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February 22, 2019

The Honorable James White
Chair, Committee on Corrections
Texas House of Representatives
Post Office Box 2910
Austin, Texas 78768-2910

Opinion No. KP-0241

Re: Standards courts apply when balancing the rights of the State against the fundamental rights of parents to raise their children free from government intrusion (RQ-0258-KP)

Dear Representative White:

You seek an opinion regarding the "elements, factors, or standards" courts consider or apply "when balancing the rights of the state against the fundamental rights of parents to raise their child free from government intrusion."[1] To address the standards courts apply in balancing those rights, it is first necessary to understand the basis for fundamental parental rights and the scope of those rights.

I. The Due Process Clause of the Fourteenth Amendment protects fundamental parental rights.

Courts have long held that "the natural right existing between parents and their children is of constitutional dimensions." *In re Pensom*, 126 S.W.3d 251, 254 (Tex. App.—San Antonio 2003, no pet.); *Wiley v. Spratlan*, 543 S.W.2d 349, 352 (Tex. 1976). As the U.S. Supreme Court recognized almost a century ago, "[t]he 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. Soc'y of Sisters*, 268 U.S. 510, 535 (1925). Consistent with this recognition, the Court has held that the interest parents possess with regard to their children is a fundamental liberty interest protected by the Due Process Clause of the Fourteenth Amendment. *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

The Due Process Clause provides that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. In addition to guaranteeing fair process, the Court has held that this Clause includes a substantive component that forbids the government from infringing upon "certain 'fundamental' liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 301–02 (1993). The Court has long held that among the fundamental rights protected by the Due Process Clause are certain fundamental parental rights.

[1]Letter from Honorable James White, Chair, House Comm. on Corrections, to Honorable Ken Paxton, Tex. Att'y Gen. at 1 (Nov. 27, 2018) ("Request Letter"), https://www2.texasattorneygeneral.gov/opinion/requests-for-opinions-rqs.

Troxel, 530 U.S. at 65; *Pierce*, 268 U.S. at 534–35; *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) ("liberty" includes the right of the individual to "establish a home and bring up children"). Over time, the Court has identified several contexts in which these fundamental parental rights apply.

a. Due Process protects the right of parents to make decisions regarding the care, custody, and control of their children.

The Due Process Clause "protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Troxel*, 530 U.S. at 66. In *Troxel*, the Court held unconstitutional a state statute authorizing a court to grant visitation rights to any person, even over the objection of a fit parent. *Id.* at 72–73. Noting that the statute placed the best-interest-of-the-child determination solely in the hands of the judge, the Court concluded that it unconstitutionally infringed on the right of parents to make decisions about the care, custody, and control of their children. *Id.*; *see also Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.").

b. Due Process protects the right of parents to direct the upbringing and education of their children.

In conjunction with the right to make decisions about the care, custody, and control of their children, the Due Process Clause guarantees the right of "parents and guardians to direct the upbringing and education of children under their control." *Pierce*, 268 U.S. at 534–35. In *Pierce*, the Court overturned a state law requiring parents to send their children to public school, emphasizing that the "fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only." *Id.* at 535; *see also Meyer*, 262 U.S. at 403 (overturning a state law that prohibited teaching in any language other than English). Lower courts expanding on this right have explained that *Meyer* and *Pierce* "evince the principle that the state cannot prevent parents from choosing a specific educational program," whether it be religious instruction at a private school or instruction in a foreign language. *Parker v. Hurley*, 514 F.3d 87, 101 (1st Cir. 2008); *see also Meyer*, 262 U.S. at 403; *Pierce*, 268 U.S. at 534–35.

c. Due Process protects the right of parents to make medical decisions on behalf of their children.

The Due Process Clause protects the right of parents to make medical treatment decisions on behalf of their children. *See Parham v. J.R.*, 442 U.S. 584, 602 (1979). In *Parham*, the Court addressed voluntary commitment procedures for minor children, which allowed a parent to apply for commitment over the objection of the child. *Id.* at 587. Rejecting the idea that a formal, adversarial, preadmission hearing was necessary to protect the minor children's rights, the Court emphasized that its "jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children." *Id.* at 602. "The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making difficult decisions." *Id.* Thus, the Court concluded

that parents can and must make judgments about children's need for medical care and treatment. *Id.* at 603.

d. Due Process, coupled with the First Amendment, protects the right of parents to guide the religious training and education of their children.

In conjunction with the First Amendment, the Due Process Clause protects the right of parents "to guide the religious future and education of their children." *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972). *Wisconsin v. Yoder* addressed a challenge to a compulsory education law, which required school attendance until age 16, by Amish parents who objected to formal education beyond the eighth grade. *Id.* at 207–11. Recognizing that the parents' objections were firmly grounded in their religious beliefs, and that compulsory high school education could significantly alter the religious future of their children, the Court held that the First and Fourteenth Amendments "prevent the State from compelling respondents to cause their children to attend formal high school to age 16." *Id* at 234. In doing so, the Court emphasized that the "primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition." *Id.* at 232.

II. As a general matter, Courts apply strict scrutiny to review state statutes that infringe upon fundamental parental rights.

You ask generally about the standards courts will apply in adjudicating cases in which parental rights are at issue, but you do not target a specific context in which those rights are impacted. *See* Request Letter at 1. What elements, factors, or standards a court will use in balancing state interests against the fundamental rights of parents will depend on the context in which the balancing of interests arises.[2] However, we can provide guidance on the general standard courts use to balance these interests and then discuss certain contexts where courts may apply additional standards.

The U.S. Supreme Court's 2000 opinion *Troxel v. Granville* contains the most recent expansive discussion of fundamental parental rights. 530 U.S. at 63. In *Troxel*, the Court held unconstitutional a Washington statute that allowed any person to petition for visitation rights at any time if it was in the best interests of the children. *Id.* Overturning the decision to grant a grandparent access to a child over the objection of the parent, the Court emphasized that if 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." *Id.* at 68–69. But the plurality opinion in *Troxel* did not articulate a standard of review for addressing fundamental parental rights. *See id.* at 80 (Thomas, J., concurring) (noting that the plurality and other concurring opinions do not state the appropriate standard of review and suggesting strict scrutiny

[2]As your question recognizes, the fundamental rights of parents regarding their children are not absolute. Request Letter at 1. "Parental rights are fundamental, but neither the Texas Family Code nor the Constitution treats them as plenary and unchecked." *In the Interest of H.S.*, 550 S.W.3d 151, 163 (Tex. 2018). "[A] state is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized." *Parham*, 442 U.S. at 603. However, while not absolute, parental rights are still fundamental and accorded significant protections, as the standards discussed *infra* reveal.

should apply); *In the Interest of H.S.*, 550 S.W.3d at 175 (Blacklock, J., dissenting) ("[The U.S.] Supreme Court . . . has not articulated a standard of review by which to judge the constitutionality of infringements upon parents' rights.").

Nevertheless, both federal and state courts generally apply strict scrutiny if a state statute infringes upon a *fundamental* liberty right protected under the Due Process Clause of the Fourteenth Amendment. *See, e.g.*, *Reno*, 507 U.S. at 302 (explaining that the Due Process Clause "forbids the government to infringe certain 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest"); *Holley v. Adams*, 544 S.W.2d 367, 370 (Tex. 1976) (recognizing that because the case involved the right of the parent to surround the child with proper influences, the case was "strictly scrutinized"). "Strict scrutiny" requires the "Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2231 (2015); *see also Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (recognizing that the Due Process Clause forbids the government from infringing upon a fundamental liberty interest "unless the infringement is narrowly tailored to serve a compelling state interest").

Consistent with this applicable standard of review, Texas courts and this office recognize that "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. Att'y Gen. Op. No. GA-0260 (2004) at 5; *see also In re Pensom*, 126 S.W.3d 251, 254 (Tex. App.—San Antonio 2003, no pet.). *In re Pensom* addressed the constitutionality of Texas's grandparent visitation statute in light of *Troxel*. 126 S.W.3d at 253–54. Recognizing that the statute implicated the fundamental liberty interest of parents in the care, custody, and control of their children, the court underscored the appropriate standard of review: "Because a fundamental right is implicated here, we apply strict scrutiny and will uphold the statute if it is narrowly tailored to serve a compelling government interest." *Id.* at 254.

III. Certain contexts regarding child custody determinations may warrant the application of additional standards.

While strict scrutiny will apply in any instance when a state statute infringes upon a fundamental parental right, in the context of making custody adjustments or determinations, courts have adopted additional standards that they utilize when applicable.

a. When a court resolves disputes concerning conservatorship and possession of a child, the court bases those decisions on the best interest of the child.

While parents are presumed to act in the best interest of their children, in situations involving divorce parents may have differing opinions regarding what is best for the children. In addressing child custody disputes between parents or in instances of abuse and neglect of a child, the Legislature has established the standard by which courts must resolve those disputes: "The best interest of the child shall always be the primary consideration of the court in determining the issues of conservatorship and possession of and access to the child." TEX. FAM. CODE § 153.002. The

Texas Supreme Court provided a non-exhaustive list of factors to consider in ascertaining the best interest of the child, including:

> (A) the desires of the child;
> (B) the emotional and physical needs of the child now and in the future;
> (C) the emotional and physical danger to the child now and in the future;
> (D) the parental abilities of the individuals seeking custody;
> (E) the programs available to assist these individuals to promote the best interest of the child;
> (F) the plans for the child by these individuals or by the agency seeking custody;
> (G) the stability of the home or proposed placement;
> (H) the acts or omissions of the parent which may indicate that the existing parent-child relationship is not a proper one; and
> (I) any excuse for the acts or omissions of the parent.

Holley, 544 S.W.2d at 372 (footnotes omitted); *see also Reno*, 507 U.S. at 303–04 ("'The best interests of the child' . . . is a proper and feasible criterion for making the decision as to which of two parents will be accorded custody.").

b. Before permanently severing parental rights, the State must provide clear and convincing evidence that the termination is warranted.

Both federal and Texas courts have held that the Due Process Clause requires a heightened evidentiary standard before permanently terminating parental rights. "Before a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegations [that support termination] by at least clear and convincing evidence." *Santosky v. Kramer*, 455 U.S. 745, 747–48 (1982); *see also In Interest of G.M.*, 596 S.W.2d 846, 847 (Tex. 1980) (requiring clear and convincing evidence standard of proof "in all proceedings for involuntary termination of the parent-child relationship"). The Legislature defines "clear and convincing evidence" as "the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established." TEX. FAM. CODE § 101.007. Consistent with the U.S. Supreme Court case law, the Legislature incorporated the clear and convincing evidence standard into the Family Code procedures addressing termination of the parent-child relationship. *See, e.g.*, *id.* §§ 161.001(b), .003(a)(2), .206(a)–(a-1).

c. Courts presume that fit parents act in the best interests of their children.

In evaluating parent-child relationships before making decisions about access to the child, courts presume "that fit parents act in the best interests of their children" and refrain from imposing their own judgments in lieu of a fit parent's decision regarding what is in the best interest of the child. *Troxel*, 530 U.S. at 68. "The law's concept of the 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*, 442 U.S. at 602. "More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children." *Id.* Due to this presumption, the State may not "infringe on the fundamental rights of parents to

make child rearing decisions simply because a state judge believes a 'better decision' could be made." *In re Derzapf*, 219 S.W.3d 327, 333 (Tex. 2007) (quoting *Troxel*, 530 U.S. at 72–73). So long as a parent 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 68–69; *see also In re Scheller*, 325 S.W.3d 640, 642 (Tex. 2010).

Parental rights issues arise in many different contexts, and diverse scenarios regularly occur that require courts to evaluate those rights and balance them against the interests of the State in new settings. While we do not attempt to anticipate every context a court will consider, or provide an exhaustive list of the elements, factors, or standards that courts will apply in all settings, the standards and presumptions discussed herein reveal how courts give fundamental parental rights expansive protection under the Due Process Clause.

SUMMARY

The Due Process Clause of the Fourteenth Amendment protects certain fundamental parental rights, including the right of parents to make decisions concerning the care, custody, and control of their children, to direct the upbringing and education of their children, the right to make medical decisions on behalf of their children, and, in conjunction with the First Amendment, to guide the religious future and education of their children.

Courts review governmental infringements on fundamental rights protected by the Due Process Clause under strict scrutiny, requiring that the statute serve a compelling state interest and be narrowly tailored to achieve that interest.

In addressing child custody disputes between parents or in instances of abuse and neglect of a child, the Legislature has established the standard by which courts must resolve those disputes. Pursuant to section 153.002 of the Family Code, the best interest of the child shall always be the primary consideration of the court in determining the issues of conservatorship and possession of and access to the child.

A court may not permanently and irrevocably terminate parental rights absent clear and convincing evidence of the allegations supporting the termination.

In evaluating parent-child relationships before making decisions about access to the child, courts presume that fit parents act in the best interests of their children and refrain from imposing their own judgments in lieu of a fit parent's decision regarding what is in the best interest of the child.

Very truly yours,

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