ORIGINAL

IN THE SUPREME COURT OF THE STATE OF OREGON

In the Matter of the Marriage of JOHN PAUL EPLER, Petitioner-Respondent, Respondent on Review, and ANDREA MICHELLE EPLER, nka, Andrea Michelle Walker, Respondent-Appellant, Petitioner on Review and KIMBERLY SUE GRAUNITZ, Third Party Respondent-Respondent, Respondent on Review,	Marion County Circuit Court No. 04C33678 Court of Appeals A148643 S061818

PETITIONER ON REVIEW'S BRIEF ON THE MERITS (Corrected)

Appeal from the Decision dated September 11, 2013
In the Court of Appeals
Opinion: Hon. Rex Armstrong
Concurring Judges: Hon. Rebecca Duncan and Hon. Darleen Ortega

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Legal Question Presented

Does the constitutional parental presumption and ORS 109.119 apply to this action brought pursuant to ORS 107.135(1)(a) as a custody modification proceeding between a parent and third party, where the parent originally consented to placing custody with a third party/Grandmother, and such placement was adopted in a court order. *Troxel v. Granville,* 530 U.S. 57 (2000).

Proposed Rule Of Law

In custody modification proceedings, where the parent initially consents to a custody order with a third party, the subsequent contested modification proceeding is subject to the *Troxel* presumption; i.e. the custodial third party must rebut the *Troxel* presumption by a preponderance of the evidence based upon the criteria set forth in ORS 109.119(4)(b).

Nature of the Action

In this child custody modification case, the child's mother appeals from a judgment that declined to modify in any respect a prior custody order in the context of a dissolution judgment where a mother consented to custody with the child's grandmother. The child's mother brought the modification proceeding pursuant to ORS 107.135(1)(a) to modify provisions as to custody, the parenting plan and child support. The Court of Appeals affirmed, with a majority of a divided court agreeing that the change of circumstances rule precluded

modification of custody, but remanded for reconsideration of a parenting plan and support. *Epler and Epler,* 258 Or App 464, 484, 309 P3d 1133 (2013). Mother requests that this Court grant her custody of her child, together with a remand for development of a reunification plan, parenting plan and support.

Scope of Review

In review of a suit in equity from the Court of Appeals, this Court has consistently ruled that it may review *de novo*, or limit its review to questions of law. The Court is more apt to exercise *de novo* review if it reaches issues that the Court of Appeals did not address, or decides issues that are fact dependent. See *State ex rel. State Office for Servs. to Children & Families v. Stillman*, 333 Or 135, 138, 36 P3d 490 (2001). Further, this Court is not constrained by ORAP 5.40(8). In the parallel case of *O'Donnell-Lamont and Lamont,* 337 Or 86, 89, 91 P3d 721 (2004), this Court elected to review *de novo.*

A remand to the trial court to take additional evidence on the issue of custody is unnecessary. The factual record developed in the trial court is sufficient to resolve the custody issue in this case. Mother requests that this Court address

all issues that depend on factual findings. Specifically, Mother requests that this Court find that Mother is a fit parent[1], that Father is not a custodial resource for the child, and that third-party/Grandmother has not rebutted the parental presumption.

Finally, Mother requests *de novo* review because the delay that necessarily would attend further evidentiary proceedings on remand would create substantial, even ruinous, litigation costs and emotional turmoil to the child. This case has been pending in the court system since May of 2008. See *Troxel*, 530 U.S. at 75; *O'Donnell-Lamont,* 337 Or at 89, 120-21.

Statement Of Facts Material to Review

A. Procedural and Factual Background.

(hereinafter "Child") was born in November of 2003 in Salem. She is now 10 years of age. Her mother (hereinafter "Mother") and father (hereinafter "Father") settled in Oregon shortly before her birth, after Father was discharged from the Navy. The parents had married in Virginia in July 2003, the place of Mother's origins, when Father was stationed there. Less than a year after Child's birth the marriage deteriorated, as did Mother's physical, emotional and mental health. Mother was then 20 years of age.

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[1] However, see fn. 6 hereinafter.

Father was largely absent from the family home in Oregon. In September of 2004, Mother turned over the day-to-day care of Child to Father's mother (hereinafter "Grandmother"), as Mother lapsed into depression, drinking heavily, inability to sustain employment and lack of sleep. (Tr 67, 78, 90, 137, 138-139, 194). Father alleged she was suicidal at the time. By the end of November, Mother "broke down" completely. She was rescued by her grandfather who arranged a plane ticket back to her home state, scheduled for departure on December 4, 2004. (Tr 140-141)

With the announcement of Mother's leaving, Father and Grandmother each immediately engaged legal counsel. Within the span of one day, the attorneys prepared a Marital Settlement Agreement and Stipulated General Judgment of Dissolution of Marriage, despite the fact that no proceeding for dissolution had then been filed[2]. (Tr 77, 78, 84, 91). These documents provided that Grandmother was awarded legal custody of Child, that Mother was to have "Marion County SLR 8.075" parenting time,[3] and each parent was to pay Grandmother $318 per month in child support.

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[2] The case was not filed with the court until December 15, 2004. OJIN #1.

[3] This Rule essentially provides for alternating weekends, holidays and weeks during the summer.

The evening before her departure, Mother was summoned to Salem to sign the documents. She signed before a notary at a store. Mother was afforded no opportunity to consult an attorney, nor was she provided with the standard 30-day notice in a summons. (Tr 91, 144-145). The documents did not reference, in any way, a waiver of parental rights, nor was there any mention of third-party jurisdiction.[4] Mother hastily signed under assurances from Grandmother that the provisions were "temporary and flexible" as Mother's plans were indefinite at that time. (Tr 93, 146, 149).

With the help and support of her family, Mother was able to change and improve her circumstances. She went back to school and obtained a B.A. in history and political science. She obtained steady employment as a corrections officer in a prison in Virginia, where she was still employed at the time of trial. (Tr 134, 150, 214). She participated in parenting classes to equip her for better parenting, and engaged in the care of other young children. (Tr 151). Her alcohol consumption was circumspect. She was in good health at the time of trial, having sought regular

[4] Grandmother was named as a "Third-Party Respondent," without nominating anyone as a third-party petitioner, or alleging the third party was "liable" for all or part of the underlying claim, as is generally required by third-party practice. See ORCP 22C. Certainly no reference was made to ORS 109.119, generally considered the entry point for third parties in domestic relations cases involving custody, visitation or contact rights of children. Particularly, no document gave notice or waiver of constitutional rights.

medical care, and psychiatric care related to the stress of separation from her daughter. (Tr 135, 137, 151, 198).[5]

Father was never considered an option for custody due to instability in his life. (Tr 231; Ex. 103; Tr 76). In his response to Mother's motion to modify, Father agreed with "a change of parenting time, visitation, and child support," but did not seek to modify custody to himself. See Tr. Ct. File, OJIN #92. Father advised the court at closing argument that he felt the child should "remain here in Oregon," without asking for an award to himself. (Tr 338, *Epler, supra* 258 Or App at 469).[6]

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[5] The trial court, in its opinion letter, and echoed by the majority of the Court of Appeals (*Epler,* 258 Or App at 476), opined about the lack of corroborating evidence of Mother's improved mental health and sobriety. However, there was no evidence from any witness that would have put Mother's credibility at issue on these matters, as credibility involves a disparity between claims or statements made and other evidentiary facts. In the absence of express findings of credibility, as here, nothing requires a party to present documentary evidence or expert testimony about medical conditions. *Coote and Coote*, 112 Or App 342, 348, 831 P2d 32 (1992). Secondly, the lower court stressed Mother's need to furnish documentary evidence in the contest of overcoming her burden to establish a change of circumstance. However, because employment of the *Troxel* presumption shifts the burden to Grandmother (see, Mother's Petition for Review at 16-17), no reason exists to discard the reasoning in *Coote*.

[6] The Court of Appeals referenced Father's response to Mother's prior motion that was dismissed by Mother, wherein he stated "if any change needs to be made of custody of [Child], * * *then I would like full custody of [Child]." *Epler supra*, 258 Or App at 468. He took this posture only briefly, but more importantly did not reiterate this position in Mother's second (and extant) motion that came before the court for trial throughout the nearly three years that the case was before the court. At every juncture Father deferred custody to his mother; i.e. Grandmother.

Grandmother testified that Father has not been a resource for the child, as he has not paid child support. (Tr 95). He was approximately $10,000 in arrears at the time of trial. (Tr 95; Ex. 108). Even Grandmother testified that Father was irresponsible, at one point refusing to allow Father to come to the home to see the child. "He is not a visitor in my house. I don't support him in his actions right now * * * I cannot be his caregiver, * * * he has to grow up, is what I'm saying." During the hearing, Father's visits with the child were supervised. Grandmother testified that the child was not safe being with Father. (Tr 97-99).

B. Factors re ORS 109.119(4)(b) (Rebutting the Parental Assumption).

When the matter proceeded to trial, the following facts were adduced.

Mother is a fit parent[7]. She presently poses no harm to the child. (Tr 104-106, 150, 260-262). As noted above, she showed that she had adequate housing and other means to provide for the child's needs. (Tr 94, 134, 150). She had always maintained contact with the child, but had recently renewed the parent-child bond. (Tr 93, 152, 153). In short, there is no evidence in the record showing that Mother is unable or unwilling to adequately care for the child.

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[7] We use the term "fit" as derived from the *Troxel* constitutional standard. However, under Oregon's formulation of *Troxel* in ORS 109.119, the presumption is afforded simply to the "legal parent," defined as the "biological or adoptive mother," or a man "who has adopted the child," or has established paternity under the law. See ORS 109.119(10)(d) and ORS 419A.004(16).

Mother acknowledged that Grandmother was the child's primary caretaker. However, she agreed to a "reunification" or transition plan that would be age-appropriate, and sensitive to the child's needs. (Ex. 103, Tr 245, 252, 255, 258-260). She agreed to not unreasonably deny Father's or Grandmother's contact with the child. (Tr 173).

No evidence showed that it would be detrimental to the child if the child were placed with Mother. (Tr 171, 252) In fact, the expert and custody evaluator testified that it would be detrimental to the child not to make the transfer. With the child's increasing age and maturity, the transition would go smoother. (Tr 245, 255-256, 258)

Mother also acknowledged that the initial placement with Grandmother was with her consent. By the same token, as soon as just one or two months after Mother's departure, Mother and Grandmother had an exchange wherein Grandmother rebuffed Mother's efforts to regain custody, and otherwise interfered with her efforts to see Child. (Tr 168-169, 172; Ex. 104)[8]. Mother has participated in the court system since 2006 to legally obtain her child, among other rights. See OJIN #16 and ff.

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8 The totality of the aforementioned rebuttal factors showing Mother's near total transformation, together with Grandmother's interference with Mother's efforts to exercise parenting time, demonstrate a substantial change of circumstances as well. See ORS 107.135(11) and *Greisamer and Griesamer*, 276 Or 397, 400-401, 555 P2d 28 (1976).

SUMMARY OF ARGUMENT

The majority of decisions from other jurisdictions hold that the parental, or *Troxel,* presumption, applies in custody modification proceedings, rather than the determination predicated upon a change of circumstances rule.

In the application of Oregon legislation, the statutory structure set forth in ORS 109.119 is controlling as to the adjudication of custody modification between a parent and a third party. ORS 109.119 "trumps," or operates independently of, the configuration of ORS 107.135. The *Troxel* presumption is embodied only within ORS 109.119(2)(a). Internally, it requires the exercise of judicial fact finding and reasoning to determine, whether or not the presumption is rebutted. It also sets forth a carefully-crafted and narrowly-tailored balancing scheme, designed to simultaneously protect constitutional guarantees to due process, both procedural and substantive, and in particular, the fundamental and compelling interest of parents to make decisions regarding their children, and the interest of the State in durable and decisive judgments.

Even though one of the two parents' interests may align with the third party, that co-alignment does not defeat the application of the *Troxel* presumption in favor of the other parent.

Finally, the *Troxel* presumption may not be waived unless the waiver is in writing and is knowing, intelligent and voluntary. Nor is the presumption applied, or to be applied, unless there is a dispute between the parent and third party into which the court is called to settle.

ARGUMENT

A. Weight of National Authority

A majority of cases throughout the Nation confronted with third party modification disputes hold the *Troxel* presumption applies rather than the change of circumstances rule. *In re B.R.D.*, 280 P3d 78 (Colo. App. 2012), *Jordan v. Jackson,* 876 A2d 443 (Pa Super 2005) (parental presumption applied in a modification proceeding following adjudication awarding custody to grandparents during mother's incarceration); *Davis v. Weinbaum*, 843 So 2d 290 (Fla Dist Ct App 2003) (same); *Heltzel v. Heltzel,* 638 NW2d 123 (Mich App 2002) (following an award of custody to grandparents, mother sought modification of custody, holding that the *Troxel* presumption applied to mother in the modification proceeding; *Harris v. Smith,* 752 NE2d 1283 (Ind Ct App 2001) (*Troxel* presumption applied in modification proceeding following an order granting custody to grandparents); *Richardson v. Richardson,* 766 So 2d 1036 (Fla S Ct. 2000) (a pre-*Troxel* case, holding the parental presumption applies).

We have found only two decisions holding that the parental presumption does not apply in modification proceedings. In *Denise v. Tencer,* 617 SE 2d 413 (Va App 2005), although the trial court awarded custody to the biological father, utilizing a material change in circumstances standard, the appellate court held that the *Troxel* presumption did not apply. *Id.* at 421. That court held that because father consented to placing custody on two occasions to grandfather, the two previous consent court orders vested grandfather with custodial status, a status that is not "subject to diminished protection under the law, simply because the individual seeking modification of that status is the child's parent." *Id.* at 424. The reasoning was that, first, father's consent agreement, as embodied in the court orders, was a relinquishment of "at least some of the constitutional rights enunciated by *Troxel.*" Second, because father's agreement was incorporated into two court orders, this circumstance "factually and as a matter of law, established an equality of interests and rights as between father and grandfather, analogous to the equality posited when two fit parents who are both deemed to be acting in the child's best interests dispute custody." *Id.*

The second case, *In re M.N.G.,* 113 SW3d 27 (Tex App Fort Worth 2003), refused to apply the *Troxel* presumption when the parent sought modification of a conservatorship, seeking return of custody to the parent. The Texas appellate court refused to adopt the *Troxel* presumption, giving the *Troxel* holding and the parental presumption a narrow reading. The Texas court reversed the trial court's award of custody to the parent.

In essence, the Texas and Virginia holdings give a very pinched view to *Troxel,* a visitation case. They reason that when a parent, by stipulation, transfers custody to a third party, such consent somehow constitutes a waiver or relinquishment of the constitutional rights enunciated by *Troxel,* or creates a status in the non-parent equivalent to that of the parent. *Denise,* 617 SE2d at 424; *In re M.N.G.,* 113 SW3d at 35-36. As argued herein below, the reasoning is flawed.

B. Application of ORS 109.119 to ORS 107.135

Even though the within custody modification action was filed under ORS 107.135(1)(a) it is still subject to the requirements of ORS 109.119. Here the party exercising custodial rights is a third party/Grandparent.

> "If ORS 109.119 applies to this action, the parties may not prevent the court from noticing and invoking that statute merely because they have failed to assert its applicability."

Burke v. Hall, 186 Or App 113, 118, 62 P3d 394 (2002); *Miller v. Water Wonderland Improvement District*, 326 Or 306, 309 n. 3, 951 P2d 720 (1998).

Mother presented and preserved her argument at trial that ORS 109.119 was applicable to the modification proceeding. (Tr 10-15, 32, 55-56). See, *State v. Hitz,* 307 Or 183, 188, 766 P2d 373 (1988) ("raising an *issue* at trial ['ordinarily ... essential'], identifying a *source* for a claimed position ['less so'], and making a particular *argument* ['least']"). The trial court denied Mother's request that the requirements of ORS 109.119 be applied to the modification proceeding. (Tr 237-238). Instead, the trial court chose to proceed with pleadings that were limited to the application of the unanticipated substantial change of circumstances rule. (Tr 40-41, 46, 51, 59).

When the legislature rewrote ORS 109.119 in 2001, it intended to make applicable the *Troxel* parental presumption, found at ORS 109.119(2)(a).[9] This is so for several reasons.

> First - "ORS 109.119, * * * is quite clear and specific in scope. It provides substantive requirements for actions in which a nonparent seeks custody * * * of a minor child over the objection of a legal parent. Nothing contained either in the text or context of that statute suggests that the legislature intended for persons who cannot satisfy those requirements to bypass them by proceeding solely under ORS [107.135(1)(a)]. It makes no sense to assume that the legislature intended to create such a loophole. To the contrary, it makes sense only to conclude that ORS 109.119 is, within the meaning of ORS [107.135(1)(a)] a separate source of * * * conditions for the

[9]The presumption in favor of a fit parent must be rebutted evidence, ORS 109.119(3)(a), utilizing the factors contained at ORS 109.119(4)(b).

> [modification of child custody involving a parent and a non-parent.] Accordingly, the two statutes can be harmonized in such a way as to give full effect to both. *See,* ORS 174.010."

Burke, 186 Or App at 120 (bracketed matter added).

Second, assuming, *arguendo,* that the two statutes are in conflict, the specific statute, ORS 109.119, controls over the general statute, ORS 107.135(1)(a), if the two statutes cannot be read together. *Burke,* 186 Or App at 120. This maxim "is applicable at the first level of statutory construction analysis." *Id.*

Following the well-worn template of statutory construction set forth in *PGE v. Bureau of Labor and Industries,* 317 Or 606, 610-12, 859 P2d 1143 (1993) as further explained in *State v. Gaines,* 346 Or 160, 171-72, 206 P3d 1042 (2009), the text of the statutes in context is examined to determine if the legislature's intended meaning has been expressed unambiguously. An examination of ORS 107.135(1)(a) shows that it addresses child custody modification for minors, and establishes a comprehensive framework, both substantive and procedural, within the context of dissolution of marriage proceedings involving natural parents. However, it does not specifically address the type of contested custody modification proceeding at issue here, where a third party seeks custody of a child over the objection of the child's legal parent. Again, that specific circumstance is dealt with in ORS 109.119(1) and (3)(a). It follows, then, that ORS 109.119, the

more specific statute, would control in the case of a conflict. *See, Burke,* 186 Or App at 120.

Stated differently, ORS 109.119 presents, within the meaning of ORS 107.135(1)(a), a separate source of conditions for the adjudication of custody modification between a parent and a third party, and of criteria for determining whether modification or change of custody is appropriate in circumstances where the parent has initially consented to third-party custody in the dissolution proceeding.

The two statutes, ORS 107.135(1)(a) and ORS 109.119(2)(c), pertaining to modification proceedings in third-party custody cases, may be harmonized in such a way as to give effect to both. ORS 174.010.

First, ORS 109.119(2)(c) provides as follows:

> "The presumption described in paragraph (a) of this subsection does not apply in a proceeding to modify an order granting relief under this section." (Emphasis added).

In this particular case, section (2)(c) does not apply because the proceeding from which Mother seeks to modify the order granting relief to Grandmother did not occur "under this section," namely ORS 109.119. It in not clear under what

authority the court originally granted custody to Grandmother, as ORS 107.105(1)(a) contemplates an award of custody only to "one party [of the marriage], or jointly."

Second, were the original court to have granted custody "under this section," as recited in ORS 109.119(2)(c), it would have necessarily included the "findings of fact supporting the rebuttal of the presumption * * *" as required by the immediate antecedent subparagraph, ORS 109.119(2)(b).

Nevertheless, the order originally granting custody to Grandmother stems from a settlement agreement that was merely approved by the dissolution court, not the result of a "proceeding" ending in an order granting relief under ORS 109.119.

Even if a parent consents or stipulates to an order transferring custody to a third party under ORS 109.119, then later moves to modify the order, subsection (2)(c) would still not apply for several reasons.

The stipulated consent transferring custody to a third party is not an adjudicatory "proceeding" granting custodial relief within the meaning of ORS 109.119(2)(c). The stipulated consent constitutes a mere formality, where the trial court gives its *pro forma* imprimatur to a stipulated custodial agreement. The transfer is not the product of judicial reasoning and determination, and in

particular, would omit the special "findings" the court is required to make. Those findings are included when the court determines that presumption has been rebutted.

Second, and more importantly, if section (2)(c) were applied to preclude parents' assertion of the *Troxel* presumption in a modification proceeding under ORS 109.119, where a parent had initially consented to custody with the third party, application of the statute in such a manner would violate the same constitutional guarantees to due process, both substantive and procedural, as Mother asserts in the within case.[10]

C. Interrelationship of Father's and Grandmother's Interests

Where Father's custodial preference aligns with Grandmother, and Mother expresses custodial wishes contrary to Grandmother, the *Troxel* parental presumption is designed to safeguard Mother against the countervailing wishes of Grandmother.

Any issue of Father's ability to assert the *Troxel* presumption, in this modification proceeding is moot. As previously noted, Father did not seek custody, but rather supported the retention of the custody with Grandmother. The record reflects that Father's fitness as a parent is tenuous at best and he was not

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[10]See, p. 28, fn. 18, infra.

considered a custodial resource, either by the custody evaluator or by Grandmother. (Tr. 232; Ex. 103)[11].

The majority opinion by the Court of Appeals seems to posit that the "special weight" that should be given to Mother stands in equipoise to the "special weight" due to Father, notwithstanding that court's determination he was "minimally involved in the proceedings." *Epler and Epler,* 258 Or App at 484.

When confronted with similar factual situations where both parents may or may not be able to provide the child with resources, courts have declined to give "special weight" to the parent who has not provided resources to the child.

In *Davis*, 843 So 2d. at 291, mother's petition, to modify custody from grandparents to her, "alleged without elaboration that the father was unfit due to his lifestyle." This mirrors Grandmother's testimony in the within case. (Tr. 97-99).

In the pre-*Troxel* case of *Richardson,* 766 So 2d. at 1037, the father subsequently withdrew his motion for custody "and took the position that the grandparents should be awarded custody." Under a Florida statute, equating grandparent standing with that of natural parents, the Florida trial court transferred custody from mother to paternal grandparents. On appeal, notwithstanding father's alignment with grandparents on the custody issue, the Florida Supreme Court held

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[11] See discussion at pages 5-6 herein.

the Florida statute unconstitutional, resulting in reversal and remand of the original trial court custody award to grandparents. *Id.* at 1043.

D. Non-waiver of Constitutional Right

Where a natural parent consents for a third person to have custody of a child, the *Troxel* presumption may not be waived unless the waiver is in writing and is knowing, intelligent and voluntary.

The Court of Appeals majority and concurring opinions suggest that once a parent consents to custody to a third party, especially in the context of a court order, the parent has automatically relinquished or waived the *Troxel* presumption. *Epler,* 258 Or App at 474, 481, 491 (Duncan, J. concurring). This view is flawed for several reasons.

First, as the dissent in *Epler* stressed, ".***[c]ourts are reluctant to find that fundamental constitutional rights have been waived; such a waiver must be *** 'voluntary and must be understandingly made with knowledge by the party of [her] rights.' (Citations omitted)" *Epler,* 258 at 498. This rule has been uniformly applied in the criminal context, but is no less applicable here where we are dealing with "perhaps the oldest of the fundamental liberty rights recognized by ..." the United States Supreme Court under the Constitution. *Troxel v. Granville,* 530 U.S. at 65.

The rule precluding waiver also applies in the civil family law context, with important exceptions. Relinquishment or waiver of a right conferred by statute must not purport to strip the domestic relations court of its inherent jurisdiction; and the stipulated agreement must not "violate the law or * * * clearly contravene public policy." ORS 107.104(1). The first requirement can be met, for example, where the parties stipulate to a non-modifiable spousal support provision or to a waiver of the parties' right to modify, so long as the waiver provision does not affect the authority of the court to modify, but rather affects only the parties' decision to forego filing an appropriate motion. *See, e.g. McInnis and McInnis,* 199 Or App 223, 235-36, 110 P3d 639 (2005). *See also, Hutchinson and Hutchinson,* 187 Or App 733, 746, 69 P3d 815 (2003), holding a spousal support agreement unenforceable which "confer[ed] authority on the court that [a statute] expressly withholds."

A stipulated agreement, whereby a party agrees to forego the right to assert the *Troxel* presumption in a future modification proceeding, would also face the additional hurdle of a parent's claim that such a waiver violates the law or clearly contravenes public policy as embodied in the Fourteenth Amendment to the United States Constitution. ORS 107.104(1).

Here, Mother's consent to Grandmother being awarded custody did not constitute a relinquishment or waiver of her *Troxel* presumption in any future proceeding, as the relinquishment or waiver was not knowing, voluntary or intelligent. "* * *The courts indulge every reasonable presumption against waiver of fundamental constitutional rights, and do not presume acquiescence in the loss of fundamental rights* * *" *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

Whether a waiver has occurred in any particular circumstance "will depend on the particular circumstances of each case, including the defendant's age, education, experience, and mental capacity." These principles of law were approved and applied in a family law civil case of *State ex rel. Dept. of Human Services v. Sumpter*, 201 Or App 79, 86 116 P3d 942, 946 (2005), addressing whether a mother's right to a trial in a termination case was validly waived.

There was absolutely no mention of any constitutional right or waiver thereof when Mother was presented with and signed the Marital Settlement Agreement and Stipulated Judgment[12]. If Grandmother is to assert that such right was waived, she did not show any evidence that Mother intentionally waived it. Further, considering Mother's then age (21), and her emotional, mental and physical ill health on December 3, 2004, it cannot be said that she clearly and decisively conceded her fundamental right to rear her child. Did she know that she

[12] Not to mention her statutory rights under divorce law.

was consenting to a grandparent having temporary custody? Yes. But that is a far cry from stating that she thereby waived any future ability to claim that her request for custody would be bolstered by the parental presumption. Indeed, the essential purpose of a fundamental constitutional guaranty is to protect a person from ignorance of his or her legal and constitutional rights, otherwise "the guaranty would be nullified by a determination that [a person's] ignorant failure to claim his rights removes the protection of the Constitution." *Johnson v. Zerbst*, 304 U.S. at 465.

Neither can the constitutional right be deemed to have been exercised by a stipulation to award custody to a third party. The majority opinion of the Court of Appeals suggests that the initial court " * * * gave that custodial preference, expressed in the marital settlement agreement, special weight in issuing the dissolution judgment that eliminated mother's custodial rights. That is all that *Troxel* requires in the case." *Epler* at 481. That is not the case at all. Whenever the court is called upon to apply "special weight" to a parent's preference, it does so in the midst of disagreement between the parent and third party. When the parties are in agreement, as was the case initially here, the court did not, and needed not, exercise any weighing of interests, or rebuttal of a parent's preference, because the parent's desires then aligned with the third party/Grandmother.

Troxel itself was borne out of dispute between a mother and her children's paternal grandparents about how much visitation should be allowed. It was at this point that the Washington Supreme Court intervened and "injected itself into the private realm of the family" to resolve the dispute. *Troxel* at 68-69. The "decisional framework" the Washington Court used to decide the case was held unconstitutional in that it did not provide for a parental presumption.

Even the framework of ORS 109.119, as we have noted as amended in response to *Troxel*, presupposes a dispute between the parent(s) and third party(s) and a decision by the court to settle it. To wit:

> " *** (4)(a) In deciding whether the presumption described in subsection (2)(a) of this section has been rebutted and whether to award visitation or contact rights over the objection of the legal parent, the court may consider factors including, but not limited to, the following, which may be shown by the evidence: ***
>
> (b) In deciding whether the presumption described in subsection (2)(a) of this section has been rebutted and whether to award custody, guardianship or other rights over the objection of the legal parent, the court may consider factors including, but not limited to, the following, which may be shown by the evidence: ***." (emphasis added)

Accordingly, there was never a "decision" by the State in the "first instance,"[13] where the State injected[14]itself into the Epler family. We suggest that there are many instances where parent(s), without a decision by the State, stipulate to -- or do not contest (often by default) -- the exercise of custodial rights by a third person. Doing so is often in the best interests of the child(ren), as a parent may be temporarily incapable of exercising parental care and control due to incarceration, physical or mental disability, or even military service. It would be the height of irony and inverted reasoning that a singular act of parental discretion results in the evermore elimination of that parent's custodial rights.[15]

The lower court opinion further reasoned that Mother's consent equates with unfitness or that the parent "poses a risk of harm." *Epler*, 258 Or App at 482. The fact that Mother consented to the relationship between the child and Grandmother

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[13] The Court of Appeals plurality posits that *Troxel* applies only in the first instance that a parent loses some level of custody and control over his or her children. Id. at 481.

[14] "Inject" means "to introduce (something new or different); or to introduce arbitrarily or inappropriately; intrude." Collins English Dictionary - Complete & Unabridged 10th Edition, 2009; "to introduce as an element or factor in or into some situation or subject." *Merriam-Webster.com*. Merriam-Webster, n.d. Web. 4 Mar 2014.

[15] See also the cogent argument and authorities on this point in the dissent in *Epler* (Egan, J. dissenting), *supra* at 494-498.

is only one factor in determining if Mother's parental preference has been rebutted. ORS 109.119(4)(b)(D). Consent is not the *sine qua non* of "eliminat[ing] mother's custodial rights." [16]

E. Application of the Change-of-Circumstances Rule

Use of the change of circumstance rule in third-party custody modification proceedings, as applied either by ORS 107.135(1)(a) or 109.119(2)(c), violates a parent's Fourteenth Amendment guarantee to substantive due process.

Previously, Mother has discussed how the trial court applied ORS 107.135(1)(a) and its case-made standards in a manner that violated Mother's substantive due process guarantees, by placing an undue burden upon Mother and by violating Mother's right to procedural due process.[17]

Substantive due process will also protect a natural parent's liberties from state interference, no matter what process is afforded, unless the infringement is narrowly tailored to achieve a compelling state interest -- a standard of strict scrutiny. *Troxel,* 120 S Ct at 2060, 2067-68 (Thomas, J. concurring; Justice O'Connor noting that substantive due process " * * *provides heightened

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[16] Likewise, and contrary to the lower court's reasoning, a parent's ability to care for the child (i.e., fitness), or whether a parent poses a risk to the child, are only two (2) of the five (5) rebuttal factors listed at ORS 109.119(4)(b), (A), (C) and (10)(b), in addition to "the totality of the circumstances," which the court must consider. *O'Donnell-Lamont*, 337 Or at 109, 117.

[17] See, additional discussion in Mother's Petition for Review at 14-25.

protection'"); *Reno v. Flores,* 507 US 292, 302 (1993); *Mullins v. Oregon,* 57 F3d 789, 793 (9th Cir 1995). In addition, a statute that directly infringes on a fundamental right also must employ an effective means to achieve the state's compelling interest that is no less drastic or burdensome than other means that are available. *Dunn v. Blumstein,* 405 US 330, 343, 353 (1972).

The majority opinion in *Epler,* 258 OR App at 474, correctly concludes that ORS 109.119 "can apply in a marital dissolution proceeding." Yet, the majority makes the faulty assumption that if the parent agrees to give custody to the third party, "the presumption would work in favor of the third party." *Id.* This stands *Troxel* on its head.

The compelling and fundamental liberty interest implicated in a custody modification proceeding is the parent's right to make decisions about the care, custody and control of a child. *O'Donnell-Lamont,* 337 Or at 120. The competing, and also compelling, state interest is "in the durability of the judgment and the related security that the judgment provides to the child and the custodian." *Epler,* 258 Or App at 490-91 (Duncan, J. concurring).

While employment of the unanticipated, substantial change in circumstance rule of case law and ORS 107.135(1)(a) arguably serves the child's interest implicated in a third-party custody modification proceeding, the parent's compelling liberty interest is not protected. This is so because the means of

achieving the state's compelling interest in protecting the stability of the child's environment - by having the parent prove a substantial, unanticipated change in circumstance - is far more "drastic and burdensome" to the corresponding parent's interest than the procedure employed by ORS 109.119. *Dunn,* 405 US at 343, 353.

The *Troxel* presumption, as embodied in ORS 109.119(2)(a), employs a rebuttable presumption that the legal parent acts in the best interest of the child, which presumption may be rebutted by a consideration of the "the totality of the circumstances," as well as the factors set forth in ORS 109.119(4)(b). Such evidence is "sufficient to overcome the presumption that the parent acts in the best interest of the child." *O'Donnell-Lamont,* 337 Or at 109, 117.

ORS 109.119 is narrowly tailored, then, to satisfy the dual compelling interests. Employment of the statute, including the rebuttal criteria, will prevent demonstrable harm to a child while giving the parental preference its "special weight." *O'Donnell-Lamont,* 258 Or App at 111, 113, 117, 120 (the court, affording father "some special weight," awarded custody to grandparents, notwithstanding that the court found father to be a fit parent; the primary reason the *Troxel* presumption was rebutted was the court's finding that an award of

custody to father "would pose a serious present risk * * * to the children"); *Davis,* 843 So 2d at 293 ('* * * the state can satisfy the compelling state interest standard [only] when it acts to prevent demonstrable harm to a child.'").

Without being impeded by the unanticipated substantial change of circumstance rule, both the parent's fundamental liberty interest and the child's liberty interest implicated in a custody modification proceeding are properly balanced by a rebuttable presumption that gives special weight to a fit parent. The presumption may be rebutted by a preponderance of evidence demonstrating, in essence, that custody to the parent would not serve the best interest of the child.[18]

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[18] Contrastingly, ORS 109.119 provides that an "ongoing personal relationship" entitling a third party to visitation rights may be rebutted by clear and convincing evidence. ORS 109.119(3)(b). Although somewhat counterintuitive at first blush, this higher burden of proof is not engrafted into the custodial portion of the statute, ORS 109.119(3)(a), providing for rebuttal by a preponderance of the evidence. The lower threshold burden protects the child's liberty interest implicated at the custody modification stage, and adequately counterbalances the *Troxel* presumption. To impose the higher, clear and convincing burden of proof requirement in custody modification proceedings would tend to afford the parental presumption excessive "special weight" at the expense of the state's interest in protecting the stability of the child's environment.

CONCLUSION

Based upon the above-referred-to statutes, case law and reasoning, Mother respectfully requests that this Court reverse the decision of the Court of Appeals and the trial court and award custody to Mother, then remand to the trial court for the formulation of an appropriate reintegration/reunification plan for Mother and child, together with appropriate modification of the parenting plan and child support.

Dated this 5th day of March, 2014.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
WITH BRIEF LENGTH AND
TYPE SIZE REQUIREMENTS

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief [as described in ORAP 5.05(2)(a)] is 6,445 words.

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

March 5, 2014.

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CERTIFICATE OF SERVICE BY MAIL
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Marion County Circuit Court No. 04C33678
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by placing two true copies thereof, duly certified to be such by me, as such attorney, in a sealed envelope, postage fully prepaid, and depositing the same in the U. S. Post Office at Salem, Marion County, Oregon, on March 5, 2014.

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