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)

RELATOR'S POST-SUBMISSION SUPPLEMENTAL BRIEF

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TO THE HONORABLE JUSTICES OF THE TEXAS SUPREME COURT:

Relator, C.J.C., files this Post Submission Supplemental Brief and respectfully shows the Court as follows:

ARGUMENT

J.D. (who, once again, was ***not*** a "stepfather" to the child) has used his post-submission supplemental brief as a last-ditch effort to inject new arguments into the case. Any arguments not raised in original briefing are waived and should not be considered; however, Father will address some of the issues raised to be sure the Court clearly understands Father's position in this matter.

1. Father has always consistently argued for the application of the fit parent presumption prior to the court considering any other best interest factors.

Contrary to J.D.'s argument, Father did not assert a new theory during oral argument, nor is he trying to "change" the best interest standard. RPI's Post Submission Brief at 9. Father has always consistently argued that if a parent is fit, he is entitled to a presumption that he is acting in the best interests of the child, and, unless that presumption is overcome, the court cannot proceed to weigh any additional best interest factors. *See* Relator's Brief on the Merits at 16-17, 24-27, 46-47. Further, he has always argued that a trial court abuses its discretion by awarding rights and possession to a nonparent over that fit parent's objections. *See* Relator's Brief on the Merits at 14, 16-17, 18-19, 47-48. Constitutional avoidance

requires this Court to read existing statutes as incorporating the United States Constitution whenever possible. *See e.g. Gen. Servs. Comm'n v. Little-Texas Insultation Co., Inc.*, 39 S.W.3d 591 (Tex. 2001) (finding that we must begin with the presumption that the legislative enactment is constitutional); *United States v. Salerno*, 481 U.S. 739, 745 (1987) (finding that a facial invalidation of a statute is appropriate only if it can be shown that under no circumstances can the statute be constitutionally applied). Accordingly, the best interest analysis should be read to incorporate the constitutional fit parent presumption.

2. Father's constitutional rights are presumed to align with the child's constitutional rights.

After arguing that parents who seek an agreed order in an original suit give up their constitutional rights for any future modification (*See* Michelle May O'Neil, Oral Argument for Real Party in Interest, Supreme Court of Texas (April 22, 2020)), J.D. has finally acknowledged that Father's constitutional rights are at play in this case. RPI's Supplemental Brief at 9-26. J.D.'s latest argument is that Father's constitutional rights should be balanced equally with the child's constitutional rights. Father agrees that his daughter has constitutional rights of her own. However, the United States Supreme Court has long held that the child's rights and the parent's rights are presumed to align absent a showing that the parent is unfit. *Santosky v. Kramer,* 455 U.S. 745, 760 (1982). Further, "[t]he

law's concept of family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions." *Parham v. J.R.*, 442 U.S. 584, 602 (1977).

3. The fit parent presumption is a two-prong test that must be applied first as part of a court's best interest analysis.

The constitutional fit parent presumption as set forth in *Troxel* requires that a trial court apply a two-pronged test at the outset of any best interest analysis in cases involving a nonparent. First, the trial court must determine if the parent is fit, placing the burden on the non-parent to prove unfitness. *Troxel v. Granville*, 530 U.S. 57, 69-70 (2000). Second, if the parent is fit, the trial court must determine if the nonparent can overcome the presumption that a fit parent is acting in the best interests of his child. *Troxel*, 530 U.S. at 68.

4. The standard for overcoming the presumption that a fit parent acts in the best interests of his child should be a significant impairment.

To rebut the presumption that a fit parent acts in the best interests of his child, a nonparent should be required to show evidence of significant impairment. Following *Troxel,* the Texas legislature sought an opinion from then Attorney General Greg Abbott on the constitutionality of the grandparent access statute. Tex. Att'y Gen. Op. No. GA-0260 (2004). In his opinion, Abbott stated, "In order to avoid an unconstitutional application of the [grandparent access] statute, a court must require a grandparent to 'overcome the presumption that a fit parent acts in

the best interest of his or her child.'" Tex. Att'y Gen. Op. No. GA-0260 at 8 (citing *In re Pensom,* 126 S.W.3d 251, 256 (Tex. App. – San Antonio 2003, no pet.). "To overcome the presumption, 'a grandparent has the burden to prove, by a preponderance of the evidence, that either the parent is not fit, or that denial of access by the grandparent would significantly impair the child's physical health or emotional well-being." *Id.* (citing *Pensom*, 126 S.W.3d at 256).

Following Attorney General Abbott's opinion, the Texas Legislature amended the grandparent access statute to incorporate the significant impairment requirement. *See* Tex. Fam. Code § 153.433(a)(2). The Texas Legislature has also added a significant impairment requirement for relatives to have standing under Section 102.004(a)(1). *See* Tex. Fam. Code § 102.004(a)(1). The same "significant impairment" burden should be required for nonparents attempting to overcome the fit parent presumption at the best interest analysis stage.

5. If the nonparent cannot prove a parent is unfit or prove significant impairment, the best interest inquiry is over.

A trial court cannot substitute its opinion of best interest for that of a fit parent. *Troxel*, 530 U.S. at 69-70. Accordingly, other best interest factors, such as those set forth in *Holley v. Adams,* do not come into play unless a nonparent has met its burden of showing the parent is unfit or in showing significant impairment[1].

[1] Certain factors often used as part of a best interest analysis may also factor into a significant impairment analysis; however, that does not mean the trial court can substitute its opinion for that of a fit parent.

See Holley v. Adams, 544 S.W.2d 367 (Tex. 1976).

Here, the trial court granted relief to a nonparent in the form of temporary orders without applying the fit parent presumption. The evidence overwhelmingly shows Father is a fit parent. Further, over the course of two hearings, J.D. did not produce any evidence that would rise to the level of significant impairment to rebut that presumption. The grandparents, who had a far bigger role in the child's life than J.D., could not show significant impairment and lost at the standing stage. *In re Clay,* ____ S.W.3d ____ (No. 02-18-00404-CV (Tex. App. – Fort Worth, 2019). Because J.D. has not shown significant impairment, he is not entitled to any relief and the trial court improperly substituted its opinion of best interest for that of Father.

6. Because Father is fit and J.D. has not rebutted the presumption that Father is acting in his child's best interest, the case should not be dismissed.

When a nonparent cannot meet his burden of showing a parent is unfit or in showing significant impairment, the case should be over. Nonparents should not be allowed to drag fit parents into lengthy, expensive litigation to go on a fishing expedition for evidence. The court of appeals found Grandparents could not meet their burden of showing significant impairment, and J.D. has not provided any additional evidence that would get him anywhere close to meeting that threshold. There can be no doubt that if J.D. had evidence against Father, he would have used

it in the two hearings held in the case.

Father testified at the hearing on temporary orders that he had already spent around $170,000 in legal fees fighting against Grandparents and J.D. in the trial court, appellate court, and probate court. **App. 4: 123; Rec. 40: 123.** Father should not have to spend tens of thousands or hundreds of thousands more fighting a nonparent all the way to final trial and appeal. If this Court does not provide for the immediate dismissal of the case, Father requests the Court issue explicit guidance that would allow Father to seek dismissal from the trial court based upon the fit parent presumption without the need to endure discovery and additional costly litigation.

PRAYER

Father prays that this Court grant his petition and order that the trial court: (1) vacate the order of June 27, 2019 giving J.D. possessory conservatorship and possession of and access to Child; (2) dismiss J.D.'s Petition in Intervention based on sufficient evidence Father is a fit parent and no showing of significant impairment; and (3) order J.D. to pay all Father's attorney's fees incurred in protecting his constitutional rights in the trial court and appellate courts.

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CERTIFICATION OF COUNSEL REGARDING WORD COUNT

I certify that this Petition for Writ of Mandamus complies with the typeface requirements of Tex. R. App. P. 9.4 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), if applicable, because it contains 1,452 words, excluding any parts exempted by Tex. R. App. P. 9.4(i)(1).

DATED: May 22, 2020

CERTIFIED BY:
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CERTIFICATE OF SERVICE

I certify that pursuant to Rule 9.5 of the Texas Rules of Appellate Procedure, I served a true and correct copy of Relator's Post-Submission Supplemental Brief May 22, 2020 on the following:

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