Connecticut Women's Education and Legal Fund, Northwest Women's Law Center, and Women's Law Project were served to each of the following by first-class mail, this 2nd Day of January, 2009:

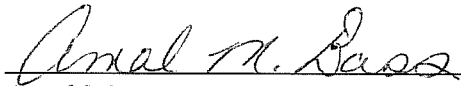
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