Texas Public Policy Foundation

January 8, 2019

The Honorable Ken Paxton
Office of the Attorney General
Attn: Opinion Committee
P.O. Box 12548
Austin, TX 78711-2548

RE: RQ-0258-KP

Dear General Paxton,

The Texas Public Policy Foundation writes to support Representative James White's November 27, 2018 request (RQ-0258-KP) seeking your office's opinion on the elements, factors, or standards courts have considered and applied when balancing the rights of the state against the fundamental right of parents to raise their children free from government intrusion. In light of recent reports of Child Protective Services removing children from innocent parents, including a high-profile case out of Harris County in which Judge Michael Schneider ordered CPS to pay a sanction of $127,000 to Michael and Melissa Bright for lying to take custody of their children under a false allegation of physical abuse, it is vital that the public have confidence that the State of Texas recognizes the fundamental nature of the parent-child relationship and protects it from unnecessary and unconstitutional interference.

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 unconstitutional government interference through its Center for Families and Children.

Nearly a century of legal precedent from the U.S. Supreme Court and the Texas Supreme Court clearly recognizes that the parent-child relationship is a fundamental social institution that predates, exists independently of, and, indeed, outlives the state. The familial relationship is a key foundation upon which society is built and, as such, does not require outside authority for its

creation or continuance. Accordingly, it should be the public policy of the State of Texas to recognize the fundamental nature of the parent-child relationship and subject any policy or action of the government or courts that seeks to intervene in this relationship to strict scrutiny. While the state has an important role to play in protecting children from immediate risk of harm and has the right to intervene in situations where the child's health, safety, and well-being are threatened, such interventions should be narrowly tailored to protect the natural right parents and children have in their relationship with one another.

United States Supreme Court Precedent

A. The Parent-Child Relationship is a Fundamental Right under the U.S. Constitution

The Fourteenth Amendment to the United States Constitution protects the rights of citizens by prohibiting the states from depriving "any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws" (U.S. Const. amend. XIV, §1). Over the 150 years since the adoption of the Fourteenth Amendment, the Supreme Court has recognized a number of fundamental rights possessed by every citizen of the United States, which are so essential to individual liberty as to subject any action by government limiting these rights to close scrutiny. In a long string of cases dating back to 1923, the U.S. Supreme Court has recognized the familial relationship as a fundamental right and almost always applied strict scrutiny when examining state actions impacting these relationships, including the right of parents to direct the care and upbringing of their children. *See, e.g.*, *M.L.B. v. S.L.J.*, 519 U.S. 102, 113-17 (1996); *Santosky v. Kramer*, 455 U.S. 745, 753-54 (1982); *Parham v. J.R.*, 442 U.S. 584, 602-04 (1979); *Moore v. City of East Cleveland*, 431 U.S. 494, 499, 503-04 (1977); *Smith v. Organization of Foster Families*, 431 U.S. 816, 845-47 (1977); *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 639-40 (1974); *Stanley v. Illinois*, 405 U.S. 645, 651-58 (1972); *Wisconsin v. Yoder*, 406 U.S. 205, 213-14, 230-33 (1972); *Ginsberg v. New York*, 390 U.S. 629, 639-40 (1968); *Prince v. Massachusetts*, 321 U.S. 158, 165-66 (1944); *Pierce v. Society of Sisters*, 268 U.S. 510, 533-35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399, 401-02 (1923).

In its parental rights jurisprudence, the Supreme Court has recognized the fundamental nature of the parent-child relationship and protected it against government intervention in a number of contexts. We briefly examine a few important examples below.

A pair of landmark Supreme Court decisions in the 1920s, *Meyer v. Nebraska* (1923) and *Pierce v. Society of Sisters* (1925), laid the foundation for the recognition of the fundamental nature of the parent-child relationship. In *Meyer*, the Supreme Court struck down a Nebraska law that prohibited teaching school children in any language other than English declaring that it "unreasonably infringes the liberty guaranteed […] by the Fourteenth Amendment." *Meyer v. Nebraska*, 262 U.S. 390, 399. Justice McReynolds, writing for the majority, found that the Constitution protects "the right of the individual to […] marry, establish a home and bring up children […]." *Id.* Just two years later, the Court built on its decision in *Meyer* recognizing the

fundamental liberty interest of parents in the care and upbringing of their children free from governmental interference stating, "the child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Pierce v. Society of Sisters*, 268 U.S. 510, 535.

B. The Fundamental Right of Parents in their Children is Broad and Requires Deference

While *Meyer* and *Pierce* considered the fundamental right of parents to be free to raise their children free from government intrusion in the context of education, the precedent established by these decisions has been applied to a wide variety of questions involving state action that infringes upon the liberty interest of parents in the care, supervision, and upbringing of children. Indeed, the Supreme Court has consistently held that the scope of the right of parents in their children is broad and warrants considerable deference from the state.

In *Parham v. JR*, the Court held that "our jurisprudence has historically reflected Western civilization concepts of the family as a unit with broad parental authority over minor children." *Parham v. JR*, 442 U.S. 584, 602 (1979). This broad authority is based on two key presumptions. First, "parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions." The second presumption, which the Court noted was the most important, is that "the natural bonds of affection lead parents to act in the best interests of their children." *Id*. For these reasons, the state shall not intervene into the private realm of the family seeking to supersede parental authority absent a compelling interest. The Court in *Parham* emphasized this point in the strongest of terms stating that "our constitutional system long ago rejected any notion that a child is the 'mere creature of the State'" and "the statist notion that governmental power should supersede parental authority […] is repugnant to the American tradition." *Id.* at 602 – 603.

The presumption that parents have a broad fundamental right in their children and naturally act in their child's best interests means that state must give broad deference to this right. In *Stanley v. Illinois* (1972), for example, the Court struck down an Illinois statute that presumed unwed fathers are unfit to raise their children, 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." *Stanley v. Illinois*, 405 U.S. 645, 651.

This deference to and protection of the fundamental right of parents extends even to situations where parents have not been "model parents." *See, e.g., Santosky v. Kramer*, 455 U.S. 745 (1982). The Court in *Santosky* struck down a New York statute permitting the permanent removal of a child from their parents for "permanent neglect" by only a showing of a "fair preponderance of the evidence." *Id.* at 747. Writing for the majority, Justice Blackmun noted that "the fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents […]." *Id.* at 753. Justice Blackmun's opinion further underscored the strength of the fundamental rights of parents in their relationship with their children against state action by stating that "parents have a vital

interest in preventing the irretrievable destruction of their family life" and those facing the "forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs." *Id*. The Court further held that since "few forms of state action are both so severe and irreversible" as permanently separating a child from his or her parents, the Due Process Clause of the Fourteenth Amendment demands that the state clear a high bar of factual certainty. *Id*. at 747 – 48. While the Court noted that the precise burden of proof is properly for state legislatures and courts to decide, it held that the Constitution requires the burden be at least equal to, if not greater than, "clear and convincing evidence." *Id*. at 769 – 70. The Texas Family Code adopts the "clear and convincing evidence" standard for termination of the parent-child relationship. Tex. Fam. Code Ann. §161.001(b).

C. Strict Scrutiny Applies when Balancing Fundamental Rights of Parents with State Interests

The Supreme Court's decision in *Troxel v. Granville* in many ways encapsulated the Court's long history of recognizing the fundamental nature of the parent-child relationship, and led to many states enacting statutes defining and protecting parental rights. Writing for a plurality of the Court, Justice O'Connor provided a strong summation of the Supreme Court's jurisprudence on the question writing, "the liberty interest at issue in this case – 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). Justice Thomas, in his concurring opinion, agreed with the plurality of the Court in recognizing the "fundamental right of parents to direct the upbringing of their children," but noted that in issuing its decision the Court failed to apply the appropriate standard of review – strict scrutiny – to this fundamental right. *Id.* at 80 (Thomas, J., concurring). In the wake of *Troxel*, then-Attorney General Greg Abbott issued Texas's response to the case in Opinion No. GA-0260 concurring with Justice Thomas and announcing that, in the opinion of the Attorney General of the State of Texas, "the message of *Troxel* may thus be summarized: state statutes that infringe upon a parent's right to control the care and custody of his or her children are subject to strict scrutiny." *Tex. Op. Att'y Gen.* GA-0260.

Texas Supreme Court Precedent

Texas, like the U.S. Supreme Court, has consistently upheld the fundamental nature of the parent-child relationship.

A. Parents have a Presumptive Right in the Custody of their Children

The landmark Texas Supreme Court case *Wiley v. Spratlan* affirmed the "presumptive right of parents" in the custody of their children. *Wiley v. Spratlan*, 543 S.W.2d 349, 352 (Tex. 1976). In its decision, the Court held that "the natural right which exists between parents and their children is one of constitutional dimensions" and any action by the state impacting this relationship, particularly those "which break the ties between a parent and child […] should be strictly scrutinized." *Id*. Drawing on the "strong presumption" in Texas jurisprudence "that the

best interest of a minor is usually best served by keeping custody in the natural parents" as well as "modern theories of child welfare," the Court in *Wiley* declared that the "legal system should generally defer to the wishes of the child's parents" and require the state to "bear a serious burden of justification before intervention" into the parent-child relationship. *Id.* (citing *Herrera v. Herrera*, 409 S.W.2d 395 (Tex. 1966); *Gunn v. Cavanaugh*, 391 S.W.2d 753 (Tex. 1965); *Mumma v. Aguirre*, 364 S.W.2d 220 (Tex. 1963).

Subsequent decisions of the Texas Supreme Court have relied heavily on *Wiley* when upholding the fundamental right of parents in their children against actions by the state, often expressly applying strict scrutiny. *See, e.g.*, *Holley v. Adams*, 544 S.W.2d 367, 370 (Tex. 1976) ("As this case involves the right of the child to the benefit of the home and environment which will probably best promote its interest and the right of the parent to surround the child with proper influences […] this case must be strictly scrutinized."); *Holick v. Smith*, 685 S.W.2d 18, 21 (Tex. 1985) ("With the view that termination is such a drastic and grave measure that involuntary termination statues are strictly construed in favor of the parent […]"); *In Interest of GM*, 596 S.W.2d 846 (Tex. 1980) ("The termination of this right is complete, final, and irrevocable. It divests forever the parent and child of all legal rights, privileges, duties, and powers between each other […]. For these reasons the proceedings below must be strictly scrutinized.").

B. Parents Enjoy an Expansive Right of Privacy, Control, and Autonomy in Decision-Making

It is further clearly established by Texas precedent that the fundamental rights of parents extends well beyond the mere custody of their children. Numerous decisions of the Texas Supreme Court have recognized that parents enjoy an expansive scope of privacy, control, and autonomy in family decision-making that the government may not interfere with except in very limited circumstances. *See, e.g.*, *In re Scheller*, 325 S.W.3d 640, 644 (Tex. 2010) ("Parental control and autonomy is a 'fundamental liberty interest.'") (quoting *In re Derzapf*, 219 S.W.3d 327, 335 (Tex. 2007)).

Six years after *Troxel*, the Texas Supreme Court decided *In re Mays-Hooper*, a case with similar facts as *Troxel*. In directing the trial court to vacate its ruling granting a grandparent limited possession and access of her grandchild over the objections of the child's mother, the Texas Supreme Court applied the U.S. Supreme Court's finding in *Troxel* that "so long as a parent adequately cares for his or her child (i.e. is fit), there will normally be no reason for the State to inject itself into the private realm of the family." *In re Mays-Hooper*, 189 S.W.3d 777, 778 (Tex. 2006) (per curiam) (quoting *Troxel*, 530 U.S. at 68). The Court has made it abundantly clear that the "private realm of the family" is broad and that the state must clear a high threshold before interfering in decisions made by a presumptively fit parent. *In re Derzapf*, 219 S.W.3d at 334 ("A court may not lightly interfere with child-rearing decisions […] simply because a "better decision" may have been made.") (quoting *Troxel*, 530 U.S. at 73).

Conclusion

Therefore in response to Rep. White's request and in accordance with the overwhelming weight of nearly a century of U.S. Supreme Court and Texas Supreme Court precedent, the Foundation recommends that this office conclude that:

(1) The parent-child relationship predates and exists independently of the state, requiring no outside authority for its creation or continuance;

(2) Parents have a fundamental liberty interest under the Due Process Clause of the Fourteenth Amendment to raise their children as they see fit free from government interference;

(3) The fundamental right of parents in their children is presumptively superior to the rights of the state, warranting deference and protection;

(4) The state may only intervene in the life of a family as a last resort when the child's health, safety, and well-being are at imminent risk of harm;

(5) Any state intervention into the private realm of the family is subject to strict scrutiny, requiring the state to show that it has a compelling interest and its actions are narrowly tailored to achieve that interest;

(6) Parents and children enjoy a broad scope of privacy and autonomy in their relationship, which extends beyond mere custody and applies to even the most basic decisions that a parent makes for their child including moral and religious instruction, education, and health care;

(7) Absent a showing that a parent's decision places the child's health, safety, and well-being at imminent risk of harm, the state may not substitute its own decision-making for that of the parent – even if a "better decision" could have been made;

(8) In instances where the state seeks to exercise coercive authority over the family, the state is required to overcome the strong presumptions that:
   a. it is in the best interests of children to remain with their natural parents;
   b. parents are presumptively fit to direct the care and upbringing of their children; and
   c. fit parents naturally act in the best interests of their children

(9) Before terminating parental rights and permanently separating a child from his or her family, the state must meet a burden of proof of at least "clear and convincing evidence."

On behalf of the Foundation, thank you for your attention in this important matter. We hope that your opinion will clearly show that the State of Texas is a vigorous defender of the fundamental right of parents and children to live their lives free from unnecessary and unconstitutional government interference.

Respectfully,

Andrew C. Brown
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Texas Public Policy Foundation