

THIS IS A BRIEF THAT MR. McNAMARA FILED IN 2009 IN A CASE IN WHICH HE REPRESENTED A MOTHER. THE CHILD'S PATERNAL GRANDPARENTS WERE SEEKING VISITATION. MR. McNAMARA LIMITS HIS PRACTICE TO FAMILY LAW BUT DOES NOT RESTRICT WHICH PARTY HE REPRESENTS. IN THIS MATTER HE COULD HAVE BEEN REPRESENTING THE GRANDPARENTS IF THEY HAD SOUGHT HIS COUNSEL BEFORE THE MOTHER DID SO.

IN THE INTEREST OF	§	IN THE DISTRICT COURT
	§	
CHILD,	§	JUDICIAL DISTRICT
	§	
A CHILD	§	HARRIS COUNTY, TEXAS

MOTHER'S BRIEF IN SUPPORT OF MOTION TO DISMISS GRANDPARENT'S SAPCR AND IN SUPPORT OF HER MOTION TO VACATE & SET ASIDE THE TEMPORARY ORDER

TO THE HONORABLE JUDGE:

MOTHER submits this brief in support of her Second Motion To Dismiss Grandparent's Petition and in support of her Motion To Vacate & Set Aside The Temporary Order.

MOTHER's Requested Relief

MOTHER respectfully requests that the Court deny the relief sought by the petitioners and dismiss this suit on the basis that their affidavits are insufficient pursuant to Tex. Fam. Code §153.432(c). Alternatively, if the Court does not dismiss this suit, then *MOTHER* respectfully requests that the court vacate and set aside the temporary order issued by the Associate Judge because it does not contain the findings required by Tex. Fam. Code §153.433.

Undisputed Facts

[DELETED FOR PRIVACY OF THE PARTIES]

Texas Family Code Ch. 153 Subchapter H

Texas Family Code §§153.432 and 153.433 address suits for possession or access by grandparents. §153.433(b) requires that an order granting possession or access by a grandparent must state with specificity that the grandparent has overcome the presumption that a parent acts in the best interest of his or her child by proving that denial of possession or access to the child would significantly impair the child's physical health or emotional well-being. There is no exception for, nor does the statute provide for, a temporary order.

§153.432 requires that the grandparents must attach an affidavit to their petition that contains, *along with supporting facts*, the allegation that denial of possession of or access to the child would significantly impair the child's physical health or emotional well-being. It further requires that the court shall deny the relief sought and dismiss the suit unless the court determines that the facts stated in the affidavit, if true, would be sufficient to support the relief authorized by §153.433.

GRANDPARENT's Affidavits

GRANDFATHER and *GRANDMOTHER* have filed almost identical affidavits. They acknowledge that they have been in *CHILD*'s life since his birth and allege that *MOTHER* has threatened to move away from Texas so that they would never see him. They make conclusory statements about *MOTHER*'s past conduct but do not provide one fact, as required by §153.432. The affidavits refer vaguely to drugs, alcohol, and arguments, but do not provide any factual descriptions of an incident involving drug use, an argument, or alcohol abuse, other than *GRANDMOTHER*'s statement that *MOTHER* was drunk during hurricane ____ and "we told them to leave." Presumably, "them" refers either to *MOTHER* and *CHILD* or *MOTHER* and *FATHER* (*CHILD*'s father) or all three. That is not made clear in the affidavit. No facts are included to support the allegation that *MOTHER* was drunk. *GRANDMOTHER* simply makes the conclusory statement that she was. Other than the single allegation that *MOTHER* was drunk on one occasion there is not one fact alleged that would support the other conclusory statements. Notably, neither affidavit alleges that *MOTHER* has actually kept *CHILD* from his grandparents, merely that she has threatened to do so.

Law

Texas Fam. Code §§153.432 and 153.433 were amended in response to the United States Supreme Court's opinion in *Troxel v. Granville*, 530 U.S. 57 (2000) and have been the subject of three recent Texas Supreme Court opinions, (*In Re Chambless*, 257 S.W. 3d 698 (Tex. 2008); *In Re Derzapf*, 219 S.W.3d 327 (Tex. 2007); and *In RE Mays-Hooper*, 189 S.W.3d 777 (Tex. 2006)); and three recent opinions of the Courts of Appeal, at least two so far this year (*In The Matter of D.K.B.*, 13-08-00177 (Tex. App.-Corpus Christi, Aug. 13, 2009, n.w.h.) (not yet reported), *In The Matter Of The Marriage Of Campbell*, 06-08-00088-CV (Tex. App.-Texarkana, Feb. 24, 2009, n.w.h.) (not yet reported), *IN RE Smith* 262 S.W.3d 463, 469 (Tex. App.-Beaumont 2008, n.w.h.)).

Troxel

In *Troxel*, the court made clear that a parent has a fourteenth amendment substantive due process right to make decisions about who will see her son and how he will be raised, free from state interference. The only basis upon which a state court can interfere with that right of a parent is after a finding that the parent is unfit. The plurality opinion repeatedly uses the term "unfit" when describing the finding that a court must make before interfering with the parent's decision regarding her own child. Justice Thomas' concurring opinion would apply strict scrutiny and

require a compelling state interest before second-guessing a fit parent's decision regarding visitation with third parties. *Troxel v. Granville*, 530 U.S. 57, 80 (2000).

The facts in *Troxel* are remarkably similar to those in this case. Both involve unmarried parents, a father who committed suicide, and paternal grandparents who have been allowed to spend time with the child but who want a court to order the times and conditions under which they *must* be allowed to see the child. The United States Supreme Court wrote:

“In light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.” *Troxel v. Granville*, 530 U.S. 57, 63 (2000).

The court then goes on to reiterate 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.” (Citations omitted). *Troxel v. Granville*, 530 U.S. 57, 68, 69 (2000).

With respect to grandparents in particular the court writes:

“In an ideal world, parents might always seek to cultivate the bonds between grandparents and their grandchildren. Needless to say, however, our world is far from perfect, and in it *the decision whether such an intergenerational relationship would be beneficial in any specific case is for the parent to make* in the first instance.” (emphasis added). *Troxel v. Granville*, 530 U.S. 57, 70 (2000).

Before this court may issue any order regarding *CHILD* it must first find that his mother, *MOTHER*, is unfit to make decisions about him herself, regardless of what the court might find to be in the child's best interest. The *Troxel* court addressed the best interest test, specifically writing:

“As we have explained, the Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a ‘better’ decision could be made.” *Troxel v. Granville*, 530 U.S. 57, 72, 73 (2000).

The state judge must first find that the parent is unfit before deciding what is in the child's best interest. If the parent is fit, then the court may not substitute its judgment for the parent's.

Texas Supreme Court Opinions

In each of the last three years the Texas Supreme Court has granted mandamus regarding a trial court's issuance of a temporary order in a case involving grandparents who sought access to a grandchild pursuant to Tex. Fam. Code §§153.432 & 153.433.

In 2006 the court issued *In RE Mays-Hooper*, 189 S.W.3d 777 (Tex. 2006). *Mays-Hooper* involved a paternal grandmother's petition for access to her grandson after her son's death. The

opinion reiterates the holding of *Troxel*, quoting it several times, but provides little insight into the facts of the underlying trial. In granting mandamus relief, the court writes:

“In this case (as in *Troxel*) there was no evidence that the child’s mother was unfit, no evidence that the boy’s health or emotional well-being would suffer if the court deferred to her decisions, and no evidence that she intended to exclude Thornton’s access completely.” *In RE Mays-Hooper*, 189 S.W.3d 777, 778.

In 2007 the Texas Supreme Court issued *In re Derzapf*, 219 S.W.3d 327 (Tex. 2007), in which the children’s mother died and her parents sought court-ordered access. The trial court granted the grandparent’s access pursuant to a temporary order and the Supreme Court again granted mandamus. As it did in *Mays-Hooper*, the court first quoted *Troxel*, before writing:

“The Legislature set a high threshold for a grandparent to overcome the presumption that a fit parent acts in his children’s best interest: the grandparent must prove that denial of access would “*significantly impair*” the children’s physical health or emotional well-being. There has been no such showing here. A court may not lightly interfere with child-rearing decisions made by Ricky – a fit parent by all accounts – simply because a ‘better decision’ may have been made.” (emphasis in original & citations omitted.) *In re Derzapf*, 219 S.W.3d 327, 334 (Tex. 2007).

The court conditionally granted mandamus relief, writing:

“The temporary orders here divest a fit parent of possession of his children, in violation of *Troxel’s* cardinal principle and without overcoming the statutory presumption that the father is acting in his children’s best interest. Such a divestiture is irremediable, and mandamus relief is therefore appropriate.” *In re Derzapf*, 219 S.W.3d 327, 335 (Tex 2007).

Derzapf included conflicting testimony of a psychologist that the court held did not support a finding that denial of access by the grandparents would significantly impair the children’s emotional well-being.

2008 brought *In Re Chambless*, 257 S.W. 3d 698 (Tex. 2008) in which the court again granted mandamus to vacate a trial court’s temporary order granting grandparent visitation. At the conclusion of the grandparent’s case-in-chief the court issued an interim visitation order that granted the grandparents’ access for three days each month pending resumption of the trial. The Supreme Court held that granting a temporary order without affording the parent a meaningful opportunity to be heard is an abuse of discretion. The court again quotes *Troxel* and includes numerous other quotes and citations in support of the proposition that “the ‘natural right’ which exists between parents and their children is one of constitutional dimensions and is far more precious than any property right.” *In Re Chambless*, 257 S.W. 3d 698 (Tex. 2008).

Recent Decisions of Courts of Appeal

At least two courts of appeals have issued opinions in 2009 reversing a trial court’s order granting possession or access to grandparents when one parent was unavailable. The Beaumont Court Of Appeals issued an opinion on the matter in 2008.

In The Matter of D.K.B., 13-08-00177 (Tex. App.-Corpus Christi, Aug. 13, 2009, n.w.h.) (not yet reported) the court reversed and rendered an order granting access to the child's paternal grandmother after the father had died. Grandmother testified that she had "a good relationship" with the child from birth until her second birthday, seeing the child at least monthly and occasionally twice or three times in a month. After the child's second birthday, her mother began restricting access to the grandmother. *In The Matter of D.K.B.*, 13-08-00177 (Tex. App.-Corpus Christi, Aug. 13, 2009, n.w.h.) (not yet reported) [first page]. Both parties acknowledged that the child's mother did not attempt to completely deny access to the grandmother. The court wrote:

"At trial, Cumby testified succinctly as to her position: 'It's not that I do not want [D.K.B.] around Ms. Farrior. I just believe that, as a mother, I should be able to decide when she should be able to be around her; and if I want to be there, that I should be able to be there.' *We agree.*" (emphasis added). *In The Matter of D.K.B.*, 13-08-00177 (Tex. App.-Corpus Christi, Aug. 13, 2009, n.w.h.) (not yet reported) [fourth page].

The court held that there was no evidence that the child's mother is unfit or that she would have completely denied the grandparent's access to the child, and reversed and rendered.

The Texarkana Court of Appeals also wrote on this issue in 2009, *In The Matter Of The Marriage Of Campbell*, 06-08-00088-CV (Tex. App.-Texarkana, Feb. 24, 2009, n.w.h.) (not yet reported). Campbell involved a divorce, an incarcerated father, and his mother's request for access to the children while he was incarcerated. The children's mother acknowledged that the children had "a close relationship" and a "very strong bond" with their paternal grandmother and regularly visited with her. Grandmother testified that she had assisted in raising the children all of their lives and the children still had bedrooms at her house as they had before her son had been incarcerated. She then claimed that she had not been able to talk to the children or see them for their birthdays. She also testified that it was in the children's best interest to spend quality time with the paternal family in their old home. There was evidence that the mother had begun restricting the grandmother's access to the children. *In The Matter Of The Marriage Of Campbell*, 06-08-00088-CV (Tex. App.-Texarkana, Feb. 24, 2009, n.w.h.) (not yet reported) [fourth page].

The children's mother acknowledged the close and strong relationship with their paternal grandmother. She stated that she did not have a problem with the grandmother visiting the children but wanted to make that decision free from a court order.

The court held that "an opinion that it would be beneficial for the children to spend quality time with Carolyn [their paternal grandmother] is not sufficient to satisfy the grandparent access statutory requirements." *In The Matter Of The Marriage Of Campbell*, 06-08-00088-CV (Tex. App.-Texarkana, Feb. 24, 2009, n.w.h.) (not yet reported) [fourth page].

In Re Smith was issued by the Beaumont Court of Appeals in 2008. It involves artificial insemination and a same sex couple. After the relationship ended the non-parent partner sought possession and access with the child. After dealing with issues of standing, the court granted mandamus relief to vacate the trial court's temporary order. The court wrote:

"In issuing the temporary orders, the trial court made no finding that Smith was an unfit

parent or that she would significantly impair the children's physical health or emotional development.” *IN RE Smith* 262 S.W.3d 463, 468 (Tex. App.-Beaumont 2008, n.w.h.) and, “Without a determination that Smith is an unfit parent or is endangering the children, the trial court abused its discretion in substituting its judgment for the parent's judgment.” *IN RE Smith* 262 S.W.3d 463, 469 (Tex. App.-Beaumont 2008, n.w.h.).

Conclusion

By issuing three opinions on this issue in three years, the Texas Supreme Court has made clear that grandparents have a high burden to overcome before a trial court can interfere with the natural and constitutional right of a parent to make decisions about her own child. Before the court can begin to consider its own view of what might be in the child’s best interest it must first overcome the presumption that a parent acts in her own son’s best interest, by finding that denial of access by the grandparent would *significantly* impair the child’s physical health or emotional well-being.

The affidavits provided by the petitioners in this case do nothing more than suggest that *CHILD* would be better off if they have access to him. They suggest that *MOTHER* might exercise her lawful and constitutional right to move to a new home; make conclusory statements allegedly describing *MOTHER* in 2007 during her relationship with the child’s father; state that they saw their grandchild frequently after his birth up until April 24, 2009, and provided his “sustenance;” and then state that they “feel” that not having continued access to the child would significantly impair his emotional or physical well-being, without stating one fact to support that.

Nothing in either affidavit suggests that *MOTHER* is an unfit parent or that denial of access to *CHILD* will *significantly impair* the child’s physical health or emotional well-being. Neither affidavit states that *MOTHER* has denied access to *CHILD*, merely that she has threatened to do so. Petitioners want a court order for access to their grandson and “feel” that it is in his best interest that one should be granted. However, that position is not consistent with Texas law and their suit must be dismissed pursuant to Tex. Fam. Code §153.432(c). The child’s mother is a fit parent and whether or not her son should have a relationship with *GRANDPARENTS* is a decision for the mother to make in the first instance. *Troxel v. Granville*, 530 U.S. 57, 70 (2000).

Respectfully submitted,
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