IN THE COURT OF APPEALS
OF MARYLAND

JANICE M.,

Defendant-Appellant,

v.

MARGARET K.,

Plaintiff-Cross Appellant.

SEPTEMBER TERM, 2006
DOCKET NO. 122

BRIEF OF FAMILY RESEARCH COUNCIL AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT

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INTERESTS AND STANDING OF *AMICUS CURIAE*

FAMILY RESEARCH COUNCIL ("FRC") is a non-profit organization located in Washington, D.C. It exists to develop and analyze governmental policies affecting the family. FRC is committed to strengthening traditional families in America and advocates continuously on behalf of policies designed to accomplish that goal.

By order dated February 28, 2007, this Court granted the motion of the Alliance Defense Fund, FRC's counsel, to file a brief *amicus curiae* in this matter. By order dated March 15, 2007, this Court granted the Alliance Defense Fund's motion to substitute Family Research Council as the named *amicus curiae*, and to clarify that the Alliance Defense Fund is merely of counsel to FRC, along with record counsel Matt M. Paavola.

INTRODUCTION AND SUMMARY OF ARGUMENT

FRC contends that respecting fit legal parents' child-rearing choices in the absence of actual harm to children is the only sure safeguard against the increasingly intrusive demands of the modern state to "micromanage" the American family. This Court's recent decision in *Koshko v. Haining*, __ Md. __, 2007 WL 93237 (Jan. 12, 2007) has moved Maryland very close to fully implementing this logically necessary threshold standard which protects parental rights in the face of third party claims for custody and visitation. However, the decision below in the case at bar shows that the doctrine of "de facto parentage," imported into Maryland law by the Court of Special Appeals, cannot be squared with robust protection for the fundamental right of parents to direct the care and upbringing of their children. This Court should complete the transformation of Maryland law on third-party custody and visitation claims it began in *Koshko*, and subject all third-party claims for custody and visitation to the same constitutionally required threshold showing of either parental unfitness or harm to the child. Absent clear and convincing evidence of compelling circumstances involving actual or potential harm to children or parental unfitness, neither the federal Constitution nor the Maryland Declaration of Rights should tolerate government intrusion into the parent-child relationship for the purpose of the state evaluating parents'

child-rearing decisions, on the basis that the state or third parties believe there to be "better" alternatives. *Koshko* emphasizes that this is true whether it is a claim for custody or visitation in view.

In a pluralistic society with government wielding great regulatory power, a more principled boundary than the "best-interests-of-the-child" standard must be interposed between the fundamental liberty of parents to direct the care and upbringing of their children, and non-constitutional claims by third parties contrary to the parents' choices. FRC urges this Court to effect the natural extension of *Koshko's* logic to all third-party custody and visitation claims, and thus to clarify the limits on governmental intrusion into the family.

ARGUMENT

I. The federal fundamental right of a parent to raise her child necessarily implies a high threshold showing of parental unfitness or harm to the child by third parties seeking to challenge that right in court.

The right of fit parents to direct their children's upbringing without state interference is one of the earliest recognized liberties protected by the Fourteenth Amendment. This Court's most recent opinions on third party claims for custody and visitation have reflected a heightened appreciation for the great degree of constitutional protection afforded this fundamental liberty interest. *See, e.g.*, *McDermott v. Dougherty*, 385 Md. 320, 353 (2005) (custody); *Koshko,* 2007 WL 93237 (visitation). Moreover, in *Koshko*, this Court indicated that this fundamental right receives *even greater protection* under Article 24 of the Maryland Declaration of Rights. *Koshko*, 2007 WL 93237 at *19. Amicus FRC urges this Court to conclude that logical consistency with the fundamental nature of parents' rights requires a threshold showing by clear and convincing evidence of parental unfitness or harm to the child, whenever a third party, including a purported "de facto parent," seeks custody or visitation over the objection of the legal parent.

For nearly 100 years, the U. S. Supreme Court has recognized and steadily guarded the fundamental liberty interest of parents in making decisions concerning their children's

upbringing. Parental rights appear very early in the Court's enumerations of those liberties considered fundamental and therefore protected by the Fourteenth Amendment:

> While this court has not attempted to define with exactness the liberty ... guaranteed [by the Fourteenth Amendment], the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, *to marry, establish a home and bring up children*, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (emphasis added). *See also Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (a "basic civil right of man").

In the case involving the specific legal concepts which must necessarily guide this Court's present analysis, the Supreme Court described the fundamental right of a parent in the strongest terms, as "perhaps the oldest of the fundamental liberty interests." *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality opinion). A parent's fundamental right necessarily includes not only formation of social and moral character, but also decisions concerning visitation, custody, and who may associate with one's child. *Troxel*, 530 U.S. at 78-79 ("The strength of a parent's interest in controlling a child's associates is as obvious as the influence of personal associations on the development of the child's social and moral character") (Souter, J., concurring).

In *Troxel*, the Supreme Court struck down Washington's third-party visitation statute. The case involved grandparents, whose son was deceased, petitioning for visitation with their grandchildren. The children's mother opposed the requested visitation. *Id*. at 61-62. In rejecting the grandparents' petition, the *Troxel* Court recognized that third-party visitation, even with a child's relatives, may unconstitutionally burden the parent-child relationship. *Id*. at 64. *Troxel* affirmed the fundamental nature of parents' Fourteenth Amendment liberty interest in directing the care and upbringing of their children, reiterating the constitutional necessity of the presumption that parents act in their children's best interests and that a court

may substitute its decision for that of a child's fit parent only in very compelling circumstances. *Troxel* held:

> [S]o 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.

Id. at 68. *Troxel* struck down Washington's visitation statute because the court failed to presume the validity of the mother's decision to deny the visitation and failed to give "special weight" to that decision. *Id*. at 67. This failure violated the mother's fundamental due process rights.

It is true, as noted by this Court in *Koshko*, 2007 WL 93237 at *9, that *Troxel* posed and left unanswered the question of "whether the Due Process Clause requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation." *Troxel*, 530 U.S. at 73. Yet against the backdrop of the Supreme Court's long history of recognition of the fundamental rights of parents, the lack of such a bright-line threshold for state interference with the exercise of this venerable liberty interest is unthinkable. The need for a threshold showing of parental unfitness or harm to the child before overruling the parent's wishes is essentially inherent in the definition of the right, if the right is to have real substance in the modern era's litigious environment.

The Supreme Court's deference to a fit parent harkens back to the days of Solomon. Tradition and experience have taught that the "natural bonds of affection" will lead fit parents to make the best decision concerning their child. *Troxel*, 530 U.S. at 68. As a Nation, we have come to trust that parents – not the state (or its courts) – are best at knowing and protecting their child's interest:

> 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. And it is in recognition of

> this that these decisions have respected the private realm of family life which the state cannot enter.

Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (citation omitted).

The Supreme Court has emphasized that the state has only a "de minimis interest" in a child's care when the child has a fit parent. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972). Protection of the natural rights and duties of parents toward their children against undue state interference lies at the root of parental rights jurisprudence:

> Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course; our constitutional system long ago rejected any notion that a child is "the mere creature of the State" and, on the contrary, asserted that parents generally "have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations" ... 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. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children.

Parham v. J.R., 442 U.S. 584, 602 (1979) (quoting *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925), and citing 1W. Blackstone, COMMENTARIES 447; 2 J. Kent, COMMENTARIES ON AMERICAN LAW 190).

Indiscriminate use of the "best-interests-of-the-child" standard by courts called upon to review parental decisions is deeply inconsistent with the fundamental status of the due process rights of parents. The "best-interests-of-the-child" standard developed largely in the context of custody disputes between parents, a context which counsels caution before extending the standard into different kinds of disputes. Where the competing litigants both have constitutionally-protected parental rights, the court unavoidably must resolve a clash between differing views of what is best for the child, each of which is backed by a presumption that the parent is acting in the child's best interests. There is no alternative to the court breaking the tie, resolving the standoff, and protecting the interests of the child caught in the middle. As this Court has recognized,

> In a situation in which both parents seek custody, each parent proceeds in possession, so to speak, of a constitutionally-protected fundamental parental right. Neither parent has a superior claim to the exercise of this right to provide "care, custody, and control" of the children. Effectively, then, each fit parent's constitutional right neutralizes the other parent's constitutional right, leaving, generally, the best interests of the child as the sole standard to apply to these types of custody decisions. Thus, in evaluating each parent's request for custody, the parents commence as presumptive equals and a trial court undertakes a balancing of each parent's relative merits to serve as the primary custodial parent; the child's best interests tips the scale in favor of an award of custody to one parent or the other.

McDermott, 385 Md. at 353.

However, when courts cross-apply the "best-interests-of-the-child" standard to the much different context of a dispute between a parent and a third party, including one who enters the litigation seeking to be declared a "de facto parent," they necessarily cross into the territory of the state potentially substituting its judgment for that of the only litigant recognized to hold a fundamental right to direct the child's upbringing. "*Troxel* . . . impliedly rejects the substitution of a judge's opinion that a particular child would be better raised in a situation a trial judge prefers." *McDermott,* 385 Md. at 352. The normal custody dispute context shows that balancing parental rights is a zero-sum game. The court cannot recognize any degree of parental rights in a third party not previously recognized as holding them, without substantially diminishing the rights the legal parent held going into the litigation:

> Where the dispute is between a fit parent and a private third party, however, both parties do not begin on equal footing in respect to rights to "care, custody, and control" of the children. The parent is asserting a fundamental constitutional right. The third party is not. A private third party has no fundamental constitutional right to raise the children of others. Generally, absent a constitutional statute, the non-governmental third party has no rights, constitutional or otherwise, to raise someone else's child.

McDermott, 385 Md. at 354.

Without a bright line threshold forbidding judicial testing of parental decisions against the "best-interests-of-the-child" standard, except where there is clear and convincing

evidence of parental unfitness or harm to the child, there is no barrier to that standard devolving into the court paternalistically second-guessing parental wisdom on its own motion or on that of a non-parental third party. Allowing courts to test the judgments of fit parents in disputes with non-parents under a "best-interests-of-the-child" standard where there is no clear and convincing showing of potential harm to the child is manifestly inconsistent with the Supreme Court's longstanding characterization of parents' rights as "fundamental."

The constitutional rights of parents ranked as a defining exemplar in one of the Supreme Court's hallmark cases on how fundamental rights are identified:

> The Due Process Clause guarantees more than fair process, and the "liberty" it protects includes more than the absence of physical restraint. The Clause also provides heightened protection against government interference with certain fundamental rights and liberty interests. In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the "liberty" specially protected by the Due Process Clause includes the rights to marry, to have children, [and] to direct the education and upbringing of one's children ....

Washington v. Glucksberg, 521 U.S. 702, 719-720 (1997) (citations omitted).

As the *Glucksberg* decision explains, only those rights with the most ancient pedigree and most elemental connection to American liberty can be described as, and merit protection as, "fundamental":

> [W]e have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, "deeply rooted in this Nation's history and tradition," []"so rooted in the traditions and conscience of our people as to be ranked as fundamental"[], and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed."

Glucksberg, 521 U.S. at 720-721 (citations and quotations omitted).

Rights that are recognized as fundamental under the Due Process Clause are entitled to the highest protection against infringement:

> [T]he Fourteenth Amendment "forbids the government to infringe ... 'fundamental' liberty interests at all, no matter what process is provided,

> unless the infringement is narrowly tailored to serve a compelling state interest."

Glucksberg, 507 U.S. at 721 (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993)).

The *Troxel* Court did not answer the question of whether a showing of harm is a threshold requirement in the specific context of grandparent or third party visitation claims. Yet the plurality alluded to the harm threshold as a basic principle present in the Court's parental rights case law. *See Troxel*, 530 U.S. at 68-69 (normally no basis for state to question parent's child-rearing decisions so long as parent adequately cares for child).

The Supreme Court's parental rights decisions over the decades have generally identified harm to the child as the proper threshold between the parents' fundamental rights and the state's interest in protecting children. For instance, in the seminal parental rights case, *Meyer*, the Court noted:

> No emergency has arisen which renders knowledge by a child of some language other than English so clearly harmful as to justify its inhibition with the consequent infringement of rights long freely enjoyed.

Meyer, 262 U.S. at 403. *See also Prince*, 321 U.S. at 167 ("the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare").

More recently, the Supreme Court has discussed at length the necessity for harm to the child to be respected as a limiting principle on the state's ability to interfere with parents' decisions regarding even matters with potentially very profound consequences on their children:

> As with so many other legal presumptions, experience and reality may rebut what the law accepts as a starting point; the incidence of child neglect and abuse cases attests to this. That some parents "may at times be acting against the interests of their children" creates a basis for caution, but is hardly a reason to discard wholesale those pages of human experience that teach that parents generally do act in the child's best interests. The statist notion that governmental power should supersede parental authority in all cases because some parents abuse and neglect children is repugnant to American tradition ... Nonetheless, we have recognized that a state is not without constitutional control over parental discretion in dealing with children when their physical

> or mental health is jeopardized ... [However,] simply because the decision of a parent is not agreeable to a child or because it involves risks does not automatically transfer the power to make that decision from the parents to some agency or officer of the state.

Parham, 442 U.S. at 602-603 (citations omitted). *See also Santosky v. Kramer*, 455 U.S. 745, 753 (1982) ("The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents").

This Court has recently moved Maryland law dramatically in the direction of greater recognition of the strength of protection that both the federal and state constitutions require for this fundamental right of parents to direct the care and upbringing of their children. In the wake of *McDermott* and most recently *Koshko*, it is now clear that the doctrine of "de facto parentage" adopted by the Court of Special Appeals in *S.F. v. M.D.*, 132 Md.App. 99 (2000), and followed in the decision below in this case, cannot pass constitutional muster.

II. This Court's *Koshko* decision necessitates that "de facto parent" claims be treated consistently with all other third party claims for custody and visitation.

Just two days after the writ was granted in this case, this Court issued an opinion recognizing the logical significance in the third party visitation context of the Supreme Court's long line of parental rights holdings. In fact, though the right of fit parents to direct their children's upbringing without state interference is one of the earliest recognized liberties protected by the Fourteenth Amendment, in *Koshko*, this Court indicated that this fundamental right receives *even greater protection* under Article 24 of the Maryland Declaration of Rights. *Koshko*, 2007 WL 93237 at *19. This Court concluded in a lengthy and careful constitutional analysis that a threshold showing of parental unfitness or harm to the child is constitutionally compelled before a grandparent visitation claim can be weighed under the best interests standard. *Koshko,* 2007 WL 93237, *17. This conclusion necessitated the overruling of a substantial line of Maryland case law construing the state's Grandparent Visitation Statute ("GVS"). *Id.* at *19.

In *Koshko*, this Court found that for the GVS to be sufficiently narrowly tailored to satisfy the necessary strict scrutiny raised by such a direct and substantial infringement on the fundamental right of parents to direct the upbringing of their children, more was required than just the bare minimum some courts have thought sufficient to comport with *Troxel*:

> [T]he GVS permits a direct and substantial burden on the exercise of parental rights concerning the control of their children ... The parental presumption we engrafted onto the GVS saves it from *per se* invalidation under *Troxel*, but it is not sufficient, by itself, to preserve the constitutionality of the statute. Although the presumption elevates a Maryland court's decision above the "simple disagreement between the [trial court] and the [parents] concerning [their] children's best interests," disparaged by the Supreme Court in *Troxel*, it does not do enough to protect parents from undue interference with their rights. Fit parents, who are presumed to act in their children's best interests, nonetheless may be hailed into court to defend their decisions absent any showing that they are unfit and without any requirement that the grandparents challenging the parental decision plead any exceptional circumstances that may tend to override the parental presumption. A proceeding that may result in a court mandating that a parent's children spend time with a third party, outside of the parent's supervision and against the parent's wishes, no matter how temporary or modifiable, necessitates stronger protections of the parental right. The importance of parental autonomy is too great and our reluctance to interfere with the private matters of the family too foreboding, whether it be in matters of custody or visitation, to allow parental decision-making to remain that vulnerable to frustration by third parties.
>
> ...[I]f third parties wish to disturb the judgment of a parent, those third parties must come before our courts possessed of at least prima facie evidence that the parents are either unfit or that there are exceptional circumstances warranting the relief sought before the best interests standard is engaged. This scheme, applied to the visitation context, would supply the safeguards lacking to tailor suitably the GVS to the State's interests by ensuring that parental decisions entitled to deference are not unduly placed in jeopardy by less significant familial disputes.

Koshko, 2007 WL 93237, *17-18.

This Court's decision in *Koshko* takes pains to harmonize the application of the best-interests standard in the third-party visitation context with its well-developed use in the

custody context. It is a model of careful balancing between the state's compelling interest in ensuring the well-being of children and parents' fundamental rights recognized through the decades by the Supreme Court and this Court. *Id*.

FRC urges this Court to see that *Koshko* correctly discerned from *Troxel* and from this Court's own recent precedents (particularly *McDermott*) that a threshold showing of clear and convincing evidence of parental unfitness or harm to the child is constitutionally compelled *whenever* a third party challenges a fit legal parent's childrearing decisions in court. The Court of Special Appeals' "de facto parent" test currently stands as an unjustified exception to this constitutionally compelled safeguard. In fact, it was originally adopted to justify the grant of visitation to a third party over the objection of the legal parent *without* requiring a threshold showing of parental fitness or harm to the child. As the Court of Special Appeals noted in the decision below, quoting the decision in which it first adopted the "de facto parent" test, "a non-biological, non-adoptive parent, ... [who] is a de facto parent, ... is not required to show unfitness of the biological parent or exceptional circumstances ... [to be] entitled to visitation." *Janice M. v. Margaret K.*, 171 Md.App. 528, 539 (2006), quoting *S.F. v. M.D.*, 132 Md.App. at 111-12.

In the decision below, the Court of Special Appeals seemed reassured that because the test it adopted in *S.F. v. M.D.* "is a strict one," no wave of de facto parentage claims would confront the Maryland courts. *Janice M.*, 171 Md.App. at 539. The test does not automatically meet constitutional muster simply because it may be hard to satisfy or will discourage borderline claims, however. In reality, there are a couple of problems with the test that render it incompatible with the broad and steep protection for the fundamental rights of parents recognized in *McDermott* and *Koshko*.

One problem with the Court of Special Appeals' de facto parent test is that it creates a risk that a parent will unknowingly permanently diminish his or her fundamental parental rights. This is a danger where a parent fosters a relationship between the child and a third party which the parent considers to be in the child's best interests at the time and as long as

it lasts, but which the parent does not necessarily intend to be a life-long relationship. In essence, the test works as a one-way ratchet and thus does not adequately protect a parent's fundamental right, implicit in the right to determine her child's associations, to reevaluate and change those associations after a period of time when that is also determined by the parent to be in the child's best interests.

The other problem with the de facto parent test as adopted and followed by the Court of Special Appeals is that in visitation claims, as noted above, it supplants the threshold test this Court has found constitutionally compelled in all other third party visitation and custody cases. As a result, it opens the door to the weighing of a parent's decisions regarding the care and upbringing of her child under the best interests of the child standard without the constitutionally required threshold showing of parental unfitness or harm to the child. Appellant Janet M. made precisely this argument below, but the Court of Special Appeals rejected it with virtually no analysis:

> Janice M. argues that our holding in *S.F. v. M.D.* has been modified by *Troxel,* in which the United States Supreme Court addressed the constitutionality of a "grandparent visitation" statute. According to Janice M., because the evidence presented in the case at bar does not establish that judicial action is necessary "to prevent harm or potential harm to the child," the circuit court's visitation award constituted an unconstitutional interference with her fundamental right to make decisions concerning the care, custody, and control of Maya. We are persuaded, however, that *Troxel* did not modify *S.F. v. M.D.* We therefore hold that the circuit court neither erred nor abused its discretion in concluding that, because visitation with Margaret K. is in Maya's best interest, Margaret K. is entitled to visitation with her de facto daughter.

Janet M., 171 Md.App. at 540.

Granted, the Court of Special Appeals issued this opinion approximately two months *before* this Court issued its *Koshko* decision. Nevertheless, the court below was well aware of the strong protections this Court had already mandated for parental rights in the face of third party custody claims, as evidenced by its repeated citation and discussion of *McDermott.* It also failed to give adequate consideration to the similar implications of the

Supreme Court's *Troxel* decision in the visitation context. Indeed, the court summarily rejected Appellant's *Troxel* argument in one sentence with no analysis at all. *Janet M.*, 171 Md.App. at 540.

This case presents the timely opportunity for this Court to quickly complete, on the heels of *Koshko,* the full renovation of Maryland law on third-party claims impacting the fundamental rights of parents, whether custody claims or visitation claims. The *Koshko* decision's full embrace of the implications of *Troxel*, and its holding that Maryland's Declaration of Rights requires even more robust protection for parental rights than the federal Fourteenth Amendment, does not leave any room in Maryland law for the Court of Special Appeals' inconsistent "de facto parent" test.

CONCLUSION

For all of the foregoing reasons, the judgment of the Court of Special Appeals should be REVERSED, insofar as it recognizes a "de facto parent" test permitting some third-party visitation claims to be weighed under the best-interests standard without a threshold showing of parental unfitness or harm to the child.

RULE 8-504(a)(8) STATEMENT

This brief has been prepared in WordPerfect 12, using the proportionally-spaced font, Times New Roman, 13 point.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that on this 20th day of March, 2007, two copies of the foregoing Brief Amicus Curiae was mailed, postage prepaid, to: Cynthia E. Young, Esq., 1200 West Street, Annapolis, Maryland 21401 and Scott J. Strickler, Esq. And Jennifer Fairfax, Esq., 4550 Montgomery Avenue., Suite 900 N, Bethesda, Maryland 20814.

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