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SUPREME COURT OF TEXAS
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NO. 19-0694

IN THE
TEXAS SUPREME COURT

IN RE: C.J.C., Relator

Original Proceeding Arising Out of
the 16th Judicial District Court, Denton County
Cause No. 16-07061-16
(Honorable Sherry Shipman, Judge Presiding)
And the Second District Court of Appeals (No. 02-19-00244-CV)

BRIEF OF PARENTAL RIGHTS FOUNDATION, AS AMICUS CURIAE IN SUPPORT OF RELATOR'S BRIEF ON THE MERITS

Respectfully submitted by:

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INTEREST OF AMICI

Parental Rights Foundation is a national, nonprofit, nonpartisan advocacy organization with supporters in all fifty states.

Parental Rights Foundation is concerned about the erosion of the legal protection of parents to raise, nurture, and educate their children without undue state interference, and about the unfortunate, unintended consequences to innocent children caused by the routine overreach of the child-welfare system. Parental Rights Foundation seeks to protect children by preserving the liberty of their parents by educating those in government and the public about the need to roll back some of the intrusive state mechanisms that have worked to harm more children than they help.

The United States Supreme Court has repeatedly held that parents have a fundamental right to direct the care, custody, and control of their children, most recently in *Troxel v. Granville*, 530 U.S. 57 (2000). Yet parents continue to encounter obstacles in exercising those rights—in schools, in hospitals, in their communities, and in the family court system. This case represents one of the most too common occurrences of undue interference: court-imposed changes in custody and visitation without first determining the fitness of a parent.

In furtherance of its interest, Parental Rights Foundation has retained Tom Sanders, a Texas attorney, to file this Amicus Brief in Support of Relator's Brief

on the Merits and exclusively paid all legal fees and costs associated with the provision of those services.

SUMMARY OF ARGUMENT

State Supreme Courts around the country have required family courts to make a finding of parental unfitness before making custodial decisions based on the best interest of the child. Whether their decisions are based on an interpretation of *Troxel* or the states' own constitutional protection of the parent-child relationship, the trend is clear: when a non-parent is seeking some sort of access to the child, due process requires the first step to be proof of parental unfitness, supported by strong evidence. Without this first step, the court's substitution of its judgment for that of the parent can irreparably harm the parent-child relationship.

ARGUMENT

I. This Court should reaffirm the importance of the parent-child relationship by requiring all third parties to prove parental unfitness before the state can overrule the wishes of the child's parent.

A. The Fourteenth Amendment requires that the decisions of fit parents receive tremendous deference.

The United States Supreme Court has consistently recognized that the interest of parents "in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (internal punctuation removed). The fitness of the parent has long played a key role in disputes over parental rights. In *Stanley v. Illinois*, the Court warned that the state "registers no gain towards its declared goals when it separates children from the custody of fit parents." 405 U.S. 645, 652

(1978). The fitness of the parent was also central to the Court's holding in *Santosky v. Kramer*, which warned that "the State cannot presume that a child and his parents are adversaries. . . . [U]ntil the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship." 455 U.S. 745, 760 (1982).

Troxel, the most recent decision from the Supreme Court on parents' rights, reaffirmed that the fitness of parents plays a critical role in resolving any disputes between parents and third parties. One of the dispositive factors – listed first, in fact – was that "the Troxels did not allege, and no court has found, that Granville was an unfit parent. That aspect of the case is important, for there is a presumption that fit parents act in the best interests of their children." *Troxel*, 530 U.S. at 68.

As the Texas Fourth Court of Appeals recognized just a few years later, "*Troxel* makes clear [that] the trial court must accord significant weight to a fit parent's decision about the third parties with whom his or her child should associate." *In re Pensom*, 126 S.W.3d 251, 256 (Tex. 4th Ct. App. 2003).

B. Post-Troxel, proof of parental unfitness has become central to the state's public policy on disputes between parents and third parties.

Since *Troxel*, the Texas legislature has codified the centrality of this presumption in two statutes: TEX. FAM. CODE § 153.433, in the context of grandparent visitation, and § 153.131, in the context of the appointment of managing conservators. Section 153.433(a)(2) was amended in 2005 to bar courts

from ordering reasonable possession of or access to a grandchild unless the grandparent first "overcomes the presumption that a parent acts in the best interest of the parent's child by proving by a preponderance of the evidence that denial of possession of or access to the child would significantly impair the child's physical health or emotional well-being."

Although the statute does not explicitly reference a finding of "parental unfitness" among the burdens of proof that a grandparent must meet, this Court has read such a burden into the statute based on *Troxel*. In *In re Mays-Hooper*, a grandparent-visitation case decided in 2006, this Court found it dispositive that "[i]n this case (as in *Troxel*) there was no evidence that the child's mother was unfit, no evidence that the boy's health or emotional well-being would suffer if the court deferred to her decisions, and no evidence that she intended to exclude Thornton's access completely." *In re Mays-Hooper*, 189 S.W.3d 777, 778 (Tex. 2006).

One year later, this Court reaffirmed that "section 153.433 now echoes the United States Supreme Court's plurality opinion in *Troxel* that a trial court must presume that a fit parent acts in his or her child's best interest." *In re Derzapf*, 219 S.W.3d 327, 333 (Tex. 2007) (internal citations omitted). The Court once again analyzed the dispute between parents and grandparents in light of the fitness of the parent: "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." *Id.* The demands imposed by the statute "set a high threshold for a grandparent to overcome the presumption that a fit parent acts in his children's best interest," which was not met in this case. *Id.* at 334. Without such a showing, the trial court could "not lightly interfere with child-rearing decisions made by Ricky—a fit parent by all accounts—simply because a 'better decision' may have been made." *Id.*

A similar statutory presumption was codified in § 153.131, which relates to the appointment of a managing conservator. Similar to *Troxel*, the statute creates a "rebuttable presumption that the appointment of the parents of a child as joint managing conservators is in the best interest of the child," which can be removed if there is a finding of a history of family violence involving the parents of the child. This Court recently held that the statute "creates a parental preference by placing the burden on the non-parent seeking conservatorship to establish that the parent's appointment would result in significant impairment to the child." *In the Interest of F.E.N.*, 579 S.W.3d 74, 77 (Tex. 2019).

Unlike *Mays-Hooper* and *Derzapf*, this Court's ruling in *F.E.N.* did not equate the statutory presumption in favor of parents with the constitutional presumption in favor of fit parents that was recognized in *Troxel*. This case presents this Court with an opportunity to make the link explicit. In doing so, this

Court would join many other sister courts in requiring that third-parties present proof of parental unfitness before they can interfere with the parent-child relationship.

II. This Court should join many of its sister courts in requiring a showing of parental unfitness before a third party can interfere in the parent-child relationship.

State supreme courts around the country have protected families by demanding that third parties demonstrate with evidence that a parent is unfit before intruding upon the parent-child relationship. Texas should require the same showing.

Maryland

Both pre- and post-*Troxel* decisions in Maryland require that "if third parties wish to disturb the judgment of a parent, those third parties must come before our courts possessed of at least prima facie evidence that the parents are either unfit or that there are exceptional circumstances warranting the relief sought before the best interests standard is engaged." *Koshko v. Haining*, 921 A.2d 171, 187 (Md. 2007). Thus, before a parent's decision can be overturned by the court, "it is necessary *first* to prove that the parent is unfit…" *McDermott v. Dougherty*, 869 A.2d 751, 783 (Md. 2005) (emphasis added).

Utah

Utah's decisions on the issue of priority are crystal clear: "courts may not make a 'best interests' inquiry into nonparent custody of a child absent a determination that the legal parents are unfit." *Jones v. Barlow*, 154 P.3d 808, 818 (Utah 2007). Supreme Court decisions in that state recognize that "The state may override a parent's right to direct the upbringing of a child, for example, in a case involving proof of child neglect and abuse, where the child's physical or mental health is jeopardized, or where a parent is 'unfit' in a manner causing a potential harm to the child." *Jones v. Jones*, 359 P.3d 603, 610 (Utah 2015) (internal citations and punctuation removed). Even there, those harms must be "substantial." *Id.* at ¶ 32.

Washington

Washington's Supreme Court, in a case decided a decade after *Troxel*, examined a statute regarding third-party custody. Due to the important fundamental rights at stake, the Court held that before a court could even hold a hearing on a third party custody order, the nonparent was required to submit sworn testimony that the parent was not a suitable custodian, and either that "the parent is unfit or that placing the child with the parent would result in actual detriment to the child's growth and development." *In re Custody of E.A.T.W.*, 227 P.3d 1284, 1290 (Wash. 2010).

Oklahoma

Oklahoma law requires both a harm to the child and proof of parental unfitness before authorizing grandparent visitation. *Herbst v. Sayre (In re Herbst)*, 971 P.2d 395 (Okla. 1998). As the Oklahoma Court said, "Absent a showing of harm, (or threat thereof) it is not for the state to choose which associations a family must maintain and which the family is permitted to abandon." *Herbst*, 971 P.2d at 399. In 1996, the original grandparent visitation statute required only "best interest of the child." But in 2002, after *Troxel* (federal) and *Herbst* (Oklahoma Supreme Court), the legislature revised the statute to conform to the Constitutional rights of parents and to require a showing of parental unfitness. In 2011, paternal grandparents sought visitation during a divorce proceeding, trying to use their son's visitation time to visit with their grandchild without going through the statutory requirement of determining parental unfitness. The Oklahoma Supreme Court specifically held that the grandparents could not do this; as third parties, they were required to show harm and parental unfitness before moving to the best interest standard. *Craig v. Craig*, 253 P.3d 57 (Okla. 2011). The Court held that "a showing of harm is necessary" to reach the best interest of the child. *Id.* at 63.

Georgia

Georgia has been especially protective of the parent-child relationship. "There can scarcely be imagined a more fundamental and fiercely guarded right

than the right of a natural parent to its offspring." *Nix v. Dept. of Human Resources*, 225 S.E.2d 306 (Ga. 1976). The state's high court has protected this relationship from outside interference since at least 1886, when it denied grandparents the right to seize custody from a father "in the absence of a voluntary relinquishment of his parental rights, parental abandonment or unfitness, or other exceptional cause, established by clear and strong evidence." *Patten v. Ardis*, 816 S.E.2d 633, 635 (Ga. 2018), *citing Miller v. Wallace*, 76 Ga. 479 (1886).

Mississippi

The Mississippi Supreme Court similarly declined to side with the grandparents on visitation because the grandparents did not allege the parents were unfit. *Stacy v. Ross*, 798 So. 2d 1275, 1280 (Miss. 2001). "The determination whether parents are unreasonable in denying visitation in whole or part to grandparents is not a contest between equals," the Court held. Because parents have a "paramount right to control the environment, physical, social, and emotional, to which their children are exposed," "forced, extensive unsupervised visitation cannot be ordered absent compelling circumstances which suggest something near unfitness of the custodial parents." *Id.*

Montana

In *Snyder v. Spaulding*, the Montana Supreme Court held that "where one party is a nonparent asking a court to overturn the decision of a parent," courts

must employ a "delicate balancing of the rights of the parent vis-a-vis the interests of the nonparent, as well as the interests of the child." *Id.* at 581 (2010). That balancing begins with an inquiry into "whether the child's parent is fit, *i.e.*, whether the parent 'adequately cares for his or her children,'" because "if the parent is fit, then a presumption arises in favor of the parent's wishes." *Id.; see also Schwarz v. Schwarz (In re L.R.S.)*, 414 P.3d 285, 289 (Mont. 2018) ("When a grandparent petitions for visitation over a parent's objection, a court must first make a determination as to whether the objecting parent is a fit parent")(internal quotation omitted).

Iowa

Iowa has also required a showing of unfitness before moving on to visitation issues. In a ruling striking down a portion of the grandparent visitation statute as unconstitutional, the Iowa Supreme Court ruled that the statute inappropriately "places the best interest decision squarely in the hands of a judge without first according primacy to the parents' own estimation of their child's best interests. Without a threshold finding of unfitness, the statute effectively substitutes sentimentality for constitutionality. It exalts the socially desirable goal of grandparent-grandchild bonding over the constitutionally recognized right of parents to decide with whom their children will associate." *Santi v. Santi*, 633 N.W.2d 312, 320 (Iowa 2001). Specifically, the Court found the law fundamentally

flawed, "not because it fails to require a showing of harm, but because it does not require a threshold finding of parental unfitness before proceeding to the best interest analysis." *Id.* at 321. And the Court held later that the presumption regarding fit parents "is not simply applicable to joint decisions of fit *married* parents, but applies to the decisions of *all* fit parents." *Howard v. Howard (In re Howard)*, 661 N.W.2d 183, 191-192 (Iowa 2003)(emphasis added).

Nebraska

The Nebraska Supreme Court has stated that a parent's natural right to custody "trumps the interests of strangers to the parent-child relationship … unless it has been affirmatively shown that a biological or adoptive parent is unfit or has forfeited his or her right to custody…" *Jeri H. v. Jacob H. (In the Interest of Lakota Z.)*, 804 N.W.2d 174, 179 (Neb. 2011). This principle holds true across the spectrum of parental custody cases:

- Termination (*Jeri H.*)
- Reunification after out-of-home placement (*State v. Katianne S. (In re Xavier H.)*, 740 N.W.2d 13, 25 (Neb. 2007)): the parental rights termination statute "nowhere expressly uses the term 'unfitness,' but that concept is encompassed by … a determination of the child's best interests…. subject to the overriding recognition that the relationship between parent and child is constitutionally protected. There is a

'rebuttable presumption that the best interests of a child are served by reuniting the child with his or her parent.' Based on the idea that 'fit parents act in the best interests of their children,' this presumption is overcome only when the parent has been proved unfit."

- Termination of guardianship (*Carla R. v. Tim H. (In re D.J.)*, 682 N.W.2d 238, 246 (Neb. 2004)): "an individual who opposes the termination of a guardianship bears the burden of proving by clear and convincing evidence that the biological or adoptive parent is either unfit or has forfeited his or her right to custody. Absent such proof, the constitutional dimensions of the relationship between parent and child require termination of the guardianship and reunification with the parent."

New Jersey

New Jersey requires a showing of unfitness in actions for guardianship due to its desire to "reduce or minimize judicial opportunity to engage in social engineering in custody cases involving third parties." *Watkins v. Nelson*, 748 A.2d 558, 559 (N.J. 2000). In 2003, the Supreme Court reiterated that "a dispute between a fit custodial parent and the child's grandparent is not a contest between equals. We have long recognized that the best interest standard, which is the tiebreaker between fit parents, is inapplicable when a fit parent is in a struggle for

custody with a third party." Because visitation from a third party, even a grandparent, is "an incursion on a fundamental right (the right to parental autonomy)," parents are presumed to be fit, and before visitation is allowed, the parent must be shown to be unfit by showing actual harm to the child. *Moriarty v. Bradt*, 827 A.2d 203, 222-223 (N.J. 2003).

South Carolina

South Carolina's Supreme Court ruled in 2003 that *Troxel* required a presumption of parental fitness, and could only be overcome by clear and convincing evidence of parental unfitness. *Camburn v. Smith*, 586 S.E.2d 565 (S.C. 2003). Even if the parent's refusal "is simply not reasonable in the court's view, [that] does not justify government interference in the parental decision." *Id.* at 579. A year later, the Court interpreted *Troxel* to require that "one of two evidentiary hurdles must be met: the parent must be shown to be unfit by clear and convincing evidence, or there must be evidence of compelling circumstances to overcome the presumption that the parental decision is in the child's best interest." *Latimer v. Farmer*, 602 S.E.2d 32, 39 (2004).

Tennessee

Tennessee has held similarly. In rejecting a trial court grant of visitation many years before *Troxel*, the Supreme Court ruled that "[t]he trial court in this case engaged in the presumptive analysis we seek to avoid. Without finding that

the parents were unfit…, the court imposed its own notion of the children's best interests over the shared opinion of these parents, stripping them of their right to control in parenting decisions." *Hawk v. Hawk*, 855 S.W.2d 573, 582 (Tenn. 1993).

Alabama

Alabama has also taken a very strong interest in protecting a parental presumption of fitness. As far back as the 1980s, the Supreme Court had ruled that "[s]o strong is this presumption…that it can be overcome only by a finding, supported by competent evidence, that the parent seeking custody is guilty of such misconduct or neglect to a degree which renders that parent an unfit and improper person to be entrusted with the care and upbringing of the child in question." *Ex parte Mathews*, 428 So. 2d 58 (Ala. 1983). Based on this protection, the Court said, "the Constitution requires that a prior and independent finding of parental unfitness must be made before the court may proceed to the question whether an order disturbing a parent's 'care, custody, and control' of his or her child is in that child's best interests." *Ex parte E.R.G.*, 73 So. 3d 634, 644 (2011).

Arkansas

Arkansas jurisprudence on the issue of grandparent visitation clearly establishes that courts must evaluate such visitation under a strict-scrutiny framework. In a case where grandparents sued for visitation, the Arkansas Supreme Court found that "the trial court found Lea Ann to be a fit parent for all

purposes save one: making the decision about Brandon's relationship with his paternal grandparents." That was not enough to overcome the mother's fundamental right, though. The Court held that if the mother was "fit to care" for her son on a day-to-day basis, she was fit to determine his visitation, and the courts could not interfere without a compelling reason. *Linder v. Linder*, 72 S.W.3d 841, 857 (Ark. 2002).

Illinois

When examining Illinois' grandparent visitation statute, the Illinois Supreme Court declared it to be unconstitutional because it did not serve a compelling state interest. That statute allowed grandparents to sue for visitation when a couple was divorced, yet united in their opposition to grandparent visitation. The Court held that the law did not sufficiently protect the fundamental right of "fit parents who have determined that the visitation should not occur." *Lulay v. Lulay*, 739 N.E.2d 521, 534 (Ill. 2000).

Vermont

The Vermont Supreme Court determined that to protect a parent's fundamental rights, the parental decision about visitation must "be given a presumption of validity," *Glidden v. Conley*, 820 A.2d 197, 204-205 (Vt. 2003), because a dispute between a custodial parent and a grandparent "is not a contest between equals." In order to overcome this presumption, the petitioner "must show

circumstances like parental unfitness." *Id.* The Court held that the presumption required by constitutional precedents is "that a fit parent's decision governs in a dispute about visitation between the child and a third party…." *Id.* at 121.

CONCLUSION AND PRAYER

This Court should follow the excellent example set forth by many of its sister state Supreme Courts. Whether Oklahoma, ("parental unfitness has been demonstrated"),[1] Maryland ("it is necessary first to prove that the parent is unfit…"),[2] or Montana ("When a grandparent petitions for visitation over a parent's objection, a court must first make a determination as to whether the objecting parent is a fit parent"),[3] the proper order is clear. The court must first require the third party to overcome with evidence the presumption that the parent is fit. Only then may the third party move on to proving that visitation or other access is in the child's best interest.

Respectfully submitted,

November 26, 2019

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[1] *Murrell v. Cox*, 226 P.3d 692, 698 (Okla. 2009).
[2] *McDermott v. Dougherty*, 869 A.2d 751 (Md. 2005).
[3] *Schwarz v. Schwarz (In re L.R.S.)*, 414 P.3d 285 (Mont. 2018).

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CERTIFICATE OF COMPLIANCE

I certify that this document was produced on a computer using Microsoft Word 365 and contains 3620 words, as determined by the computer software's word count function, excluding the sections of the document listed in Tex. R. App. P. 9.4 (i) (1).

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document was delivered on November 26, 2019, via electronic service to the parties and/or attorneys as listed below, in accordance with the Texas Rules of Civil Procedure.

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