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ORIGINAL

22-6944

No.

In The
Supreme Court of the United States

PAIGE C. SULLIVAN
N/K/A PAIGE C. AUER,

Petitioner,

v.

JACOB JAMES CULWELL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE FIFTH DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

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QUESTIONS PRESENTED

Whether a natural parent has a fundamental liberty interest, guaranteed by the Fourteenth Amendment, in the care, custody, and management of her child, precluding the grant of custody to an individual who is not a parent of the child and has not adopted the child simply because the individual was "there when she was born" and thus "feels" that the child is his daughter.

Whether constitutional rights of a parent to make decisions for the child a preclude a court from granting custody to a non-parent over the objection of the natural parent.

Whether, if the concept of de facto parenthood exists– a claim never raised by the Respondent–, the constitutional protections afforded to a biological parent would remain intact, and would require a finding of, among other things, consent to such a relationship by clear and convincing evidence and should result only in visitation and not transfer of custody.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

RELATED CASES

None.

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OPINIONS BELOW

The order of the Fifth District Court of Appeal, which affirmed the order of the Circuit Court without opinion may be found in the Appendix at A-1. It is reported at 2022 Fla. App. LEXIS 6832, 2022 WL 6612992. An order denying rehearing, which denied the application without opinion and may be found in the Appendix at A-2.

JURISDICTION

The order of the Fifth District Court of Appeal, which affirmed the order of the Circuit Court without opinion, was entered October 11, 2022 and appears in Appendix "A". A timely motion for rehearing was denied on November 15, 2022 and appears in the Appendix at "B". The Florida Supreme Court lacks jurisdiction to hear an appeal from the order of the Court of Appeal. See *Jenkins v. State*, 385 So. 2d 1356 (Fla. 1980). An extension of time to file the petition for a writ of certiorari was granted to and including March 15, 2023 on February 14, 2023 in Application No. 22 A 744. The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., Amdt. XIV, sec 1:

". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

A. Nature of the Case

The case began by a Petition filed by the State of Florida under the UIFSA. A3, R22[1]. Subsequent to the State's filing of the UIFSA, petitioner Culwell commenced the proceeding to domesticate and modify a parenting plan entered as a judgment by the Superior Court of Washington, County of Kitsap and to fix custody and visitation with respect to a daughter (who is admittedly not his biological daughter) and who was not named in that judgment. R67- R69.

B. Statement of Facts

In a June 26, 2014 parenting plan, the Superior Court of Washington, County of Kitsap, among other things, granted Petitioner Paige C. Sullivan n/k/a Paige C. Auer, full custody of JC, Jr., then two years old. R78-R84. There is no mention of the other child in the order, BC, because Respondent Jacob James Culwell is *not* the biological father of BC. A27; R720 ("While Mr. Culwell acknowledged not being the biological Father to B., he also said that he was there when she was born and that she is his daughter. He feels that way and she feels that he is her Dad."); R744. There is no decree of adoption and Petitioner's motion for a DNA test, in which she noted that a home DNA test established a lack of

[1]. "A" Refers to the Appendix in the Court of Appeal. "R" refers to the Record in the Court of Appeal.

paternity, A22;R626, was denied.[2]

The parties moved to Florida and Culwell filed a petition for modification of the Washington plan and to "find" that he "was and is the legal father of B[redacted] C[redacted]" R68, R75. In the Petition, he set forth the following for a substantial change of circumstances:

> (a) Petitioner in the Final Judgment was not awarded any time sharing due to a default entered.
>
> (b) The Respondent mother then moved with all her children (Mother has two children from another relationship along with B[redacted] C[redacted] who is the legal daughter of the Petitioner along with J[redacted] C[redacted]. who is the Petitioners biological and legal child to Florida.
>
> c) Petitioner has been having substantial time sharing with the children for over a year.
>
> d) It is in the children's best interest for the Petitioner to have equal time sharing and that the Court find that the Petitioner's proposed parenting plan is in the children's best interest

R75.

The Circuit Court issued a final order on January 6, 2022. A40 *et seq.*; R1201 *et seq.* Insofar as pertinent, it found that "paternity is not at issue in this case," because, Respondent "had been adjudicated the father of both of the above children on more than one occasion," notwithstanding Respondent's admission to the

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[2]. Culwell specifically denied the allegation that he was B[redacted]'s father in the UIFSA proceeding, noting that a home DNA test excluded him, and no DNA test was performed in the proceeding. A3, A4, A17; R22, R23, R50.

contrary. A 41, R1237. *There is no such prior judicial determination.*[3] The Court denied Petitioner's application to relocate, gave primary custody to Respondent, and ordered Petitioner to pay child support. A46, R1207.

The ultimate determination seems to have had a racial component to it. Petitioner is Black. R464. Respondent is White. R508. The child B is listed as White. R 532, 563. JC Jr. is listed as multi-racial. R 563.

REASONS FOR GRANTING THE WRIT

The decision below is contrary to controlling decisions of this Court and decisions of other state courts of last resort. However, several other courts, including the District Court of Appeal here, have purported to engage in a best interest analysis to give third-parties custody of children over a biological parent's objection. Correction by this Court is warranted.

In *Troxel v. Granville,* 530 U.S. 57, 65–66 (2000), this Court collected its various precedents on point and said: "[T]he custody, care and nurture of the child reside first in the parents whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." Clearly "first" means "first" in this context. A fit parent has a federal due process constitutional right to make decisions concerning the care, custody, and control of his or her child. 530 U.S. at pp. 56, 58, 62. See also *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) ("In a long line of cases, we have held that, in addition to the specific freedoms protected

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[3]. This statement appears to rest upon a finding brought by the state in a child support proceeding, in which Respondent, in fact, contended that he was not the biological parent.

by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes the rights *** to direct the education and upbringing of one's children[.]"); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (discussing "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child"); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.")

Under this Court's precedents, a state court may not, except for the gravest of reasons, transfer custody of a child from a natural parent to any other person. The biological parents of a child have a right to the care and custody of their child that is superior to the rights of all others unless that right has been abandoned or the biological parents prove to be unfit. This is because neither our law nor our society as a whole is willing to permit judges or social science experts to displace, in the absence of the most urgent or grave circumstances, the primary responsibility of child-raising that naturally and legally falls to those who conceive and bear children.

As the Connecticut Supreme Court put it so well, "Where the dispute is between a fit parent and a private third party, however, both parties do not begin on equal footing in respect to rights to care, custody, and control of the children. The parent is asserting a fundamental constitutional right. The third party is not. A private third party has no fundamental constitutional right to raise the children of

others. Generally, absent a constitutional statute, the non-governmental third party has no rights, constitutional or otherwise, to raise someone else's child." *Fish v. Fish*, 285 Conn. 24, 45–46, 939 A.2d 1040, 1053 (2008) (internal citations omitted and clean-up); see also, e.g. *Conover v. Conover*, 450 Md. 51, 146 A.3d 433 (2016); *Best v. Fraser*, 252 Md. App. 427, 259 A.3d 194 (2021).

The Oregon Supreme Court rejects this reading of *Troxel*, calling it a plurality opinion that does not go that far: "'[t]he absence of a majority opinion in *Troxel* and the array of viewpoints expressed in the six different opinions make it difficult to identify the scope of the parental rights protected by the Due Process Clause.'" *O'Donnell-Lamont and Lamont*, 337 Ore. 86, 100, 91 P3d 721, 730 (2004), cert den, 543 U.S. 1050 (2005). It has thus upheld an Oregon statute that allows any person "who has established emotional ties creating a child-parent relationship or an ongoing personal relationship with a child" to seek intervention "with the court having jurisdiction over the custody" of the child to ask the court to award the person custody, guardianship, or visitation with the child. ORS 109.119(1), (3)(a).

In doing so, the Court took the position that the *Troxel* plurality expressly declined to define the precise scope of the parental due process right in the visitation context, "let alone in any other context." Rather the Court was of the view that "a majority of the Justices" emphasized the "nuanced, case-specific nature of the inquiry." *O'Donnell–Lamont*, 337 Or. at 99, 91 P.3d at 729. If this be so, then *Troxel* needs to be clarified to reject such a viewpoint.

It may be that the Court of Appeal implicitly found some sort of de facto parenthood– albeit such a contention was never made– a concept first recognized in *E.N.O. v. L.M.M.*, 429 Mass. 824, 711 N.E.2d 886, 891 (1999) ("A de facto parent is one who has no biological relation to the child [as a parent], but has participated in the child's life as a member of the child's family. The de facto parent resides with the child and, with the consent and encouragement of the legal parent, performs a share of caretaking functions . . . ."). However, that concept does not displace a parent's constitutional rights and has not application here.

De facto parenthood is not an accidental status—it happens only if and when the child's other biological parent(s) create and allow a parent-caliber relationship to develop between their child and another adult.

In any event, the burden of proof for putative de facto parents is steep. To qualify as a de facto parent, the proponent must demonstrate that (1) "the biological or adoptive parent consented to, and fostered, the petitioner's formation and establishment of a parent-like relationship with the child"; (2) proponent and child "lived together in the same household"; (3) proponent "assumed obligations of parenthood by taking significant responsibility for the child's care, education and development, including contributing towards the child's support, without expectation of financial compensation"; and (4) proponent "has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature." *Conover v. Conover*, 450 Md. 51, 74, 146 A.3d 433, 447 (2016) (cleaned up) (and cases cited therein). It cannot be

achieved without knowing participation by the biological parent. See *V.C. v. M.J.B*, 163 N.J. 200, 748 A.2d 539, 551-53 (2000).

And their burden of persuasion is higher too. In *E.N. v. T.R.*, the Maryland Court specified that a party must file "a verified complaint attesting to the consent" of biological parents, and must prove their case by clear and convincing evidence:

> [A]n action for de facto parenthood may be initiated only by an existing parent or a would-be de facto parent by the filing of a verified complaint attesting to the consent of the establishment of de facto parent status. The trial court should find by clear and convincing evidence that the parent has established: [ ] that the biological or adoptive parent consented to, and fostered, the petitioner's formation and establishment of a parent-like relationship with the child ....

474 Md. 346, 381–82, 255 A.3d 1 (2021) (quoting *Conover*, 450 Md. at 93, 146 A.3d 433 (Watts, J., concurring)). Accord *Pitts v. Moore*, 2014 ME 59, 90 A.3d 1169, 1172, (2014); *Rubano v. DiCenzo*, 759 A.2d 959, 974 (R.I. 2000) ("[These] criteria preclude such potential third-party parents as mere neighbors, caretakers, baby sitters, nannies, au pairs, nonparental relatives, and family friends from satisfying these standards.").

In no sense can the concept apply here to displace the biological parent here.

Finally, this Court has held that, where, as here, a Florida custody decision at variance with its precedent, an affirmance without opinion cannot shield it from review. See *Palmore v. Sidoti*, 466 U.S. 429, 431–32 (1984) ("The judgment of a state court determining or reviewing a child custody decision is not ordinarily a likely candidate for review by this Court. However, the [trial] court's opinion, after

stating that the 'father's evident resentment of the mother's choice of a black partner is not sufficient' to deprive her of custody, then turns to what it regarded as the damaging impact on the child from remaining in a racially mixed household. App. to Pet. for Cert. 26. This raises important federal concerns arising from the Constitution's commitment to eradicating discrimination based on race."); see also *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 139 n.4, 146 (1987) (certiorari granted; "The judgment of the Florida Fifth District Court of Appeal is . . . . Reversed.")

CONCLUSION

Certiorari should be granted to resolve the serious constitutional issue presented and rectify a grave injustice.

Dated: February 27, 2023

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