***[Please note: This is a memorandum by a law student intern. It is intended to jump-start your own research. We have not Shepardized the cases or determined that the student’s analysis of the cases or other sources is correct.]***

**Memorandum**

TO: CAFL Appellate Panel Support Unit

FROM: Law Student Intern (EdC)

DATE: August, 2020

RE: Due Process—Burden-Shifting

**QUESTIONS PRESENTED**

In termination of parental rights (TPR) and care and protection cases, who bears the burden of proof to show parental unfitness? When does a court’s application of the burden of proof constitute burden shifting, and when is burden shifting a violation of due process? These questions are examined through the lens of four Massachusetts cases.

**BRIEF ANSWERS**

(1) DCF bears the ultimate burden of proof to show current parental unfitness, analogous to the burden a prosecutor holds in presenting a state’s case. Subsequently, this burden “never shifts [back] to the parents.”

(2) A department must properly show a parent’s unfitness by “clear and convincing evidence.”

(3) A parent’s right to due process can be violated when a court improperly shifts the burden of proof to the parent to prove their fitness, rather than to the department to properly prove *unfitness.* The presumption is that the best interest of the child is served by being with his or her parent, who has a fundamental right to parent his or her child under the Fourteenth Amendment.

**DISCUSSION**

The right to parent and have “freedom of personal choice in matters of family life” is a fundamental liberty interest under the Fourteenth Amendment. *See Santosky v. Kramer,* 455 U.S. 745, 753 (1982); *Quilloin v. Walcott,* 434 U.S. 246, 255 (1978); *Prince v. Massachusetts,* 321 U.S. 158, 166 (1944); *Pierce v. Society of Sisters,* 268 U.S. 510, 534-535 (1925); *Meyer v. Nebraska,* 262 U.S. 390, 399 (1923). Any potential deprivation of a fundamental right, like the right to parent, “implicates the protections of procedural due process.” *Commonwealth v. Travis,* 372 Mass. 238, 250 (1977). Moreover, as *Santosky* provided, “[b]efore a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegations by…clear and convincing evidence.” 455 U.S. at 746. For procedural due process to be satisfied, one must have “notice” and an “opportunity to be heard.” *See Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314 (1950); *Mathews v. Eldridge,* 424 U.S. 319, 333 (1976). Under the second part, “a fundamental requisite” to satisfy procedural due process is that the opportunity to be heard “must be granted at a meaningful time and in a meaningful manner.” *Armstrong v. Manzo,* 380 U.S. 545, 552 (1965). Improper burden-shifting is generally a violation of procedural due process, as it violates a person’s “meaningful opportunity to be heard.” The Supreme Court’s test in *Mathews v. Eldridge* can be a guide in determining whether a trial’s application of the burden of proof comports with due process. 424 U.S. at 335.[[1]](#footnote-1)

In *Santosky v. Kramer,* the parents involved appealed from a New York judgement finding their children to be permanently neglected. 455 U.S. 745 (1982). The case made its way to the Supreme Court, which ruled that the “preponderance of the evidence” standard used by the New York Family Court Act for termination proceedings denied the parents procedural due process and a heightened standard was needed for such a fundamental right; New York’s procedural protections for parents were less than what was required. *Id.* Under the 5th and 14th Amendments, courts must strike a balance between the government’s interests and the risk of error to private interests created by the state’s chosen procedure. *Id.* The Court provided that “before a State may sever completely and irrevocably the rights of parents in their natural child, due process requires the State to support its allegations by at least clear and convincing evidence.” *Santosky,* 455 U.S.at 747-748. Persons “faced with dissolution of their parental rights have more critical need for procedural protections” than those facing more limited state intervention. *Id.* Moreover, the Court ruled that “[e]vidence that is at least ‘clear and convincing’ is constitutionally required for a finding of parental unfitness.” *Santosky,* 455 U.S.at 769-770.

Since the *Santosky* opinion, all courts in the United States need to use the “clear and convincing” evidence standard to find unfitness raising to the level of parental termination. But where does the burden fall in presenting such evidence, specifically in Massachusetts courts? When is the burden shifted improperly, constituting a violation of due process? The following cases give guidance.

**I. The Appropriate Burden of Proof**

In *Adoption of Lorna,* the appeals court affirmed an unfitness finding against the parents of two children. 46 Mass. App. Ct. 134 (1999). The affirmation rested on two holdings: (1) “the evidence supported findings” that the children were abused; and (2) finding both parents to be unfit does “not require a determination that each parent had committed abuse, but could rest on [the parent’s] inability to protect [the children] against future abuse.” *Id.* In this case, a physician concluded that several injuries to the minor children—including bone fractures—were not the result of accidents, but abuse. *Lorna,* 46 Mass. App. Ct. at 136. The “hospital staff filed a 51A report, which the department determined was supported;” this triggered the filing of a care and protection petition, and Lorna and her sister being placed with their grandparents. *Lorna,* 46 Mass. App. Ct. at 137.

While the mother “visited her children regularly” and followed her service plan, she “declined to present the department with evidence that she had undergone a psychological evaluation before trial, or attended counseling for battered women, as recommended by her service plan.” *Id.* The court also found that the mother had “a history of involvement in unstable, abusive relationships with men,” and displayed a lack in maturity. *Id.* “Although both parents complied substantially with their respective service plans,” neither parent gave “any insight into the conditions or causes” that led to their child’s injuries. *Lorna,* 46 Mass. App. Ct. at 138. The parents were found unfit and the children were adopted by their grandparents. *Id.* On appeal, the parents contended that because it was “unclear” whether the child’s injuries were from abuse or an accident, and no perpetrator was positively identified, DCF had not met its burden to show unfitness. *Id.* Moreover, the parents contended that “the judge improperly shifted to them the burden of proving their own fitness” because neither parent assumed responsibility for the injuries. *Id.*

The appeals court acknowledged that in termination and care and protection proceedings, DCF bears the burden of proof to show current parental unfitness by clear and convincing evidence and the “burden never shifts to the parents.” *Lorna*, 46 Mass. App. Ct. at 139. However, the appeals court rejected the parents’ arguments: “the judge's findings of abuse were not limited to whether either parent was the perpetrator of the abuse. While at least one parent abused Abby, both were deemed unfit for their inability to protect the children from future abuse.” *Lorna,* 46 Mass. App. Ct. at 140. The mother was abusive because either through *an act or omission to remedy the situation,* the child was hurt. *Id.* DCF was found to have met its burden in showing the parents’ unfitness by drawing consideration from the parents’ “character, temperament, conduct, and capacity to provide for the child” according to his/her “particular needs, affections, and age.” *Lorna,* 46 Mass. App. Ct. at 142.

**II. Where Improper Burden Shifting Becomes a Violation of Procedural Due Process**

In *Petition of the Dep’t of Soc. Servs. To Dispense with Consent to Adoption*, the mother involved had “demonstrated a repeated pattern” of turning her minor children over to the state in “periods of stress” and then reclaiming them later. 389 Mass. 793 (1983). Evidence showed a history of failing to cooperate with state employees, while her children “suffered from physical and emotional deficiencies.” *Id.* The mother’s rights were terminated, and the grandparents adopted the children. *Id.*

The mother appealed the termination, arguing that evidence of the past pattern of frequently turning over the children may not be used to show current parental unfitness. *Petition,* 389 Mass. at 801. However, the termination was affirmed, partially on the SJC’s distinction that this was not “an isolated instance” of turning the children over, but a harmful pattern of turning the children over, not working with department employees, and not following through with the service plans. *Petition,* 389 Mass. at 801-802.

The mother also argued that the statutory presumption of [G.L. c. 210, § 3(c)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000042&cite=MAST210S3&originatingDoc=I9233edcad38811d9a489ee624f1f6e1a&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) violated her due process rights under the Fourteenth Amendment to the United States Constitution. *Petition,* 389 Mass. at 802. In pertinent part, [G.L. c. 210, § 3(c)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000042&cite=MAST210S3&originatingDoc=I9233edcad38811d9a489ee624f1f6e1a&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) states: “[i]f the child has been in the care of the department or a licensed care agency for more than one year…there shall be a presumption that the best interests of a the child will be served by granting a petition for adoption . . . or by issuing a decree dispensing with the need for consent[.]” *Id.* She argued that the statute is rendered unconstitutional by the Supreme Court case *Santosky v. Kramer*, which held that “before a State may sever completely and irrevocably the rights of parents in their natural child, due process requires the State to support its allegations by at least clear and convincing evidence.” 455 U.S. 745, 747-48 (1982). The Court agreed with the mother’s argument about § 3(c) because it required an “affirmative showing” by parents, rather than by DCF, that the parents were (1) currently fit and (2) that a return of custody to them would serve the child’s best interests. *Petition*, 389 Mass. at 802. Requiring parents to prove their fitness, or that a return of custody to them served the child’s best interests, violated procedural due process because it impermissibly shifted the burden of proof to them. *Id.[[2]](#footnote-2)*

In *Care and Protection of Erin,* the Juvenile Court Department, Essex County Division, initially concluded that *mother had not proved* by *clear and convincing evidence* that she was fit, and that her child must remain in custody of Department of Social Services. *Erin,* 443 Mass. 567 (2005).In 2000, by stipulation, Erin’s mother was unavailable to parent her. *Erin,* 443 Mass. at 568. Erin was found in need of care and protection and was put into DCF custody. *Id.* Over the next few years, Erin struggled with cutting herself and was hospitalized; she also had a pattern of running away from residential placements. *Erin,* 443 Mass. at 569*.* During these events, Erin was actually in contact with her mother. *Id.* When DCF informed Erin that she would be placed into a group home, she filed a petition to challenge the decision, asking to be placed with a foster home or parent. *Id.* The court held a hearing where the mother testified that she would be willing to take Erin and “if she regained custody of Erin, she would put Erin in therapy…” *Id.* The mother further testified that despite being homeless earlier in the year, she was living in an apartment with her new husband and six-year-old daughter. *Id.* Importantly, “no documents were admitted into evidence at this hearing” but the judge still found the mother unfit. *Id.*

The child and mother both appealed. *Id.* After filing for appeal, the trial judge allowed the parties to “submit proposed findings of fact” from which the judge issued his own “findings of fact and conclusions of law” using information not admitted into evidence at trial. *Erin,* 443 Mass. at 570. The judge found that it was better for Erin to remain in DCF custody. *Id.*

The Massachusetts Supreme Judicial Court held that (1) “in a petition for review and redetermination in proceeding to commit child to custody of Department…it is the Department that bears ultimate burden to prove that child is still in need of care and protection…”; and (2) although DCF has the ultimate burden in showing a child needs care and protection, the “party filing petition for review and redetermination has the initial burden of production” to trigger DCF’s burden. *Id.* Moreover, “the department *always* bears the burden of proving, by clear and convincing evidence, that a child is still in need of care and protection.” *Erin,* 443 Mass. at 568. Once the initial burden of the party filing petition is met, “the department must then meet its burden of proving that the child is still in need of care and protection.” *Id.* This involves showing the parent is currently unfit and “the child’s best interests are served by *remaining* in removal from that parent’s custody.” *Erin,* 443 Mass. at 572 (see *Care and Protection of Stephen,* 410 Mass. 144, 150 (1987)). In this case, the due process rights of the mother were violated at trial because DCF did not meet its burden of proof to show unfitness before interfering on a fundamental right. *Erin,* 443 Mass. at 571. The presumption is that the best interest of the child is to be with his or her parent; the burden is not for the parent to affirmatively prove fitness when the State has that advantage. *Id*.In review and redetermination hearings “the judge does not start with a blank slate but builds on findings established in preceding states.” *Erin,* 443 Mass. at 570. The SJC agreed with mother and Erin that the trial court “started with a blank page” and improperly put the ultimate burden on the mother “to prove she was fit by clear and convincing evidence.” *Erin,* 443 Mass. at 570-571.

By the time this appeal made it to the SJC, the child in question (Erin) had turned eighteen, so the appeal was dismissed as moot for the parties. *Erin,* 443 Mass. at 568.Despite the outcome, the court still provided clear and concise language about the burdens of the parties involved. **III. Where it Can Be Inferred that Improper Burden-Shifting is a Violation of Procedural Due Process**

In *Care and Protection of Ian,* the District Court Department, Lowell Division, adjudicated a mother’s two minor children in need of care and protection and placed them in the custody of the Department of Social Services (DSS). 46 Mass. App. Ct. 615 (1999). The mother appealed, contending that there was little to no evidence of her *current* unfitness on the record. *Ian,* 46 Mass. App. Ct. at 616. On appeal, the court vacated the district court’s adjudication and remanded, partially because of the lack of evidence and the erroneous application of the burden of proof. *Ian,* 46 Mass. App. Ct. at 615-616.

Parents have an opportunity and a right to offer evidence of their capacity and fitness to parent in order to rebut the evidence presented by DCF. *Ian,* 46 Mass. App. Ct. at 619 (citing *Duro v. Duro*, 392 Mass. 574, 580 (1984)) (fundamental fairness and due process concerns require opportunity for parent in child custody proceedings to rebut adverse allegations concerning his or her child-rearing capabilities). However, “[n]owhere…do the cases even remotely suggest that the burden of persuasion on the crucial question of parental fitness is somehow to be shifted onto the parent at any point during adjudicatory proceedings conducted on a care and protection petition under G. L. c. 119, § 26.” *Ian,* Mass. App. Ct. at 619.The appeals court found the original order placing the children in DSS custody was “in error” because it placed on the mother “the burden of showing that she possess[ed] the present ability, capacity or readiness to parent the two children.” *Id.* Despite the court’s silence on due process specifically, the court found that the original order was in error. *Id.* It can be inferred from the remand, and from the principles in *Erin* and *Petition,* that the improper burden shifting here was a violation of due process.

**CONCLUSION**

Improper burden-shifting is generally a violation of procedural due process, as it violates a person’s “meaningful opportunity to be heard.” However, DCF bears the ultimate burden of proof to show current parental unfitness, analogous to the burden a prosecutor holds in presenting a state’s case. Subsequently, this burden “never shifts [back] to the parents.” Such a shift would go against the holding of cases like *Santosky v. Kramer,* violating a parent’s constitutional right to procedural due process under the Fourteenth Amendment. The presumption is that the child’s best interest would be served by being with his or her parent, not a presumption of unfitness.

A petitioner must show a parent’s unfitness by “clear and convincing evidence.” This burden is especially pressing when conducting termination proceedings, which permanently strip a parent of one of the oldest fundamental rights reflected in Supreme Court case law. If evidence of abuse is a part of the fitness determination, the parent does not necessarily have to physically commit the abuse to meet the burden; unfitness can rest on the parent’s inability to prevent future abuse by another party.

1. A court must evaluate whether a given procedure satisfies the due process requirement by assessing three factors: (1) “the private interest to be affected” (here, the right to parent); (2) “the risk of error” and “possibility of less-restrictive alternatives;” and (3) “the government’s interest” (here, the child’s welfare). *Id.*  [↑](#footnote-ref-1)
2. The caveat? The SJC found that while invalidating the portion of § 3(c) would be important for other cases, it would not help the mother here, because § 3(c) was never relied on in the original case. *Petition*, 389 Mass. at 803. [↑](#footnote-ref-2)