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, aka, Andrea Michelle Walker, Respondent-Appellant, Petitioner on Review, and KIMBERLEY SUE GRAUNITZ, Third-Party Respondent, Respondent on Review.	Supreme Court No. S061818 Court of Appeals No. A148643 Marion County Circuit Court No. 04C33678

CORRECTED BRIEF ON THE MERITS OF AMICI CURIAE LEGAL AID SERVICES OF OREGON AND OREGON LAW CENTER

On Petition for Review of the Decision of the Court of Appeals
On Appeal from a Judgment of the
Marion County Circuit Court
The Honorable Dennis J. Graves, Judge

Opinion filed: September 11, 2013
Author of Opinion: Honorable Rex Armstrong

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I. Summary of Facts

This is an appeal by a mother of a judgment denying her motion to modify custody of her daughter. On December 3, 2004, mother signed a marital settlement agreement giving custody of her one-year-old daughter to paternal grandmother. She was twenty years old and unrepresented by counsel. A petition for dissolution was filed December 14, 2004. On March 9, 2005, a stipulated dissolution judgment was entered that awarded custody to grandmother. Mother first moved to modify the stipulated dissolution judgment in September 2006 when the child was two years old. She withdrew her request one year later due to financial constraints. She filed a second motion to modify the stipulated dissolution judgment in May 2008. The trial court denied her motion on March 28, 2011, and mother appealed that decision.

II. Court of Appeals Decision

In *Epler and Epler,* 258 Or App 464, 309 P3d 1122 (2013) the Court of Appeals affirmed the trial court's decision denying mother's motion to modify the dissolution of marriage judgment awarding grandmother custody. The trial court's ruling was based on a conclusion that mother had failed to demonstrate a substantial change of circumstances and to show that modification of custody was in the child's best interest. The Court of Appeals rejected mother's arguments that

the trial court erred in applying ORS 107.135, a statute authorizing modification of dissolution judgments. The Court of Appeals also rejected mother's arguments that ORS 109.119, Oregon's third-party custody and visitation statute, applied. Finally, the Court of Appeals rejected mother's contention that she was entitled to a presumption that a modification awarding her custody was in her daughter's best interest under the Fourteenth Amendment of the United States Constitution. *Troxel v. Granville*, 530 US 57, 120 S Ct 2054, 147 L Ed 249 (2000).

III. Summary of Arguments

The primary question in this case is what legal standard applies to a parent's motion to modify an award of custody to a nonparent. In considering that question, an additional issue is the significance of a parent's consent to an initial custody order. Amici assert that parents' fundamental right to the care, custody, and control of their children under the Fourteenth Amendment to the United States Constitution as detailed in *Troxel v. Granville* must be considered in modification of third-party custody awards. *Troxel* requires that "at least some special weight" must be given to a fit parent's decisions regarding the best interest of his or her children. Parents' rights under the Due Process Clause do not evaporate because a nonparent is awarded custody. More specifically, the presumption that the "legal parent acts in the best interest of the child," as set out at in Oregon's statute that governs third-party custody claims, controls in all modifications. *See* ORS

109.119; ORS 109.119(2)(a). The "substantial change of circumstances and best interest of the child rule" applied by the trial court and affirmed by the Court of Appeals treats parents and nonparents equally and gives no "special weight" to the constitutional rights of parents. This standard is unconstitutional under the Due Process Clause of the Fourteenth Amendment and *Troxel*.

IV. Parents have fundamental rights under the Due Process Clause of the United States Constitution

United States Supreme Court jurisprudence establishes the fundamental right of parents to the care, custody, and control of their children.[1] The most recent case and the most directly relevant is *Troxel v. Granville,* a dispute between a parent and grandparents over visitation of minor children. In *Troxel*, the Supreme Court found that a Washington statute permitting a court to award visitation rights to any nonparent if the visitation served the best interest of the child was unconstitutional. *Troxel,* 530 US at 73. The Supreme Court held the Due Process Clause "protects the fundamental right of parents to make decisions concerning the care, custody

[1] A long line of United States Supreme Court cases have established the fundamental right of fit parents to determine the care, custody, and control of their children. *Reno v. Flores,* 507 US 292, 304, 113 S Ct 1439, 123 L Ed 2d 1 (1993) (children will not be removed from adequate care of their parents to nonparents even if nonparents could provide better care); *Pierce v. Society of Sisters*, 268 US 510, 45 S Ct 571, 69 L Ed 1070 (1925) (Oregon's law prohibiting parents from enrolling their children in private schools unconstitutional); *Meyer v. Nebraska*, 262 US 390, 43 S Ct 625, 67 L Ed 1042 (1923) (law barring teaching of children in any language other than English violates parent's fundamental rights).

and control of their children." *Id.* at 66. The Supreme Court noted that this fundamental right "…is perhaps the oldest of the fundamental liberty interests recognized by this Court. *Id.* at 65. The Court reiterated that "there is a presumption that fit parents act in the best interest of their children." *Id.*at 69. The Court concluded that "at least some special weight" must be given to a fit parent's determination of whether such visitation is in the child's best interest. *Id*. at 70.

Other United States Supreme Court decisions provide additional context when considering the issues presented by this case. In *Stanley v. Illinois*, 405 US 645, 651, 92 S Ct 1208, 31 L Ed 2d 551 (1972), the Court ruled that an unwed father had constitutionally protected rights to the "companionship, care, custody, and management" of his biological children. The Court has recognized that a parent's rights to the care, custody, and control of that parent's child are not only of long standing, they are fundamental. *Santosky v. Kramer*, 455 US 745, 753, 102 S Ct 1388, 71 L Ed 2d 599 (1982) (requiring New York to use a "clear and convincing" standard when terminating a parent's rights). In *Santosky*, the Court noted that it is "plain beyond the need for multiple citation that a natural parent's desire for and right to the companionship, care, custody, and management of his or her children is a right far more precious than any property right." 455 US at 758-59 (citations and internal quotations omitted).

This court extensively analyzed *Troxel* and parents' fundamental rights under the Fourteenth Amendment in the context of an initial request by nonparents to establish a custody order over the objection of a parent. This court allowed review to examine the "appropriate application of the changes that the legislature made" in 2001 to ORS 109.119. *O'Donnell-Lamont and Lamont*, 337 Or 86, 89 P3d 721 (2004), *cert den*, 543 US 1050, 125 S Ct 867, 160 L Ed 2d 770 (2005). The court examined the parameters of the Due Process Clause protections and extensively analyzed the interplay between ORS 109.119's parental presumption and these due process requirements. Ultimately, the court rejected father's arguments that ORS 109.119 was unconstitutional in its application. The court held that a "court must presume that a fit parent's decision is in the best interest of the child" and that "some special weight" must be given to the interest of the parent. *O'Donnell-Lamont*, 337 Or at 120.

These federal and state court decisions establish without question that parents have a fundamental right to the care, custody, and control of their children. This court must examine for the first time the application of these undisputed rights to requests by parents to modify orders granting custody of their children to nonparents. Amici assert that this "oldest of fundamental liberty interests" survives an initial award of custody and applies in full force to modification proceedings.

V. ORS 109.119 governs all third-party custody claims

ORS 109.119 is Oregon's statute that applies to custody disputes between legal parents and third-parties. In pursuing modification of the dissolution judgment that contained the award of custody to grandmother, mother argued consistently that ORS 109.119 was the controlling statute. She was correct. In 2001 the statute was amended to include a parental presumption as required by *Troxel*. *See O'Donnell-Lamont,* 337 Or at 89. The statute provides in part:

> "(1) [A]ny person, including but not limited to a related or nonrelated foster parent, stepparent, grandparent or relative by blood or marriage, who has established emotional ties creating a child-parent relationship * * * with a child may petition or file a motion for intervention with the court having jurisdiction over the custody * * * of that child, or if no such proceedings are pending, may petition the court * * * for an order providing for relief under subsection (3) of this section.
>
> "(2)(a) In any proceeding under this section, there is a presumption that the legal parent acts in the best interest of the child.
>
> (b) In an order granting relief under this section, the court shall include findings of fact supporting the rebuttal of the presumption described in paragraph (a) of this subsection.
>
> (c) The presumption described in paragraph (a) of this subsection does not apply in a proceeding to modify an order granting relief under this section.
>
> "(3)(a) If the court determines that a child-parent relationship exists and if the court determines that the presumption described in subsection (2)(a) of this section has been rebutted by a preponderance of the evidence, the court shall grant custody * * * to the person

> having the child-parent relationship, if to do so is in the best interest of the child. * * *
>
> "* * * * *
>
> "(4)(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:
>
> "(A) The legal parent is unwilling or unable to care adequately for the child;
>
> "(B) The petitioner or intervenor is or recently has been the child's primary caretaker;
>
> "(C) Circumstances detrimental to the child exist if relief is denied;
>
> "(D) The legal parent has fostered, encouraged or consented to the relationship between the child and the petitioner or intervenor; or
>
> "(E) The legal parent has unreasonably denied or limited contact between the child and the petitioner or intervenor."
>
> "* * * * *
>
> "(8) As used in this section:
>
> "* * * * *
>
> "(b) 'Circumstances detrimental to the child' includes but is not limited to circumstances that may cause psychological, emotional or physical harm to a child."

The statute requires that a nonparent seeking custody must first show a "child-parent relationship" with the child. A claim may be initiated by intervention in a pending proceeding or by filing a stand-alone petition. The parental

presumption in ORS 109.119(2)(a) can be rebutted by a preponderance of the evidence. ORS 109.119(3)(a). In determining whether the presumption has been rebutted, the court may consider five nonexclusive factors. If the presumption is rebutted, a court must grant custody or other rights to the nonparent "if to do so is in the best interest of the child." ORS 109.119(3)(a). Findings of fact supporting the rebuttal of the presumption are required in an order granting relief. Finally, ORS 109.119(2)(c) provides that the parental presumption does not apply in a modification of an order under ORS 109.119.

The Court of Appeals erred in holding that ORS 109.119 did not apply to mother's modification claim. *Epler*, 258 Or App at 478. The rejection of ORS 109.119 by the Court of Appeals was mistaken. Its ruling creates an arbitrary situation in that parents may be treated differently depending on whether these claims are initiated as ORS 109.119 or chapter 125 guardianship cases, or by intervening in and pleading these claims in a dissolution or unmarried parents matter. Similarly situated parents who are modifying awards of custody to nonparents should not be governed by different procedural protections, rules, case law, and legal analysis, especially in light of what is at stake and the constitutional rights at play. While ORS 109.119 permits intervention in other types of proceedings involving custody, it remains the governing statute in disputes

between parents and nonparents whether at an initial determination or at a subsequent modification.

ORS 109.119, commonly described as a third-party custody statute, and ORS 125.301, the guardianship statute, are the two Oregon statutes that expressly provide authority for nonparents to seek custody of minor children. *Burk v. Hall*, 186 Or App 113, 62 P3d 394 (2003), stands for the principle that irrespective of the type of case in which third-parties state their custody claim, the procedures and standards found in ORS 109.119 apply. In *Burk* a child's half-sister and her spouse sought appointment as the child's co-guardians under ORS 125.301(1) and the general guardianship statutes found in ORS chapter 125. The Court of Appeals in *Burk* determined that ORS 109.119 "provides substantive requirements for actions in which a nonparent seeks custody or guardianship of a minor child over the objection of a legal parent." *Burk*, 186 Or App at 119-20. Thus, the petitioners had to show they had a "child-parent relationship" as required by ORS 109.119 even though the guardianship statutes demand no such showing. Stating that "[n]othing contained either in the text or context of the statute suggests that the legislature intended for persons who cannot satisfy those requirements to bypass them by proceeding solely under ORS 125.301(1)," the Court of Appeals held ORS 109.119 applied to guardianship cases. *Id.* at 121.The court further explained that "[i]t makes no sense to assume that the legislature intended to create such a

loophole." *Id*. at 120. Likewise, a nonparent cannot avoid the application of ORS 109.119 in a modification case by choosing to incorporate a third-party custody order in a dissolution judgment that fails to cite ORS 109.119. The Court of Appeals' conclusion that the "trial court did not err by failing to apply ORS 109.119" cannot be squared with the holding in *Burk*. *Epler*, 258 Or App at 478.

Whether the claim originates as a stand-alone ORS 109.119 case or guardianship case or results from intervention and assertion of a claim in a dissolution of marriage case has no legal significance. This court should find that the requirements of ORS 109.119 control the modification of judgments awarding custody of a child to third-parties.

VI. ORS 109.119(2)(c) barring application of the presumption that a parent acts in the best interest of the child is unconstitutional.

At the heart of this case is the right of parents under the Fourteenth Amendment of the United States Constitution to care, custody and control of their children. As previously discussed, a presumption "that the legal parent acts in the best interests of the child" was added to the statute in 2001. ORS 109.119(2)(a). At the same time, the legislature included a provision that the "presumption does not apply in a proceeding to modify" custody. ORS 109.119(2)(c).

That the statute would be unconstitutional if it failed to provide a presumption of some kind to parents in an initial third-party custody proceeding is

not contested. The question here is what standard must be provided to adequately protect parents' due process rights in a modification proceeding. The blanket denial of the presumption to parents in modification proceedings as codified at ORS 109.119(2)(c) is unconstitutional because it provides no "special weight" whatsoever to parents' decisions regarding their children and, therefore, is inconsistent with the *Troxel* decision. A parent's right to the presumption should survive an initial award of custody to a nonparent.

The Court of Appeals went to great lengths to find language in the *Troxel* plurality opinion to support a conclusion that only a custodial parent is fit and that only a fit parent is entitled to the presumption. While the *Troxel* opinion discussed the scope of a parent's fundamental rights under the Due Process Clause, it did not address and does not support a conclusion that a parent's rights in relation to third-parties disappear or are due no weight after an initial proceeding. In *Santosky v. Kramer,* 455 US 745, 753, 102 S Ct 1388, 71 L Ed 2d 599 (1982), the Supreme Court stated that "[t]he fundamental liberty interest of natural parents in the care, custody and management of their child does not evaporate because they have not been model parents or *have lost temporary custody* of their children to the state." (Emphasis added.) Although *Santosky* was a termination of parental rights case, it supports the principle that parents' rights are not ephemeral in nature and survive an award of custody to a third-party.

The *O'Donnell-Lamont* opinion did not examine ORS 109.119(2)(c) or reach the issue of its constitutionality. While this is an issue of first impression for this court, a holding requiring application of the presumption in a modification claim would not be at odds with the holding in *O'Donnell-Lamont,* the most directly related Oregon precedent.

The body of United States Supreme Court law establishing parents' fundamental rights under the Due Process Clause supports the application of a presumption that a parents acts in the best interest of the child in modification proceedings. Regardless of the stage of a proceeding, "special weight" must be given to parents' fundamental liberty interest in rearing their children.

This court should find that ORS 109.119(2)(c) is unconstitutional and that the presumption contained in ORS 109.119(2)(a) and related statutory protections in ORS 109.119 apply to proceedings where a parent is seeking modification of an award of custody to a nonparent.

VII. ORS 109.119(2)(c) barring application of the presumption that a parent acts in the best interest of the child is unconstitutional when applied to modification of a consensual custody award.

The elimination of the parental presumption in modifications, as set forth in ORS 109.119(2)(c), is unconstitutional as applied to a parent who has consented to an initial award of custody. Instead, where a parent has previously consented the

presumption contained in ORS 109.119(2)(a) should apply.[2] The arguments made regarding the applicability of the presumption to all modification proceedings apply equally to consenting parents. Additional considerations support the application of ORS 109.119(2)(a) when a parent consents to an award of custody to a nonparent.

Parents who consent to an order awarding custody to a nonparent *are* acting in the best interest of their children. As the dissent in *Epler* pointed out "[t]he irony should not go unstated: The lead opinion holds that mother is no longer entitled to a presumption that she acts in daughter's best interests because of a decision she made that was in daughter's best interests." *Epler,* 258 Or App at 500 n 5. The Court of Appeals holding contravenes the spirit of language in *O'Donnell-Lamont* which recognized that a parent who decides to permit a nonparent to assume custody of a child is acting in the best interest of a child. One parental presumption rebuttal factor is whether the "legal parent has fostered, encouraged or consented to the relationship between the child and the [nonparent]." ORS 109.119 (4)(b)(D). When analyzing this factor the court in *O'Donnell-Lamont* stated "we agree with father that this factor should not be accorded any weight in rebutting the presumption in this case, because the fact that father consented to the grandparents

[2] Other related provisions in ORS 109.119 must also apply - the rebuttal factors set out in the ORS 109.119 4(b), the preponderance of the evidence standard in ORS 109.119(3)(a), and the required findings of facts under ORS 109.119(2)(b).

serving as primary caregivers and otherwise having a close relationship with the child does not indicate in any way that he does not act in the best interests of the children." 337 Or at 116.[3] Courts in other jurisdictions have similarly ruled that consenting to third-party custody actually bolsters the presumption of fitness, rather than destroying it. *In re D.I.S.*, 249 P3d 775, 787 (Colo 2011); *In re Guardianship of Reena D.*, 163 NH 107, 35 A3d 509 (2011).

Further, the stipulated judgment in this matter does not contain a finding that the presumption in ORS 109.119(2)(a) was applied and rebutted. Neither does it include factual findings supporting rebuttal of the presumption as required by ORS 109.119(2)(b). Contrary to assertions made by the Court of Appeals, mother's constitutional rights were ignored when the judgment awarding custody to grandmother was entered. Neither does the record reflect that mother was apprised that she had fundamental rights under the Due Process Clause or that her consent might affect future consideration of those rights. That mother's liberty interest in her child was never acknowledged or weighed at the initial stage of the case was fundamentally unfair. Thus ORS 109.119(2)(a) is the proper standard in this case.

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[3] Courts in other jurisdictions have similarly ruled that consenting to third-party custody *bolsters* the presumption of fitness, rather than destroying it. *In re D.I.S.*, 249 P3d 775, 787 (Colo 2011); *In re Guardianship of Reena D.*, 163 NH 107, 35 A3d 509 (2011).

Concerns about stability for children are not infrequently asserted as a basis for denying the presumption to parents. Stability may be at times a relevant consideration in certain cases. Nonetheless, a generalized concern that may or may not be present in any given case cannot take precedence over parents' fundamental rights under the federal constitution. Further, ORS 109.119(4)(b)(C) permits the court, when weighing evidence offered to rebut the presumption, to consider "[c]ircumstances detrimental to the child exist if relief is denied" when determining whether or not to rebut the ORS 109.119(2)(a) presumption.

In addition, fears regarding the stability of children may be overstated. Children are resilient. Children separated from their parents may long for reunification or puzzle over why they reside with a nonparent. The testimony of the custody evaluator, Lorrie Dukart, is instructive. Overall, Ms. Dukart's testimony indicated that children over the age of seven are more adaptable and able to cope with change. She noted that at around third grade children also become aware of societal norms and living with a grandparent instead of a parent may be distressing. She also suggested the child's return to mother would permit her to have both a mother-daughter relationship and a traditional grandmother-granddaughter relationship.

Failing to apply the presumption in a modification proceeding of a consensual custody award ignores the constitutional rights of parents and is

particularly egregious because consenting parents are acting in the best interests of their children. Not only is that outcome inequitable, it is unconstitutional. ORS 109.119(2)(c) erroneously places parents and nonparents on equal footing in proceedings to modify custody awards to third-parties and is unconstitutional as applied to a parent who consented to custody in an initial proceeding.

VIII. The majority of other jurisdictions apply the parental presumption in termination of consensual guardianship cases.

Courts throughout the country are considering modification of custody by parents versus third-parties, mainly in the context of consensual guardianship terminations. The Supreme Court of Arkansas acknowledged a split in how states deal with this subject but noted that the majority of state courts have found that parents' constitutional rights must be given some weight. Most require the application of a presumption that the parent acts in the best interest of the child. *See Troeskyn v. Herrington* (*In re S.H.*), 2012 Ark 245, 409 SW 307 (2012). The facts in *Troeskyn* are similar to those in *Epler*. Mother was struggling with drug addiction, unemployment, and unstable housing when she consented to custody. *Troeskyn,* 409 SW at 310. The trial court denied her motion stating it was in the child's best interest for the guardianship to continue. In a case of first impression, the Arkansas Supreme Court held "[w]e align ourselves with the majority view and hold that parents who have not been found unfit do not relinquish their fundamental liberty interest in raising their children by consenting to a

guardianship and, thus, they are entitled to the *Troxel* presumption in a proceeding to terminate that guardianship." *Id.* at 316. The Court further stated:

> It is evident from the court's findings that Tamera's status as natural parent was afforded no weight in the decision. Rather, the best interest of . was the controlling factor in deciding whether to terminate the guardianship, and the circuit court specifically saddled Tamera with the burden of proving both that the guardianship was no longer necessary and that termination was in . 's best interest.

Id.

Multiple states similarly hold that a parent seeking to terminate a consensual guardianship with no underlying finding of unfitness is entitled to a presumption that termination serves the child's best interests. *See, e.g*., *Tourison v. Pepper*, 51 A3d 470, 473, n 11 (Del 2012) (holding that fit parents are entitled to a presumption that they serve their child's best interests by seeking to terminate a guardianship); *In re D.I.S*., 249 P3d 775, 787 (Colo 2011) (failing to accord parents a presumption when terminating a consensual guardianship would penalize parents who have acted in the best interest of child).

In another guardianship termination case, the Maine Supreme Court held that the third-party must show by a preponderance of the evidence that the parent is unfit to *retain* custody. *In re Guardianship of David C.,* 2010 ME 136, P4, 10 A3d 684 (2010). That court stated:

> "[b]ecause of the fundamental parental rights at issue, we recently held that a court must address parental fitness in

> guardianship termination proceedings, recognizing that 'any decision . . . limiting the right of a parent to physical custody of his child also affects his constitutionally protected liberty interest in maintaining his familial relationship with the child.' *Guardianship of Jeremiah T.,* 2009 ME 74, PP26-28, 976 A.2d 955, 962-63.*"*

In re Guardianship of David C., 2010 ME at 112.

The New Hampshire Supreme Court grappled with this issue in the context of a consensual guardianship between the parents and the paternal grandfather and his wife which was established to allow the parents to travel to India to start a business. *In re Guardianship of Reena D*., 163 NH 107, 35 A3d 509 (2011). The court stated:

> [w]e first examine whether the *Troxel* presumption applies in a proceeding to terminate a guardianship established by consent. Most courts that have examined the issue since *Troxel* have held that it does. *See In re D.I.S*., 249 P.3d 775, 783, 784 (Colo. 2011) (citing cases); *In re Guardianship of David C*., 2010 ME 136, 10 A.3d 684, 686 (Me. 2010); *In re Guardianship of D.J*., 682 N.W.2d 238, 246, 268 Neb. 239 (Neb. 2004); *In re Guardianship of Barros*, 701 N.W.2d 402, 407, 2005 ND 122 (N.D. 2005); *Boisvert v. Harrington*, 173 Vt. 285, 796 A.2d 1102, 1108 (Vt. 2002); *In re SRB-M*, 2009 WY 22, 201 P.3d 1115, 1119-20 (Wyo. 2009). These courts reason that a parent of a child in a guardianship established by consent is presumptively fit and, thus, the parent's decision to terminate the guardianship is entitled to due regard.

In re Reena D., 163 NH at 112. The paternal grandfather later died, and the parents eventually filed to terminate the guardianship. *Id*. at 110-11. The court stated that while they had previously ruled that a fit parent is one who has not been found unfit, "[w]e have not previously addressed the issues in this case, which are

whether a fit biological parent is entitled to the *Troxel* presumption in a proceeding to terminate a guardianship established by consent, and, if so, what burden of proof should apply." *Id.* at 112. The court ruled that under *Troxel* and its "New Hampshire progeny" all parents are fit until adjudicated otherwise, a principle applying equally to custodial and noncustodial parents. *Id*. at 113. This standard, it reasoned, served both the constitutional concerns and the policy concern that doing otherwise would penalize parents who had acted in the best interest of their child by initially consenting. *Id*. The guardian in opposition would have the burden to prove that the guardianship was still needed to protect the child's physical or psychological well-being. *Id*. at 115. The court rejected the minority view "that a parent who voluntarily relinquishes the care, custody and control of his child by consenting to a guardianship also relinquishes his entitlement to the *Troxel* presumption." *Id.* at 113.

While not binding on this court, these decisions may be useful given that little Oregon case law exists.

IX. ORS 107.135 and related case law do not apply to custody disputes between parents and nonparents

The Court of Appeals erroneously held that ORS 107.135(1)(a) applies in a custody modification proceeding between a parent and a nonparent. Its conclusion was premised on the fact that the award of custody to grandmother was embedded

in a dissolution of marriage judgment.[4] *Epler,* 258 Or App 469-70. ORS 107.135(1)(a) authorizes modification of custody in dissolution judgments.[5] Based on an erroneous threshold determination that ORS 107.135(1)(a) was the relevant statute, the court took a faulty analytical trajectory. Citing only cases where one parent is seeking modification of the other parent's custody in a dissolution judgment, the court required mother to first prove a substantial change of circumstances and, if successful, to prove that modification of custody is in the best interests of her child. *Id*. This court should reject the application of parent to parent statutes and caselaw to third-party custody cases because the rights of parents and nonparents are fundamentally different. Dissolution statutes and caselaw did not develop with parent versus nonparent claims in mind.

It is evident from a review of ORS chapter 107 that ORS 107.135(1) applies only to modification of judgments involving two parents. ORS 107.135(1)(a) is part of the subsection of ORS chapter 107 entitled "Dissolution, Annulment and

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[4] Neither case the Court of Appeals cites for that proposition involved a custody dispute between a parent and a third-party. *See State ex rel Johnson v. Bail,* 325 Or 392, 396-97, 938 P2d 209 (1997); *Merges v. Merges,* 94 Or 246, 257-58, 186 P 36 (1919). The former involved unmarried parents, the latter, a husband and wife.

[5] ORS 107.135 provides in part: "1) The court may at any time after a judgment of annulment or dissolution of marriage or of separation is granted, upon the motion of either party. . . (a) Set aside, alter or modify any portion of the judgment that provides . . . for the custody, parenting time, visitation, support and welfare of the minor children[.]"

Separation." That subsection contains procedural and substantive provisions having to do with married couples and provides the trial courts' authority to make custody and parenting-time decisions. It is apparent from the text of the statutes set out in ORS 107.005 to ORS 107.452 that they apply to matters involving married or formerly married parents. They are replete with references to marriage, children born to or adopted by the parties, parents, and spouses. For example, ORS 107.105(1)(a) allows the court to determine "the future care and custody, *by one party or jointly*, of all *minor children of the parties* born, adopted or conceived during the marriage…" (Emphasis added.) It is important to note that these statutes do not even directly apply to unmarried parents. Separate statutory authority for custody, support and parenting time claims between unmarried parents is found at ORS 109.103.[6] This statute explicitly cross-references the application of certain statutes relating to children that are found in ORS chapter 107. ORS 109.119, unlike ORS 109.103, does not cross-reference ORS chapter 107 statutes involving the custody, support, and parenting time of children. This omission supports the premise that ORS 107.135(1)(a) does not apply to third-party custody claims authorized by ORS 109.119. Given the court's authority over

[6] ORS 109.103(1) states that "[t]he parents have the same rights and responsibilities regarding the custody and support of, and parenting time with, their child that married or divorced parents would have and the provision of ORS 107.093 to 107.440 that relate to custody, support and parenting time, and the provision of ORS 107.755 to 107.795 that relate to mediation procedure apply to the proceeding."

the children of the parents dissolving their union, ORS 107.085(2) mandates that the petition include the "names and dates of birth of all of the children born or adopted during the marriage…" ORS 107.085(2)(a). Taken as a whole, these statutes and others contained in ORS chapter 107 make plain that ORS 107.135 applies only to disputes between parents.[7]

ORS 107.135 and related case law are also irrelevant to legal claims between parents and nonparents because they fail to consider parents' constitutional rights in relation to third-parties as required by *Troxel*. The logical reason for this is because between two parents, both would have this presumption so neither would attain any benefit from it over the rights of the other parent, making it unnecessary to refer to it. The Court of Appeals' contrary holding means that in third-party custody modifications, nonparents are elevated to the status of parents and that the rights of parents under the Due Process Clause of the United States Constitution are of no consequence. In other words, by deciding that the substantial change of circumstances/best interest rule applied, the Court of Appeals placed mother and grandmother on equal footing, thereby violating mother's constitutional rights.

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[7] While ORS 107.105(1)(b) contemplates third-parties, it does so only as to "*visitation* rights pursuant to a petition filed under ORS 109.119."

The majority of courts grappling with this issue in other jurisdictions do not apply a substantial change of circumstances standard. E.g. *Troeskyn v. Herrington (In re S.H.)* , 409 SW 307; *Tourison v. Pepper*, 51 A3d 470, 473 n 11 (Del 2012); *In re D.I.S*., 249 P3d 775, 787 (Colo 2011); *In re Guardianship of Reena D*., 163 NH 107, 112, 35 A3d 509 (2011); *In re Guardianship of David C.,* 2010 ME 136, P4, 10 A3d 684 (Me 2010).

X. The substantial change of circumstances and best interest of the child rule is unconstitutional in a dispute between a parent and a nonparent.

The legislative history surrounding the 2001 amendment to ORS 109.119 in response to *Troxe*l may be useful to this court's analysis of what standard should apply in a modification of a third-party custody order. *State v.Gaines*, 346 Or 160, 206 P3d 1042 (2009). The 2001 amendments to ORS 109.119 were contained in House Bill (HB) 2427 (2001). The legislature rejected a change of circumstances standard when amending ORS 109.119 in response to *Troxel*. The original language of HB 2427 regarding modification of custody stated in relevant part that: "(5)(b) When custody of a child has been granted to a person with a child-parent relationship in an order entered under this section, the order may be modified only upon a showing that there has been a change in circumstances relating to the legal parent, the person with custody or the child such as is required to allow the court to

reconsider the provisions of the order.[8] In the modification proceeding, to retain custody the person with custody is not required to make the showing described in subsection (2)(a) and (b) of this section." HB 2427 (2001) (as introduced).

The legal sufficiency of subsection (5) as introduced in HB 2427 was questioned by Maureen McKnight of LASO. Testimony, House Judiciary Committee, Civil Law Subcommittee, HB 2427, Feb 26, 2001, Ex G at 2 (statement of McKnight). McKnight was a member of the interim committee work group that drafted HB 2427 prior to its introduction. *Id*. at 1. She expressed concern about the legal sufficiency of requiring a parent to show that there had been a change in circumstances before the parent was able to pursue modification of a prior order. *Id*. at 2. The final version of HB 2427 deleted the change of circumstances requirement, and the current language of ORS 109.119(2)(c) was added. The Court of Appeals' decision to apply an even higher standard (i.e. "substantial" change of circumstances) is inconsistent with the legislature's explicit removal and apparent rejection of the change of circumstances rule.

The Court of Appeals majority cites *Lear v. Lear*, 124 Or App 524, 863 P2d 482 (1993), to support the argument that no parental presumption (or any other "special weight") should be given to the parent in a modification. *Epler,* 258 Or App at 478*,* n 6. *Lear* offers little guidance in this consent case for several reasons.

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[8] On the face of this record, mother arguably showed both a substantial change of circumstances and that it was in her child's best interest to return to her care.

First, it was a pre-*Troxel* case that had no analysis of a parent's constitutional rights and may have been resolved differently after *Troxel.* Second, *Lear* very clearly applied to a modification after a parent lost a contested litigation where some special weight was given to the parent, albeit less than *Troxel* requires. *Lear,* 124 Or App at 527. Further, while the Court of Appeals in *Lear* applied the change of circumstances rule, it did not apply a best interest standard. The court stated "[i]f the parent shows that circumstances have substantially changed, *then the question for the court is again whether there are compelling reasons* not to award custody to the natural parent." *Id*. at 527(emphasis added).

The net result of the 2011 amendments to ORS 109.119 is that the legislature provided no affirmative direction to the bench, bar, or litigants as to what standard does apply in modifications of awards of custody to third-parties. The ORS 109.119(2)(a) presumption that a parent acts in the best interest of a child is the correct legal standard for use in proceedings to modify awards of custody to third-parties. Under the Due Process Clause, a nonparent, even one who has been caring for a child for some period of time, cannot be elevated to the same plane as a fit parent. Parents should never lose their "superior" position in relation to nonparents.[9] Alternatively, as discussed, the presumption should be applied in a

[9] As one commentator has noted the best interest rule is vague, subjective, and may lead to social engineering by judges who impose their own values about what is best for children in deciding cases. Josh Gupta-Kagan, *Children, Kin and Court:*

case where a parent has consented to custody. If this court declines to apply the presumption to modification proceedings regardless of whether the award of custody to a nonparent occurred as a result of an adjudication or as a result of a parent's consent, *Troxel* nevertheless requires a standard that recognizes the superior rights of parents vis a vis third-parties and gives those rights some "special weight." Only a rule that gives some "special weight" to the fundamental interest parents have in the care, custody, and control of their child is constitutionally sound.

XI. Public policy considerations

This case affects the many Oregon parents facing myriad challenges that may temporarily impinge on their present ability to care for their children.[10] This case also implicates concerns about access to justice. Parents most affected will be single mothers because 86 percent of children living with only one parent are living with their mothers. Nationwide 27.8 percent of children living below the poverty level live with third-parties versus 19.9 percent of children overall.

Designing Third Party Custody Policy to Protect Children, Third Parties, and Parents, 12 Legis & Pub Pol'y 43, 93-94 (2008)(discussing the danger of using a subjective standard).

[10] The Census Bureau estimated that 4.2 percent of the children in this country lived with nonparents in 2009. ROSE M. KREIDER et al., U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, LIVING ARRANGEMENTS OF CHILDREN: 2009), p. 70-126, *Current Population Reports* (2011) *available at* http://www.census.gov/prod/2011pubs/p70-126.pdf [hereinafter LIVING ARRANGEMENTS OF CHILDREN: 2009].

LIVING ARRANGEMENTS OF CHILDREN: 2009 at 20. For children living with only their mother that number climbs to 38 percent living in poverty. *Id*. Thus a disproportionate number of the parents in these cases will be low income single mothers. These parents are likely suffering the effects of poverty and may be unable to access legal assistance to help them understand the implications of consenting to third-party custody awards or to mount a legal case against nonparents who typically have far greater financial resources. Many legal aid clients are young and poorly educated and they must be living very near or below the poverty level to qualify for services. Others are single mothers escaping domestic violence with little by way of resources or support. Others may be dealing with mental or physical health crises or drug and alcohol issues.

Like the mother in this case, these parents frequently make decisions, premised on their assessment of the best interests of their children, to consent to judgments awarding custody to trusted third-parties. These decisions are agonizing but made with the hope that their children will be well cared for while they address the barriers that preclude them from maintaining custody of their children in the short run. At the time mother in this case consented to grandmother's custody her circumstances were typical of legal aid clients involved in third-party custody cases. At 20 years of age she was young, poor and did not have a college degree. She was suffering from mental-health and alcohol problems and her living

situation was unstable. If *Epler* is allowed to stand it will have a disparate impact on some of the most vulnerable mothers in this state.

The Court of Appeals' holding could have other troubling consequences. Parents may not rely on family or other third-parties and will be caught between what is best for their children at the time and the threat of being unable to regain custody. This may result in unnecessary and less appropriate state intervention. [11]

The government has an interest as *parens patriae* in the welfare and safety of children. *Epler* undercuts this interest by potentially discouraging parents from making decisions in the best interests of their children to temporarily place them with third-parties. Instead, parents who are facing instability or problems affecting their parenting abilities should be encouraged to make decisions protecting their children, even if this means temporarily separating the family.

The majority and concurring opinions point out that parents could, with thoughtful drafting, include in a judgment provisions that relieve them from showing a substantial change in circumstances and preserve their constitutional presumption. *Epler,* 258 Or App at 485 (majority), 491 n 2 (Duncan, J., concurring). Whether or not this approach is legally tenable, it fails to recognize

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[11] Ironically, when the Department of Human Services removes a child, a parent is in a much better legal position than one who has made a conscious choice to place her child with a third-party so she can stabilize her life. In Juvenile Court proceedings, parents have the benefit both of appointed counsel and reunification policies that require family strengthening services. ORS 418.578; ORS 419.205.

that poor parents often have little knowledge of the law and rarely have access to attorneys.

The barriers to accessing legal assistance in family-related matters in Oregon are daunting. A recent report of the Oregon Judicial Department (OJD)/Oregon State Bar (OSB) Task Force noted that an estimated 67 to 86 percent of family law cases involved at least one self-represented party.[12] In Oregon, the number of litigants representing themselves in family law-related cases is so great that for well over a decade -- even while struggling with recession-related budget issues -- OJD has created and maintained forms and other resources devoted to their needs.[13] While LASO and OLC have provided advice in hundreds of nonparent custody and guardianship cases and full representation to many parents, the programs serve only 15 percent of the people who qualify for their services.[14] Consequently, LASO and OLC estimate that the vast majority of low-income parents involved in third-party custody cases cannot afford to retain counsel and

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[12] Report from the OJD/OSB Task Force on Family Law Forms and Services, page ii. February 2011. http://courts.oregon.gov/Multnomah/docs/FamilyCourt.

[13] The OJD Family Law Home page does not provide forms for third-party custody cases. The reason for their absence is unknown but perhaps is related to the procedural and legal complexity of these cases.

[14] LASO and OLC generally serve only those clients whose income is up to 125% of the poverty level. For 2013, that amount is $1,197 per month for an individual, $2453 per month for a family of four. Legal Services Income Guidelines, 45 CFR § 1611Appendix A (2013).

have no legal assistance in determining or asserting their legal rights.[15] Parents with no access to legal assistance and no information about the legal ramifications of such choices may consent to custody awards to nonparents without any knowledge or awareness of the rights that they are relinquishing under *Epler*. The far-reaching consequences of their decisions will become clear only when seeking the return of their children in modification cases. Alternatively, parents with some understanding of the law may be reluctant to consent.

Scenarios frequently encountered by legal aid attorneys involve a parent, usually a mother, who may be escaping an abusive partner, experiencing homelessness, seeking assistance for physical problems and mental health issues relating to the abuse, and/or lacking financial resources and job skills. Often relatives have already been involved in caring for the children but pursue legal custody in order to provide health insurance, enroll children in school, and

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[15] A further consideration is how these self-represented litigants are likely to fare in court. The "best interest of the child standard" is highly subjective. "Wide discretion under the best interest factors raises the specter of cultural, class, life-style and other types of prejudice. The very subtle ramifications of social bias often invade custody and visitation decisions. Poorer, less educated parents will always look worse in relation to older, seemingly more established and settled grandparents, who often have significantly more resources. Social bias against fit, but single, parents will also affect decision makers." Brief for Amici Curiae Domestic Violence Project Inc./Safe House (Michigan) et al. at 21, *Troxel v. Granville*, 530 US 57 (2000). For example, in a shockingly recent case, a trial court ordered temporary guardianship in part based on a mother living with men with no visible means of support. *Troeskyn v. Herrington* (*In re S.H.*), 2012 Ark 245, 409 SW 307 (2012).

authorize medical care. *See* Gupta-Kagan 12 Legis & Pub Pol'y at 48-49. Mother, recognizing that a relative can provide in the short run what she cannot, agrees to custody. Her agreement is likely based on assurances that the third-party will return the children as soon as she is back on her feet. She consents to legal custody and is successful in getting her life back in order. When mother seeks the return of her children, the nonparent refuses.

XII. Conclusion

LASO and OLC urge this court to hold that the presumption in ORS 109.119(2)(a) that a legal parent acts in the best interests of her child applies in this modification of a consensual custody award to a nonparent.

Respectfully submitted this 18th day of March, 2014.

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