

No. 19-0694

In the Supreme Court of Texas

IN RE C.J.C.,

Relator.

On Petition for Writ of Mandamus
from the Second Court of Appeals, Fort Worth

**BRIEF FOR THE STATE OF TEXAS
AS AMICUS CURIAE IN SUPPORT OF RELATOR**

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STATEMENT OF INTEREST OF AMICUS CURIAE

The State of Texas has an interest in proceedings involving the care and custody of children within this State. The State’s “fundamental interest” in such proceedings “is to protect the best interest of the child.” *In re M.S.*, 115 S.W.3d 534, 548 (Tex. 2003). The State also has a weighty interest in respecting and protecting parental rights, reflecting the fact that the “parent and child share a ‘commanding’ and ‘fundamental’ interest” in preventing any unnecessary disruption in their relationship. *In re A.C.*, 560 S.W.3d 624, 630 (Tex. 2018) (quoting *Santosky v. Kramer*, 455 U.S. 745, 758–59 (1982)). No fee has been or will be paid for the preparation of this brief.

TO THE HONORABLE SUPREME COURT OF TEXAS:

In awarding possessory rights to Mother's former boyfriend over Father's objection, the trial court disregarded the presumption that a fit parent—and there is no suggestion Father is not a fit parent—acts in his child's best interest. The record does not support such infringement on a parent's fundamental rights. This is the rare and extraordinary case in which the Court should grant Relator's petition for writ of mandamus.

STATEMENT OF FACTS

Mother and Relator Father were joint managing conservators of their child, each having a roughly equal right to possession. *In re C.*, No. 02-18-00404-CV, 2019 WL 545722, at *1 (Tex. App.—Ft. Worth, Feb. 12, 2019, orig. proceeding). Mother later filed, over Father's objection, a petition to modify the custody order to change child-support arrangements. *Id.* While that modification proceeding was pending, Mother tragically died in a car accident. *Id.* at *2. Child thereafter resided solely with Father. *Ibid.*

Child's maternal grandparents ("Grandparents") and Mother's live-in boyfriend (and fiancé of three months), J.D., sought to intervene in the modification proceeding. *Ibid.* The trial court determined that each had standing to seek relief. *Ibid.* Up on mandamus review, the Fort Worth Court of Appeals held that Grandparents lacked standing to seek conservatorship, possession, or access to Child. *Id.* at *4–6 (discussing Tex. Fam. Code §§ 102.004, 153.433(b)). But the court of appeals held that J.D. did have standing to seek custody rights, based on sections

102.033(a)(9) and 102.033(a)(11) of the Family Code and this Court’s decision in *In re H.S.*, 550 S.W.3d 151 (Tex. 2018). *In re C.*, 2019 WL 545722, at *7–8.

The trial court held a hearing on J.D.’s request to be named as joint managing conservator of Child, with rights of possession and access. R.40. At the conclusion of the hearing, the court named Father temporary sole managing conservator. R.40:133. But the court also ruled that J.D. would be a temporary possessory conservator. *Id.* Among the rights the court awarded to J.D. was a generous visitation schedule that allowed Grandparents unchaperoned access to Child at J.D.’s discretion. R.40:133–34.

The trial court then entered temporary orders affecting the parent-child relationship, which spelled out the rights and duties of Father and J.D. R.46. The rights awarded to J.D. exceeded the default rights provided by statute to temporary possessory conservators in the Code. *See* Tex. Fam. Code § 153.376(a). For instance, alongside additional rights to Child’s medical information, the court included in a handwritten notation “the right to receive information regarding school activities and to attend such activities” accompanied by Grandparents. R.46:2. The orders also dictated a visitation schedule, R.46:6, with detailed instructions for surrender of the child to J.D. and Grandparents, R.46:7. The temporary orders obligated Father to comply with these obligations at the threat of jail time. R.46:9–10.*

* Father’s request for mandamus review of the temporary orders in the Fort Worth Court of Appeals was denied. *See In re C.C.*, No. 02-19-00244-CV, 2019 WL 3064472, at *1 (Tex. App.—Fort Worth, July 12, 2019, orig. proceeding [mand. pending]) (per curiam).

SUMMARY OF THE ARGUMENT

In issuing the temporary orders in this case, the trial court abused its discretion in multiple ways. It disregarded the presumption that a fit parent acts in his child's best interest. It swept beyond the standard rights provided to non-parent possessory conservators in section 153.376(a) with nary a mention of why doing so, over the objection of a fit parent, was in the child's best interest. It also effectively granted Grandparents possessory rights to Child over Father's objection.

Although there are unique circumstances in which a non-parent should be given the obligations and rights ordinarily belonging to a parent, such circumstances do not appear in this record. The trial court's decision infringes on fundamental constitutional rights. Mandamus should be granted.

ARGUMENT

Relator is entitled to mandamus relief. "Mandamus," of course, is "an extraordinary remedy." *In re Prudential Ins. Co. of America*, 148 S.W.3d 124, 138 (Tex. 2004) (quotation omitted). But chief among the "situations in which mandamus relief [is] appropriate," *In re McAllen Med. Ctr., Inc.*, 275 S.W.3d 458, 468 (Tex. 2008) (quotations omitted), is "to correct a clear abuse of discretion," *City of Houston v. Hous. Mun. Emps. Pension Sys.*, 549 S.W.3d 566, 577 (Tex. 2018) (quotations omitted). A court abuses its discretion when it issues "a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law." *In re Dawson*, 550 S.W.3d 625, 628 (Tex. 2018) (per curiam) (orig. proceeding) (quotations omitted). Mandamus relief is particularly appropriate when, as here, the

challenge concerns otherwise unreviewable temporary orders from a trial court. *See, e.g., Dancy v. Daggett*, 815 S.W.2d 548, 549 (Tex. 1991).

In issuing the temporary orders in this case, the trial court abused its discretion in multiple ways. It swept beyond the standard rights provided to non-parent possessory conservators in section 153.376(a) with nary a mention of why doing so, over the objection of a fit parent, was in the child’s best interest. It also effectively granted Grandparents possessory rights to Child over Father’s objection. Because of the trial court’s disregard of governing law, this is the “exceptional case” in which mandamus relief is appropriate. *In re Prudential*, 148 S.W.3d at 138.

I. The Trial Court Disregarded the Presumption that a Fit Parent Acts in His Child’s Best Interest.

The trial court lost sight of the significant constitutional implications in this case. The court never so much as intimated that Child’s one remaining natural guardian, Father, was an unfit parent. But the Supreme Court has categorically held that when a parent is fit—that is, when he “adequately cares for his . . . children”—“there will normally be no reason for the State to inject itself into the private realm of the family to further question [his] ability . . . to make the best decisions concerning the rearing of [his] children.’” *Troxel v. Granville*, 530 U.S. 57, 68–69 (2000). Yet, over Father’s objection, the trial court made Mother’s former boyfriend, J.D., a temporary non-parent possessory conservator and granted J.D. significant rights and duties backed by court order.

In *Troxel*, a plurality of the Court held that an order granting grandparents visitation rights to their deceased son’s children over the mother’s objection

unconstitutionally infringed on the mother's due process right to make decisions regarding her children's care, custody, and control. *Id.* at 72–73 (plurality op.). In keeping with *Troxel*, this Court has since observed that a State may not “infringe on the fundamental rights of parents to make child rearing decisions simply because a state judge believes a ‘better decision’ could be made.” *In re Derzappf*, 219 S.W.3d 327, 333 (Tex. 2007) (per curiam) (orig. proceeding) (quoting *Troxel*, 530 U.S. at 72–73).

Troxel and its progeny traveled well-trodden terrain. It has long been a “cardinal” rule that “the 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.” *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). This right is one of the most fundamental liberty interests anyone can have. *See, e.g., Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). Indeed, in keeping with deeply rooted “Western civilization concepts of the family as a unit with broad parental authority over minor children,” the law necessarily “rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment for making life’s difficult decisions.” *Parham v. J.R.*, 442 U.S. 584, 602 (1979). Courts, in turn, must presume “that fit parents act in the best interest of their children” and refrain from imposing their own judgments in place of a fit parent’s decision as to what is in the child’s best interest. *Troxel*, 530 U.S. at 68.

There is no suggestion in the record that Father, with whom Child has resided since Mother’s death, is an unfit parent. In all likelihood that should have been the

end of the matter for purposes of awarding temporary substantive custody rights. As this Court has put it, “there is no reason to inject the State into the family realm when a parent adequately cares for his children.” *In re Scheller*, 325 S.W.3d 640, 644 (Tex. 2010) (orig. proceeding) (per curiam).

II. The Statutory Right to Be Heard is Not a Right to Win.

The trial court did not have to set Texas’s non-parent standing statutes on a collision course with parents’ constitutional due process rights by entering the sweeping temporary orders it did. Texas’s statutes providing that a non-parent may be heard under certain circumstances, *see* Tex. Fam. Code §§ 102.003(a)(9), (a)(11), do not compel the conclusion that a non-parent who meets the bare-minimum requirements of standing is therefore entitled to substantive possessory rights, particularly over the objection of a fit parent. Standing, after all, “does not mean the right to win; it is only a right to be heard.” *In re SSJ-J*, 153 S.W.3d 132, 137–38 (Tex. App.—San Antonio 2004, no pet.). And even statutes otherwise broad on their face are “given a construction consistent with constitutional requirements, when possible, because the legislature is presumed to have intended compliance with [the Constitution].” *Brady v. Fourteenth Court of Appeals*, 795 S.W.2d 712, 715 (Tex. 1990); *see also* Tex. Gov’t Code § 311.021 (“In enacting a statute, it is presumed that . . . compliance with the constitutions of this state and the United States is intended”). It is axiomatic that courts, as part of their duty to avoid “constitutionally suspect construction[s],” “*must* interpret . . . statutory language in a manner that renders it constitutional.” *City of Houston v. Clark*, 197 S.W.3d 314, 320 (Tex. 2006) (emphasis added).

Although “trial courts have considerable discretion in making temporary orders for a child’s safety and welfare in suits affecting the parent-child relationship,” that discretion is not without limits—constitutional and otherwise. *In re Scheller*, 325 S.W.3d at 642. A trial court’s temporary custody orders are subject to the provisions in chapters 153 and 154 of the Code. *See* Tex. Fam. Code § 105.001(g). Included among those is the requirement that the “terms of an order that . . . imposes restrictions or limitations on a parent’s right to possession of or access to a child may not exceed those that are required to protect the best interest of the child.” *Id.* § 153.193. And the law presumes that a parent, unless shown to be unfit, acts in the best interests of his child. *See, e.g., In re Derzapf*, 219 S.W.3d at 333; *accord Troxel*, 530 U.S. at 68. The trial court’s temporary orders gave no consideration to this statutory requirement.

III. Though There are Circumstances Where a Non-Parent Should Assume Parental Rights and Obligations, No Such Circumstances Appear in this Record.

There are rare circumstances in which non-parent guardians may assume the rights and obligations over the custody and care of children normally exercised by parents. The Legislature has appropriately provided non-parents with the ability to establish standing to assert their interests in court. *See* Tex. Fam. Code §§ 102.003(a)(9), (a)(11). In doing so, the “Family Code recognizes that a narrow class of non-parents, who have served in a parent-like role to a child over an extended period of time, may come to court to and seek to preserve that relationship, over a

parent's objections." *In re H.S.*, 550 S.W.3d at 163 (discussing Tex. Fam. Code § 102.003(a)(9)).

In re H.S. involve unusual circumstances like these. The Court concluded that a child's grandparents had standing in a suit affecting the parent-child relationship under section 102.003(a)(9). In so concluding, the Court pointed out that the child's grandparents "played an unusual and significant parent-like role" in the child's life. *Id.* at 163 (quotations omitted). It was, for instance, "undisputed that [the child's] principal residence, from the time she was born until she was almost two, was Grandparents' home." *Id.* at 160. Her grandparents were her "primary caregivers, providing for her everyday physical and emotional needs." *Ibid.* Indeed, while the child's mother was away for significant periods of time, "[t]hey paid for her food, clothes, and daycare"; "[t]hey managed and directed her day-to-day activities"; and they took primary responsibility for her medical treatment. *Ibid.* Even then, though, this Court was careful to "express no opinion on whether [the grandparents were] entitled to conservatorship or visitation rights with respect to [the child]." *Id.* at 163. The Court addressed only their standing to seek such relief. *Ibid.*

By contrast, it is doubtful that a live-in boyfriend who was never the child's primary caregiver and who had only occasional access to the child for a period of several months could ever—over the objection of the child's fit parent—be entitled to possessory conservatorship given the constitutional presumption that "fit parents act in the best interest of their children." *Troxel*, 530 U.S. at 68; *accord In re Derzapf*, 219 S.W.3d at 333. But at a minimum, before entering a temporary order awarding significant rights to J.D. as a temporary non-parent possessory conservator, the trial

court had an obligation to, “[a]s *Troxel* makes clear,” “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. App.—San Antonio 2003, orig. proceeding).

Moreover, the trial court effectively granted Grandparents possessory rights to Child over Father’s objection—going so far as to allow Grandparents to have unchaperoned access to Child in direct contravention of the court of appeals’ earlier holding, on mandamus review, that Grandparents did not meet their burden for grandparent-access rights under sections 102.004 and 153.433(b). This disregard of Texas law—to the derogation of Father’s weighty constitutional interests—warrants mandamus relief.

* * *

Trial courts must be cognizant of the serious constitutional implications at stake when awarding custody to a non-parent over the objection of a parent. The mechanical application of statutory provisions providing non-parents *standing* as a basis to award substantive rights, even if temporary, treads into treacherous constitutional terrain. Here, the trial court’s entry of temporary orders giving Mother’s live-in boyfriend possessory conservatorship over Child was a plain abuse of discretion. The court took this action despite making no suggestion that Father was an unfit parent. And it did so without explaining in detail just why this unusual arrangement was in the best interest of the child, given the presumption that a parent

acts in the best interest of his child. The record in this case does not reflect that the trial court took sufficient account of Father's weighty interests.

PRAYER

The Court should grant Relator's petition for writ of mandamus.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

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