THIRD PARTY STANDING, THE TWO PARENTAL PRESUMPTIONS, AND TAKEAWAYS FROM *IN RE C.J.C.*

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Ms. Draper hosts a podcast called Texas Family Law Insiders and is active in the Family Law Sections of the Collin County Bar Association and State Bar of Texas, and she serves on the Family Law Council Appellate Committee. Ms. Draper is also active in the Collin County Women Lawyers' Association, the Texas Academy of Family Law Specialists, and the Curt B. Henderson American Inn of Court. Beginning in June of 2020, Ms. Draper began a three-year term on the State Bar of Texas' Law Practice Management Committee. She speaks regularly at continuing education seminars and bar association meetings statewide, particularly on the topic of parental rights in cases involving nonparents. Ms. Draper has been recognized as a Super Lawyer by Super Lawyers Magazine every year since 2019 and was on the Rising Stars list from 2016 – 2018. She was recognized as one of the Top 50 Up and Coming Women Lawyers in Texas in 2017 by Super Lawyers Magazine.

Outside of the office, Ms. Draper enjoys spending time with her husband, Rob, their two children, and their dogs (a Great Dane and a silver lab). She loves traveling the world with her family, with favorites so far including trips to Australia, Iceland and Egypt.

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THIRD PARTY STANDING, THE TWO PARENTAL PRESUMPTIONS, AND TAKEAWAYS FROM *IN RE C.J.C.*

I. INTRODUCTION

In June of 2020, the Texas Supreme Court issued the landmark parental rights opinion *In re C.J.C.*, wherein the Court affirmed the constitutional rights of fit parents to make decisions regarding the care, custody and control of their children free from government interference. This paper will provide an in-depth analysis of the *C.J.C.* opinion, including the distinction between third party standing and entitlement to relief and the difference between the statutory parental presumption contained in Section 153.131 of the Texas Family Code and the constitutional fit parent presumption as set forth in *Troxel* and *C.J.C.* The paper will also discuss more recent cases interpreting *C.J.C.* and the unanswered questions that remain in child custody litigation between parents and nonparents.

II. PARENTAL RIGHTS ARE CONSTITUTIONAL RIGHTS

In the United States, parental rights are some of the oldest, most protected fundamental rights we have as citizens. The fourteenth amendment, also known as the due process clause, states that "[n]o state shall make or enforce any law which shall abridge the privileges and immunities of the citizens of the United States, nor shall any state deprive 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." The due process clause has been used to protect a whole host of rights considered fundamental in this country. It extended the rights specifically enumerated in the bill of rights (freedom of speech, freedom of religion, right to bear arms, etc.) to apply to the states. It also protects a number of rights that are not specifically spelled out elsewhere in the constitution. Over the years the United States Supreme Court has looked to the due process clause to protect rights deemed fundamental even in the absence of specific enumeration in the constitution, such as abortion rights and the right to gay marriage.

The United States Supreme Court has recognized the fundamental nature of parental rights in the care and custody of their children, going back at least as far as *Meyer v. Nebraska* in 1923, but the landmark Supreme Court case on the issue came much more recently. In 2000, the United States Supreme Court expressly held that the due process clause protects the fundamental rights of fit parents in *Troxel v. Granville*, 530 U.S. 57 (2000).

A. Troxel

Troxel v. Granville involved a Washington statute that allowed any interested person to file suit, and the court could award visitation if it believed it was in the best interest of the child. 530 U.S. 57 (2000). In *Troxel*, the father died, and the paternal grandparents sued for visitation rights. Prior to the father's death, he and the mother were separated, and he lived with the paternal grandparents. At first, the mother continued to allow the grandparents to have access to the children, but she later wanted to limit their access to once a month. The trial court awarded the grandparents visitation one weekend per month, one week during the summer, and four hours on each of the grandparents' birthdays. Ultimately, in a plurality opinion by Justice O'Connor, the U.S. Supreme Court overturned the trial court's award and held that "so long as a parent ***adequately cares for his or her children (ie: 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." *Troxel*, 530 U.S. at 68.

The trial court had placed the burden on the parent, requiring her to show that it would not be in the children's best interest to have visitation with the grandparents. The Supreme Court found this burden to be improperly placed on the mother. Instead, the burden should have been on the grandparents to show that the mother was an unfit parent. "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." *Id.* at 72-73.

Although courts around the country have been quick to distinguish *Troxel* as a case only addressing standing and as a case where the standing statute at issue was exceptionally broad, the underlying holdings in *Troxel* extend well beyond those limited issues. Courts distinguishing *Troxel* also often point out that it was "just" a plurality opinion. (Justices Rehnquist, Ginsberg, and Breyer joined Justice O'Connor in the plurality opinion. Justices Souter and Thomas each issued concurring opinions, and Justices Stevens, Scalia and Kennedy each issued dissenting opinions.) However, *Troxel* is considered the biggest case on the issue of constitutional parental rights, and its holding provides the basis for the protection of this fundamental liberty interest.

B. Texas's Response to *Troxel*

Troxel happened to be a case involving standing, and it happened to be a case involving grandparents. As a result, Texas laws with respect to standing for grandparents and other family members seeking conservatorship or access changed in an effort to embed the required constitutional protections into the family code. The Texas legislature fell back on the standard

historically used to protect parental rights in Texas – the significant impairment standard. Specifically, section 102.004(a)(1) of the Texas Family Code was amended to require a showing of significant impairment for a relative to have standing to seek conservatorship. Likewise, Section 153.433(a)(2) of the Texas Family Code, otherwise known as the grandparent access statute, was amended to require a showing of significant impairment for a grandparent to obtain possession and access. These changes meant that following *Troxel*, in order for a grandparent or other relative to obtain conservatorship or an order for possession or access, that relative must first meet the high burden of significant impairment to overcome the presumption that a fit parent acts in the best interest of his or her child.

III. IN RE C.J.C.

On June 26, 2020, the Texas Supreme Court reaffirmed the rights of fit parents to make decisions regarding their children free of government interference. *In re C.J.C.*, 603 S.W.3d 804, 807 (Tex. 2020). The Court applied the *Troxel* fit parent presumption to a modification suit filed by a nonparent where the parent was previously appointed managing conservator. *Id.* at 807.

A. Background

C.J.C. began as an ordinary, simple modification between a mother and a father related to a child ("Abigail[1]") who was, at that time, three years old. Mother and Father were appointed joint managing conservators in a prior order, with Mother having the exclusive right to designate Abigail's primary residence. The agreed prior order included a custom possession schedule that gave Mother slightly more than fifty percent of the time with the child and gave Father more than he would have had under an expanded standard possession order. In January of 2018, Mother filed suit, seeking to modify possession and access and child support based on an alleged material and substantial change in circumstances. Father moved to deny relief, alleging there had been no material and substantial change in circumstances, but the motion was never heard.

In July of 2018, Mother was tragically killed in a car accident. Abigail began living exclusively with Father at that time, but she saw her maternal grandparents ("Grandparents") numerous times in the weeks following her mother's death. Before the end of the month, Grandparents intervened in the lawsuit, seeking to be named joint managing conservators with Father and alleging that the appointment of Father as sole managing conservator would significantly impair Abigail's physical health or emotional development. Because Grandparents' petition failed to meet any possible grounds for standing under the Texas Family Code, Father moved to strike their intervention, seeking to have them dismissed for lack of standing.

Shortly thereafter, Mother's fiancé ("J.D.") filed his own petition in intervention, claiming he had standing because Mother and Abigail had lived primarily with him since August of 2017 and claiming he had actual care, custody and control of the child for more than six months. Father moved to strike J.D.'s intervention, arguing that J.D. also lacked standing. Grandparents and J.D. both amended their petitions in intervention to add more specificity to their grounds for standing. Father likewise amended his motions to strike.

The trial court held a hearing on standing. Despite clear evidence that grandparents lacked standing, the trial court denied Father's motions and chose not to dismiss Grandparents or J.D. for lack of standing. This led to the first mandamus in the case, *In re Clay*, No. 02-18-00404-CV, 2019 WL 545722 (Tex. App. – Fort Worth 2019, orig, proceeding) (mem. op.). In *Clay*, Father argued the trial court abused its discretion in failing to grant his motions to strike and in failing to dismiss Grandparents and J.D. based on lack of standing. The Fort Worth Court of Appeals granted the mandamus in part and denied it in part, finding that Grandparents lacked standing but J.D. did not.

Following the first mandamus and Grandparents' subsequent dismissal from the case, the trial court held a hearing on temporary orders. J.D. requested to be named joint managing conservator with Father, and he sought possession and access of Abigail. Despite evidence that Abigail was doing very well in her Father's exclusive care and would regress if J.D. were awarded possession and access, and despite no evidence whatsoever that Father was anything but a fit parent, the trial court named J.D. as a possessory conservator, with more rights that a nonparent possessory conservator under the family code, and awarded him a stair-step visitation schedule. Even though Grandparents were dismissed for lack of standing, the trial court ordered that the maternal grandmother and/or grandfather attend all periods of possession with J.D. during his first phase of possession.

Following the trial court's decision to grant temporary possessory conservator rights and possession to J.D., Father filed his second petition for writ of mandamus. This is the mandamus that ultimately led to the *In re C.J.C.* decision. Father began by filing his petition for writ of mandamus in the Fort Worth Court of Appeals. That court denied the petition without

[1] The Texas Supreme Court referred to the child as Abigail, choosing to use an alias. Because the Texas Supreme Court called her Abigail, this paper will do the same.

requesting a response from J.D. (Our theory was that the court of appeals already wrote us one opinion, so they were punting this one to the Texas Supreme Court, but who really knows.). Father then filed his petition for writ of mandamus in the Texas Supreme Court. Nine amicus groups filed into the case in support of Father's position.

B. Father's Arguments

Father argued that the trial judge violated his due process constitutional rights when she awarded rights and possession to a nonparent over the fit Father's objections. The United States Constitution protects the rights of fit parents to handle the care, custody, and control of their children free from state interference. Texas laws were changed following *Troxel*, but only with respect to grandparents and other relatives. Father argued *Troxel*'s holding is not limited only to family members, but it must be extended to all nonparents seeking conservatorship in order to protect parents' constitutional rights.

Father argued that the constitutional fit parent presumption must be distinguished from the parental presumption contained in Section 153.131 of the Texas Family Code, and the fit parent presumption must be applied in both original suits and modifications.

We knew that the Texas Supreme Court did not want to find statutes unconstitutional if at all possible, so in the interest of constitutional avoidance, we had to find a way for the Court to read the fit parent presumption into the current Texas Family Code. If that could not be done, numerous standing statutes and the entirety of Chapter 156 of the family code would have been unconstitutional for failing to protect the constitutional rights of fit parents. We encouraged the Court to read the fit parent presumption into the best interest analysis, which is ultimately what the Court did.

C. Fiancé's arguments

The fiancé argued that the fit parent presumption and the parental presumption found in Section 153.131 of the family code were the same. As such, he argued the long-standing position that the parental presumption does not apply in modification proceedings. He relied heavily upon *In re V.L.K.*, 24 S.W. 3d 338 (Tex. 2000).

D. The Ruling

The Texas Supreme Court ruled 9-0 in favor of Father, making clear that the constitutional fit parent presumption applies not just in original suits, but also in modification proceedings where the parent had previously been appointed a managing conservator and a nonparent enters the suit for the first time. *In re C.J.C.*, 603 S. W.3d 804, 808 (Tex. 2020). Justice Bland wrote the majority opinion, with Justice Lehrmann writing a concurring opinion.

The question presented to the Court was whether the presumption that fit parents act according to the best interest of their children applies when modifying an existing order that names a parent as the child's managing conservator. "Because a fit parent presumptively acts in the best interest of his or her child and has a 'fundamental right to make decisions concerning the care, custody and control' of that child," the Court held that it does. *C.J.C.*, 603 S.W.3d at 808. It is important to note that this case involved an unquestionably fit parent, where the fiancé made no attempt to argue Father was unfit.

Although the nonparent standing threshold in Texas is higher than the exceptionally broad standing statute at issue in *Troxel*, the standing statutes that gave J.D. standing did not incorporate a fit parent presumption into a custody modification proceeding. "Those who establish such standing face a different burden under the modification statute – a court may modify a custody order if it is 'in the best interest of the child' and 'the circumstances of the child, a conservator, or other party affected by the order have materially and substantially changed.'" *Id.* at 816.

Because neither the standing statutes nor the modification statute included the fit parent presumption, the Court determined that it must be read into the best interest determination. This is not merely one factor to be weighed against others in a traditional best interest analysis. This means that the first prong of any best interest analysis in a case against a nonparent must be to determine if the fit parent presumption has been overcome before moving on to any additional factors. If it has not, the nonparent is not entitled to any rights or possession over the objections of the fit parent.

The Court held that in awarding J.D. visitation and overnight possession over the fit father's objections, the trial court substituted its determination of the child's best interest for her father's. This is exactly the opposite of the fit parent presumption that must be applied. *Id.* at 815-816. "[A] court must apply the presumption that a fit parent – not the court – determines the best interest of the child in any proceeding in which a nonparent seeks conservatorship or access over the objection of a child's fit parent." *Id.* at 817. Further, the burden of overcoming the fit parent presumption must be on the nonparent. *Id.* at 815-16.

In her concurring opinion, Justice Lehrmann pointed out that this ruling leaves unanswered the question of the burden of proof required to overcome the fit parent presumption. Because there was no evidence Father was unfit and J.D. made no attempt to make that argument, it was unnecessary for the Court to determine the standard for overcoming the fit parent presumption. *Id.* at 820-24.

IV. KEY TAKE-AWAYS

A. Standing

C.J.C. is not about standing. It is about whether a nonparent is entitled to any relief in a case against a

parent. Certain standing statutes incorporate the constitutional protections of the fit parent presumption, but many, such as 102.003(a)(9) and 102.003(a)(11), the two standing statutes used to give the fiancé standing in *C.J.C.*, do not. *In re C.J.C.*, 603 S.W.3d 804, 816 (Tex. 2020).

Section 102.003(a)(9) gives standing to a nonparent who has had "actual care, control and possession" of the child for at least six months ending not more than 90 days before filing the petition. Whether or not a nonparent meets this criteria does not, in and of itself, address the fit parent presumption.

Section 102.003(a)(11) gives standing to a nonparent "with whom the child and the child's guardian, managing conservator, or parent have resided for at least six months ending not more than 90 days preceding the date of the filing of the petition if the child's guardian, managing conservator, or parent is deceased at the time of the filing of the petition." This provision requires no level of involvement in the child's life from the nonparent other than having lived in the same home for the requisite time, and it very clearly does not incorporate the fit parent presumption.

Standing gets a party in the door to filing a lawsuit. It does not mean that the party has any right to relief. In cases involving nonparents, courts must ask not just if a party has standing but if that party can overcome the fit parent presumption. If he cannot, the court cannot award any rights or possession to that nonparent over the objections of the fit parent.

B. The Parental Presumption vs. The Fit Parent Presumption

Texas family lawyers and judges alike have long believed that the only presumption in favor of parents was the statutory parental presumption contained in section 153.131 of the Texas Family Code. However, in taking this issue before the Texas Supreme Court in *In re C.J.C.*, we argued that a parent does not lose constitutional rights simply because that parent is involved in a modification rather than an original proceeding. The Texas Supreme Court agreed, at least in certain types of modifications. *In re C.J.C.*, 603 S.W.3d 804 (Tex. 2020).

Texas law has two distinct, different presumptions – the statutory parental presumption found in Section 153.131 of the Texas Family Code and the constitutional fit parent presumption as set forth in *Troxel* and *C.J.C.* Many lawyers and judges confuse and conflate these two presumptions.

Texas Family Code § 153.131 is a statutory presumption that it is in the best interest of the child that a parent be appointed sole managing conservator over a nonparent unless the appointment would significantly impair the child's physical health or emotional development. Tex. Fam. Code § 153.131(a). The statutory presumption only provides a presumption that a parent should be appointed sole managing conservator over a nonparent and does not prevent a court from awarding rights, duties, and possession to a nonparent. Tex. Fam. Code § 153.131.

The statutory presumption applies only in original suits, as it was explicitly excluded from the Chapter 156 modification statute. *See In re V.L.K*, 24 S.W.3d 338, 339-40; *In re C.A.M.M.*, 243 S.W.3d 211 (Tex. App.-Houston [14th Dist.] 2007). "Chapter 156 modification suits raise additional policy concerns such as stability for the child and the need to prevent constant litigation in child custody cases." *V.L.K.*, 24 S.W.3d at 340. When you have a modification between the same two parties, "the first judgment between the parties is res adjudicata of the question of the child's best interest and of custody." *C.J.C.*, 603 S.W.3d at 818 (citing *Taylor v. Meek*, 154 S.W.2d 787, 790 (Tex. 1955)).

In contrast, *C.J.C.* addressed a *constitutional* presumption that a fit parent is presumed to act in the best interests of his or her child. The constitutional presumption discussed in *C.J.C.* prevents a court from giving a nonparent *any* rights, duties, or possession over the objections of a fit parent in certain situations.

The *constitutional* fit parent presumption, as discussed in *Troxel* and *C.J.C.*, is a presumption separate and apart from the statutory parental presumption. The constitutional presumption provides that "a court must apply the presumption that a fit parent – not the court – determines the best interest of the child in any proceeding in which a nonparent seeks conservatorship or access over the objections of a child's fit parent." *C.J.C.*, 603 S.W.3d at 817.

C. When does the fit parent presumption apply and when does it not?

The constitutional fit parent presumption set forth in *Troxel* and *C.J.C.* applies in original suits involving a nonparent and in certain modifications. Specifically, it applies in modifications where the parent or parents were previously appointed managing conservators and a nonparent enters the case for the first time. The Court stated that its holding does not alter the burden of proof for modifications of prior orders in which neither parent was named a managing conservator. "But when nonparents seek court-ordered custody of a child subject to an existing order, under which one or both fit parents were appointed managing conservators, that parent or parents retain the presumption that protects their fundamental right to determine their child's best interest." *C.J.C.*, 603 S.W.3d at 819.

Although *C.J.C.* was a modification, its holding is not limited only to modification proceedings. It necessarily must also apply in original suits. The statutory parental presumption is insufficient to protect the constitutional rights of fit parents because it only addresses whether the parent or the nonparent should be named managing conservator. It does not prohibit a

court from awarding possessory conservatorship or visitation to a nonparent if the parent is fit. If the constitutional fit parent presumption did not apply in original suits, we would be giving greater protections to parents when a nonparent files into a case with a prior order than when a nonparent files against a parent in an original suit. Such a result would be illogical and unconstitutional.

There are certain modification scenarios where a parent is not entitled to this constitutional fit parent presumption. If the parent were named as a possessory conservator in the prior order, that parent is no longer entitled to the presumption in a future modification. It does not matter if the managing conservator is a parent or a nonparent. The rationale is that the parent was found to be unfit in the prior case, as evidenced by the possessory conservator designation, and has lost the benefit of that presumption going forward. *See In re B.B.*, 632 S.W.3d 136 (Tex. App. – El Paso 2021) (holding that because the father was previously the equivalent of a possessory conservator, not a managing conservator, in a California order, he was not entitled to the fit parent presumption); *Interest of H.V.S.*, No. 04-20-00217-CV, 2020 WL 5646472 (Tex. App. – San Antonio 2020) (fining that because the mother was not a managing conservator in the prior order, she was not entitled to the benefit of the fit parent presumption). Keep this in mind when you have a client considering agreeing to be named a possessory conservator.

Additionally, if a parent and nonparent were appointed as joint managing conservators in a prior order, the parent is not going to be entitled to the benefit of the fit parent presumption in a future modification. Although *C.J.C.* did not involve a modification proceeding in which a parent and nonparent were previously appointed joint managing conservators in a prior order, the Court's opinion gave a clear indication as to what the result would be in such a situation: the prior order is *res judicata* and the parent is no longer entitled to any presumption in favor of that parent. *C.J.C.*, 603 S.W.3d at 819, FN 78 ("As the Nevada Supreme Court has stated in construing a modification statute without a parental presumption: 'When a nonparent obtains visitation through a court order or judicial approval, they have successfully overcome the parental presumption and are in the same position as a parent seeking to modify or terminate visitation.' *Rennels v. Rennels*, 127 Nev. 564, 257 P.3d 396, 401 (2011)"). Keep this in mind when you have a client considering agreeing to let a nonparent into a final order.

Similarly, if a parent was appointed a managing conservator and a nonparent was appointed a possessory conservator in the prior order, the parent is not going to be entitled to the benefit of the fit parent presumption either. The nonparent had to overcome the fit parent presumption in the prior order to be entitled to receive *any* rights or possession, so if that nonparent was named a possessory conservator, the nonparent must have been unfit. *See C.J.C.*, 603 S.W.3d at 819, FN 78.

D. What is the standard?

As Justice Lehrmann pointed out in her concurrence, *C.J.C.* did not set forth the standard a nonparent must meet to successfully overcome the fit parent presumption. "I write separately to highlight an equally important issue that the Court appropriately does not reach but with which trial courts will undoubtedly continue to struggle: the proper evaluation of whether the fit-parent presumption has been overcome in a particular case." *C.J.C.*, 603 S.W.3d at 821.

As of the writing of this article, none of the cases post-*C.J.C.* cases address the level of proof required to overcome the fit parent presumption. In my opinion, attorneys and courts should look to the long history of cases addressing the significant impairment standard to determine if a nonparent has met his or her burden of overcoming the fit parent presumption.

Following *Troxel*, both the Texas legislature and the Texas Supreme Court required proof of significant impairment to rebut the presumption that a parent acts in the child's best interest with regards to standing for grandparents and other relatives. *See* Tex. Fam. Code § 102.004(a)(1) (requiring a showing of significant impairment for a relative to have standing); Tex. Fam. Code § 153.433(a)(2) (requiring a showing of significant impairment for a grandparent to obtain possession and access); *In re Derzapf,* 219 S.W.3d 327, 330 (Tex. 2007) (finding no significant impairment where the father had relinquished care to the grandmother following the mother's death and a court-appointed psychologist found it might be harmful to cut off the grandmother's access to the children); *In re Scheller*, 325 S.W.3d 640, 643 (Tex. 2010) (orig. proceeding) (per curiam) (finding no significant impairment when the grandparent presented evidence the children displayed anger, a child was wetting the bed and having nightmares, witnesses testified that denying contact between the children and grandfather would impair the children's physical or emotional development, and the grandfather was the only remaining maternal familial connection).

Texas case law is clear that the significant impairment burden is very difficult to overcome. Texas appellate courts have found the following evidence sufficient to establish significant impairment:

- *In re L.D.F.*, 445 S.W.3d 823, 831-32 (Tex. App. – El Paso 2014, no pet.) - Significant impairment found when the parent assaulted family members, was hospitalized for drug use and mental health reasons five times in five years, and refused

ongoing therapy or medication for his mental health issues;

- *Compton v. Phannenstiel,* 428 S.W.3d 881, 884 (Tex. App. – Houston [1st Dist.] 2014) – Significant impairment found where the parent used drugs, physically and verbally mistreated her children, was extremely neglectful and had been arrested four times in the six months before the final hearing;
- *In re R.T.K.*, 324 S.W.3d 896, 904 (Tex. App. – Houston [14th Dist.] 2010) – Significant impairment found when the parent was incarcerated for much of the child's early life, was absent from the child's life for more than two years, and repeatedly failed to exercise visitation rights;
- *Taylor v. Taylor*, 254 S.W.3d 527, 537-37 (Tex. App. – Houston [1st Dist.] 2008, no pet.) – Significant impairment found when the parent was physically violent, favored the children of his girlfriend, refused to seek help after learning the child was possibly sexually abused; and
- *In re C.R.T.*, 61 S.W.3d 62, 68 (Tex. App. – Amarillo 2001) – Significant impairment found where the parent had a drug problem, did not support her children, and was irresponsible.

In contrast, courts in the following cases have found the circumstances did not constitute significant impairment:

- *Gray v. Shook*, 329 S.W.3d 186, 198 (Tex. App. – Corpus Christi 2010) (*rev'd in part on other grounds*) – No significant impairment found when the child would be uprooted from the life and people who had cared for her for five years;
- *Lewelling v. Lewelling*, 796 S.W.2d 164, 167 (Tex. 1990) – No significant impairment found where the parent was an abused spouse, was unemployed, and lived in crowded conditions;
- *In re S.T.*, 508 S.W.3d 482, 497-98 (Tex. App. – Fort Worth 2015, no pet.) – No significant impairment found when father had a history of substance abuse and criminal activities, but he had not continued since being released on parole, had appropriate housing and income, had completed parenting classes, and was compliant with medication for mental illness;
- *Critz v. Critz*, 297 S.W.3d 464, 477-78 (Tex. App. – Fort Worth 2009) – No significant impairment found when the parent had a history of drug abuse, did not own a vehicle, lived with boyfriend's parents, and was unemployed;
- *Whitewell v. Whitewell,* 878 S.W.2d 221, 223 (Tex. App. – El Paso 1994, no writ) – No significant impairment found when the Australian parent intended to move with a child who had significant health issues from the United States to Australia against the intervening grandparents' wishes;
- *In re W.G.W.*, 812 S.W.2d 409, 414-15 (Tex. App. – Houston [1st Dist.] 1991, no writ) – No significant impairment found when the parent moved several times, brandished a fireplace poker in front of her children, and tried to stab a nonparent in front of the children;
- *Neely v. Neely*, 698 S.W.2d 758, 760 (Tex. App. – Austin 1985, no writ) – No significant impairment found when a parent had let the house get "pretty bad" and paid more attention to one child than another; and
- *In re K.R.B.*, No. 02-10-0021-CV (Tex. App. – Fort Worth 2010, no pet.) (memo op,; 10-7-10) – No significant impairment found where the parent had a history of drug abuse and associating with drug users but had passed all drug tests in the twenty months before trial.

It is clear based on *C.J.C.* that the burden to overcome the fit parent presumption must be high because it is of constitutional dimensions. Further, the Texas legislature has previously found the significant impairment threshold to be the appropriate standard when it incorporated that burden into certain standing statutes in response to *Troxel*.

V. POST-*C.J.C.* CASES

As of the writing of this article (June 6, 2022), there have been ten courts of appeals opinions addressing *C.J.C.* on substantive issues. Of those cases applying the fit parent presumption, the opinions largely fall into two distinct categories: (1) cases where the court of appeals found heavily in favor of the parent; and (2) cases where the court of appeals deferred completely to the decision of the trial court, not overturning a trial court's determination that a parent was unfit if there were *any* possible basis for such a finding.

A. Application of the Fit Parent Presumption

To date, two cases have addressed whether a parent is entitled to the benefit of the fit parent presumption when that parent was not appointed as a managing conservator in the prior order.

1. *In re B.B.*, 632 S.W.3d 136 (Tex. App. – El Paso 2021)

This was a CPS case where DFPS removed the child from the mother's home and the father sought custody. The department was granted temporary managing conservatorship of the child, and the father filed a petition for writ of mandamus. The father lived in California, and the mother resided in Texas. The mother had moved away when the child was only one year old, and the father had visited only a handful of

times in the past six years. The Court distinguished the case from *C.J.C.* because the father was not previously named a managing conservator of the child. He held the equivalent of possessory conservatorship in California. The Court determined that because he was not previously named as a managing conservator, he was not entitled to the fit parent presumption.

2. *Interest of H.V.S.*, No. 04-20-00217-CV, 2020 WL 5646472 (Tex. App. – San Antonio 2020)

This was also a CPS case. The trial record showed evidence of the mother's improvement since the beginning of the CPS case, and the court of appeals agreed the mother's position had materially and substantially changed. The Court found that because the mother was not a managing conservator in the original order, she did not receive the benefit of the fit parent presumption. The Court referenced in a footnote the line from *C.J.C.* stating that it did not alter the burden of proof for modifications when neither parent was named as a managing conservator in the original order.

B. Cases Ruling in Favor of Parents

1. *Interest of S.K. and L.K.*, No. 13-19-00213-CV, 2020 WL 4812633 (Tex. App. – Corpus Christi 2020)

This is a CPS case. When L.K. was born with opiates in his system, the parents entered into a family-based safety plan with the Department that resulted in the children being placed with their maternal grandmother. The affidavit alleged the mother continued to use illegal drugs and the father was verbally abusive toward the mother. The department was named temporary managing conservator, and the parents were ordered to complete services. The children were placed with the maternal grandmother for more than twelve months. The maternal grandmother intervened, seeking to be named sole managing conservator or, alternatively, a possessory conservator. The Department recommended the court name the father sole managing conservator with the grandmother as a possessory conservator.

Evidence at trial showed the mother did not complete her services and did not regularly visit the children, but the father had successfully completed his service plan, including a psychological evaluation, individual counseling, and anger management. The children were bonded to the father and were happy when they learned they were going to live with him. The testimony showed the children were very bonded to the maternal grandmother. The caseworker opined that the children would be harmed if the grandmother did not have visitation, and she did not believe the father would permit that visitation without a court order. Both the caseworker and CASA testified they believed it would be harmful for the children to be cut off from the maternal grandmother, who had been their primary caretaker.

The final order dismissed the department, named the father as sole managing conservator, and naming the grandmother as a possessory conservator with possession. The father appealed.

The court of appeals initially issued an opinion in favor of the nonparent the day before the *C.J.C.* opinion came out. In light of that opinion, the Court, *sua sponte*, vacated its original opinion and entered a new one in favor of the father. In its new opinion, the Court found that, pursuant to *C.J.C.*, "to have properly exercised its discretion in ordering visitation over Father's objection, there must have been sufficient evidence presented to the trial court to overcome the presumption that Father acts in his child's best interest. We find no such evidence in the record." *Interest of S.K.*, 2020 WL 4812633 *5.

The nonparent petitioned to the Texas Supreme Court, which initially denied the petition. However, following a motion for rehearing, the Texas Supreme Court has now granted full briefing in the case. Watch for an opinion in this case in 2023, which very likely will provide more clarification on the level of proof required to overcome the fit parent presumption.

2. *In re B.F.*, No. 02-20-00283-CV, 2020 WL 6074108 (Tex. App. – Fort Worth 2020)

The father requested mandamus relief from a temporary order that granted a nonparent possessory conservatorship and periods of possession of the child. The parents were named joint managing conservators of the child. The nonparent did not specifically argue the father was unfit but presented "factors" for the court to consider. These factors included a claim that the father had abused methamphetamines in the past. No evidence was presented showing the father was currently using drugs. There was also a claim that there was a current CPS case against the father's girlfriend. Nothing provided to the court relating to the CPS case mentioned the father. Because the court of appeals did not find any evidence of the father being unfit, mandamus was granted based on *C.J.C.*

3. *In re G.B. and L.B.*, No. 05-21-00463-CV, 2021 WL 4071152 (Tex. App. – Dallas 2021)

The father filed for mandamus after the trial court's temporary orders awarded the grandmother possessory conservatorship and access to the children. The mother and father had been named joint managing conservators in their final decree of divorce, with the mother having the exclusive right to designate the primary residence. For at least a year before the mother died in January 2021, that residence was the grandmother's home. After the mother died, the grandmother refused to return the children to the father. The father sought and was

granted a writ of habeas corpus, and the children were returned to him.

The grandmother intervened, seeking to be named sole managing conservator. The father moved to strike based on standing. The trial court held a hearing on the father's motion to strike and the grandmother's request for temporary orders. The court later interviewed the children in chambers. The trial court denied the motion to strike and entered temporary orders appointing the grandmother as a possessory conservator, setting a visitation schedule, and granting her electronic access.

The father argued on mandamus that the trial court abused its discretion in giving the grandmother possession and conservatorship rights because she did not overcome the fit parent presumption. The court of appeals agreed, finding that the facts largely mirrored the facts in *C.J.C.* The father was an involved parent and the only possible evidence against him was that he did not use his Thursday periods of possession. Further, the trial court specifically found that the father was a fit parent, and the court of appeals felt the record supported that finding. The court of appeals overturned the decision because the trial court substituted its opinion of best interest for that of the father when it appointed the grandmother as a possessory conservator over the father's objections.

4. *In re S.D.*, No. 14-20-00851-CV, 2021 WL 3577852 (Tex. App. – Houston [14th Dist.] 2021)

The trial court named mother as temporary sole managing conservator and grandmother as temporary possessory conservator. While they were married, the mother, father and child all lived in the home with the paternal grandmother. When the parents divorced, they were named joint managing conservators, with father having the exclusive right to designate the primary residence. The father continued to live with the paternal grandmother. The parents remained joint managing conservators in a subsequent modification. The father then died, and the child went to live with the mother. The grandmother petitioned to modify, seeking to be the managing conservator with the exclusive right to designate the primary residence or, alternatively, have possession and access of the child. The trial court entered temporary orders naming mother as temporary sole managing conservator and naming the grandmother as a nonparent temporary possessory conservator with a standard possession order.

The mother filed for mandamus. She argued she was necessarily fit based on the trial court's decision to name her as sole managing conservator, and as such, the court could not name grandmother as a possessory conservator. The grandmother argued that she rebutted any fit parent presumption, as demonstrated by the trial court's decision to appoint her as possessory conservator. The grandmother raised concerns about the mother's decision to remove the special needs child from his private school and the mother's decision to live with her long-time boyfriend. She argued the mother could not provide a safe environment for the child.

The grandmother argued that the trial court was authorized to consider her as a possessory conservator, citing *Shook v. Gray*, 381 S.W.3d 540 (Tex. 2012). The Court of Appeals, in ruling in favor of the mother, found that "the Texas Supreme Court's decision in *C.J.C.* forecloses consideration of Grandmother as possessory conservator over a fit parent's objections." *S.D.*, 2021 WL 3577852 at *6.

5. *In re B.A.B.,* No. 07-21-00259-CV, 2022 WL 1687122 (Tex. App. – Amarillo 2022)

The father had been previously named joint managing conservator with the mother. The mother died, and the maternal grandmother and step-grandfather intervened. The trial court found standing under 102.003(a)(9) and awarded the grandparents conservatorship and possession. The father filed for mandamus.

The grandparents alleged the father voluntarily relinquished the child for over a year, tracking the language of Section 153.373 of the Texas Family Code (rebutting the statutory parental presumption if the trial court finds voluntary relinquishment has occurred). The Court found that the grandparents failed to establish voluntary relinquishment for the requisite time, which suggests the Court believed that voluntarily relinquishment for a period of a year of more would be enough to rebut the fit parent presumption, not just the statutory parental presumption.

The grandparents argued they successfully rebutted the fit parent presumption by presenting evidence the father did not contact CPS when he learned it was investigating Mother for alcohol abuse and that the father's attendance at AA meetings demonstrated his own addiction. The Court noted that the grandparents did not allege grounds, nor did they offer any evidence intended to rebut the presumption that the father was acting in the child's best interest, and it ultimately concluded the court abused its discretion by awarding rights and possession to the nonparents over the father's objections.

(In reaching its conclusion, the Court noted that the trial court did not make a finding that the father was unfit. It is common for trial courts to enter temporary orders without explicitly making any findings of fact or conclusions of law, and parties are not required to request them following a temporary order ruling. It would be prudent for attorneys to request this specific finding one way or another to support a court's ruling.)

C. Cases Ruling in Favor of Nonparents

1. *In re C.D.C.*, No. 05-20-00983-CV; 2021 WL 346428 (Tex. App. – Dallas 2021)

The mother and father had been named joint managing conservators in a prior order, with the mother having the exclusive right to designate the primary residence. The mother and child lived with grandparents. Both parents had history of drug use, but the father had no problems in several years leading up to this case. The mother could not stay clean, so the father filed to modify, seeking to become primary. The maternal grandparents intervened, seeking to be named sole managing conservators or to be given the exclusive right to designate the primary residence. They alleged father and mother had neglected the child.

The trial court issued temporary orders that flipped primary custody to the father but named the grandparents and mother as joint managing conservators with a standard possession order. The father argued the evidence could not simultaneously be sufficient to flip primary custody to him but also sufficient for grandparents to overcome the fit parent presumption as to the father.

The three-justice panel of the court of appeals split and issued a majority and dissent. The majority found in favor of the grandparents and found that if there was *any* evidence to support a finding that a parent is unfit, the court of appeals will not overturn it. Justice Pedersen III issued a dissent.

(In my opinion, the majority opinion here is a terrible decision that minimizes the burden one must overcome when a constitutional right is at stake. We took this case to the Texas Supreme Court, who initially declined to take up the case. We filed for rehearing, and the Court requested a response. The trial court would not grant a continuance on the underlying suit, so when the trial court entered a final order that did not give rights or possession to the grandparents, the Texas Supreme Court case was dismissed as moot. Unfortunately, that leaves this majority opinion standing.)

2. *S.C. v. Texas Dept. of Family and Protective Services*, No. 03-20-00179-CV, 2020 WL 4929790 (Tex. App. – Austin 2020)

This was a CPS case initiated by a report of inadequate supervision. The mother, who had previously been named a managing conservator in the prior order, subsequently failed a drug test and tested positive for methamphetamines. Prior to the trial, the mother tested negative for drugs for nine months, obtained housing, and attended visits with her children. The mother had a history of relapsing and CPS involvement. There was evidence questioning the reliability of the mother's negative drug test results, since the mother rarely tested on her assigned date and failed to submit for a nail test when requested. The trial court named the grandmother as managing conservator and the mother as possessory conservator.

The mother appealed, incorrectly arguing that the court should have applied the statutory parental presumption. The court of appeals found that the statutory presumption did not apply because this was a modification, but it found that the fit parent presumption set forth in *C.J.C.* did apply.

In applying the fit parent presumption, the Court noted that "evidence of a recent turn-around in behavior by the parent does not totally offset evidence of a pattern of instability and harmful behavior in the past." *S.C.*, 2020 WL 4929790 *3 (citing *Spurck v. Texas Dep't of Family & protective Servs.,* 396 S.W.3d 205, 222 (Tex. App. – Austin 2013, no pet.). The Court also found it reasonable that the trial court weighed the evidence questioning the reliability of the mother's drug tests against mother. The Court ultimately found that the constitutional fit parent presumption had been rebutted, and the trial court did not abuse its discretion in naming a nonparent as managing conservator.

3. *In re Tad Mayfield*, No. 06-21-00115-CV, 2022 WL 363270 (Tex. App. – Texarkana 2022)

The children had been removed from the father in prior CPS cases, but the prior order named the father as a managing conservator. Drug test results came back positive for meth, so CPS filed again to terminate. CPS was named temporary managing conservator and the father was named temporary possessory conservator, but case was ultimately dismissed after the statutory deadline passed. CPS did not refile. The child had been living with foster parents for 20 months.

Foster parents then filed suit seeking to be named managing conservators, alleging the parents had engaged in a history or pattern of child neglect. The father had only had phone visits and did not provide any financial support. He had been involved in three CPS cases for drug use and admitted to testing positive for meth in late 2019. He testified he had not been tested since July 2020, where he had negative hair follicle and urinalysis tests, that he was subject to random drug testing at work and had never failed, and that he had done everything he could to prove and maintain sobriety.

The trial court found the father to be an unfit parent. The trial court referenced his history of CPS cases and said the father's rights would have been terminated due to instability and drug use had the CPS case not been dismissed for missing the statutory deadline. The judge noted that the father testified contrary to ways he had testified in the past. The trial court named dad and foster parents joint managing conservators, with foster parents primary, and limited the father to supervised-only possession.

The court of appeals refused to overturn the trial court's factual determination that father was an unfit parent. If there is "some evidence" to support a finding of unfitness, mandamus is not appropriate. The Court cites to *C.D.C.* for the proposition that "the law does not provide a basis for mandamus relief based on the trial court's factual determination and application of the law to that determination." *Mayfield*, 2022 WL 363270 at *4 (citing *In re C.D.C.*, No. 05-20-00983-CV, 2021 WL 346428 at *2 (Tex. App. – Dallas 2001).

(In my opinion, the facts of this case do support the determination that the fit parent presumption was overcome, but it concerns me that the language the Court used suggests it would not overturn any trial court's decision as long as there were "some" evidence to support it. This should be a high burden, and deferring to the trial court places the best interest analysis back into the hands of the trial judge, rather than in the hands of the fit parent.)

VI. WHAT'S NEXT?

There are obviously unanswered questions left by the *C.J.C.* opinion as to the standard and the burden required to overcome the constitutional fit parent presumption. The Texas Supreme Court has granted full briefing in *In the Interest of S.K. and L.K.*, so I would expect an opinion sometime in 2023 that might give us some guidance on the standard. *S.K.* represents the opposite end of the spectrum from *C.J.C.*, where we had an involved parent that was unquestionably fit. *S.K.* involves CPS litigation, a situation where the department was named temporary managing conservator (and, therefore, was able to establish the parent was unfit early in the case), and the nonparents had custody for more than twelve months.

Issues surrounding the fit parent presumption will often be important in LGBTQ custody litigation, when one parent has a biological connection to a child and the other does not. As it stands, Texas law would treat the non-biological parent exactly the same as any other nonparent involved in custody litigation with a parent. Other states have adopted statutes giving LGBTQ non-biological parents and other "psychological parents" avenues to rights and access, even when the biological parent qualifies as a fit parent. To date, Texas does not have any such laws. It remains to be seen how Texas appellate courts will treat LGBTQ non-biological parents in a post *C.J.C.* world.