No. 19-0694

IN THE SUPREME COURT OF TEXAS

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 AMICUS CURIAE ALLIANCE DEFENDING FREEDOM IN SUPPORT OF RELATOR'S PETITION FOR MANDAMUS

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

Alliance Defending Freedom (ADF) is a nonprofit legal organization that provides training, funding, and direct litigation services to protect civil rights, particularly the freedoms of speech and religion, the sanctity of human life from conception until natural death, and the integrity of marriage and the family. ADF has been involved in dozens of legal matters throughout the United States involving parental rights, including the rights of natural parents in custody and visitation issues, the rights of parents to raise their children according to their faith, and the rights of parents to educate their children at home.

SUMMARY OF ARGUMENT

The right of a parent to care for his or her child "is perhaps the oldest of the fundamental liberty interests" recognized by the Supreme Court. *Troxel v. Granville*, 530 U.S. 57, 65 (2000). Any state action significantly limiting that right must, at a minimum, establish that the child would suffer some type of harm if he or she were to remain in the care of the parent or parents. *Id.* at 67.

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[1] No fee was paid or will be paid to amici or its counsel for preparing and filing this brief. *See* Tex. R. App. P. 11(c).

But here, the District Court required no such showing of harm. Instead, it held that the child's natural father must split conservatorship with someone unrelated to the child and with whom the child has lived less than a year—with no indication that the father is unfit to care for the child and over the father's express objections. Because the District Court's ruling gave no weight to the constitutional requirement that a parent's decision is presumed to be in the child's best interest, this Court should reverse.

ARGUMENT

I. The District Court violated Relator's parental rights under the U.S. and Texas Constitutions.

The Texas statutory scheme for Suits Affecting the Parent-Child Relationship is subject to constitutional limitations.

Both this Court and the U.S. Supreme Court "have long recognized that due process 'guarantees more than fair process' and 'provides heightened protection against government interference with certain fundamental rights and liberty interests.'" *In re N.G.*, 577 S.W.3d 230, 235 (Tex. 2019) (per curiam) (quoting *Troxel*, 530 U.S. at 65). And "[o]ne of the most fundamental liberty interests" is "the interest of parents in the care, custody, and control of their children."

Id.; *accord Troxel*, 530 U.S. at 65–66 ("[T]he custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.").

A. Under *Troxel*, a fit parent's decision about visitation is constitutionally presumed to be in the child's best interest.

Troxel arose in a context nearly identical to the facts here. An unmarried couple had a child out of wedlock. And after the child's father died, the child's paternal grandparents sued for visitation rights under a Washington statute. That law gave nearly anyone standing to seek a visitation order on the mere ground that it would be in the child's best interest.

There were two elements of the Washington law that led the Supreme Court to conclude it was unconstitutional.

First, the standing to bring a suit for visitation was "breathtakingly broad." *Troxel*, 530 U.S. at 67. Any party asserting that visitation rights would be in the child's best interest had standing to challenge a fit parent's determination. *Id.*

Second, the Washington law gave no weight to the constitutional rule that a parent's decision is presumed to be what is best for the child. The Supreme Court stated that, "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." *Id.* at 68–69.

This is more than a platitude. Like any other fundamental constitutional right, there must be a showing that the burden placed on parental rights serves a compelling governmental interest not otherwise served. *See Wisconsin v. Yoder*, 406 U.S. 205 (1972). So in the context of visitation disputes, *Troxel* teaches that, by itself, a court's view that the requested visitation would serve the "best interest of the child" is constitutionally insufficient.

B. The District Court improperly disregarded the constitutional presumption and substituted its judgment for the Relator's.

This Court has meticulously and repeatedly insisted that a showing of best interest, standing alone, is not constitutionally adequate to override a parent's constitutional rights.

For example, in the context of termination of parental rights, this Court noted that Texas law allows for involuntary termination of parental rights only when "clear and convincing evidence supports that a parent engaged in one or more of the twenty-one enumerated grounds for termination *and* that termination is in the best interest of the child." *In re C.W.*, No. 18-1034, 2019 WL 5280809, at *1 (Tex. Oct. 18, 2019) (per curiam) (quoting Tex. Fam. Code § 161.001(b)) (emphasis added); *see also Schoenfeld v. Onion*, 647 S.W.2d 954, 955 (Tex. 1983) (per curiam).

Likewise, in the context of a suit for visitation rights, this Court proclaimed that although Texas "[t]rial courts have considerable discretion" in "suits affecting the parent-child relationship," a trial court "cannot infringe on the fundamental right of parents to make child rearing decisions simply because [it] believes a better decision could be made." *In re Scheller*, 325 S.W.3d 640, 642 (Tex. 2010) (per curiam) (quoting *Troxel*, 530 U.S. at 72–73).

And similarly, this Court recognized that the Texas Legislature amended the grandparent visitation statute to reflect the holding 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). Previously, that statute merely required a showing that the requested visitation rights were in the child's best interest. The prior law was indistinguishable from the Washington statute insofar as it failed to protect the legal presumption that parents act in their children's best interest. Indeed, even though the Texas grandparent visitation statute had a more limited basis of standing than the Washington statute, it was still amended to correct the constitutional flaw—to now require more than a "best interest" determination. Best interest inquiries remain relevant, but only after a showing of the level of harm required by the amended statute.

Any statutory scheme that grants control over parental decision making on a mere "best interest" determination improperly presents the opportunity for judges to substitute their own judgment for that of the parents. This Court has wisely, and repeatedly, repudiated such determinations. *See, e.g.*, *In re Derzapf*, 219 S.W.3d at 333.

C. Regardless of whether the non-parent has standing to seek visitation, he must carry his burden of rebutting the parental presumption to prevail on the merits.

In the very recent case of *In re H.S.*, 550 S.W.3d 151 (Tex. 2018), this Court considered the question of non-parent standing in custody and visitation disputes.

There, grandparents sought conservatorship of their grandchild who had lived in their home and under their control for most of the child's life. The grandparents did not rely on the grandparent visitor section of the Code but relied on the same section in play here, which confers "standing on nonparents who have had 'actual care, control, and possession of the child for at least six months.'" *Id.* at 152 (quoting Tex. Fam. Code § 102.003(a)(9)).

Discussing *Troxel,* the *H.S.* majority noted a material distinction between the legislative grant of *standing* and the ultimate determination of the *merits*:

> Nor does section 102.003 govern the merits of a SAPCR; again, the statute addresses only who may file a suit affecting the parent–child relationship, not what a petitioner must show to obtain the relief she seeks. The merits of a SAPCR petition are governed by other statutes that contain additional safeguards. *See, e.g.*, Tex. Fam. Code § 153.131 (the appointment of the parent or parents as managing conservators is in the child's best interest unless the court

> finds that the appointment "would significantly impair the child's physical health or emotional development").

Id. at 162.

This distinction is crucial. Whatever may be the case for standing, it is beyond question that it is unconstitutional to apply a statute that interferes with parental rights in visitation matters without giving proper weight to the constitutional presumption that parents act in the child's best interest.

A review of the three relevant statutory provisions allowing non-parents to seek visitation or custodial rights over a parent's objection illustrates the point. The question is this: *what is the required showing to prevail on the merits?*

First, in grandparent visitation cases, the grandparents must first overcome the parental presumption by proving "denial of possession of or access to the child would significantly impair the child's physical health or emotional well-being." Tex. Fam. Code § 153.433(a)(2). This determination is followed by a consideration of whether the child's best interest would be served by granting the requested visitation.

Second, as noted in *H.S.,* in a proceeding for managing conservatorship, the parental presumption is taken into account by the

requirement of Tex. Fam. Code § 153.131. That statute mandates the appointment of the parent or parents as managing conservators in the child's best interest unless the court finds that the appointment "would significantly impair the child's physical health or emotional development." Tex. Fam. Code § 153.131(a); *accord H.S.*, 550 S.W.3d at 162. Even if the requisite showing of harm is made to deny the parent's appointment as managing conservator, there must be a further determination that the proposed alternative would be in the child's best interest.

In both of these statutory schemes, a best interest determination *follows* the finding of a form of significant harm.

But the third option—a suit for possessory conservatorship and the one in question here—has no statutory requirement of any form of proof that takes the parental constitutional presumption into account. The controlling statute reads in full as follows:

> § 153.006. Appointment of Possessory Conservator
>
> (a) If a managing conservator is appointed, the court may appoint one or more possessory conservators.
>
> (b) The court shall specify the rights and duties of a person appointed possessory conservator.

> (c) The court shall specify and expressly state in the order the times and conditions for possession of or access to the child, unless a party shows good cause why specific orders would not be in the best interest of the child.

The only limiting provision is the general best interest standard in § 153.002. As such, it is constitutionally suspect.

In *H.S.*, the Court held that the former fiancé of a deceased parent may have standing to bring an action to determine visitation rights but that the merits of such an action may not be premised on the grounds of best interest alone. Again, the *H.S.* majority grounded its opinion on the fact that a showing of significant harm was required by the managing conservatorship statute.

But in suits for possessory conservatorship, the governing statute lacks any mechanism for protecting the constitutionally required presumption that parents act in the best interest of their child. No showing of harm is required. All that is required is a mere determination that visitation would be in the best interest of the child.

Thus, on its face, § 153.006 is unconstitutional under *Troxel* and the long line of decisions of this Court prohibiting judges from substituting their judgment as to what is best for a child over and against the decision by a fit parent.

II. This Court can, and should, broadly interpret § 153.006 to avoid the District Court's constitutional error.

Even so, this Court can (and should) avoid the constitutional conflict by broadly interpreting § 153.006 to preserve parental rights.

Under § 153.006(a), a court may appoint a possessory conservator "*[i]f a managing conservator is appointed*." But most parents are never appointed managing conservators of their children. Such an appointment cannot be made absent divorce, a child abuse proceeding, or some other suit affecting the custody of children which seeks to appoint a managing conservator. When, as here, there is no challenge to the parent's authority other than a claim to possessory conservatorship, there is no reason to appoint the parent as the managing conservator. He or she is the child's parent and that is all the authority needed. The parent is not subject to any court's ongoing supervision.

The situation would be entirely different if the proceeding between the child's mother and father was ongoing. Third parties could potentially get limited possessory rights in such a case.

Section 153.006's failure to require a showing more than best interest thus makes sense, to some degree, when it is understood to be only available as ancillary to an appointment of a managing

conservator. The statutory language requires a showing of a significant harm to name a managing conservator. If possessory rights flow only after the showing of such a harm, the constitutional considerations are far closer to the norm required by *Troxel*. But when possessory suits are allowed without any showing of harm, the constitutional error is obvious since a mere best interest finding will override a parent's decision.

Without a limiting interpretation, § 153.006 is unconstitutional as applied here. No parent can have their decision about visitation overturned—whether it involves a grandparent or a former live-in fiancé—just because a judge thinks it is in the child's best interest to do so.

CONCLUSION

A parent's interest "in the care, custody, and control" of his children is "[o]ne of the most fundamental liberty interests" and must be protected. *In re N.G.*, 577 S.W.3d 230, 235 (Tex. 2019) (per curiam). But instead of protecting this fundamental constitutional right, the District Court violated it by refusing to follow the constitutional presumption that a parent's decision about the "care, custody, and

control" of his child, including matters of visitation, is in the child's best interest. This Court should reverse.

Respectfully submitted this 26th day of November 2019.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief contains 2,353 words, excluding the parts exempted by Tex. R. App. P. 9.4(i), according to the word count of the computer program used to prepare it. Further, this brief complies with the typeface requirements of Tex. R. App. P. 9.4(e) because it has been prepared in a proportionally spaced typeface using Century Schoolbook 14-point font.

Date: November 26, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on November 26, 2019 a true and correct copy of the foregoing Brief of *Amicus Curiae* Alliance Defending Freedom filed electronically with the Texas Supreme Court has been forwarded to the following persons via the Court's electronic filing system:

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