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COURT OF APPEALS, STATE OF COLORADO
2 East 14th Avenue
Denver, CO 80202

Weld County
2016JV379

Appellee,
People of the State of Colorado,

In the interest of
Children:
J.G. and C.G.,

and Concerning
Intervenor-Appellee:
M.B., Special Respondent,

and
Appellant:
A.M.

Court of Appeals Case No.: 2020CA800

Attorney for Respondent-Appellant:
(*Through the Office of Respondent Parent Counsel*)

Katayoun A. Donnelly, #38439
AZIZPOUR DONNELLY, LLC
2373 Central Park Blvd., Suite 100
Denver, Colorado 80238
Telephone No.: (720) 675-8584
E-mail: katy@kdonnellylaw.com

REPLY BRIEF

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that this brief complies with all requirements of C.A.R. 28, 28.1, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g).

☑ It contains 4,986 words.

/s/ Katayoun A. Donnelly
Katayoun A. Donnelly, #38439

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INTRODUCTION[1]

Father shot Mother and was sent to prison for doing so. While Mother was hospitalized, the Department placed her children with the family of the perpetrator – the same environment that created the perpetrator – in order to "protect the children." This decision then led to parental alienation, an abuse of the children, at the hands of the paternal family. The paternal family manipulated these very young children by leading them to believe that their mother is a dangerous person who shot their father and cannot be trusted.

When it was brought to the court's attention that the paternal family had alienated the children for two years, the state removed the children from the care of paternal aunt and uncle. It then placed them with the perpetrator's mother.

The expert psychologists and a caseworker found Mother fit and recommended accelerated reunification. The Department and GAL not only disregarded the specific direction of the psychologist to stop the alienation and accelerate the reunification process but enabled the paternal family to block any possibility of progress—and then use it as a reason that the family could not be reunified.

[1] Citations for all facts are included in the opening brief. Op. Br. pp. 8-17.

When Mother requested that the Department return her children, instead of following the direction of the caseworker and expert the Department fired the caseworker and the GAL filed a motion to allocate parental rights to the perpetrator's mother. When the court found the actions of the Department and GAL questionable and ordered them to address the underlying issue of alienation, so that the children could return home to their mother, the Department, GAL, and the paternal family disregarded the specific directions and instead prepared for moving for allocation of parental responsibilities to the perpetrator's mother. When Mother took matters in her own hands and requested that the family hire a provider who could address the trauma imposed on the family, the Department, GAL, and perpetrator's mother blocked her efforts.

By the time of the second hearing, a new trial judge was assigned to the case. The new judge expressed regret about how the case had been handled. Nonetheless, in direct contradiction to the expert's advice, he closed the D&N case, depriving Mother (who has become indigent as a result of the cost of the D&N proceedings) of state-provided resources to address the alienation and trauma. Even though the court was aware that the perpetrator will be released from prison soon, it granted sole custody and decision-making rights to his mother. In doing so, it limited the parental rights of Mother, who had successfully completed

her treatment plan despite all odds and was found fit, to only visitation rights, supervised by the mother of the man who shot her.

The Covid-19 crises began days after the final judgment was issued.

UNDISPUTED FACTS

Findings of Parental Fitness

The court found that Mother was fit but Father was unfit.

> 10. MOTHER'S FINDINGS OF PARENTAL FITNESS: Mother is in compliance with her treatment plan and has made significant progress in this case. Mother is a fit parent but her relationship with the Children is compromised.
> 11. FATHER'S FINDINGS OF PARENTAL FITNESS: Father is currently in prison for shooting Mother. Father has not addressed his serious anger and domestic violence tendencies. Currently, Father is not a fit parent.

CF. 807.

Judge Hartmann adopted all of Judge Kamada's findings. CF. In the final judgement, Judge Hartmann stated that he "reviewed and adopted the order of Judge Kamada dated July 14, 2019," CF. at 1206, which found Mother fit. CF. at 807.

Procedural Posture

The court closed the D&N case, CF. 1208, and certified the Allocation of Parental Responsibilities (APR) order into a Domestic Relations (DR) case. CF. 1212.

Temporary physical custody

The paternal grandmother, intervenor, obtained temporary physical custody of the children when in the course of the D&N proceedings the Department temporarily placed them with her. CF. 561; 633.

LEGAL ARGUMENTS

The Intervenor's response brief does not respond to Mother's main arguments. Instead, much of it is spent on issues the Intervenor does not have standing to discuss.

1. **The Intervenor does not have standing**

   a. Burden of proof

The party invoking federal jurisdiction bears the burden of establishing its elements. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992); *Whitmore v. Arkansas*, 495 U.S. 149, 164 (1990) ("The burden is on the "next friend" clearly to establish the propriety of his status and thereby justify the jurisdiction of the court.").

b. Intervenors' Standing in D&N cases

"Except in certain limited circumstances, a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties." *C.W.B., Jr. v. A.S.*, 2018 CO 8, ¶ 18, 410 P.3d 438, 443 (citating *Hollingsworth v. Perry*, 133 S.Ct. 2652, 2663 (2013). "Standing to intervene at the trial court level is not the same as standing to proceed on appeal." *Id.* (citing *Diamond v. Charles*, 476 U.S. 54, 68 (1986)).

The paternal grandmother obtained temporary physical custody of the children in the D&N proceeding because when it was established that the paternal aunt and uncle alienated the children, the Department placed them with her. This made her the intervenor in the D&N proceedings.

In *C.W.B.*, the Colorado Supreme Court explained the limitations of the scope of intervenors' standing.

> Although section 19-3-507(5)(a) permits foster parents to intervene in dependency and neglect proceedings following adjudication, foster parents here do not have a legally protected interest in the outcome of termination proceedings, and section 19-3-507(5)(a) does not automatically confer standing to them to appeal the juvenile court's order denying the termination motion at issue, where neither the Department nor the GAL sought review of the trial court's ruling. Moreover, because the GAL is statutorily obligated to advocate for the best interests of the child, including on appeal, there is no need to confer standing on foster parents to represent the best interests of the child on appeal.

C.W.B., Jr. v. A.S., 2018 CO 8, ¶ 2, 410 P.3d 438, 440.

As such, only the Department and GAL, who are tasked with statutory duties in D&N cases – but not the Intervenor, paternal grandmother – have standing to challenge the trial court's findings in the D&N proceedings, e.g. the court's finding that Mother is fit.

Here, the Department and GAL did not file a cross-appeal and decided to file a response brief, conceding Mother's arguments. *Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999) (arguments not raised on appeal are waived); *United States v. Farris,* 532 F.3d 615, 619 (7th Cir. 2008) (failure to respond to argument raised constitutes waiver).

c. D&N Intervenors' Standing in DR cases

The Colorado Supreme Court has not addressed the issue of D&N Intervenor's standing where, as here, the case is certified into a DR case. This issue highlights the tension between the purpose of Title 19 and the general standing requirement of Title 14.

This question was not before the Supreme Court in *In re B.B.O.*, 2012 CO 40, ¶ 22, 277 P.3d 818, 824. Nevertheless, as the concurring opinion explained, there are situations where the dictionary definition of "physical custody" cannot provide a harmonious statutory construction.

This explanation is consistent with other jurisdictions' statutory construction of the term "physical custody," which takes the manner in which the non-parent obtained physical care of the child into consideration in order to uphold the "the overriding policy of discouraging abductions of minors at the time of filing the petition for custody." *Matter of Custody of C.C.R.S.*, 892 P.2d 246, 252–53 (Colo. 1995). While this is not a child abduction case, it is undisputed that the Intervenor obtained "physical custody" of the children as a result of a state action, and over the parent's objection.

So, unlike *B.B.O.*, there was no implied consent here. And the state action was for the sole purpose of complying with the statutory purpose of Title 19 Article 3, i.e., protecting the children while providing the family all the resources necessary to succeed and reunite. Therefore, to allow such non-parent intervenors with whom the state has temporarily placed the children to obtain standing would inevitably result in further interruption and complications for families already in distress or just recovering from – and thus defeat that very statutory purpose of the Children' Code.

Such temporary placements are part of the services provided to the families to facilitate reunification, not the means for non-parents to request custody of fit

parents' children after they have complied with all the statutory requirements in order to have their children back.

The Intervenor's suggested statutory interpretation would render section 14-10-123(1)(b) and (c) unconstitutional as applied because they would violate the fundamental constitutional rights of Mother.

As Justice Eid wrote, allowing the intervenors

> to litigate the merits, would raise concerns under *Troxel*. *See, e.g.*, 530 U.S. at 67, 120 S.Ct. 2054 (plurality opinion) (noting that, "in practical effect, in the State of Washington a court can disregard and overturn any decision by a fit custodial parent concerning visitation *whenever a third party affected by the decision files a visitation petition* " (first emphasis in original; second emphasis added)). I therefore cannot agree with the majority's broad pronouncement that *Troxel* would never be implicated in an analysis of nonparental standing under sections 14–10–123(1)(b) and (c). Maj. op. at ¶ 18. But cf. *Troxel*, 530 U.S. at 67, 120 S.Ct. 2054 ("The Washington Supreme Court had the opportunity to give [the statute] a narrower reading, but it declined to do so.").

In re B.B.O., 2012 CO 40, ¶ 22, 277 P.3d 818, 824 (Eid. J., concurring).

Further, the Colorado Supreme Court "favor[s] interpretations that produce a harmonious reading of the statutory scheme, and we avoid inconsistent constructions." *People In Interest of J.G.*, 2016 CO 39, ¶ 13, 370 P.3d 1151, 1157. Mother's suggested statutory interpretation is consistent with other parts of the Children's Code, e.g., § 19–1–117, which, under specific circumstances, grants

grandparents standing only to request visitation, not custody and decision-making rights.

> § 19–1–117 limits standing to grandparents and allows a petition for visitation only if there is or has been a "child custody case or a case concerning the allocation of parental responsibilities." By doing so, the statute ensures that grandparent visitation decisions made by parents of intact families, where there has been no prior court intervention, are not challenged.

In re D.C., 116 P.3d 1251, 1253 (Colo. App. 2005).

It is also consistent with the rationale used in the decision of another panel of this court, which explained that temporary physical custody does not satisfy the "physical care" element. *See In re D.T.*, 2012 COA 142, ¶ 9; *In Interest of L.F.*, 121 P.3d 267, 273 (Colo.App.2005) ("[T]he General Assembly did not intend that the term 'physical care' grant temporary caregivers standing to seek allocation of parental responsibilities when their care is subject to the continuing direction and discretion of the child's parents."); *cf. In re Custody of C.C.R.S.*, 892 P.2d 246, 253 (Colo. 1995) (comparing cases from other jurisdictions, in which babysitters or temporary caregivers were determined not to have "physical custody" of a child, with case of the prospective adoptive parents at issue, who had total care of the child with the intention that they would ultimately adopt the child).

As such, D&N intervenors lack standing to seek or contest custody of the child who is left in their temporary care. *In re G.C.*, 558 Pa. 116, 735 A.2d 1226

(1999) (Foster parents lacked standing to seek or contest custody of their foster child, who had been adjudicated dependent).

Any contrary interpretation would eviscerate the purpose: reunification. This is why the Intervenor has not been able to cite to a single case granting standing to a foster parent or a grandparent based on their intervenor status in a D&N case. The Intervenor did not have standing to request APR.

2. The trial court's decision was a *de facto* termination of a fit parent's fundamental constitutional rights

The trial court's decision to grant a non-parent intervenor in the D&N proceeding sole custody and sole decision-making rights until the relationship between the children and Mother – that has been destroyed in the hands of the state – becomes "exceptional", CF. at 1208 ¶¶ 15, 16; 1214, is a *de facto* termination of parental rights of Mother, a fit parent, and thus a constitutional violation.

By the time the court issued its final judgement, Mother had been fit for two years. The only right the court give her, however, was visitation, supervised by paternal grandmother. [2]

[2] On June 11, 2020, Norma Alkire notified Judge Hartman: "I am writing this letter to notify you that I will be discharging the Meyer/Gerald family from my services effective June 10, 2020, which will be the date of our final therapy session."

a. The trial court did not apply the required multi-factor constitutional test

In allocation of parental responsibilities proceedings, the court ***must*** employ a multi-part test before issuing an order granting a nonparent's request for parental responsibilities. *See In re B.J.*, 242 P.3d 1128, 1134 (Colo. 2010); *In re Reese*, 227 P.3d 900, 903 (Colo. App. 2010).

- First, the *Troxel* presumption favoring the parental determination. *Troxel v. Granville*, 530 U.S. 57, 70 (2000); *B.J.*, 242 P.3d at 1134.
- Second, to rebut this presumption, the nonparent must show by clear and convincing evidence that the parental determination is not in the child's best interests. *Id.*
- Finally, the ultimate burden rests on the nonparent to establish by clear and convincing evidence that the nonparent's requested allocation is in the child's best interests. *Id.*
- After applying this test, a court allocating parental responsibilities to a nonparent must make factual findings and legal conclusions identifying those "special factors" on which it relies. *Id.*

Mother requests that the court take judicial notice of this letter. *Harriman v. Cabela's Inc.*, 2016 COA 43, ¶ 64, 371 P.3d 758, 765.

The trial court, however, failed to apply (or even identify) this constitutional test.[3] Under these circumstances, different panels of this court have consistently reversed the order and remanded the case with specific instructions on how to properly apply each and every step of this constitutional test. *See, e.g., In re M.W.*, 2012 COA 162, ¶ 26, 292 P.3d 1158, 1163; *People ex rel. N.G.*, 2012 COA 131, ¶ 57, 303 P.3d 1207, 1218–19. The court should therefore reverse the trial court's order.

i. Constitutional Burden of Proof for Allocation of Parental Responsibilities to a non-parent

Citing *In re B.R.D.*, 2012 COA 63; 280 P.3d 78, the Intervenor claims that "where the parents [sic] are not in custody of the parent and the case does not result in a termination of parental rights that [sic] the nonparent must satisfy their evidentiary burdens by a preponderance of the evidence." Resp. Br. at 23.

Intervenor, however, misses the mark.

In *B.R.D.*, the court acknowledged the clear and convincing burden of proof applied in *In re B.J*, 242 P.3d 1128 (Colo. 2010) but distinguished itself based on the legal posture and concluded that its facts were analogous to *D.I.S.*, requiring application of the preponderance standard.

[3] The Intervenor is not able cite to a single page in the final judgement where the court actually has applied this test.

> Thus, analogously to the guardianship arrangement in *D.I.S.*, father and mother in this case agreed to transfer significant legal authority to non-parents—the couple. As a result, the preponderance standard approved in *D.I.S.* should likewise govern here. *See In re Parental Responsibilities of E.S.*, 264 P.3d 623, 627 (Colo.App.2011)(explaining differences in burdens of proof between *B.J.* and *D.I.S.*).

In re B.R.D., 2012 COA 63, ¶¶ 35-36, 280 P.3d 78, 85.

Unlike *B.R.D.* and *D.I.S.* (a guardianship case), this is a D&N case. Mother has never voluntarily transferred any of her parental rights to the Intervenor. As such the applicable burden of proof is clear and convincing.

ii. The Troxel *presumption*

The Intervenor argues that "[b]ecause the Comprehensive Order was not a termination of parental rights, parental fitness and constitutional parental rights are not at issue." Resp. Br. at 28. She cites *People ex rel. L.B.*, 254 P.3d 1203, 1208 (Colo. App. 2011) for the proposition that "[n]o finding concerning fitness or endangerment is necessary in cases that do not arise from dissolution of marriage cases." *Id.*

Intervenor again misses the mark.

In *L.B.*, a panel of this court held that "[b]ecause the adjudication of L.B. as dependent and neglected provided the predicate for the disposition entered, no finding concerning either unfitness or endangerment was necessary." *L.B.*, 254

P.3d at 1208. The issue here, however, is not whether the court is required to make findings regarding fitness before placing the child out of home during a pending D&N proceeding. The issue is whether the constitutional presumption that a fit parents' decisions, including her request to return the children home, is in the best interest of the child reattaches where, as here, the court makes a specific finding that Mother has successfully and fully complied with the treatment plan, and is therefore, fit. This finding has not been disputed or appealed by the only parties with standing to appeal it, i.e., the Department and GAL. *See C.W.B.* 2018 CO 8, ¶ 2, 410 P.3d 438, 440.

The Intervenor further claims that parents who, at some point in their lives, have had an open D&N case are forever stripped of their fundamental constitutional rights, even if they successfully complete their treatment plans and are found fit by a court of law. Resp. Br. at 30-31, 24 ("Thus, the constitutional presumption of a fit parent will not apply in this case until Applicant continues to comply with the new Domestic Relations case and eventually obtains custody of her children again.") Intervenor, however, does not cite to a single authority for this unsupported and outrageous claim, and the undersigned counsel has found none – presumably because this startling proposition flies in the face of the very fundamental constitutional rights recognized in *Troxel* and *Santosky v. Kramer*,

455 U.S. 745 (1982). When the court finds the parent fit, as in this case, the state no longer has a *parents patriae* interest to interfere with the constitutional rights of parents and their children. Therefore, the *Troxel* presumption re-attaches. *Troxel*, 530 U.S. at 58.

iii. The court did not identify or apply any special factors that could justifies violation of the constitutional rights of Mother

> Before the court may order such grandparenting time or any other impositions against mother's wishes, the court must identify special factors that justify interfering with mother's discretion in making her determinations. *See B.J.*, 242 P.3d at 1130.

People In Interest of N.G.G., 2020 COA 6, ¶ 23, 459 P.3d 664, 669. The Intervenor has not been able to cite to any part of the court order that could suggest that the court

- Acknowledged this legal requirement,
- Complied with it,
- Explained which special factors it did or did not apply,
- Provided its reasons for choosing each factor and rejecting others, or
- Actually applied *any* of the special factors.

Res. Br. 18-22. Instead, the Intervenor takes it upon herself to attempt to perform the trial court's legal duties. *Id. B.J.* does not allow her to do so. The Court should

therefore reverse the trial court's order.

3. Granting sole custody and sole decision-making to a non-parent violated Mother's fundamental constitutional rights as recognized in *Santosky* and *Troxel*

Even if there were sufficient legal grounds for allocating *some* parental rights and responsibilities to the perpetrator's mother, she has not cited a single legal authority (and the undersigned counsel has not been able to find any) that would allow a court to grant sole custody and sole decision-making rights for a fit parent's child to a non-parent – because such an outcome should never be allowed to occur.

Similar to the *Troxel* district court, the court here failed to provide any protection for Mother's fundamental constitutional rights to care for, have custody of, and to make decisions concerning the rearing of her own children. *Troxel*, 530 U.S. at 70.

> [T]he [Fourteenth] Amendment's Due Process Clause, like its Fifth Amendment counterpart, guarantees more than fair process. The Clause also includes a substantive component that provides heightened protection against government interference with certain fundamental rights and liberty interests. The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court.

Id. at 65 (internal citations and quotation marks omitted).

It is important to note that *Troxel* involved visitation rights, not parental rights, and certainly not sole parental rights. Therefore, the extent of the infringement of constitutional right in this case is much greater than what alarmed the United States Supreme Court in *Troxel*. It follows that the constitutional presumption in favor a fit parent is much stronger where, as here, the issue is parental, not mere visitation, rights. At issue is "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child." *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).

A process allowing such blatant violation of the constitutional rights of the children and their mother in the name of child protection has no resemblance to a fundamentally fair process required by *Santosky*. The state cannot rely on its own mistakes—assuming that reckless disregard of advice of expert phycologist can be called a mistake—as an excuse to deprive a fit parent of her fundamental constitutional right to the care and custody of her children. This perhaps explains why neither the Department nor the GAL have filed a response brief in this case. There is no way to defend these actions.

> So long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.

Troxel, 530 U.S. at 68–69, 120 S.Ct. 2054; *see also B.J.*, 242 P.3d at 1135 ("Whether to allow any daytime or overnight visits, and if so, under what circumstances, is typically a parent's decision to make.").

Further, granting sole custody and decision-making rights to an intervenor is a direct violation of the explicit purpose of the Children's Code. C.R.S. Section 19-1-102(1) (Among the express purposes in dependency and neglect cases is the preservation of family ties); *People ex rel. A.W.R.*, 17 P.3d 192, 196 (Colo. App. 2000) ("The primary purpose of the Children's Code is the reunification of the family.").

It is unconstitutional to deprive Mother and children of their fundamental liberty rights and grant sole custody and decision-making rights to the perpetrator's mother because the state placed the children with the perpetrator's family and allowed them to alienate the children and destroy their trust and loving relationship with their mother.

4. The trial court's decision was not in the best interest of the children because it directly contradicted the expert phycologists' advice

The court's final judgment adopted its earlier July 14, 2019 order, CF. 1206, which found Mother fit, and Dr. Everhart diagnosed parental alienation, CF. 799, which Dr. Harman testified is child abuse. Tr. (3/3/20), at 17-19.

As Dr. Harman testified, "the only way to reverse that is to get quality time with the parent that's fit and healthy, and having this, you know, reunification therapy to help facilitate that and to help repair the damage that was done by the alienating behaviors that's caused the child abuse that had occurred." Tr. (3/3/20), at 17-19. The children and alienated parent are victims of domestic abuse, Tr. (3/3/20), at 134-36, and should receive services for individual and family reunification therapy. The same therapist cannot be used to perform both. *Id.* 135-36.

Mother's suggested provider would provide these services. But the Department, GAL, and paternal grandmother objected to Mother's motion to allow the family to receive these services in a two-week (or alternatively, one-week) camp to allow them to finally address the alienation issues and start reversing its devastating impact on the interactions between children (mainly the older child) and their mother. The Department instead provided Ms. Tuma, who has no relevant experience to address these complex issues. It therefore should come as no surprise that the handful of visits with Ms. Tuma between August 2019 and March 2020 did nothing to address the alienation problems—which for four years has halted any meaningful progress in reuniting Mother and her children. Tr. (2/7/20), 94:13-23.

To this day, neither the Department, the GAL, nor the paternal family has addressed this crucial issue—and they have blocked Mother's efforts to do so.

The court's March 9, 2020 order completely disregards the opinions of the professionals to restrict the influence of and disruption by the paternal family, limit their control of the interaction by manipulation of the alienated children, to encourage more interaction, and to constantly create opportunities for more contact. Instead, it states:

> If the children ask Mother for more time, then she shall say- let me talk with [paternal grandmother]. However, the adults are not at this time to suggest additional time or be suggestive. This means that Mother should not ask would you like to spend the night, because you don't want to be suggestive.

CF. 1214

The continued problem in this case, as predicted and explained by the experts, is that unless enforced by the court, none of the aspirational goals are being met. For instance, in the final judgement, the court (with good intentions) stated:

> the goal is to increase the frequency of visits. We're now moving to the point where there won't be any paternal family members during that Wednesday visit. Ultimately, we want unsupervised visits altogether, and then overnights. Then we measure how many overnights that's going to be. With the ideal situation that they increase in frequency. So that's where we're trying to get.

CF. at 1212

In reality, almost six months has now passed and Mother has not had a single unsupervised visit or a single overnight.

a. Why not the maternal grandmother?

Some of the lingering questions in this case are

- Why the department would place the children with the paternal grandmother in the first place?
- Why the department would support APR to paternal grandmother after it was confirmed that the paternal family alienated the children and knowing that father, the perpetrator, will be out of prison soon—especially because maternal grandmother, the other special respondent, is an ideal option for placement?
- Why wouldn't the Department and GAL place the children with maternal grandmother to allow for completion of reunification and reintegration therapy in a receptive environment, as opposed to forcing placement with paternal family, the cause of alienation?
- Better yet, even if the court could grant to a nonparent sole custody and decision-making rights of a fit parent's children, in the name of the best interest of the child—let's remember the expert testified that it is in the best interest of the children to accelerate reunification therapy and

minimize contact with the paternal family—why aren't the children with their maternal grandmother (to allow the family to successfully repair the damages the paternal family cause it in the hands of the state)?

Mother has been fit and ready[4] to have her children back for over two years. It is long past time for the children to return home. If there is any concern regarding

[4] The intervenor, consistent with her continued negative allegations against the Mother, interprets her honesty regarding the unfortunate situation caused by the paternal family as hesitation about being ready to have her children back. First, the intervenor forgets that the July 2019 hearing was scheduled to address Mother's motion to return her children home. An unequivocal expression of a fit parent to have her children back. Second, the intervenor's recounting of Mother's testimony is incomplete and out of context. Compare the intervenor's version:
"She stated that if the children were returned home tomorrow, she did not think anyone would be ready, and that she did not have a plan for their schooling. R. Tr. 3/9/2020, p. 149, In. 12 - 25." Resp. Br. at 5, with Mother's testimony:

Q So if tomorrow, the Court says, done with the case,
12 done with APR, the kids are coming home to you. What is your
13 plan for school for the kids?
14 A I would have them finish out the school year with
15 where they're at.
16 Q Okay. But then you would change their school?
17 A That I don't know.
18 Q Okay.
19 A That I don't know. That is something that I would
20 have to see with where they're at.
21 Q So you really haven't plans for if the children are
22 returned home to you right now?
23 A I think if the children would return home to me
24 tomorrow, I don't think any of us would be ready. No. And I'll be honest. But do I think with help we would be ready?
1 Yes. Do I know that they have gone through a lot of

the first days or weeks, the transition can be through the maternal grandmother, to allow the family to complete reunification therapy in a safe, positive, and supportive environment—without the additional stress of what will happen when the Father, who remains unfit, is released from prison.

CONCLUSION

Mother requests that this Honorable Court reverse the district court's order granting APR to paternal grandmother. The court should return the children to their fit mother, allowing the children to spend the first few weeks with maternal grandmother while they transition and complete reunification and reintegration therapy.

Respectfully submitted on August 28, 2020.

AZIZPOUR DONNELLY, LLC

/s/ Katayoun A. Donnelly

Katayoun A. Donnelly, #38439
2373 Central Park Blvd., Suite 100
Denver, CO 80238

For Appellant the Mother

2 experiences? Yes, most definitely. Have I individually?
3 Yes, most definitely.

CERTIFICATE OF SERVICE

I hereby certify that on August 28, 2020, a true and correct copy of the foregoing was served on the counsel of record through the ICCES electronic court filing system, pursuant to C.R.C.P. 121(c), § 1-26:

/s/ *Katayoun A. Donnelly*
Katayoun A Donnelly

In accordance with C.A.R. 30(f) and C.R.C.P. 121 § 1-26(9), a printed copy of this document with original signatures is maintained by the filing party and will be made available for inspection by other parties or the Court upon request.

Appendix D

COLORADO SUPREME COURT 2 East 14th Avenue Denver, Colorado 80203	DATE FILED: April 29, 2021 11:19 PM FILING ID: B72EBDB2CD741 CASE NUMBER: 2021SC312
Appeal from Court of Appeals, State of Colorado, Opinion Issued by Judge Berger (Dailey and Tow, JJ., concurring) Case No. 20CA0800	
Weld County, District Court Hon. James F. Hartmann, District Court Judge Case No. 2016JV379	
Petitioner: **A.M., a/k/a A.G.** v. Respondent: **The People of the State of Colorado** In the interest of: J.G. and C.G. Children.	▲ **COURT USE ONLY** ▲ Case Number:
Attorney for Petitioner: (*Through the Office of Respondent Parent Counsel*) Katayoun A. Donnelly, #38439 AZIZPOUR DONNELLY, LLC 2373 Central Park Blvd., Suite 100 Denver, Colorado 80238 Telephone No.: (720) 675-8584 E-mail: katy@kdonnellylaw.com	

PETITION FOR WRIT OF CERTIORARI

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28, 32, and 53 including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that: The Petition complies with the word count of C.A.R. 53(f). It contains 3,573 words. This Petition also complies with all other requirements of C.A.R. 53(a)(1)-(9).

Katayoun A. Donnelly
Katayoun A. Donnelly

Attorney for Petitioner

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ISSUES PRESENTED FOR REVIEW

1. Does it infringe a fit parent's fundamental constitutional rights to restrict her parental rights to supervised visitation while awarding sole parental or decision-making rights over that fit parent's children to a non-parent without, at the very least, requiring clear and convincing evidence of unfitness or significant harm caused by the fit parent's conduct?
2. Does it infringe a fit parent's fundamental constitutional rights to grant grandparent intervenors in D&N cases automatic standing to request allocation of parental rights (APR) based on the state's previous placement of the fit parent's children with intervenors over the parent's objection, without satisfying the Title 14 standing requirements?
3. Does it defeat the legislative purpose and infringe on a fit parent's fundamental constitutional rights to allow a Guardian Ad Litem to relieve grandparent intervenors in D&N cases from the legal obligation to satisfy the Title 14 statutory requirements necessary to establish standing by merely filing a motion for APR of a fit parent's children?

COURT OF APPEALS' OPINION

Published opinion of the Colorado Court of Appeals (COA) in *People In Int. of J.G.*, 2021 COA 47. (Appendix A).

JURISDICTION

This Court has jurisdiction pursuant to C.R.S. §§ 13-2-127 & 13-4-108.

STATEMENT OF THE CASE[1]

Father shot Mother. While Mother was being treated in the hospital, the Department placed her children with the family of Father—the same environment that created the perpetrator. This decision led to parental alienation at the hands of the paternal family. During the first visits the caseworker described the children's reaction to seeing their mother and their tears of joy as the most "raw" and "beautiful" things she had seen in her entire professional career. In the following months, the paternal family manipulated these very young children's emotions by leading them to believe that their mother shot their father, was dangerous, and could not be trusted—despite the fact that he was convicted and sent to prison for shooting Mother.

[1] The facts are taken from Mother's Opening (Appendix B, pp 9-18) and Reply (Appendix D) briefs which provide citations to the record and specific findings of the court in its July 14, 2019 Order regarding Mother's Motion to Return Home ("July 14 Order") (Appendix E), which were adopted in the final judgment ("Comprehensive Order Regarding Allocation of Parental Responsiblities [sic]") (Appendix F), which adopted the July 14 Order. Grandmother's Answer brief is in Appendix C. Department and GAL did not file separate Answer briefs.

When it was brought to the court's attention that the paternal family had alienated the children for two years, the state removed the children from the care of paternal aunt and uncle—and placed them with the perpetrator's mother!

The expert psychologist and the caseworker found Mother fit and recommended accelerated reunification. The Department and GAL disregarded the specific direction of the psychologist to stop the alienation and accelerate the reunification process. They instead sided with the paternal family to block Mother's efforts to seek reunification and reintegration therapy—and then used the resulting symptoms of alienation to prevent reunification of Mother with her children.

When Mother requested return of her children, the Department, instead of following the direction of the caseworker and expert, fired the caseworker. And the GAL filed a motion to allocate parental rights to paternal grandmother.

When the court found the actions of the Department and GAL questionable and ordered them to address the underlying issue of alienation, so that the children could return home to their mother, the Department, GAL, and the paternal grandmother instead prepared for moving for allocation of parental responsibilities to paternal grandmother. When Mother took matters in her own hands and requested permission to hire a provider who could address the layers of trauma

imposed on her and her children, the Department, GAL, and perpetrator's mother blocked her efforts.

By the time of the second hearing, a new trial judge had been assigned to the case. The new judge expressed regret about how the case had been handled. Nonetheless, in direct contradiction to the experts' advice, he closed the D&N case, depriving Mother (who has become indigent as a result of the cost of the D&N proceedings) of state-provided resources to address the alienation and trauma. Even though the court was aware that the perpetrator would be released from prison soon, it granted sole custody and decision-making rights to his mother. In doing so, it limited the parental rights of Mother—who had successfully completed her treatment plan despite all odds and was found fit—to only supervised visitation.

Mother appealed, raising three issues: (A) whether non-parents have standing to request allocation of parental rights and responsibilities after a child is placed with them over the parent's objection; (B) whether before allowing *any* parenting time to non-parents, the court must (1) make findings of fact identifying those "special factors" on which it relies, (2) determine if the non-parent proved, by clear and convincing evidence, that special facts and circumstances constituting an extraordinary reason exist to overcome the constitutional presumption that

custody of child should be awarded to her natural parent, and (3) address whether awarding custody to a non-parent is in the best interests of child; and (C) whether it infringes on the parent's fundamental constitutional rights to grant a non-parent sole custody and sole decision-making powers over the child of a fit parent.

A division of the COA ("Division") rejected Mother's first and third arguments but agreed with her second argument and remanded the case for further proceedings.

Considering the importance of the rejected constitutional arguments and their impact on the trial court's treatment of Mother's constitutional rights on remand, and in order to avoid further delay by a second appeal, Mother respectfully asks this Court to address these issues of first impression in an expedited manner to allow this family to receive the services it desperately needs to address years of trauma caused by alienation of these children.

The issues of first impression presented in this petition also impact the daily work of many other involved in Dependency and Neglect proceedings facing these questions.

REASONS TO GRANT A WRIT

A. The Division's statutory interpretation that the Children's Code authorizes a court to grant sole parental responsibilities and decision-making to a nonparent, over the fit parent's objection, without requiring clear and convincing evidence of parental unfitness or significant harm to the child, renders the statute unconstitutional as applied.

It is undisputed and unrefuted that Mother is a fit parent.

> MOTHER'S FINDINGS OF PARENTAL FITNESS: Mother is in compliance with her treatment plan and has made significant progress in this case. Mother is a fit parent but her relationship with the Children is compromised.

Appendix E (the July 14 Order), p. 18 #10; Appendix F (Final Judgment), p. 2 (adopting the July 14, 2019, including its findings regarding Mother's fitness); *see also* Appendix A (COA opinion), ¶¶ 25, 27.

It is also undisputed that the paternal family compromised and undermined Mother's relationship with her children by alienating them and leading them to believe, among other things, that Mother shot their father. (It is also undisputed that Father shot Mother and served prison time for doing so). *See, e.g.,* Appendix A (COA opinion), ¶ 41; Appendix. E, p. 15, i; *id.*, p. 17.

Mother acknowledged the difficulties resulting from the alienation and requested that the court issue an order to develop and implement a transition plan (consistent with that mentioned in the court's July 14 Order) to return the children home. *See, e.g.,* Appendix A (COA opinion), ¶¶ 32-33, 44; Appendix. E (July 14

Order), p. 18 ("All parties shall research reintegration/clarification services. The Court would note that this case may need the services such as those provided at ChildSafe.").

Without addressing fit Mother's request, Appendix A, ¶ 44, the trial court granted sole decision-making and custody to the paternal grandmother and restricted fit Mother's parental rights to only supervised visitation. Appendix F, ¶ 36 ("Ms. B. is awarded sole decision making but is to confer with Mother before any decisions are made."), ¶ 35 ("The Court will find that the allocation of parental responsibilities should be awarded to Ms. B."), ¶ 55 ("[T]he children are residing with Mrs. B and that they going to continue seeing Mother, but this is where they'll be living with Mrs. B."); ¶ 39 ("The Court will order that the supervised visits with Mrs. Alkire at Mother's home are to continue on Wednesdays or another day per week that works for the parties and Mrs. Alkire."); Appendix A, ¶ 10.

On appeal Mother argued that, in the absence of clear and convincing evidence of harm or unfitness, award of sole decision-making and custody to the paternal grandmother and limiting fit Mother's parental rights to only supervised visitation violated Mother's fundamental constitutional rights to rear and have custody of her children. Appendix B, pp. 26-34; Appendix D, 17-23.

The Division held:

> [W]e turn to mother's constitutional argument. As previously discussed, the Children's Code authorizes a court to allocate parental responsibilities to a nonparent in accordance with the child's best interests. *L.B.*, 254 P.3d at 1208. The court may do so, even over the objection of a parent, without requiring the demonstration of parental unfitness or significant harm to the child. *See People in Interest of M.D.*, 2014 COA 121, ¶¶ 43-44; *see also C.M.,* 116 P.3d at 1283.

Appendix A, ¶ 50.

Paternal grandmother is not a parent to this child. As such, no Colorado statutory or case law, nor any provision in United States constitutional law, gives her any parental rights to the child (beyond visitation rights upon satisfaction of the strict requirements of Title 14)—let alone rights equivalent to those of a fit, biological parent.

The Division's statutory interpretation of the Children's Code, however, allows district courts to go beyond what is allowed under Title 14 (i.e., visitation rights) and expand the rights that could be allocated to a non-parent beyond the constitutionally allowed limits to sole decision making and primary caregiver rights—equal to the rights of biological parents—*without identifying any* constitutional (or other) source for such a power and without, at the very least, requiring clear and convincing evidence of parental unfitness and significant harm to the child. Such broad statutory

interpretation does not pass the strict scrutiny test. It renders the relevant sections of Children's Code unconstitutional as applied to Mother.

The right to parent one's children is a fundamental liberty interest. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972), *Santosky v. Kramer*, 455 U.S. 745, 758-59 (1982); *In Interest of Baby* A, 2015 CO 72, ¶ 20, 363 P.3d 193, 201. Strict scrutiny review is required for situations like this, where government practices and statutes, if misconstrued, infringe on the fundamental constitutional rights of parents and their children. *See, e.g., City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985); *Washington v. Glucksberg*, 521 U.S. 702, 767 (1997) (Souter, J., concurring); *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 16–17 (1973).

Laws that are subject to strict scrutiny review will be sustained only if they are supported by a compelling state interest and narrowly drawn to achieve that interest in the least restrictive manner possible. *Rodriguez*, 411 U.S. at 17; *Plyler v. Doe*, 457 U.S. 202, 217 (1982); *Evans v. Romer*, 854 P.2d 1270, 1275 (Colo. 1993). As such, for application of the Children's Code to be constitutional, the court must first identify the compelling state interest that would allow interreference with fit parents' constitutional rights

and then require the moving party to prove with clear and convincing evidence that the scope of the interference is the least restrictive means available to address the specified compelling interest.

The cornerstone of the state's *parens patriae* authority is the interest in protecting children from harm caused by an unfit parent. *Prince v. Massachusetts*, 321 U.S. 158, 166–67 (1944) (recognizing when circumstances place child in "some clear and present danger" or affect the child's well-being, state could properly intrude on that "private realm of family life" to protect child from harm); *Parham v. J.R.*, 442 U.S. 584, 603 (1979) ("Nonetheless, we have recognized that a state is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized."); *Santosky*, 455 U.S. at 767 n 17 (**"[a]ny *parens patriae* interest in terminating the natural parents' rights arises only at the dispositional phase, after the parents have been found unfit**." (emphasis added)).

If not tied to clear and convincing proof of harm and unfitness, the best interests standard delegates to judges the authority to apply their own essentially unreviewable personal and lifestyle preferences in resolving such disputes. As the United States Supreme Court has explained, however, "the

Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better' decision could be made." *Troxel v. Granville*, 530 U.S. 57, 72-73 (2000); *Santosky*, 455 U.S. at 762-63 ("Because parents subject to termination proceedings are often poor, uneducated, or members of minority groups, . . . such proceedings are often vulnerable to judgments based on cultural or class bias."). And *Troxel*, it should be emphasized, involved only visitation rights, not parental rights (let alone sole parental rights). Therefore, the extent of the infringement of constitutional right in this case is much greater than the infringements that alarmed the United States Supreme Court in *Troxel*.

The Division's incomplete statutory interpretation allows *de facto* termination of a fit parent's fundamental constitutional rights—restricting her parental rights to only supervised visitations—without enforcing the necessary constitutional safeguards, *i.e.,* application of the strict scrutiny test, which requires clear and convincing evidence that such restriction (i.e., de facto termination) is the least restrictive mean to achieve a state compelling interest to protect the children from an identified harm which has been caused by Mother. *See also* Colo. Rev. Stat. § 19–3–604(2) (clear and

convincing evidence that Mother's conduct or decisions have an actual reasonable potential to cause "grave risk of death or serious bodily injury to the child."); *M.C. v. Cabinet for Health & Family Servs.*, 614 S.W.3d 915 (Ky. 2021) (same).

Such statutory interpretation renders the relevant sections of the Children's Code unconstitutional as applied to Mother. It both impermissibly grants equal footing to non-parents and does not provide adequate protection for fundamental constitutional rights of biological parents—thereby depriving them of fundamentally fair substantive and procedural due process.

In addition, such interpretation finds no support in the language of the statute. Nothing in the language of section 19–3–702 (the Division relies on *M.D.* and *C.M.*, who rely on 19–3–702(4)(a)) allows restricting a fit parent's constitutional rights to supervised visitation *without applying the strict scrutiny test*, as explained above.

Rules of statutory construction require courts to "favor interpretations that produce a harmonious reading of the statutory scheme," and avoid "inconsistent constructions." *People In Interest of J.G.*, 2016 CO 39, ¶ 13, 370 P.3d 1151, 1157. The Division's statutory construction ignores the statutory scheme designed to

work in harmony to protect the constitutional rights of parents and their children and to minimize interreference with those rights. *See e.g.*, Colo. Rev. Stat. Ann. § 19-3-100.5 (West) (the ultimate statutory goal is to keep the children safe and reunify the family whenever possible); *id.*, § 14-10-123 (prevent interreference with fundamental constitutional rights of parents); and *id.*, § 19–1–117 (same).

Section 19-3-702(4)(a) merely allows the state to identify "allocation of parental responsibilities" to a relative as a ***concurrent goal*** to "**return home**"—the primary statutory and constitutional goal—in case the parent does *not* become fit within a reasonable time. Colo. Rev. Stat. § 19-3-702(4)(a) (citing § 19-3-508(7) ("Efforts to place a child for adoption or with a legal guardian or custodian, including identifying appropriate in-state and out-of-state permanent placement options, may be made concurrently with reasonable efforts to preserve and reunify the family.")). Nothing in the statute allows a court to actually allocate parental rights to children of a fit parent to anyone other than a legal parent. *See id.*

Considering the importance of this issue in protecting the constitutional rights of parents and their children in D&N cases, the district courts need the Court's attention to this matter.

B. The Division's *sua sponte* argument holding that the Children's Code automatically grants grandparent intervenors standing to request allocation of parental responsibility for the children the state had placed with them before the parent became fit, renders the statute unconstitutional, ignores this Court's precedent, and has created a split of authority with other divisions.

In her Answer brief, the paternal grandmother solely relied on Title 14 (section 14-10-123(l)) to meet her burden to prove that she had standing to request APR of a fit parent's children. The Division, however, ignored her arguments and *sua sponte* raised two grounds for standing: one under Title 19 and another under a novel theory that the GAL's motion for APR granted paternal grandmother standing (which is addressed below).

In *Stanley v. Illinois*, the U.S. Supreme Court recognized that the substantive due process required by the Fourteenth Amendment protects against government interference with a parent's fundamental rights. *Stanley v. Illinois*, 405 U.S. 645 (1972). To protect parents' constitutional rights, the Colorado Revised Statute allows only visitation rights/parenting time to non-parents—not sole parental and decision-making rights—and even then only upon satisfaction of the strict requirements of section 14-10-123 (standing) and section 14-10-124(1.5)(a)—while also applying the *Troxel* presumption. This is consistent with the language of section 19-1-117, which "limits standing to grandparents and allows a petition for visitation only if there is or has been a 'child custody case or a case concerning the

allocation of parental responsibilities.'" *In re D.C.,* 116 P.3d 1251, 1253 (Colo. App. 2005).

The Division's deviation from the *D.C.* division's analysis of grandparents' standing under the Children's Code creates a split of authority regarding an issue of constitutional magnitude. Further, the *D.C.* division's analysis is consistent with this Court's in *In re B.J.,* 242 P.3d 1128, 1132 (Colo. 2010).

In addition, the Division's reliance on section 19-3-507 is misplaced. While section 19-3-507 grants grandparent standing to intervene in the D&N proceedings, the scope of such standing is very limited and does not extend to standing for APR.

As the Court explains in *C.W.B., Jr. v. A.S.*, 2018 CO 8, ¶ 2, 410 P.3d 438, 440.

> Although section 19-3-507(5)(a) permits foster parents to intervene in dependency and neglect proceedings following adjudication, foster parents here do not have a legally protected interest in the outcome of termination proceedings, and section 19-3-507(5)(a) does not automatically confer standing to them to appeal the juvenile court's order denying the termination motion at issue . . . .

C.W.B, 2018 CO at ¶ 2. By the same analysis, section 19-3-507 does not automatically confer standing for APR. Grandparent intervenors must still meet the Title 14 requirements, which includes constitutional protections, before they can request APR for a fit parent's children.

It is undisputed that the paternal grandmother obtained physical custody of the children as a result of a state action, and over Mother's objection. To grant standing to grandparents without including the constitutional protections of Title 14 renders section 19-3-507 unconstitutional as applied to Mother.

Only this Court can resolve this disagreement by determining which statute governs allocating parenting time for children of a fit parent to non-parents—Title 14, Title 19, or Title 19 in harmony with Title 14, as explained above?

C. The Division's *sua sponte* argument holding that a GAL's motion for APR relieves a grandparent intervenor from the legal obligation to satisfy the statutory requirements for standing undermines the statutory and constitutional goal to limit interference with constitutional rights of parents to rear and have custody of their children.

The Division's *sua sponte* holding that GAL's motion for APR can confer standing to non-parent interveners cites to *C.W.B*, at ¶ 24. Nothing in *C.W.B*'s holding, however, suggests that a GAL has the legal authority to expand the scope of the intervenor's legal role or create a legal right for intervenor beyond what is allowed by the statute, under Title 19 (as explained in this Court's decision *C.W.B*). Neither does the Division cite to any legal authority that gives a GAL authority to alter the statutory requirements for standing under Title 14.

Further, the Division's conclusion is in direct contradiction with *C.W.B.*'s holding that "[e]xcept in certain limited circumstances, a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties." *C.W.B.*, 2018 CO at ¶ 18. *C.W.B.* emphasizes the very limited scope of intervenor's standing. It does not expand it.

Granting automatic standing for APR to individuals who temporarily care for children while parents complete their treatment and the family awaits reunification enables interference with the constitutional rights of fit parents and their children and rewards those who contribute to the alienation of children and sabotage reunification.

CONCLUSION

The Division's holdings, in addition to violating the fundamental constitutional rights of parents, have created a panel split, caused uncertainty regarding the statutory interpretation of provisions often applied in D&N cases, and cast doubt on the scope of rights of intervenors and their role in D&N proceedings. Only this Court can shed light on these issues.

Respectfully submitted this 29th day of April 2021.

/s/Katayoun A. Donnelly
Katayoun A. Donnelly #38439

Attorney for Petitioner

CERTIFICATE OF SERVICE

I certify that on April 29, 2021, a true and correct copy of the above *Petition for Writ of Certiorari* was served by ICCES upon the following:

Kristin M. Zacheis, #46994
HOUTCHENS GREENFIELD SEDLAK & ZACHEIS, LLC
822 7th Street, Suite 270
Greeley, Colorado 80631
Telephone: (970) 353-9195
Facsimile: (970) 353-0151
Email: kristin@houtchens.com

Katayoun A. Donnelly
Katayoun A. Donnelly