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 THE TEXAS PUBLIC POLICY FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF RELATORS' PETITION FOR MANDAMUS

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INTEREST OF *AMICUS CURIAE*

The Texas Public Policy Foundation (the "Foundation") is a non-profit, non-partisan research organization dedicated to promoting liberty, personal responsibility, and free enterprise through academically sound research and outreach.

Since its inception in 1989, the Foundation has emphasized the importance of limited government, free market competition, private property rights, and freedom from regulation. In accordance with its central mission, the Foundation has hosted policy discussions, authored research, presented legislative testimony, and drafted model ordinances to reduce the burden of government on Texans. Specifically, the Foundation seeks to promote the welfare of children and the fundamental rights of Texas families to live free from unnecessary and unconstitutional government interference through its Center for Families and Children.

It is with this background and experience that the Foundation files this Brief in support of Relator's Petition for Mandamus.

The Foundation has paid all of the costs and fees incurred in the preparation of this brief.

SUMMARY OF ARGUMENT

Respondent abused her discretion and violated Relator's constitutional rights by awarding conservatorship rights to a non-relative who only had minimal interaction with the child during the brief period he lived with the child's mother. The award represents a Pandora's Box that, if allowed to remain open, could permit untold numbers of non-relatives and, indeed, even virtual strangers to children to obtain custody and visitation rights over the objections of fit parents. This case provides the Court with an opportunity to correct a grave injustice in the application of Texas statutes protecting the fundamental right of a father to direct the care, custody, and control of his daughter free from outside interference. Further, it provides the Court with an opportunity to ensure the protection of the fundamental right of all fit parents in Texas to do the same going forward.

The United States and Texas Constitutions provide expansive protection of the fundamental rights of fit parents to the uninterrupted care, custody, and control of their children. *See, e.g., Troxel v. Granville*, 530 U.S. 57, 65 (2000); *Wiley v. Spratlan*, 543 S.W.2d 349, 352 (Tex. 1976). An essential element of this right is the presumption that fit parents naturally act in the best interests of their children and the government may not interfere with decisions parents make for their children, including decisions concerning who they allow to be involved in the lives of their

children, except in very limited circumstances. *Troxel 530 U.S.* at 68-69; *Parham v. J.R.*, 442 U.S. 584, 602 (1979).

Respondent's decision to award J.D. possessory conservatorship rights to C.J.C.'s daughter over C.J.C.'s objections represents an unconstitutional interference with C.J.C.'s fundamental rights as a parent and misapplication of Texas law. It also establishes a dangerous precedent for granting non-relatives and, indeed, virtual strangers to the child more rights to custody and access than the law grants to grandparents and other blood relatives. Because this Court expanded standing with its decision in *In the Interest of H.S.*, 550 S.W.3d 151 (Tex. 2018), now this Court must make it clear that when a standing statute does not explicitly include the fit parent presumption, courts must still apply that presumption prior to interfering with the fundamental right of a fit parent to make decisions concerning the care, custody, and control of his child. Accordingly, this Court should grant Relator's petition for mandamus relief and find that the constitutional principles articulated by the United States Supreme Court in *Troxel* extend equally to statutes governing suits seeking conservatorship and visitation filed by both relatives and non-relatives.

ARGUMENT

I. THE UNITED STATES AND TEXAS CONSTITUTIONS PROVIDE EXPANSIVE PROTECTION OF THE FUNDAMENTAL RIGHT OF PARENTS TO DIRECT THE CARE, CUSTODY, AND CONTROL OF THEIR CHILDREN.

Both the United States and Texas Constitutions have long recognized that the parent-child relationship is a fundamental right that government may not interfere with except in the most limited circumstances. *See, e.g., Troxel v. Granville*, 530 U.S. 57, 65 (2000); *Wiley v. Spratlan*, 543 S.W.2d 349, 352 (Tex. 1976). This right is expansive, extending to even the most basic decisions that parents make for their children. *Parham v. J.R.*, 442 U.S. at 602 (explaining that "our jurisprudence has historically reflected Western civilization concepts of the family as a unit with broad parental authority over minor children."). Accordingly, Due Process requires that Courts give broad deference and protection to decisions that parents make concerning the upbringing of their children. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (stating that "the private interest […] of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection."). This deference derives from the presumption that, absent strong evidence to the contrary, natural parents are fit and act in the best interests of their children, creating no reason for the state to question or otherwise interfere with the private decisions made by parents. *See, e.g., Troxel*, 530 U.S. at 68-69; *Parham*,

442 U.S. at 602. Indeed, this deference is so broad that is extends to situations where parents have not been "model parents" and prohibits courts from substituting their own judgment for that of a fit parent even if a better decision could have been made. *See Santosky v. Kramer*, 455 U.S. 745, 753 (1982); *In re Derzapf*, 219 S.W.3d 327, 334 (Tex. 2007).

II. THE DISTRICT COURT ABUSED ITS DISCRETION AND VIOLATED RELATOR'S CONSTITUTIONAL RIGHTS BY AWARDING CONSERVATORSHIP RIGHTS TO A NON-RELATIVE OVER RELATOR'S OBJECTIONS.

1. Even though certain standing statutes allow non-parents to file a custody suit without the application of the fit parent presumption, the Constitution requires that courts still apply the fit parent presumption before awarding conservatorship rights or access over the objections of the child's natural parents.

Acting in his role as natural father of the child, C.J.C. decided that it was in his daughter's best interests for him to maintain sole custody of the child following the death of her mother. As a consequence of this decision, C.J.C. resisted efforts by the child's maternal grandparents and J.D., the Real Party in Interest who was engaged to and lived with the child's mother for several months before her death, to obtain custodial rights to the child. Despite the fact that no evidence was presented that C.J.C. was in anyway an unfit parent nor that a "powerful countervailing interest" existed to deny deference to C.J.C.'s decision as required by *Stanley*, the District Court chose to substitute its own judgment for that of C.J.C. in awarding

rights and generous access and possession to J.D. This action constituted an abuse of discretion by the District Court and a violation of C.J.C.'s constitutional rights.

In the wake of the United States Supreme Court's decision in *Troxel v. Granville*, the State of Texas made fundamental changes to its statutes governing the ability of relatives, especially grandparents, to sue for custody of or access to their grandchildren. *See, e.g.* Tex. Fam. Code § 102.004; Tex. Fam. Code § 154.433. These changes set a much higher bar for relatives to overcome when petitioning for custodial or visitation rights. In such circumstances, those wishing to obtain these rights must overcome, by at least a preponderance of the evidence, the presumption that the child's parent is fit and acting in the child's best interests as well as that denial of access would "significantly impair the child's physical health or emotional well-being." *In re Pensom*, 126 S.W.3d 251, 256 (Tex. App.—San Antonio 2003); Tex. Fam. Code. § 154.433. The standing statutes relied upon to grant J.D. standing in the present case, Tex. Fam. Code § 102.003(a)(9) and Tex. Fam. Code § 102.003(a)(11), currently lack these requirements, creating an incongruity within the Family Code that provides individuals with the most minimal connection to a child greater rights to file conservatorship suits against the child's parents than are afforded to the child's own relatives. Such a result is clearly contrary to the constitutional principles outlined in *Troxel* and it is unfathomable that it was intended by the Legislature.

While holding that Tex. Fam. Code § 154.433 was facially constitutional under the standards set by *Troxel*, the Court in *Pensom* cautioned that the statute was only constitutional if "its application protects parents' fundamental rights under the Due Process Clause," and if construed "narrowly and in a manner consistent with the constitutional principles stated in *Troxel*." *In re Pensom*, 126 S.W.3d at 256. This standard is consistent with the overwhelming weight of precedent that any action of the state that impacts the natural right of parents and children in the sanctity of their relationship with one another is subject to strict scrutiny. *See, e.g.*, *Troxel*, 530 U.S. at 80 (Thomas, J., concurring) (noting that strict scrutiny is the proper standard of review to apply to "infringements of fundamental rights."); *Wiley*, 543 S.W.2d at 352 (stating that "actions which break the ties between a parent and child […] should be strictly scrutinized."). Accordingly, this Court should apply strict scrutiny when reviewing the District Court's decision and construe all statutes governing suits for possession and access to a child filed by a non-parent narrowly and in favor of vindicating the constitutional rights of C.J.C. and all Texas parents.

2. The District Court's ruling amounts to an unconstitutional end-run around higher court rulings denying Grandparents' petition for joint managing conservatorship or access to C.J.C.'s child.

Writing for a plurality of the Court in *Troxel*, Justice Sandra Day O'Connor noted that the Washington visitation statute at issue in that case was "breathtakingly broad." *Troxel*, 530 U.S. at 67. The same phrase may be used to describe the District Court's ruling in the present case.

One of the more fascinating aspects of this case is that the child's grandparents, who were actively involved in the child's life since birth, were denied standing to sue for custody and visitation while J.D., a non-relative with minimal history with the child, was named as a possessory conservator with more rights than provided in the Texas Family Code for a non-parent possessory conservator and was given generous periods of possession with the child. Grandparents were the original intervenors who petitioned for joint managing conservatorship of Relator's child after the mother's death, with J.D. filing his petition approximately one month later after Relator moved to strike Grandparents for lack of standing. Respondent denied Relator's motion to strike both Grandparents' and J.D.'s claims, but the Court of Appeals later dismissed Grandparents' claim on mandamus for lack of standing. This Court denied mandamus relief to Grandparents effectively upholding the dismissal of their claim. At that point, only J.D.'s petition remained live. In a decision that can only be described as a creative end-run around denial of rights and

access to Grandparents and the fundamental right of C.J.C. in his relationship with his daughter, Respondent not only appointed J.D. as a possessory conservator of the child, but also ordered that Grandparents be present at every visit during the first four months of his possession schedule. Rec. 40 (Tr. at 133:22-25) (May 8, 2019). Respondent even awarded Grandparents rights through J.D. by handwriting into the order that J.D. has the right to attend school activities accompanied by Grandparents, at Grandparents' election. Rec. 46:2. Respondent took the even more brazen step of specifically stating that J.D. had the right to allow the child to spend time with Grandparents even without J.D. being present. Rec. 40 (Tr. at 137:21-138:6) (May 8, 2019). This seems to be little more than a thinly veiled attempt at circumventing the rulings of the Court of Appeals and this Court denying Grandparents' petition for conservatorship or grandparent access to the child. If allowed to stand, Respondent's order in this case will provide a blueprint for other courts to exploit an unintended loophole in the Texas Family Code to undermine the orders of higher courts with which they disagree. Respondent's decision is not only unconstitutional, it also sets a dangerous precedent that non-relatives and, indeed, virtual strangers to the child possess greater rights to custody and access than grandparents, other blood relatives, and even the child's natural parents.

III. THE PRESENT CASE IS DISTINGUISHABLE FROM THE CASE THAT GAVE RISE TO THIS COURT'S DECISION IN *IN THE INTEREST OF H.S.*, 550 S.W.3D 151 (TEX. 2018).

This Court previously denied Relator's petition for mandamus relief on the issue of standing without full briefing. Therefore, Texas trial courts are left with the precedent set by the Court of Appeals in this case extending this Court's holding from *In the Interest of H.S.* to allow non-parents like J.D. with relatively minimal history with a child greater standing rights to seek conservatorship than grandparents and other family members.

It is important to note that the present case is distinguishable from this Court's opinion in *H.S.* While this Court expressed no opinion on whether the Grandparents in *H.S.* were actually entitled to conservatorship or visitation rights, the majority's analysis of the "actual care, control, and possession" requirement under Texas Family Code § 102.003(a)(9) supports Relator's petition for mandamus relief. *In the Interest of H.S.*, 550 S.W.3d at 163. This Court held that a nonparent satisfies the "actual care, control, and possession" requirement if:

> "for the requisite six-month time period, the nonparent served in a parent-like role by (1) sharing a principle residence with the child, (2) providing for the child's daily physical and psychological needs, and (3) exercising guidance, governance, and direction similar to that typically exercised on a day-to-day basis by parents with their children."

In the Interest of H.S., 550 S.W.3d at 160. The only person who reasonably could be said to have met the three prongs of this Court's analysis in the present case is

Relator. The record is clear that J.D. never served as the primary caretaker or provider for C.J.C.'s child nor did the child ever reside exclusively with J.D. In fact, upon the death of the child's mother, the child immediately moved in with C.J.C. and remained exclusively in his care and custody until the District Court issued its order appointing J.D. Temporary Possessory Conservator of the child.

Now that the District Court has granted conservatorship rights and possession to J.D., this case is ripe for this Court to review. There is considerable evidence that the child has no significant relationship or emotional bond with J.D, having repeatedly told her counselor that she does not want to go with J.D. and physically recoiling when asked by the counselor if she would be comfortable with J.D. giving her a bath. Rec. 40 (Tr. 75:6-76:8) (May 8, 2019). By contrast, the child in *H.S.* had a close, special relationship with her grandparents having continuously lived with them for the first 23 months of her life during which time her grandparents had served as her "primary caretakers and providers" for the eight months leading up to filing suit. *In the Interest of H.S.,* 550 S.W.3d at 151. Bearing in mind the facts of the present case and the overwhelming weight of constitutional precedent holding that the fundamental right of natural parents in the exclusive care, custody, and control of their children is presumptively superior to the interests of any other relative or non-relative and may not be interfered with by the government absent a

compelling state interest, the District Court's order constitutes a clear and unconstitutional abuse of discretion.

CONCLUSION

The District Court's order in this case has created a constitutional paradox in which relatives of a child are denied even standing to pursue custodial or visitation rights under statutes like Texas Family Code Sections 102.004 and 154.433 as well as Texas cases interpreting *Troxel*, but an unrelated man who has minimal connection to the child is able to obtain custodial rights and a possession schedule over a fit parent's objections. If allowed to stand, the District Court's ruling will set a dangerous precedent by which unrelated individuals are afforded greater rights with respect to children than blood relatives or even the child's own parents. This result is clearly contrary to the Constitution, the overwhelming weight of United States Supreme Court and Texas Supreme Court precedent, and the Legislature's intention when it worked to ensure that Family Code Sections 102.004 and 154.433 complied with the constitutional principles articulated in *Troxel*. Accordingly, this Court should grant Relator's petition for mandamus relief and find that because statutes like Texas Family Code Sections 102.003(a)(9) and 102.003(a)(11) do not explicitly contain the same protections as Sections 102.004 and 154.433, this Court needs to make it clear that the constitutional protections articulated by the United

States Supreme Court's decision in *Troxel* still apply even when a non-relative is found to have standing.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with the typeface requirements of Tex. R. App. P. 9.4(e) because it has been prepared in a conventional typeface no smaller than 14-point for text and 12-point for footnotes. This document also complies with the word-count limitations of Tex. R. App. P. 9.4(i), because it contains 2,756 words, excluding any parts exempted by Tex. R. App. P. 9.4(i)(1).

/s/Robert Henneke
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been forwarded to the following persons via the Court's electronic filing system this 13th day of August, 2019.

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