IN THE SUPREME COURT OF THE STATE OF OREGON

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

Third-Party Respondent-Respondent, Respondent on Review -- Answering Brief

Appeal from the Supplemental Judgment of the Circuit Court for Marion County (Honorable Dennis J, Graves) and Court of Appeals Decision

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Legal Question Presented

In a custody modification proceeding governed by ORS 107.135, where a parent ("Mother") stipulated to a third party ("Grandmother") having legal custody of Mother's child in Mother's dissolution action, based on her belief that such decision was in the best interest of the child, were the trial court and the Court of Appeals correct in holding that:

1. Mother was required to show a change of circumstances as any other party seeking a custody modification would be required to do; and

2. The parental presumption of ORS 109.119(2)(a) does not apply to this proceeding.

Proposed Rule of Law

In custody modification proceedings, whether the original action was pursuant to ORS Chapter 107 (dissolution); ORS Chapter 109 (unmarried parents); or ORS 109.119 (psychological parents), where a parent has previously stipulated to grant custody of her child to a third party based upon the best interests of the child, the parental presumption of ORS 109.119(2)(a) does not apply and the change of circumstances rule does apply.

Nature of the Action

Respondent on Review ("Grandmother") accepts the statement of Petitioner on Review ("Mother") as to the nature of this action, except that

Grandmother respectfully requests this court to affirm the decision of the Court of Appeals, including the Court's remand to the trial court to determine Mother's parenting time modification. John Paul Epler, also Respondent on Review ("Father"), joins this brief.

Standard of Review

This court should review the matter below for errors of law, not *de novo*. In reviewing this decision of the Court of Appeals, this court may review *de novo* or may limit its review to questions of law. *State ex rel. State Office for Servs. to Children & Families v. Stillman*, 333 Or 135, 138, 36 P3d 490, 491–92 (2001). This case turns on whether the Court of Appeals was correct in reviewing the trial court's decision in not applying the parental presumption of ORS 109.119, in finding that Mother's constitutional rights were not violated, that the change of circumstances rules applied, and that Mother had not showed a change of circumstances under ORS 107.135.

Here, the Court of Appeals addressed all the issues raised in this court. None of those issues are fact-dependent, so this court should review only for errors of law. Even if this court does review *de novo*, it should defer to the credibility determinations of the trial court. *In re Marriage of O'Donnell-Lamont and Lamont*, 337 Or 86, 89, 91 P3d 721 (2004), *cert den*, 543 US 1050 (2005) (noting that, even on *de novo* review, the court gives "considerable weight to the findings of the trial judge who had the

opportunity to observe the witnesses and their demeanor in evaluating the credibility of their testimony") (internal quotation marks omitted).

Statement of Facts

Grandmother accepts Mother's statement of facts, except as follows. Grandmother rejects the characterization of Mother's signing of the Marital Settlement Agreement ("MSA"). There is nothing in the record showing that Mother's announcement of her leaving caused Father and Grandmother to engage legal counsel. *See* Mother's Br. 4. Regarding how quickly Father's and Grandmother's lawyers prepared the MSA, Grandmother did not know that or when the MSA was prepared. Tr. 79:12–14; 84:9–14. That "Mother hastily signed under assurances from Grandmother," Mother's Br. 5, is likewise misleading: Grandmother was not present when Mother signed. Tr. 77:14. Grandmother did not discuss the MSA with Mother. Tr. 77:23–78:14; 87:4–7. Mother did not read the entire MSA before signing; she merely "skimmed" it. Tr. 183:12-14. Mother had contacted an attorney to "protect my rights." Tr. 185:15-18. At the time she stipulated to custody to Grandmother, Mother believed it was in the best interests of her Daughter. Tr. 171:25–172:1; 201:14-15; Mother's Br. App-22.[1]

[1] The references herein to Appendix (App) reference the Appendix submitted with Mother's opening brief.

Summary of Argument

Under *Troxel v. Granville*, 530 US 57, 120 S Ct 2054, 147 L Ed 2d 49 (2000), the presumption that a parent acts in the best interest of her child applies in an original action to a fit parent who has legal custody of a child where a third party is seeking custody or visitation over the legal custodian's objection. *Troxel* is silent about the application of the presumption in modification proceedings. In codifying the constitutional requirements articulated in *Troxel*, the Oregon Legislature determined that the presumption does not apply in third-party modification proceedings. ORS 109.119(2)(c).

An ORS 109.119(1) proceeding is initiated by a third party and the presumption applies only to that initial proceeding. *Compare* ORS 109.119(2)(a) *with* (2)(c). Once an initial custody decision has been made, a party seeking to modify that decision must prove a change of circumstances since the last court ruling. That rule applies whether or not the original proceeding was brought under ORS chapter 107, ORS chapter 109, or ORS 109.119. Mother here is trying to do the following:

1. Import the parental presumption set forth in ORS 109.119(2)(a) into an ORS chapter 107 (modification) proceeding;

2. Apply such presumption after she previously stipulated that Grandmother be awarded custody based on her child's best interests;

3. Apply such presumption at the modification stage, where the legislature has expressly determined that the presumption does not apply.

Mother's position is not supported by *Troxel,* Oregon statutes and case law, and is contrary to legislative intent.

ARGUMENT

I. This case should be decided solely under ORS 107.135; the parental presumption does not apply here.

Mother's modification was subject to and governed by ORS 107.135, which requires a change of circumstances. If a change is demonstrated, a best-interests determination is then made. This case is not governed by ORS 109.119 because it is not a modification of an ORS 109.119 action.

This case began as a dissolution of marriage under ORS chapter 107. Mother and Father stipulated to a general judgment of dissolution that granted custody to Grandmother. When a court renders a judgment of marital dissolution, it may provide for, among other things, "the * * * custody, by one party or jointly,[2] of all minor children of the parties born * *

[2] Amici curiae argue that ORS 107.135(1) applies only to proceedings between parents. *See* Amici Br. 20–22. The statute's wording is permissive; it does not require a court to provide for custody only between parents. If it were required, it would have had to provide for custody to one or the other of two unwilling parents. Instead, it provided for custody as it deemed just and proper, namely, as the parents agreed in the MSA.

* during the marriage * * * as the court may deem just and proper under ORS 107.137. ORS 107.105(1)(a).

Mother's first motion for modification was brought exclusively under ORS 107.135, where she alleged a change of circumstances. *See In re Marriage of Epler and Epler*, 258 Or App 464, 467, 309 P3d 1133, 1137 (2013) *rev allowed*, 354 Or 699 (2014). Mother then amended her motion, relying on both ORS 107.135(1)(a) and ORS 109.119(2)(a), yet she did not allege a change of circumstances. *See id.* at 468–69.

For the ORS 109.119(2)(a) parental presumption to apply, this case would have had to be originally filed under ORS 109.119. The presumption is available only under ORS 109.119. Even if this case were filed under ORS 109.119, the presumption does not apply to a modification. *See* ORS 109.119(2)(c).

A. As an ORS 107.135 modification case, the change of circumstances rule applies. Such application does not violate the U.S. Constitution.

The change of circumstances rule in all custody modifications is a rule of long standing. The first case that required a parent to show a change in circumstances to justify a modification of custody was *Merges v. Merges,* 94 Or 246, 257–58, 186 P 36 (1919) (no material change in father's ability or inclination to care for child shown to support modification). Only after a

change has been shown will a court move on to a best-interests determination. *In re Marriage of Greisamer*, 276 Or 397, 400–401, 555 P2d 28 (1976) (en banc). This court has repeatedly enforced the change of circumstances requirement. *See, e.g., In re Marriage of Deffenbaugh,* 286 Or 759, 765, 596 P2d 966 (1979) (en banc) *Henrickson v. Henrickson,* 225 Or 398, 402, 358 P2d 507 (1961); *Leverich v. Leverich,* 175 Or 174, 179–80, 152 P2d 303 (1944).

The rule has been articulated as follows:

> "unless the parent who seeks a change in custody establishes that the facts that formed the basis for the prior custody determination have changed materially by the time of the modification hearing, the prior adjudication is preclusive with respect to the issue of the best interests of the child under the extant facts."

State Dep't of Human Res. ex rel. Johnson v. Bail, 325 Or 392, 398, 938 P2d 209 (1997) (en banc).

The rationale of the change of circumstances rule is "to avoid repeated litigation over custody and to provide a stable environment for children." *In re Marriage of Ortiz and Ortiz*, 310 Or 644, 649, 801 P2d 767 (1990).

A change in circumstances is required even if the custody order was stipulated to or taken by default, rather than litigated. *In re Marriage of Welby*, 89 Or App 412, 414, 749 P2d 602 (1988), *abrogated on other grounds by State Dept. of Human Res. ex rel. Johnson v. Bail*, 325 Or 392,

938 P2d 209 (1997); *State Dept. of Human Res. ex rel. Johnson v. Bail*, 140 Or App 335, 341–344, 915 P2d 439 (1996), *aff'd*, 325 Or 392, 938 P2d 209 (1997) (en banc).

The change of circumstances rule is also required in third-party custody modifications under ORS 109.119. *Lear v. Lear*, 124 Or App 524, 527, 863 P2d 482 (1993). The *Lear* court understood that *former* ORS 109.119 (1987) did not provide its own standard for modifications.[3] *Id.* Since *Lear*, neither *Troxel* nor the 2001 amendments to ORS 109.119 have changed the application of this rule.

Lear has never been abrogated and has been cited in third-party cases such as *In re Marriage of Winczewski and Winczewski*, 188 Or App 667, 72 P3d 1012 (2003), *rev den* 337 Or 327 (2004) and *Meader v. Meader*, 194 Or App 31, 94 P3d 123, *rev den* 337 Or 555 (2004). *Lear* continues to be controlling authority for the proposition that a change of circumstances is required as the threshold question in modification of custody cases—regardless of who has custody. *See Epler,* 258 Or App at 478 n 6. In other

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[3] Amici curiae argue that *Lear* failed to apply a best interest standard and instead applied the compelling-reasons test. Amici Br. 25. This misses the point that the first step in a modification proceeding is always the change of circumstances showing. The second step—whether best interests or compelling reasons—has had its own evolution. *See generally* Philip F. Schuster II, *Constitutional and Family Law Implications of the* Sleeper *and* Troxel *Cases: A Denouement for Oregon's Psychological Parent Statute?*, 36 Willamette L. Rev. 549 (2000).

words, there is no case in Oregon where a change of circumstances is not required in order to change custody.

Courts in other jurisdictions require the change of circumstances rule in third-party modifications. *See, e.g., Albert v. Ramirez*, 45 Va App 799, 802–03 (Va 2005) (existence of a prior final decree requires court to apply change of circumstances test in custody modification between biological parent and non-parent); *Barnett v. Oathout*, 883 So 2d 563, 567 (Miss 2004); *In re Guinta v. Doxtator*, 20 AD3d 47, 54, 794 NYS2d 516, 521 (2005) ("[i]t is well established that alteration of an established custody arrangement will be ordered only upon a showing of a change [of] circumstances which reflects a real need for change to ensure the best interest[s] of the child"); *Denise v. Tencer*, 46 Va App 372, 617 SE2d 413 (2005).

Oregon's change of circumstances rule has never been held to be unconstitutional and this court should not so hold either, regardless of the type of custody proceeding. That is so because the *Troxel* presumption extends only so far as the initial custody determination. When parties by stipulation or when a court adjudicates the rebuttal of the presumption at the initial stage and awards custody to a third party, the constitutional imperative has been satisfied. The third party becomes the psychological

parent with custody. To change custody, the prior custodian must show a change of circumstances.

Here, Mother and Father stipulated to their dissolution, which included the Marital Settlement Agreement (MSA) with the following language:

> "Husband and Wife acknowledge that [Grandmother] has been the primary custodian of [daughter] since [daughter's] birth in 2003. Through this agreement, it is the intention of the parties to formalize Grandmother's custody, and provide for both Husband and Wife to pay child support to Grandmother for [daughter's] benefit."

Mother's Br. App-9.

Mother now wants the presumption of ORS 109.119(2)(a) to apply to this modification and require Grandmother to rebut that presumption, as though this were an original ORS 109.119 case. But Mother then seeks to avoid ORS 109.119(2)(c), which eliminates the presumption in a modification. She cannot have it both ways. *See infra* II.B.1.

What Mother proposes is to eliminate the change of circumstances rule in third-party modifications, eliminate the non-application of the presumption in third-party modifications, apply the parental presumption, require the rebuttal, and turn every third-party modification into an original ORS 109.119 case.

If the court accepts Mother's analysis, it would then have to create a rule that focuses on what a "fit" parent is, in order to apply the presumption

(because only a fit parent is entitled to the presumption under *Troxel*). This is unnecessary and unwarranted because the change of circumstances rule already does just that: It focuses the inquiry on whether circumstances—including a parent's fitness—have changed since the granting of the original custody order such that a court can then reconsider whether it is in the best interests of the child to change custody.

Mother is required to show a change of circumstances as the first step in a modification. Only when she has shown that the circumstances that led to the original custody determination have changed for the better should a court then move on to the best-interests analysis. To do otherwise will encourage constant litigation, contrary to the premises of the change of circumstance rule, and cause instability for the children affected.

B. This not being an ORS 109.119 case, the parental presumption does not apply.

The parental presumption applies to cases brought under ORS 109.119, but only at an initial determination. *See, e.g., O'Donnell-Lamont*, 337 Or at 94–95; *Strome and Strome*, 185 Or App 525, 527, 60 P3d 1158 (2003) (en banc); *Winczewski*, 188 Or App at 668; *Sears v. Sears*, 190 Or App 483, 79 P3d 359 (2003). The presumption does not apply in cases not brought under ORS 109.119 and there is no Oregon case where the parental presumption has been applied.

The case here is similar to *Underwood v. Mallory*, 255 Or App 183, 297 P3d 508 (2013). There, grandparents obtained custody of child by default. Although certain ORS 109.119 rebuttal factors were alleged, the judgment granting custody to grandparents was pursuant to ORS 109.103. Mother later filed a motion to modify the original judgment, citing ORS 107.135 and ORS 109.103, but not ORS 109.119. In response, grandparents contended that mother did not satisfy the change of circumstances rule governing ORS 107.135 modifications. The trial court and the Court of Appeals agreed. *Id.* at 193. The Court of Appeals also approved the trial court's finding that a change of custody would not be in the child's best interest, noting in particular that grandparents had been the primary caretaker of the child for the past ten years and facilitated (until recently) ongoing relationships between the child, his siblings, and mother. *Id.* at 193–94. Because the case had originally been filed (apparently erroneously) under ORS 109.103, the Court of Appeals avoided "the complex and difficult question * * * as to whether the provision of ORS 109.119(2)(c) that removes the presumption from modification proceedings would be constitutional as applied to a circumstance where no determination as to parental unfitness was made at the time the court granted custody to grandparents." *Id.* at 192. Accordingly, where a custody or visitation judgment is obtained originally by default without a specific finding that the parental presumption had been overcome,

it is unclear as to whether such presumption, under the U. S. Constitution, needs to be rebutted in modification or other subsequent proceedings.

Like the current case, *Underwood* was not a contested proceeding; mother there moved to modify; mother did not meet the change of circumstances rule; and no determination of parental unfitness was made when the court granted custody to grandparents. However, unlike *Underwood*, the current case was not contested but stipulated to Grandmother having custody. Moreover, to the extent factual findings were required (and they are not required in a Chapter 107 dissolution action), they were implicit in the MSA and in the facts and pleadings below. *See* Mother's Br. App-8–17, 22. It is clear that the initial award of custody in this case was not pursuant to ORS 109.119 (the award was not made "over the objection of the legal parent," ORS 109.119(4)(a)) and is thus inapposite to any modification under that statute.

Mother had no legal basis to modify under ORS 109.119 because the original action—the petition for dissolution of marriage—did not result in "an order granting relief under [ORS 109.119]." And even if the original action were under ORS 109.119, the presumption would not apply. ORS 109.119(2)(c).

II. Mother was not denied her rights under the U.S. Constitution by not having the parental presumption applied, whether under ORS chapter 107 or ORS chapter 109.

The elimination of the parental presumption in modifications, as set forth in ORS 109.119(2)(c), is not an unconstitutional infringement on Mother's rights when she has agreed to an initial grant of custody under ORS chapter 107. The only place in Oregon's statutory domestic relations scheme where the presumption exists is in ORS 109.119. The presumption does not apply outside of ORS 109.119, nor should it.

Mother argues that *Troxel* mandates that the presumption be applied, but as argued below Mother is not entitled to the *Troxel* presumption because she is not the child's custodian, the state was not involved, and this is not an initial custody proceeding—as was the case in *Troxel*.

In *Troxel*, the Supreme Court struck a particularly burdensome order by a Washington trial court, which had acted under the authority of a broad statute that "allow[ed] 'any person' to petition for forced visitation of a child at 'any time' with the only requirement being that the visitation serve the best interests of the child." *Troxel*, 530 US at 67 (quoting *In re Custody of Smith*, 137 Wa 2d 1, 20, 929 P2d 21, 30 (1998)). Specifically, the trial court in *Troxel* had ordered visitation between a mother's two young daughters and the daughters' paternal grandparents over mother's objections. The

result was a splintered decision featuring six separate opinions: one plurality, two concurrences, and three dissents.

From the plurality opinion's narrow base, *Troxel* is an object lesson on how not to apply a "breathtakingly broad" non-parental visitation statute. *See Troxel*, 530 US at 67. The holding of *Troxel* is narrow, as-applied, and fact-specific. This court should not extend the boundaries of the plurality opinion and not be swayed by suggestions and sentiments that lack the force of binding precedent.

Justice Thomas, concurring in the judgment, would apply strict scrutiny to an interference with the "right to rear [one's] children." *Id.* at 80. And the assertion that a "blanket denial" of the parental presumption in modification proceedings is facially unconstitutional might be something Justice Souter or the Washington Supreme Court of a decade and a half ago might have accepted—though not necessarily. *See id.* at 75–77. Yet neither Justice Thomas's nor Justice Souter's view is the law of the case. "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Marks v. United States*, 430 US 188, 193, 97 S Ct 990, 51 L Ed 2d 260 (1977) (internal quotation marks and citations omitted).

The plurality opinion thus governs under the *Marks* standard, by dint of parsimony and head-count. The *Troxel* plurality's holding was narrow, as-applied, and fact-specific:

> "Because we rest our decision on the sweeping breadth of [Washington Revised Statutes] 26.10.160(3) and the application of that broad, unlimited power in this case, we do not consider the primary constitutional question passed on by the Washington Supreme Court—whether the Due Process Clause requires all non-parental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation * * *. [T]he constitutionality of any standard for awarding visitation turns on the specific manner in which that standard is applied and that the constitutional protections in this area are 'best elaborated with care.'"

Troxel, 530 US at 73 (quoting Kennedy, J., dissenting).

The *Troxel* plurality thus implicitly rejected the Washington Supreme Court's (and Justice Souter's) conclusion that the whole statutory scheme was unconstitutional by its text alone. *Id.* at 76 n 1 (Souter, J., concurring in the judgment). The plurality was uncomfortable at the thought that even a statute so "breathtakingly broad," *Id.* at 67, was unconstitutional on its face. "Because much state-court adjudication in this context occurs on a case-by-case basis, we would be hesitant to hold that specific non-parental visitation statutes violate the Due Process Clause as a *per se* matter." *Id.* at 73 (Kennedy, J., dissenting); *see also Harrington v. Daum*, 172 Or App 188, 197, 18 P3d 456 (2001).

Troxel, being an as-applied decision in a original (nonmodification posture), provides little guidance here. In her testimony before the Oregon Senate Committee on Judiciary regarding House Bill (HB) 2427 (2001), the bill that eventually codified *Troxel* into ORS 109.119, Maureen McKnight put it succinctly: "[The *Troxel* case] basically said, 'You have to be careful if you're intruding into parental autonomy, but we're not gonna tell you how careful, or how we do this.' It's given us, as a state, some leeway in how we draw those lines." Tape Recording, Senate Committee on Judiciary, HB 2427, May 7, 2001, Tape 124, Side B (statement of Maureen McKnight). Being an as-applied decision, our only guide for compliance with *Troxel* are the facts of *Troxel*. Those facts will shed some light on just how far the case here is from the few, faintly bright lines the *Troxel* plurality drew.

A. This case does not raise *Troxel* issues.

Troxel does not apply to this case. *Troxel* held narrowly that a very broad visitation statute was unconstitutional as applied to a custodial parent when the state ordered visitation over her objection at an initial determination. Thus, the Court granted mother a presumption that she acted in the best interests of her child in order to prevent a judge's discretion from overriding her constitutional right as a fit parent to direct the "care, custody, and control of [her] child[]." *Troxel*, 530 US at 65. *Troxel* should not apply when Mother is not the custodial parent, when she stipulated to a judgment that the

court then entered, and when she now seeks to modify that stipulated judgment.

1. *One must be a custodial parent for the parental presumption to apply.*

Mother's preference here is not entitled to special weight because the parental presumption, which requires a court to give special weight to a parent, depends upon such parent having custody. In *Troxel*, mother had custody. *Troxel*, 530 US at 60–61. That basic fact is central to the Court's decision that it is a parent who "adequately cares for his or her children," *id.* at 68, who is entitled to the presumption.

Mother here does not have legal custody of the child. *Harrington* confirms this custody prerequisite. *See* 172 Or App at 198 ("*Troxel* now establishes that the court must give significant weight to a fit *custodial* parent's decision") (emphasis added). *See also O'Donnell-Lamont*, 337 Or at 94 ("The [Supreme] Court failed to articulate the scope of the parent's right, holding only that, to meet due process requirements, '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.").

Without being the legal custodian, *Troxel* does not require that Mother be accorded a parental presumption or for the court to accord her preference special weight.

2. In Troxel, the state acted to adjudicate a dispute between parties; here, the parties agreed, leaving the state's role to make their agreement enforceable.

Oregon did not impose its authority and did not impair the constitutional rights of Mother and Father when they both stipulated to give custody to Grandmother.

The constitutional wrong in *Troxel* was the *state's* injection of itself into the parties' dispute by ordering a result without first considering giving mother's preference special weight about when and with whom her daughters would spend their time. *Troxel*, 530 US at 61.

The Washington statute at issue in Troxel empowered "a court [to] disregard and overturn *any* decision by a fit custodial parent concerning visitation whenever a third party affected by the decision files a visitation petition, based solely on the judge's determination of the child's best interests." *Id.* at 67 (emphasis in original). The parental presumption prevented a judge's estimation of a child's best interests from trumping the mother's decisions about those best interests. *Id.* This latent potential—for a trampling of the liberty interests of people who, though they had done nothing meriting termination of parental rights, were nonetheless in danger of being haled into court to defend those rights from being chipped away by intermeddlers who would not even bear the burden of proof—was finally

realized in the case of Tommie Granville. *Id.* at 69 ("In effect, the judge placed on Granville the burden of *disproving* that visitation would be in the best interests of her daughters") (Emphasis in original).

In contrast, here Mother agreed to the legal transfer of her custodial rights to her daughter to Grandmother two or three months after Mother's physical, emotional, and mental health had deteriorated, during which time she had already turned day-to-day care of infant Daughter over to Grandmother. Mother's Br. 3–5. Mother then left Oregon for her home state. *Id.* Daughter has remained in Grandmother's sole, uninterrupted care ever since. *Epler*, 258 Or App at 466.

When Mother, without any evidence of coercion or incapacity, stipulated that Grandmother would have custody and that such was in her daughter's best interest, Mother ceded her custodial rights. *McCurdy v. Albertina Kerr Homes, Inc.*, 9 Or App 536, 539, 498 P2d 392 (1972) ("[T]he right of a parent to raise his child has constitutional protection and can be taken away only when the requirements of due process are observed. But parental rights also can be waived by the parent.") (internal citations omitted). By asking this court to disregard the change of circumstance rule and interpose the parental presumption, Mother is asking this court to give her special weight or deference over Grandmother solely because she is a biological parent, even though Grandmother has been the child's primary caretaker as the state

did not originally adjudicate any dispute between her and Grandmother.

The constitutional basis of the parental presumption is when the state challenges a fit custodial parent's decision-making. The presumption is not some pocketable, transportable right to be exercised anywhere at any time, but only to prevent a judge's discretion from overriding the constitutional right of a fit parent. *See Troxel*, 530 US at 67.

Here, because of the MSA, the trial court judge's discretion—the state injection—did not come into play, there was no reason to apply the presumption. Mother concedes this point. Mother's Br. 10 ("Nor is the presumption applied * * * unless there is a dispute between the parent and third party into which the court is called to settle.").

Here, because Mother stipulated that custody be awarded to Grandmother, there was no state action except to then formalize the parties' agreement. What Mother wants the state to do here, before this court, is to "inject itself" now to save her from her own contract.

3. Troxel was an initial determination; the case here is a modification of a judicially approved custody stipulation.

The constitutional wrong of Troxel being the state's injection, at this stage of the proceedings, the parental presumption does not arise when Mother is asking the court to modify custody that she has already stipulated to.

As argued above (I.A), the change of circumstances rule must be applied in modification proceedings subsequent to a court's initial custody determination. *See, e.g., Albert*, 45 Va App at 802–03 (*Troxel* presumption does not apply; existence of a prior final decree based on a consent order requires court to apply change of circumstances test in custody modification between biological parent and non-parent); *Blair v. Badenhope*, 77 SW3d 137, 141 (Tenn 2002), *superseded on other grounds by statute in Armbrister v. Armbrister*, 414 SW3d 685 (Tenn 2013) (absent extraordinary circumstances, a natural parent cannot invoke the doctrine of superior parental rights to modify a valid order of custody, even when that order resulted from the parent's voluntary consent to give custody to the non-parent).[4] If the change of circumstances rule did not exist, any party that

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[4] "[A] parent's voluntary consent to cede custody to a non-parent defeats the ability of that parent to later claim superior parental rights in a subsequent proceeding to modify custody. Presuming that a parent is afforded the opportunity to assert superior parental rights in the initial custody proceeding, then the parent's voluntary transfer of custody to a non-parent, with knowledge of the consequences of that transfer, effectively operates as a waiver of these fundamental parental rights. Under these circumstances, therefore, the Constitution does not again entitle the natural parent to assert superior parental rights to modify a valid custody order, even if no court has previously found the natural parent to be unfit." *Blair*, 77 S.W.3d at 147-48. *But see id.* at 147, fn 3, "[w]here a natural parent voluntarily relinquishes custody without knowledge of the effect of that act, then it cannot be said that these rights were accorded the protection demanded by the Constitution. As such, application of the superior rights doctrine in a subsequent modification proceeding would be justified. However, no such allegation has been made by Mr. Blair in this case." Likewise in the present case, no

wanted to modify could arguably litigate over and over again based simply on the parent's judgment that she take "another bite at the apple."

By the time of Mother's motion for modification, the state's role with respect to the original custody determination was over by its entering the stipulated judgment of the parties. Thus, it is inapposite to say that a parental presumption at the modification is useful to prevent the state from injecting itself.

4. If this court does give special weight to Mother's decision, it should also give special weight to Father's decision and Grandmother's rights.

Like Mother, Father stipulated to the judgment granting custody to Grandmother. If a custody agreement in a dissolution proceeding grants custody to a third party, then applying the parental presumption when one parent wants to unilaterally change that custody arrangement under Mother's interpretation of ORS 109.119, and the other natural parent wants the agreement honored, a court must necessarily give special weight to Father's position, both initially and at the current juncture. Thus, if Mother's position is accepted, the court must choose which of the two natural parents receives

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allegation was made that Mother agreed to custody without knowledge of the effect of her act.

the benefit of the special weight that *Troxel* directs. This dilemma is avoided if this case is decided, as it should be, under ORS 107.135, where a change of circumstances must be shown by the moving party and where the parental presumption is not applied.

B. ORS 109.119(2)(c) is constitutional and ORS 109.119 is not substantive law on modification.

Assume, *arguendo,* there is some question as to the constitutionality of removing the parental presumption in modification proceedings where the initial custody awarded was pursuant to ORS 109.119. This is not the case to decide that issue, as custody here was determined in the underlying ORS chapter 107 dissolution proceeding, based on the parties' stipulations. If the court nevertheless proceeds to this issue, it should find no constitutional infirmity.

A long line of Oregon cases has deemed the current version of ORS 109.119 to be constitutional in that the statute incorporates the federal constitutional presumption that gives effect to a parent's fundamental due process right to the care, custody, and control of his or her children. *See Winczewski*, 188 Or App at 700–06 (citing cases). *See also O'Donnell-Lamont*, 337 Or at 120.

Mother argues that, because ORS 109.119(2)(c) does not preserve the parental presumption in a modification, it is inconsistent with and thus

unconstitutional under *Troxel*. The elimination of the presumption at the modification stage is not inconsistent with *Troxel* because *Troxel* is silent on the issue of the applicable standards in the modification context. Nothing in *Troxel* supports the idea that the presumption applies after the initial court determination. Mother's citation to *Santosky v. Kramer*, 455 US 745, 753, 102 S Ct 1388, 71 L Ed 2d 599 (1982) is inapposite because this is not a temporary custody case where Mother lost custody of her child to the state. This is a case where Mother voluntarily agreed, without state interference, to grant custody to the child's grandmother.

ORS 109.119(2)(c) is not substantive law on modifications. It merely indicates what a party cannot bring to the modification, namely, the parental presumption. *Lear*, *Meader, Winczewski,* and *Burk v. Hall*, 186 Or App 113, 62 P3d 394 (2003), all hold that the change of circumstances rule is the first.

1. Mother's position on the elimination of the parental presumption under 119(2)(c) is inconsistent.

Mother argues that she does not want to lose the parental presumption under ORS 109.119(2)(c), so she argues that her case is not under ORS 109.119. Mother's Br. 15. Yet in the same breath she argues that ORS 109.119 is a "separate source of conditions for the adjudication of custody modification between a parent and a third party * * *." Mother's Br. 15. In other words, the elimination of the presumption in ORS 109.119

modifications does not prevent her from using the presumption in an ORS 107.135 modification. Mother cites no authority for this except for her misinterpretation of *Burk*. Mother's Br. 13. This stands ORS 109.119 on its head.

First, the proposition Mother argues *Burk* stands for is quite a bit broader than the court's actual holding, which was, "guardianship actions involving a child who is not subject to a court's juvenile dependency jurisdiction and whose legal parent objects to the appointment of a guardian are—in addition to the requirements of ORS 125.305—subject to the requirements of ORS 109.119." *Burk*, 186 Or App at 121. The reason the court in *Burk* had to reach over to ORS 109.119 in the first place was because 1) "ORS 125.305(1) makes clear that it does not specify all of the requirements for establishing a guardianship of a minor," *id.* at 119; 2) the case the court had at hand was a contested proceeding to establish—not modify—a guardianship, and 3) ORS 109.119 provided substantive standards that could be used for that particular sort of proceeding. *See id.* at 119–20.

Burk also held that

> "[w]e are not called upon to decide whether ORS 109.119 has any application to guardianship actions where a minor protected person does not have a living legal parent or the minor's legal parent does not object to the appointment as guardian of a person who lacks a child-parent relationship with the minor. Of course, the legislature, in its policy judgment, is free to address that and any other issue of concern that is raised by our decision here."

Id. at 121 n 4 (emphasis added).

In establishing a procedural limit to relitigation of child-custody determinations stemming from dissolution judgments, it would seem the legislature has done just that in ORS 107.135 and ORS 109.119 in the context of cases like our present one.

Note also that the would-be guardians in *Burk* lost to the biological parent not because they could not overcome the parental presumption, but because they could not establish the existence of a parent-child relationship in the psychological-parent analysis, as required by ORS 109.119(10)(a), and so did not qualify to use ORS 109.119 to gain a custody determination in their favor. *See id.* at 118–19; 121.

To draw the conclusion from *Burk* that "a non-parent 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," Amici Br. 10, would not just be a non sequitur. It would also be, if adopted by this court, a triumph of form over substance in a case where ORS 109.119, had it been explicitly cited and applied in the original dissolution judgment, would have yielded exactly the same result because Mother, in the MSA, waived the parental presumption. *See infra* III.A.

2. Thus, the simplest, clearest analysis is to look at the plain language of ORS 109.119(2)(c).

The parental presumption does not apply to ORS 109.119 modifications. ORS 109.119(2)(c). If the parental presumption is not applied in an ORS 109.119 modification, there is no reason to apply it in an ORS 107.135 modification. This court should be guided by *Lear,* where the change of circumstances rule was applied. *See* 124 Or App at 527. This court should hold likewise and further hold that it is not unconstitutional to apply the change of circumstances rule, or not apply the parental presumption, in modifications of custody where custody was previously awarded to a third party.

What ORS 109.119(2)(c) prevents, when combined with the change of circumstances rule, is "repeated litigation over custody…" *Ortiz*, 310 Or at 649. What it provides is "a stable environment for children. *Id.*

III. <u>Mother waived her parental presumption.</u>

A. Mother's stipulation was a waiver.

Assuming this court finds that the parental presumption applies, whether as an emanation of *Troxel* or the application of ORS 109.119(2)(a), it should find that when Mother stipulated to custody at the time of her dissolution, she waived application of the parental presumption. There is no evidence that Mother was forced or coerced to stipulate to grant custody to

Grandmother. Mother could have refused and forced Grandmother to file an ORS 109.119 action if Mother wanted the parental presumption to formally apply. Parties are presumed to know the law. *Marlin v. T'Vault*, 1 Or 77, 78 (1854). Instead, she voluntarily stipulated that Grandmother's informal custody be legally recognized. As such, she waived her right to exercise her presumption. *See Blair*, 77 SW3d at 147 (voluntary transfer of custody to non-parent operates as a waiver of fundamental parental rights). By waiving, Mother acknowledged that the *Troxel* presumption had been rebutted and that it was in the best interest of her child that Grandmother have custody.

If the original custody decision had been made under ORS 109.119, the result would have been the same. Several of the ORS 109.119 rebuttal factors would have applied in favor of Grandmother,[5] including:

1. That Grandmother had been the primary caretaker[6] (ORS 109.119(4)(b)(B));

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[5] In her affidavit supporting her motion for modification, Mother stated that, "[a]t the time of the divorce, when [Grandmother] was granted custody of [Child], I agreed to this arrangement because, at the time, it was in [Child's] best interests to do so." App-22. Both Amici curiae and the *Epler* dissent below think it ironic that parents who agree to grant custody to a third party are no longer entitled to the parental presumption. Amici Br. 13; *Epler*, 258 Or App at 500 n 20. The question then arises, was Mother acting in her daughter's best interests then, or is she acting in her best interests now? If she was acting in her best interests then, when both Mother and Father appeared incapable of caring for her, and there is today an increase in the consistency and stability of the daughter's life in the care and custody of her Grandmother, is it not in daughter's best interests to remain in the care of Grandmother?

2. That Mother and Father supported and encouraged the psychological parent relationship (ORS 109.119(4)(b)(D)); and

3. That Mother and Father were unable or unwilling to care for the child at the time of the stipulation (ORS 109.119(4)(b)(A)).[7]

This case was not brought under ORS 109.119, so the trial court was not required to include factual findings supporting the rebuttal. In any event, the lack of specific findings by the dissolution court, in approving a stipulated judgment, is not significant. *Sappington v. Brown*, 68 Or App 72, 77, *rev den*, 298 Or 238 (1984) ("It is true that ORCP 62 E has eliminated the requirement of objecting to special findings in court trials for purposes of appellate review, but nothing in that rule authorizes the pursuit on appeal of theories wholly different from those on which the case was tried or relieves a litigant of the duty to call potential error to the attention of the trial court"); *see also Collis v. Cone*, 64 Or 157, 161, 160–62, 129 P 753 (1913) (stipulating to waiver of private rights operates as a waiver to require findings regarding those rights).

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[6] Noting Amici curiae's point, Amici Br. 13–14, that courts in other jurisdictions have ruled that consenting to third-party custody bolsters the presumption of fitness, that point supports the above, namely, that the presumption *was* implicitly applied in this case.

[7] The list in ORS 109.119(4)(b)(A)–(E) is non-exclusive and a court can make its decision based on one factor, five factors, or other factors. *See O'Donnell-Lamont*, 337 Or at 108.

If Mother wanted to avoid the consequences of her decision to formally stipulate that Grandmother be awarded custody under ORS Chapter 107 and thereby require that she prove a change of circumstances to modify custody, Mother (and Father) could have temporarily delegated their parental authority to Grandmother under ORS 109.056 without court involvement at all. In that event, Mother could have resumed her parental custody prerogatives merely by revoking the delegation agreement or allowing it to expire.

By stipulating to grant custody to Grandmother, Mother waived whatever right she had to the presumption, to findings of fact, and to relitigate this matter except by way of a modification with a required showing of a change of circumstances and that best interests now require a change of custody.

B. Mother did not waive a fundamental right.

Mother's waiver of the parental presumption was not a waiver of a fundamental liberty interest. Not all rights are created equal. Some rights are unwaivable by nature, such as the right to free speech. Some rights, when waived, have grave consequences, such as when a biological father signs a certificate of irrevocability and waiver waiving his right to receive notice of any proceeding and his right to appear in court involving a stepparent adoption. Far lower on the continuum is the right to a simple hearing. A licensed driver, for example, can waive his right to a hearing on the

suspension of his license by failing to appear. His license will be suspended for a period of time, but not permanently.

In *Brady v. United States,* 397 US 742, 748, 90 S Ct 1463, 25 L Ed 2d 747 (1970), the Court stated that "[w]aivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.". However, it is not entirely true that the Court has consistently applied this standard in every instance when a person waives a constitutional right. For example, when a "defendant who chooses to testify [at trial, he] waives his privilege against compulsory self-incrimination with respect to the testimony he gives." *Harrison v. United States*, 392 US 219, 222, 88 S Ct 2008, 20 L Ed 2d 1047 (1968).

"While knowing consent to waive a constitutional right is *sometimes* not required in the criminal context, it is *often* not required in the civil context * * *. Instead, civil law waivers are judged according to contact law principles." Stephen J. Ware, *Arbitration Clauses, Jury-Waiver Clauses, and Other Contractual Waivers of Constitutional Rights*, 67 Law & Contemp. Probs. 167, Part V (2004). The differential treatment of criminal and civil rights is likely because a waiver of civil rights is normally done in the context of a contract and there is "far less danger of overreaching and duress

by the party seeking to enforce the waiver." *L&R Realty v. Conn Nat'l Bank*, 246 Conn 1, 14, 715 A2d 748 (1998).

Statutory rights, on the other hand, are easily waived. *See, e.g., Collis*, 64 Or at 161 (parties may, by a stipulation, waive the benefit of a statutory or constitutional provision or rule of law); *McMillian v. Follansbee,* 194 Or App 145, 154, 93 P3d 809 (2004) ("As with contractual waiver, the waiver of a statutory right is an intentional relinquishment or abandonment of a known right or privilege."). The MSA that both Mother and Father signed was simple, clear, and apprised both parties of what they were agreeing to. Moreover, Mother did not read the entire MSA before signing; she merely "skimmed" it. Tr. 183:12-14. Mother had contacted an attorney to "protect my rights." Tr. 185:15-18. Later, in her affidavit supporting her motion to modify, Mother recalled her granting custody to Grandmother was something she did "in best interests." Mother's Br. App-22. If Mother did not know what she was doing, it was only because she did nothing to gain knowledge.

Moreover, parties can waive a statutory right by behaving in a way inconsistent with that right. *See, e.g., In re Marriage of Pollock and Pollock*, 259 Or App 230, 246, 313 P3d 367 (2013) (trial court did not err by not compelling complete discovery in order to permit one party to reexamine the circumstances underlying a voluntary settlement agreement, where wife had

signed settlement agreement while some of her discovery requests were still outstanding); *Collis*, 64 Or at 161 (in legal proceedings, parties are held by particular conduct or admissions conclusively to have waived rights which otherwise they might have insisted upon). Mother's stipulation to custody was behavior inconsistent with exercising her parental presumption.

When Mother waived her parental presumption by signing the MSA and having it incorporated into the stipulated judgment, she did not cede custody of her daughter forever. Her waiver did not preclude her from seeking custody later; she (like Father or any other noncustodial parent in Oregon) simply needs to show a change of circumstances and that a modification is in her child's best interests. Her waiver does not preclude her from seeking a change in parenting time either. In that event no changes of circumstances is needed—she simply needs to show that such change is in the best interest of her child. *See Ortiz*, 310 Or at 649.

IV. The parties' original stipulation did not violate public policy and should be honored.

This court should be loath to undermine the parties' original stipulation. "It is the policy of this state [t]o encourage the settlement of suits for marital annulment, dissolution or separation * * *." ORS 107.104(1). A court has the power to enforce the terms in a stipulated judgment signed by the parties or a judgment incorporating a MSA. ORS 107.104(2). There is a

presumption in favor of enforcement of stipulated dissolution judgments as expressed in the policy statements set forth in ORS 107.104(1) and ORS 107.135(15)(a). *See In re Marriage of Matar and Harake*, 246 Or App 317, 320, 270 P3d 257 (2011) *aff'd*, 353 Or 446, 300 P3d 144 (2013) (en banc). After the stipulated judgment was entered, it became conclusive. *See* ORS 43.130. To apply the parental presumption at this stage of the proceedings would undermine ORS 107.104.

MSAs form the basic alternative to litigation and the resultant judicially imposed judgment. The advantage of an MSA over litigation is that the disputants in a marriage know their situation far better than a judge ever will. Mother cannot be heard to complain that the judge that signed the judgment that incorporated the MSA should have ordered a trial on the matter. That would have been the height of the state's "injection." The agreement was not unfair as between Mother and Father because neither one was gaining an advantage by its term of granting custody to a third party. Executed MSAs are enforceable. *See, e.g., In re Marriage of Crowley and Crowley*, 134 Or App 177, 181, 894 P2d 1174 (1995) ("a considered agreement by parties on the division of property should be respected, absent a basis to conclude that the proposed division is unfair to a party.").

Mother's acknowledgement of her waiver, as expressed in the MSA granting custody to Grandmother, did not strip the court of its jurisdiction

and it did not violate the law[8] or contravene public policy. To the contrary, it honored the ORS 107.104 policy of encouraging settlement and avoiding unnecessary litigation.

Mother could have preserved her parental presumption in her stipulation, as the parties did in *In re B.R.D.*, 280 P3d 78 (Colo App 2012). In that guardianship case, parents had consented to custody to a third party. *Id.* at 80. Their consensual permanent order of custody included a provision explicitly reserving the parents' rights to ask the court to modify the allocation of parental responsibilities in the permanent order. *Id.*

If Mother had included preservation of the parental presumption in the MSA, that would have helped avoid the false dilemma amici has created, that parents "will be caught between what is best for their children * * * and the threat of being unable to regain custody."[9] Amici Br. 28. Instead, she agreed to terms she now regrets.

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[8] ORS 107.104 does not conflict with the parental presumption; it was enacted in 2001 by the same legislature that amended ORS 109.119, so it should be presumed that the legislature was aware of *Troxel* and its implications.

[9] The beauty of the change of circumstances rule is that a parent *is* able to regain custody—custody determinations are not termination of parental rights determinations. All a parent has to do is show a change of circumstances. "[Judges] aren't some kind of weird monsters that have fun making us do things we don't want to do." Munro Leaf, *How To Behave and Why* (1946).

Even agreements made in anticipation of a dissolution—as the one in this case was—are "generally enforceable and accepted by the court when they are equitable given the circumstances of the case." *McDonnal,* 293 Or at 778.

At trial below, Mother had the opportunity to demonstrate a substantial change of circumstances, but the trial court found she failed to meet her burden. She is not precluded from filing a new motion showing that her circumstances have changed since the trial court order below.[10]

Her stipulation waived her right to apply the presumption at the modification stage, not to mention that ORS 109.119(2)(c) prohibits the presumption in modifications. She cannot be heard to complain of what she voluntarily and knowingly decided to do with respect to providing custody. The MSA, as incorporated into the stipulated judgment, effectively kept the state out of the parties' dispute.

> "It is axiomatic that public policy requires that persons of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred and shall be enforced by courts of justice; and it is only when some other overpowering rule of public policy intervenes, rendering such agreements unfair or illegal, that they will not be enforced."

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[10] Honoring of and enforcement of this policy does not prevent a party from modifying under ORS 107.135. ORS 107.104(4).

In re Marriage of McDonnal and McDonnal, 293 Or 772, 779, 652 P2d 1247 (1982) (citing *Feves v. Feves,* 198 Or 151, 159–160, 254 P2d 694 (1953)).

V. This Court should defer to the express and unambiguous intent of the legislature.

Because the legislature's intent does not conflict with *Troxel*, this court should defer to the legislature's intent on ORS 107.135 and ORS 109.119 by requiring the change of circumstances rule under both statutes and reading ORS 109.119(2)(c) to dispense with the parental presumption in ORS 109.119 modifications. *See Meader*, 194 Or App at 94 (*dicta* that change of circumstances applies in modification of parental custody); *Underwood*, 255 Or App at 191–92 (modifications under ORS 107.135 require change of circumstances); *Epler*, 258 Or App at 486.

When construing a statute, the court must honor the intention of the legislature, if possible. ORS 174.020; *see Portland Gen. Elec. Co. v. Bureau of Labor & Indus.*, 317 Or 606, 610–11, 859 P2d 1143 (1993), *as modified by State v. Gaines*, 346 Or 160, 166–74, 206 P3d 1042 (2009) (en banc). When the court acts contrary to legislative intent, such action infringes on the authority given to the legislature. *State ex rel. Lucas v. Goss*, 23 Or App 501, 504, 543 P2d 9 (1975) (court must enforce statute as written even if it considered such enforcement inequitable). When a court is faced with a

decision as to whether a statute violates the constitution and should be struck down or not applied in a particular case, a court will presume that the legislature intends its acts to be constitutional and will choose from among plausible alternative statutory constructions one that saves the law from invalidation. *Westwood Homeowners Ass'n, Inc. v. Lane County*, 318 Or 146, 160, 864 P2d 350 (1993), *adh'd to on recons*, 318 Or 327, 866 P2d 463 (1994).

The most persuasive evidence of the intent of the legislature is the words of the statute it has enacted. *Gaines*, 346 Or at 171. The text and context of ORS 109.119 is sufficiently plain to preclude consideration of legislative history. *See id.* at 166. As this court noted *O'Donnell-Lamont*, the 2001 amendments to ORS 109.119 made "that statute consistent with the due process requirements articled in *Troxel*, but [did] not [] make broader changes in custody law." 337 Or at 105.[11] The court should defer to the legislative intent as expressed in the statute.

The legislature did not reject the change of circumstances requirement when it amended ORS 109.119 in response to the *Troxel* decision. The legislative history cited by Amici does not support such an intent. Should the

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[11] *See also id.* at n 9 (comments of Representative Lane Shetterly, who sponsored the legislation, stated the drafters' intentions before the House Judiciary Committee: "[O]ur focus would be limited to addressing those issues raised by the Troxel case.").

court consider the legislative history, the following might be useful to its analysis. The draft language of Section (5)(b) of HB 2427 that Amici quotes, Amici Br. 23–24, survived the House Committee on Judiciary in the bill of March 28, 2001, that went over to the Senate Committee on Judiciary. However, the Senate committee did not merely snip out the portion relating to the change of circumstances rule; it substantially revised a much larger section of the bill, replacing it with the current, streamlined ORS 109.119(2)(c).[12]

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[12] The relevant language from HB 2427, as it exited the House committee, is as follows:

(7) Notwithstanding subsection (1) of this section:

(a) When custody of a child has been granted to or retained by a legal parent in an order entered under this section or in a decree or final order dissolving the marriage of the child's parents, a person or legal grandparent may file a petition with the court for an order providing for relief under subsections (2) to (5) of this section only if:

(A) The person or legal grandparent did not file a petition or a motion for intervention during the pendency of the proceedings under this section or during the pendency of the dissolution proceedings; or

(B) There has been a change in circumstances relating to the custodial legal parent or the child such as is required to allow the court to reconsider the provisions of the order or decree.

(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. In the modification proceeding, to retain custody the person with custody is not required to make the showing described in subsection (2)(a) to (c) of this section.

On May 7, 2001, in Senate committee testimony, two witnesses spoke up in support of HB 2427: Tim Travis, of the Oregon Judicial Department, and Phil Schuster, a lawyer in private practice. HB 2427 was "perfectly balanced." Tape Recording, Senate Committee on Judiciary, HB 2427, May 7, 2001, Tape 124, Side B (statement of Phil Schuster). Schuster wrote that the burden should be on the person seeking a change of custody and that he supported the change of circumstances rule. Testimony, Senate Committee on Judiciary, HB 2427, May 4, 2001, Ex E (statement of Phil Schuster). There followed a colloquy about whether a parent could come back to court after years of drug abuse treatment, appearing to have gotten her life in order, and then sought to apply the parental presumption in a modification proceeding. The consensus was that the parental presumption should not apply in that situation. Tape Recording, Senate Committee on Judiciary, HB 2427, May 7, 2001, Tape 124, Side B (statements of Tim Travis, Phil Schuster, and Senator Burdick).

> (c) When visitation with a child has been granted to a person with a child-parent relationship, to a legal grandparent or to a person with an ongoing personal relationship in an order entered under this section or ORS 109.121 (1999 Edition), the order may be modified only upon a showing that a change in visitation is in the best interests of the child. In the modification proceeding, to retain visitation rights the person or legal grandparent with visitation rights is not required to make the showing described in subsections (3)(a) to (E), (4)(a) to (F) or (5)(a) to (E) of this section.
>
> HB 2427 (2001).

In that same hearing, Travis explained how the House's language of (5)(b) would change to the Senate's language of the current ORS 109.119 (2)(c):

> "[J]ust to make sure that that doesn't happen * * * where it's talking about a modification proceeding * * * it says, '[i]n the modification proceeding, to retain custody, the person with custody'—this would be grandma or whoever got the custody— 'is not required to make the showing required in (2)(a)–(c) of this section." That's the initial showing. [W]e want * * * it to read, '[i]n the modification proceeding, to retain custody, the person with custody is not required to rebut the parental presumption or to make the showing required in 2(a)–(c)." And that will make it clear that when Mom comes in after ten years of drug treatment, she cannot say, 'I know the child's been with my mom for ten years, but *I* have a presumption.' So we're doing away with the parental presumption in that modification situation. And that makes it absolutely clear that she doesn't have that presumption to get the kid back".[13]

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[13] After this, Schuster speaks:

> "Most or all of the better reasoned opinions I've studied from around the country, where you have a subsequent modification proceeding, they do away with the presumption, and you start out on a totally level playing field. And a court under those circumstances, with that kind of six-year bonding, or whatever, would not change custody, to be given back * * *."

Id. (statement of Phil Schuster).

Travis replies:

> "I don't agree with Mr. Schuster that they would be on equal footing at that point. *I believe that the presumption would be in favor of the person who had had that custody all that time, because the burden is on the parent, at that point, to show that the changes have been made.*"

Id. (statement of Tim Travis) (emphasis in original).

And that is exactly what the Senate did. The way (5)(b) was worded, it moved the burden back and forth between the parent, if the parent had lost custody in an ORS 109.119 proceeding, to the third party, if the third party had not gained custody in an ORS 109.119 proceeding. The Senate's redrafting dispensed with the non-requirement of "the showing" that there was a child-parent relationship, that the legal parent was unfit, and so on. In its place, the Senate simply said the parental presumption does not apply—either to the third party (reflecting Travis's testimony) or to the parent.

Thus, in the first place, it is an unreasonable interpretation of legislative history for Mother to conclude that "[t]he legislature rejected a change of circumstances standard," Amici Br. 23, when that language was not voted on in the full House or the legislature and rejected, but merely revised in committee. In the second place, Maureen McKnight's testimony clearly indicated that she disagreed with the showing required to retain custody after a third party has had the child for a while, but only where the third party did not have an order.[14] That is not the case here. Moreover, she testified that

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Id. (statement of Tim Travis) (emphasis added).

[14] "I also disagree with the showing required to retain custody after a third-party has had the child for a while * * *. I think in terms of the situation where the grandparent or the third party not having an order, and really just

"[w]e can live with this bill." Tape Recording, Senate Committee on Judiciary, HB 2427, May 7, 2001, Tape 124, Side B (statement of Maureen McKnight).

Given the murky record and the rebuttal testimony of Messrs. Travis and Schuster, this court should draw no inferences from the legislative history and instead look only to the text of the statute. The legislature already considered the holding of *Troxel* and amended ORS 109.119 to account for the presumption at the custody determination stage. The legislature had the opportunity to amend the statute to specifically account for modifications, and did so in ORS 109.119(2)(c), showing that it understood that *Troxel* was relevant only at the initial determination stage. Such legislative wisdom recognized the limits that *Troxel* held itself to. The text of ORS 109.119 does not indicate that legislature rejected the change of circumstances rule in third-party custody modifications.

The legislature may have had other reasons for not codifying the change of circumstances rule. It may have known that ORS 109.119 is not a

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providing the care without an enforceable right, and then the natural parent coming in, akin to the kind of circumstances detrimental to the child the court would be looking at, would be looking at the child's relationship with those third parties, and how detrimental it might be for the child to be removed from those third parties, in the scenario where the third party didn't even have an order at that point."
Tape Recording, Senate Committee on Judiciary, HB 2427, May 7, 2001, Tape 124, Side B (statement of Maureen McKnight).

substantive modification statute, like ORS 107.135 is. It may have thought that an expressed change of circumstances rule in ORS 109.119—however drafted—would conflict with ORS 107.135, or confuse judges and practitioners such that they would ask, "Why are there two change of circumstances rules?" The legislature might have known that judges and practitioners know to look to ORS 107.135 and related case law for substantive law on modifications.

All we can assume from ORS 109.119's silence is that the change of circumstances rule is not precluded from application in third-party custody modifications.

Moreover, mere non-codification of the change of circumstances rule does not mean that the rule does not apply. The rule is not codified in ORS 107.135 with respect to custody, but courts apply the rule. *See, e.g., Deffenbaugh,* 286 Or at 765. The rule is not codified in ORS 109.103, but courts apply the rule.[15] *See, e.g., Bail*, 325 Or at 396 ("the burden of showing a change in circumstances *does* apply to a parent seeking a change

[15] Grandmother understands that Amici argues, Amici Br. 25, that the change of circumstances rule applies to 109.103 modifications because the provisions of ORS 107.094 to 107.449 apply to 109.103 modifications. *See* ORS 109.103(1). That, however, serves to underscore Grandmother's argument that ORS 107.135 and its related case law is the substantive law on modification.

of custody in subsequent [ORS 109.103] proceedings.") (emphasis in original).

The legislature fully considered *Troxel* when it amended ORS 109.119. It accounted for the presumption in ORS 109.119(2)(a). Because *Troxel* was silent on the whether the presumption applied in ORS 109.119 modifications, and because custody modifications under Oregon law require the change of circumstances rule, the legislature eliminated the presumption at the modification stage. Nothing in that was unconstitutional under *Troxel*. Thus, this court can defer to the legislature because, in this case, the legislature is correct.

VI. **The application of the change of circumstances rule to modifications of third-party custody awards does not violate the U.S. Constitution.**

Troxel gives custodial parents "some special weight" when making decisions for their children that involve third parties. The plurality in *Troxel* declined to say anything more than that the Washington court's ordering visitation over custodial mother's objections was unconstitutional. It certainly did not vest parents with "superior" rights when parents themselves grant custody to third parties by way of agreement. *Troxel* left it up to courts to decide, on a case-by-case basis, such issues as the requirements and standards applicable to a third party custody or visitation case. This court should hold that the change of circumstances rule is not a state impairment

on the constitutional rights of Mother and that she was not denied her due process right to make decisions regarding the care and custody of her child.

VII. Applying the parental presumption in modifications of awards of custody to third parties will have serious negative public policy implications.

If this court determines that a non-custodial parent is accorded the parental presumption after having stipulated to custody, in a case not originally filed under a statute that allows her the presumption, at a stage in the proceedings where the presumption does not, by law, operate, and without even showing a change of circumstances, it will result in serious negative public policy consequences in this area of the law.

The parental presumption limits a court's discretion in its best-interests determination when a parent has custody and a third party seeks custody or visitation rights. The presumption applies nowhere else. If the presumption is applied in modifications under ORS 109.119 or under any other statute, it will impair the stability of stipulated or litigated custody arrangements, unnecessarily inject uncertainty into settled families and children, thus destroying emotional bonds, waste judicial resources by repeating litigation, deter appropriate third parties from assuming custody of children, and violate the state's public policy of settlement of domestic relations cases.

A. Applying the parental presumption in cases like this will create uncertainty for families and children.

If this court determines that the parental presumption applies in modification of custody proceedings, what Amici fears could indeed become true, that parents will default to DHS because third parties will rarely agree to custody if they understand that the biological parent can, armed with such presumption, return to court over and over again seeking to reverse the custody. The existence of a valid order of custody demands consideration of interests other than those of the natural parent. *Blair*, 77 SW3d at 149 n 4.[16]

As far as a "threat" of a biological parent being unable to regain custody, all the parent needs to do is demonstrate that he or she has changed the circumstances that led to the award of a custody to a third party—which circumstances were what led to the custody determination in the first place. It there is any "threat" here, it is the threat of returning a child to a circumstance the parties agreed or the court ordered was not best for the child. Thus the point of the change of circumstances rule. As it stands, ORS 109.119 does not prevent modifications and it does not prevent settlement agreements or enforcement of those agreements.

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[16] *See also C.R.B v. C.C*, 959 P2d 375, 380 (Alaska 1998) ("Having once protected the parent's right to custody, at the risk of sacrificing the child's best interests, we should not then sacrifice the child's need for stability in its care and living arrangements by modifying those arrangements more readily than in a parent-parent case.").

B. The court should consider the impact of Mother's and Amici's positions on the rights of affected children.

While the constitutional rights of biological parents are at issue, the court should also consider the policy implications as well as the constitutional rights of children involved. The United States Supreme Court has held that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone." *In re Gault*, 387 US 1, 13, 87 S Ct 1428, 18 L Ed 2d 527 (1967).

In his dissent in *Troxel*, Justice Stevens discussed the constitutional rights of children and how these rights are important to consider:

> "While this court has not yet had occasion to elucidate the nature of a child's liberty interest in preserving established familial or family-like bonds, * * * it seems to me extremely likely that, to the extent parents and families have fundamental liberty interests in preserving such intimate relationships, so, too, do children have these interests, and so, too must their interests be balanced in the equation."

Troxel, 530 US at 90.

Judge Brewer, in his dissent in *Winczewski*, addressed the constitutional rights of children in detail, stating, "When the competing rights of child and parent are pitted against each other, a balancing of interests is appropriate." 188 Or App at 750.

Other state courts and scholars have recognized that, in third-party custody cases, the child's rights are an important consideration.

> "Although parents have a fundamental, constitutionally protected interest in their relationships with their children, attainment of the children's best interest may involve some limitation of the liberties of one or the other of the parents * * * * Here, [the child's] interest in continuing to have access to the only adult who has acted as a parent to her is powerful."

Youmans v. Ramos, 429 Mass 774,784, 711 NE2d 165 (1999).

> "After *Troxel*, it seems clear that in a properly presented custody case, the Court can be expected to recognize children's rights to due process, equal protections, and privacy in the context of custody as well. The challenge for scholars (and for judges) is to acknowledge children's rights in custody cases in a manner that does not treat them like small adults, that takes account of their essential difference, and that respects their complex needs for nurture, protection, identity, and connection."

Barbara Bennett Woodhouse, *Talking About Children's Rights in Judicial Custody and Visitation Decision-Making*, 36 Fam L Q 105, 113–14 (2002).

In third-party custody modification cases where children have been living with non-parents for an extended period of time, the court must recognize that the children have a strong interest in continuing and protecting their relationships with their caretakers. While it is important to recognize that children have an interest in protecting their relationships with their caregivers, it is equally important to understand why the court should protect these relationships. The theory of attachment is about the first relationships

we as humans experience and how those relationships affect our later development.

> "The cessation of contact with a grandparent whom the child views as a parent may have a dramatic, and even traumatic, effect upon the child's well-being. The State, therefore, has an urgent, or compelling, interest in providing a forum for those grandparents having such a sufficient existing relationship with their grandchildren * * *. This interest springs not from any common law right of the grandparent to visitation with the child, but from the child's significant need to be assured that he or she will not unnecessarily lose contact with a grandparent who has been a parent to that child."

Rideout v. Riendeau, 761 A2d 291, 301 (Me 2000) (internal quotation marks omitted).

Having a secure attachment is important for children in the early stages of life, but researchers have also found that having this secure attachment as an infant has lasting consequences for humans for the rest of their lives.

> "The major legacy of secure attachment is that those children go forward into the social world armed with a belief that relationships with others are valuable, a belief that others will be interested in them and in being with them, a belief that they have the capability of eliciting emotional responses from other people, and a confidence about their ability to deal with emotions that arise in these interactions."

Alan Sroufe and Jennifer McIntosh, *Divorce and Attachment Relationships: The Longitudinal Journey*, 49 Fam Ct Rev 464, 469 (2011).

Just as researchers have found that having a secure attachment as a young child has lasting positive consequences for the child, having an unsecure attachment puts a child at risk.

> "When they experience a disruption of attachment, children's mental models of attachment become insecure, which means they develop difficulties with entering into new intimate relationships that they could use as secure bases for exploration, risk-taking, and perception of themselves as separate persons * * *. In sum, when we deliberately remove a very young child *from the only home he or she has ever known*, we move that child into the group of children who mentally represent close relationships as untrustworthy. In other words, when the state places any child at risk of failing at human connection, we are effecting an irreparable harm."

Willemsen, 36 Santa Clara L Rev at 471 (emphasis added).

If the court were to apply the *Troxel* presumption in custody modification cases where a third party has custody of the child, the court runs the strong risk that children who are attached to the third party caretaker will now be placed with their parents because the caretakers cannot overcome the presumption. At the very least it threatens the stability of a child's placement, one that a trial court has adjudicated (or parents have stipulated) is in the child's best interests. This puts these children, particularly the youngest ones, at a significant risk of not developing a secure attachment, which will have lasting negative consequences throughout their lives.

Conclusion

The parental presumption applies only to an original ORS 109.119 action. It does not apply to a modification of an ORS 109.119 judgment or a judgment pursuant to ORS Chapter 107 or ORS 109.103. Once an initial custody or visitation determination has been made, a party seeking to modify a custody determination must prove a change of circumstances since the last determination. This is not only consistent with the United States Constitution, Oregon statutes and case law, the intent of the legislature, but is also good public policy that balances the rights of biological parents and the needs and rights of children.

Grandmother respectfully requests this court to affirm the Court of Appeals' decision including remand to the trial court to determine Mother's parenting time modification motion.

Respectfully submitted on April 30, 2014.

KRAMER & ASSOCIATES

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CERTIFICATION OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

Brief length

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 13,097 words.

Type size

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).

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CERTIFICATE OF SERVICE AND FILING

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