No.

IN THE

# Supreme Court of the United States

LAUREN N. STONE,

*Petitioner,*

*v.*

THEODORE WORNER AND ADELINA WORNER,

*Respondents.*

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**ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

Does Pennsylvania's Child Custody Act, 23 Pa. Stat. and Cons. Stat. Ann. § 5325, permitting a judge to grant to a grandparent, over a fit parent's objection, partial physical custody of a child where the other parent is deceased, violate the fit parent's right under the Due Process Clause of the Fourteenth Amendment?

- Is a fit parent's constitutional right, most recently addressed in *Troxel v. Granville*, 530 U.S. 57, 64, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000), a fundamental right?

- Must state laws restricting a fit parent's right, such as the grandparent visitation statute like Pennsylvania's, pass strict scrutiny review, or does lesser scrutiny apply?

- Must a court order compelling custody or visitation over a fit parent's objection be premised on a finding of harm or potential harm to the child?

- Does the state court decision in Petitioner's case violate *Troxel's* holding that a fit parent's constitutional right cannot be overridden simply because a judge believes another decision is better for the child?

## PARTIES TO THE PROCEEDINGS

Petitioner, Lauren N. Stone, was the defendant in the Pennsylvania Court of Common Pleas of Philadelphia County, Family Law Division, the appellant in the Pennsylvania Superior Court, and the petitioner in the Pennsylvania Supreme Court. Respondents, Theodore Worner and Adelina Worner, were the plaintiffs in the Pennsylvania Court of Common Pleas of Philadelphia County, Family Law Division, the respondents in the Pennsylvania Superior Court, and the respondents in the Pennsylvania Supreme Court.

## STATEMENT OF RELATED PROCEEDINGS

There are no proceedings in any court that are directly related to this case.

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## PETITION FOR A WRIT OF CERTIORARI

Lauren N. Stone petitions this Court for a writ of certiorari to review the decisions of the Pennsylvania Supreme Court, Superior Court, and Court of Common Pleas.

## OPINIONS BELOW

The April 9, 2024 Order of the Pennsylvania Supreme Court is unpublished and appears at App. 1. The February 2, 2024 Memorandum Opinion of the Pennsylvania Superior Court is unpublished and appears at App. 2. The October 4, 2023 Opinion of the Pennsylvania Court of Common Pleas of Philadelphia County, Family Court Division, is unpublished and appears at App. 21. The proposed order and findings of the Custody Hearing Officer is unpublished and appears at App. 58 and 63.

## JURISDICTION

The Pennsylvania Supreme Court's Order denying Ms. Stone's Petition for Allowance of Appeal was entered on April 9, 2024. App. 1. This Court's jurisdiction is invoked under 28 U.S.C.A. § 1257.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment provides "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."

## STATEMENT OF THE CASE

Lauren Stone is the mother of her five year old daughter, G. She has been her daughter's primary caretaker since birth. The state courts, and all parties and their lawyers, acknowledged that Ms. Stone is an excellent and loving mother and perfectly fit parent. She holds a bachelor's degree. She is employed as a nutritionist. She has never been involved with child services agencies in any manner. She has no criminal history. G. has grown up healthy and happy in her mother's care. As the Court of Common Pleas Judge noted in her decision in this case, "Mother attends to the daily physical and emotional needs of the child and testified that she and the child share a strong bond. Mother reports that the child is thriving, participates in gymnastics, and attends Christian school on Sundays. Mother maintains a loving, stable, and consistent relationship with the child."

Unfortunately, G.'s father (Joseph) was a drug addict, in and out of rehab throughout his life. Ms. Stone and Joseph lived together with their newborn daughter during the first years of G.'s life, until the parents separated on October 31, 2021 because of the father's continued drug addiction.

The parents continued to co-parent successfully, though, even after they ended their romantic relationship. The father trusted Ms. Stone as an excellent and loving mother.

The parents' coparenting included decisions about the extent of involvement of Joseph's own parents—Paternal Grandparents, Theodore and Adeline Worner—in their granddaughter G.'s life. Mr. and Mrs. Worner were initially very involved in G.'s life, and, as G. approached her second birthday (around September 2020), began helping provide care for G. when Mother and Father were working as well.

In June 2021, however, an incident occurred that caused the parents (Lauren and Joseph) to decide, jointly, to no longer leave G. unsupervised with the Paternal Grandparents. This incident occurred while G. was in her grandparents' home in their care. Mrs. Worner pulled G.'s arm so forcefully that it pulled from its socket. Paternal Grandfather called Mother (Ms. Stone) immediately to take G. to the hospital. Mother and Father brought their daughter to the hospital right away, and the doctors confirmed that that G.'s arm "was pulled really hard out of the socket." The doctors were able to repair G.'s arm, thankfully, so the child suffered no lasting injury.

But this incident prompted Lauren and Joseph to limit the Paternal Grandparents' involvement to supervised visits only. Joseph "was afraid that the same thing that happened to him growing up, would happen to" his own daughter. Lauren and Joseph enrolled G. in daycare. When G. visited with her Paternal Grandparents after this, Joseph was always present. G. did not spend any overnights at her Paternal Grandparents' home either. Mother and Father "decided that she wasn't to stay. We actually didn't let her stay anywhere overnight," Ms. Stone affirmed at trial of this case in the state court.

Meanwhile, the Father's drug issues continued. He relapsed by September 2021. He entered rehab again in January 2022, but died in March 2022.

The conflict between Mother and Paternal Grandparents then began. Paternal Grandparents claimed, in their testimony before the state court, that Mother simply stopped permitting them to see G. after Joseph's funeral.

Mother, however, revealed a far different reality. As she ultimately admitted in the court proceedings, Mrs. Worner confronted Mother immediately after Father's funeral and threatened Mother with litigation to enforce their "rights" to their grandchild.

Mrs. Worner's threat of litigation was accompanied by bizarre behavior that, Ms. Stone came to understand, showed that the Paternal Grandparents were preparing to sue her as Mrs. Worner had threatened. In one instance, when Ms. Stone arrived at the Worner's home to retrieve the death certificate, "I noticed that they were kind of taking pictures of her, back and forth in the living room. Like Adelina [Mrs. Worner] would take a picture with her and then Ted [Mr. Worner] would take a picture with her. And I thought it was bizarre. . . . Because it was—it was almost like a calculated thing that they were doing. It wasn't exactly like a happy moment, let's take a picture together."

Mrs. Worner then threatened Mother again "about how she has rights to my daughter, that I was to leave her there, um, unsupervised, I'm not welcome in her home. . . . she said how . . . she only cared about Joe

and the baby." "I was really taken back," Ms. Stone told the state court judge below. "I didn't argue with her. I didn't say anything, really, back to her . . . I just pretty much took G., and that's when I went home and retained a counsel."

This culminated in the lawsuit that the Paternal Grandparents filed against Mother in this case, in the state court below. Paternal Grandparents demanded that the state court grant, over Ms. Stone's objection, their request for partial physical custody of their granddaughter. The Paternal Grandparents premised their demand on a provision of Pennsylvania's Child Custody Act, 23 Pa. Stat. and Cons. Stat. Ann. § 5325, which permits grandparents to seek a court order granting partial physical custody of a minor child whose parent has died (here, G.'s father, Joseph—Mr. and Mrs. Worner's son, died). In their Complaint for Custody, Paternal Grandparents alleged that "[t]he best interests and permanent welfare of the Minor Child will be served by granting the relief requested herein as Paternal Grandparents have, and should continue to have a meaningful relationship with the Minor Child . . . An abrupt discontinuation of same can have serious detrimental effects on the physical and emotional well-being of the Minor Child, who has already experienced significant trauma with the loss of her father."

Mother (Ms. Stone) opposed Paternal Grandparents' demand, advising the state court, "I'm asking to keep my rights as a parent. . . . I think that me and my daughter have been through a lot of trauma, and she's doing really well right now. And I would hate for her peace to be disturbed by other people. . . . she's

doing really well in school. . . . she's doing really well, emotionally. She's extremely healthy and . . . we have a busy schedule together and it's always just me and her. She doesn't stay with anybody. . . . I don't leave her with anybody. She's an emotional child. She gets scared and we have a bond, a really strong bond."

A testimonial hearing was held before a Hearing Officer on February 1 and March 6, 2023. After the hearing concluded, the Hearing Officer issued a Proposed Order and Findings that an "appropriately tailored award of custodial time to Paternal Grandparents would not be overly burdensome or interfere with the child's scheduled activities." "[T]his Custody Hearing Officer believes it would be in the child's best interest to award Paternal Grandparents partial physical custody." The Hearing Officer ruled that Paternal Grandparents "shall have partial physical custody of the child" "at least one day-visit each month spending at least four hours with the child," and "partial physical custody of the child the third Saturday of each month from 10:00 a.m. to 2:00 p.m. at Paternal Grandparents' home." "Mother shall not interfere with Paternal Grandparents' custodial time."

Mother filed exceptions to the Hearing Officer's Report with the Court of Common Pleas, but the court denied Mother's exceptions and adopted the Hearing Officer's report as a final order. In a supplemental opinion filed with Pennsylvania's appeal (Superior) court, Court of Common Pleas Judge Palmer rejected Mother's claim that her federal constitutional right as a fit parent was infringed, ruling that Mother waived her rights by "conced[ing] the issue of standing" for Paternal

Grandparents, and that Mother's constitutional right was not violated because Pennsylvania courts had already ruled, in prior decisions, that the Grandparents' Custody Act was constitutional.

Mother appealed to Pennsylvania's Superior Court, arguing that the application of the Child Custody Act to override her decision as a fit parent without any showing of harm to her daughter violated her fundamental right under the United States Constitution and this Court's controlling decision in *Troxel v. Granville*, 530 U.S. 57, 64, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000).

But Pennsylvania's Superior Court rejected Mother's argument that any showing of harm is required by federal constitutional law, citing to the Pennsylvania Supreme Court's decision *Hiller v. Fausey*, 588 Pa. 342, 904 A.2d 875 (2006), which rejected the same constitutional attack.

Though this Court in *Troxel*, 530 U.S. 57, said that a court must apply "special weight" to a fit parent's decision before overriding it, and that a judge cannot override a fit parent's decision simply because the judge believes another decision is better for the child, the Superior Court agreed with Paternal Grandparents (the Worners) that a judge's decision on whether to grant the custody demanded by the petitioning grandparent lawfully can be "based on the amount of prior contact that grandparents had with the child, whether an award would interfere with the parent-child relationship, and what is in the best interest of the child" and that "[t]his is precisely what the Hearing Officer considered when reaching her decision" in this case. The Superior

Court ruled, "[t]he record confirms that prior to Mother denying Paternal Grandparents any contact with G.W., they had a loving relationship with her in which they saw her multiple times per week. The state has a strong interest in preserving this relationship between G.W. and her deceased father's family. The narrowly tailored order only grants Paternal Grandparents four hours per month with their grandchild, with Paternal Grandfather, with whom Mother admits she has a good relationship, present at all times." App. 2.

Mother filed a Petition for Allowance of Appeal to Pennsylvania's Supreme Court, asking Pennsylvania's high court to review the facial and as-applied validity of the Grandparents' Custody Act. But the court denied the Mother's request for review by Order entered April 9, 2024. App. 1.

## REASONS FOR GRANTING THE PETITION

### DOES PENNSYLVANIA'S CHILD CUSTODY ACT, 23 PA. STAT. AND CONS. STAT. ANN. § 5325, PERMITTING A JUDGE TO GRANT PARTIAL PHYSICAL CUSTODY OF A MINOR CHILD TO A PETITIONING GRANDPARENT OVER THE OBJECTION OF A FIT PARENT WHERE THE OTHER PARENT IS DECEASED, VIOLATE A FIT PARENT'S FUNDAMENTAL RIGHT UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

The Court should grant Certiorari to review the following questions left unresolved by *Troxel*, 530 U.S. at 64:

- Is the right discussed in *Troxel* a fundamental right under the United States Constitution?

- What level of constitutional scrutiny applies to assess the validity of governmental restrictions on a fit parent's right?

- In a proceeding by a grandparent (or any non-parent) asking a court to compel visitation or custody over the objection of a fit parent, must the court find that harm has been or will be caused to the child unless the visitation or custody demanded is provided?

### A. Is the right discussed in *Troxel* a fundamental constitutional right?

In *Troxel*, 530 U.S. at 64, grandparents petitioned the state court to order visitation for them over the objections of the fit mother. The trial court granted visitation under a Washington law that permitted it whenever "visitation may serve the best interest of the child." *Troxel*, 530 U.S. at 60.

The Washington Supreme Court ruled the trial judge's ruling unconstitutional, and this Court affirmed in a 6-3 decision. The plurality opinion, jointed by four Justices, noted that the Washington Supreme Court had identified the fit parent's right as a fundamental constitutional right: "The case ultimately reached the Washington Supreme Court, which held that § 26.10.160(3) unconstitutionally interferes with the fundamental right of parents to rear their children," *Troxel*, 530 U.S. at 60. The plurality opinion stated that "[t]he 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," reasoning,

> More than 75 years ago, in *Meyer v. Nebraska*, 262 U.S. 390, 399, 401, 43 S. Ct. 625, 67 L. Ed. 1042 (1923), we held that the "liberty" protected by the Due Process Clause includes the right of parents to "establish a home and bring up children" and "to control the education of their own." Two years later, in *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 534–535,

45 S. Ct. 571, 69 L. Ed. 1070 (1925), we again held that the "liberty of parents and guardians" includes the right "to direct the upbringing and education of children under their control." We explained in *Pierce* that "[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Id.*, at 535, 45 S.Ct. 571. We returned to the subject in *Prince v. Massachusetts*, 321 U.S. 158, 64 S. Ct. 438, 88 L. Ed. 645 (1944), and again confirmed that there is a constitutional dimension to the right of parents to direct the upbringing of their children. "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." *Id.*, at 166, 64 S.Ct. 438.

In subsequent cases also, we have recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children. See, e.g., *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972) ("It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children 'come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements' "

(citation omitted)); *Wisconsin v. Yoder*, 406 U.S. 205, 232, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition"); *Quilloin v. Walcott*, 434 U.S. 246, 255, 98 S. Ct. 549, 54 L. Ed. 2d 511 (1978) ("We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected"); *Parham v. J. R.*, 442 U.S. 584, 602, 99 S. Ct. 2493, 61 L. Ed. 2d 101 (1979) ("Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course"); *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982) (discussing "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child"); [*Washington v. Glucksberg*, 521 U.S. 702, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997)] ("In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes the righ [t] . . . to direct the education and upbringing of one's children" (*citing Meyer* and *Pierce*)). In light of this extensive precedent, it cannot now be doubted that

> the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children. [*Troxel*, 530 U.S. at 65–66].

Justice Thomas' opinion concurring in the judgment also stated that a parent's right is a fundamental constitutional one: "I agree with the plurality that this Court's recognition of a fundamental right of parents to direct the upbringing of their children resolves this case." *Troxel*, 530 U.S. at 80 (Thomas, J., concurring in judgment).

Thus, five of the nine Justices in *Troxel* declared the fit parent's right a fundamental constitutional right (which we contend shows that governmental restrictions on the right must pass strict scrutiny, as argued below).

The other four Justices in *Troxel* did not characterize the parent's right as a fundamental one.

Justice Souter, concurring in the judgment, simply stated that such rights are "generally protected." *Id.* at 77.

Justice Stevens, in his dissenting opinion, said that the Court's precedent did not show that a parent's right is a fundamental one: "we have never held that the parent's liberty interest in this relationship is so inflexible as to establish a rigid constitutional shield, protecting every arbitrary parental decision from any challenge absent a threshold finding of harm." *Troxel*, 530 U.S. at 85–86 (Stevens, J., dissenting). At the

same time, however, Justice Stevens said, "Our cases leave no doubt that parents have a fundamental liberty interest in caring for and guiding their children, and a corresponding privacy interest—absent exceptional circumstances—in doing so without the undue interference of strangers to them and to their child." *Troxel*, 530 U.S. at 87 (Stevens, J., dissenting).

Justice Kennedy, dissenting, did not find a fundamental right, and Justice Scalia, also dissenting, said that a parent has no constitutional right at all, *Troxel*, 530 U.S. at 92.

### B. The Court should clarify that strict scrutiny applies to any law restricting the constitutional right of a fit parent to the care and custody of his or her child.

Though five of the nine Justices in *Troxel* agreed that a fit parent's right is a fundamental constitutional one, the Court did not declare that strict scrutiny review, as is typically applied to determine the validity of governmental restrictions on other fundamental rights, applied to restrictions on a fit parent's right to the care and custody of the child. Instead, the plurality opinion provides,

> Because we rest our decision on the sweeping breadth of §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 nonparental visitation

> statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation. We do not, and need not, define today the precise scope of the parental due process right in the visitation context. In this respect, we agree with Justice Kennedy that the 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 U.S. at 73].

Only Justice Thomas' opinion declared that strict scrutiny should apply ("I would apply strict scrutiny to infringements of fundamental rights. Here, the State of Washington lacks even a legitimate governmental interest—to say nothing of a compelling one—in second-guessing a fit parent's decision regarding visitation with third parties," *Troxel*, 530 U.S. at 80 (Thomas, J., concurring in judgment).

The Court should clarify this issue as well by granting Certiorari. We submit that if the parent's constitutional right is a fundamental one as we contend, then strict scrutiny should apply to determine the constitutionality of governmental restrictions on the right—meaning that a law infringing on the right must be narrowly tailored to serve a compelling governmental interest (as it is, for example, where a parent is found to have abused or neglected the child, or where a parent's care of a child warrants termination of the parental right altogether). *Reno v. Flores*, 507 U.S. 292, 113 S. Ct. 1439, 123 L. Ed. 2d 1 (1993); *Lassiter*

*v. Dep't of Soc. Servs. of Durham Cnty., N.C.*, 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981).

The Court should address its precedent and clarify this issue. Though the Court's early cases said that parents possess a liberty interest, protected by the Due Process Clause, in directing the upbringing and education of their children (*Prince*, 321 U.S. at 166; *Pierce*, 268 U.S. at 534; *Meyer*, 262 U.S. at 399), these cases suggest that the right may be restricted as long as the restriction bears a rational relation to the governmental objective, *Prince*, 321 U.S. at 168–170; *Pierce*, 268 U.S. at 535–536; *Meyer*, 262 U.S. at 399–400. This suggests that less than strict scrutiny applies.

Clarifying this issue will help guide state courts, which are facing an increasing number of requests by grandparents and other relatives for courts to grant custody or visitation over a parent's objection.

Whether strict scrutiny applies to gauge the constitutionality of such laws varies by state. *Nelson v. Evans*, 170 Idaho 887, 517 P.3d 816 (2022); *Hamit v. Hamit*, 271 Neb. 659, 715 N.W.2d 512 (2006); *Santi v. Santi*, 633 N.W.2d 312 (Iowa 2001).

In Iowa, for example, that state's Supreme Court applied strict scrutiny to determine whether a section of Iowa's grandparent visitation statute was unconstitutional. *In re Marriage of Howard*, 661 N.W.2d 183 (Iowa 2003); *see also Blixt v. Blixt*, 437 Mass. 649, 774 N.E.2d 1052 (2002) (Massachusetts law); *Ailport v. Ailport*, 2022 WY 43, 507 P.3d 427 (2022) (Wyoming law).

In other decisions, the level of scrutiny being applied is unclear, *see, e.g.*, *Hamit v. Hamit*, 271 Neb. 659, 715 N.W.2d 512 (2006). In Utah, the Supreme Court found that the Grandparent Visitation Statute was constitutional as applied, but did not specify the level of scrutiny being applied, *Santi*, 633 N.W.2d 312*; see also In re Adoption of J.S.*, 2014 UT 51, 358 P.3d 1009 (stating *Troxel* "comes nowhere close to establishing a generalized, fundamental right of an unwed father" and that an "unwed father's" right was "only a provisional right, subject to reasonable regulation by the states"); *Sayler v. Sun*, 2023 MT 175, 413 Mont. 303, 328, 536 P.3d 399 ("The level or standard of constitutional scrutiny applicable to state law infringement of fundamental parental rights is not at issue in this case.")

In *Enrique M. v. Angelina V.*, 174 Cal. App. 4th 1148, 1155, 94 Cal. Rptr. 3d 883 (2009), the California court stated, "Ordinarily, governmental action that 'substantially interferes with the enjoyment of a fundamental right is subject to strict scrutiny . . . i.e., it must be set aside or limited unless it serves a compelling purpose and is necessary to the accomplishment of that purpose.'" The court noted that "the *Troxel* plurality did not expressly state whether it was subjecting the statute at issue in that case to the strict scrutiny standard," *see also In re Marriage of Harris*, 34 Cal. 4th 210, 96 P.3d 141 (2004).

A New York case, approving of a statute similar to Pennsylvania's in this case, said that a parent's constitutional right was a fundamental one but did not appear to apply strict scrutiny to reviewing the law

restricting it—never specifying the level of scrutiny being applied. The court said, "Notwithstanding such fundamental right, such parental primacy rights are not unfettered or absolute. For example, the intervention of the State in parental relationships with their children is allowed in Child Protective Proceedings (Family Court Act Article 10); in Juvenile Delinquency and Person in Need of Supervision matters . . . and Courts are often called upon to determine custody and visitation issues between parents themselves (Domestic Relations Law Article 5; Family Court Act § 651). The best interest of the child is the governing standard in many of these situations, to the point that best interest of a child in most cases justify intervention by the State as *parens patriae*." *Fitzpatrick v. Youngs*, 186 Misc. 2d 344, 347, 717 N.Y.S.2d 503 (Fam. Ct. 2000).

Petitioner Stone's case illustrates the need to clarify these constitutional issues. Prior Pennsylvania cases considering Pennsylvania's grandparent custody law said that the statute must pass strict scrutiny—a showing that the statute is "narrowly tailored" to further a "compelling" governmental interest. *Hiller*, 904 A.2d at 883 ("this Court traditionally has applied a strict scrutiny analysis to asserted violations of fundamental rights protected by the Due Process Clause"). Yet the state courts in this case failed to apply strict scrutiny review. In affirming the trial judge's order granting partial custody to the Paternal Grandparents, the Pennsylvania Superior court stated, "The state has a strong interest in preserving this relationship between G.W. and her deceased father's family." That is not a "compelling" interest. The only governmental interest that courts have held is "compelling" enough to warrant

intrusion into a fit parent's decision making is where a child has been harmed or is being threatened with harm by the parental action—hence, the long recognized constitutional validity of abuse and neglect, and termination of parental rights, proceedings, *Santosky*, 455 U.S. at 766; *Parham*, 442 U.S. at 603 ("[A] state is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized.").

The Pennsylvania courts in this case did not assess whether the Child Custody Act is "narrowly tailored" to further a compelling interest, either. The Superior Court said that Pennsylvania's statute is constitutional because it limits "standing" to grandparents whose child has died. That is not narrowly tailored, because not all grandparents whose child has died present an interest compelling enough to warrant court-ordered partial custody over the surviving parent's decision. There are grandparents whose child has died yet have had no relationship with the grandchild (because they are estranged, etc.). Pennsylvania's statute provides those grandparents the same standing.

As with several other states providing such standing for grandparents whose own child has died, this standing issue is critical because, as the Court of Common Pleas said in Ms. Stone's decision, "once the Paternal Grandparents were deemed to have standing . . . Paternal Grandparents merely needed to establish that it was in child's best interest to maintain a relationship with them." The Court should clarify that this fails to apply *Troxel's* core holding and impermissibly affords a *presumption* of harm where a

parent has died—typically considered impermissible when assessing the constitutionality of a fundamental right.

The Court should clarify, relatedly, the relative authority between a fit parent and the government. Justice Stevens, in his dissent in *Troxel*, noted the *parens patriae* authority of the state to protect a minor child's health or welfare—"the State's long-recognized interests as parens patriae . . . and, critically, the child's own complementary interest in preserving relationships that serve her welfare and protection." *Troxel*, 530 U.S. at 88 (Stevens, J., dissenting). As Justice Stevens noted, however, the Court has yet to "elucidate the nature of a child's liberty interest in preserving established familial or family-like bonds." *Id.* "[T]he Due Process Clause of the Fourteenth Amendment leaves room for States to consider the impact on a child of possibly arbitrary parental decisions that neither serve nor are motivated by the best interests of the child." *Troxel*, 120 S. Ct. at 2073. It is the State's job, not that of the federal courts, "to assess in the first instance the relative importance of the conflicting interests that give rise to disputes such as this." *Id.*

States have cited this language from Justice Stevens' dissent as authorizing grandparent visitation orders on the grounds that failing to provide the visitation demanded may impact the child's best interests, *see, e.g.*, *Hernandez v. Hernandez*, 151 Idaho 882, 886, 265 P.3d 495 (2011). This would seem to contradict the core holding of *Troxel* that a judge cannot override a fit parent's decision simply because the judge, personally, believes a better decision can be made for the child.

*Parens patriae* authority, moreover, has historically been invoked only where a parent has caused or will cause harm to the child—typically through abuse or neglect in caring for the child. Such cases are consistent with a parent's right because, in these instances, the parent is no longer a "fit" parent and the parent's conduct impacts the welfare of the child, a natural person who is entitled to his or her own personal rights and the government's protection of them. The Court should clarify whether a state's *parens patriae* authority extends to assessing the best interests of the child with regard to visitation or custody demands by a grandparent over a fit parent's objection.

### C. Must a judge find that harm has occurred or will occur to the child if the custody or visitation demanded is not ordered by the court?

If strict scrutiny applies, the Court should hold that a grandparent (or any non-parent) demanding that a court override a fit parent's decision must prove, and the judge must find, that harm has been or will be caused to the child unless the custody or visitation is provided.

In invalidating the Washington statute in *Troxel*, the plurality opinion stated that "some special weight" must be afforded to a fit parent's decision on what custody or visitation is best for the child. The grandparent must overcome the special weight accorded to the fit parent's decision, which cannot be overcome "simply because a state judge believes a 'better' decision could be made," *Troxel*, 530 U.S. at 73. A court cannot overrule the fit parent's decision based on "nothing more than a simple

disagreement between the [court] and [the parent] concerning her children's best interests." *Id.*

The Washington State Supreme Court had ruled that the visitation statute was unconstitutional because the United States Constitution permits a state to interfere with a fit parent's right only to prevent harm or potential harm to the child, which the state law did not require. The plurality opinion did not address that part of the state court decision, however, stating, "we do not consider the primary constitutional question passed on by the Washington Supreme Court—whether the Due Process Clause requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation. We do not, and need not, define today the precise scope of the parental due process right in the visitation context. In this respect, we agree with Justice KENNEDY that the 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 U.S. at 73–74 (citing Justice Kennedy's dissenting opinion).

Justice Kennedy specifically disapproved of the Washington State Supreme Court's ruling that harm was required to abide by the parent's constitutional right, stating, "it is quite a different matter to say, as I understand the Supreme Court of Washington to have said, that a harm to the child standard is required in every instance," *Troxel*, 530 U.S. at 94 (Kennedy, J., dissenting). "To say that third parties have had no historical right to petition for visitation does not

necessarily imply, as the Supreme Court of Washington concluded, that a parent has a constitutional right to prevent visitation in all cases not involving harm." *Id.* at 97. Justice Souter, concurring in the judgment, stated similarly—"there is no need to decide whether harm is required or to consider the precise scope of the parent's right or its necessary protections," *Troxel*, 530 U.S. at 77 (Souter, J., concurring in judgment).

Justice Kennedy noted that, at the time of the *Troxel* decision, "Georgia's is the sole state legislature to have adopted a general harm to the child standard" (*citing* Ga. Code Ann. § 19-7-3(c) (1999). Since *Troxel* was decided 25 years ago, however, the laws of several states now require a showing of harm. Because of the open questions left in *Troxel*, state courts have applied a fit parent's right differently, splitting into two main groups.

The first group of states holds that a fit parent's constitutional right cannot be overridden unless harm or threat of harm to the child is found, *see, e.g.*, *Moriarty v. Bradt*, 177 N.J. 84, 827 A.2d 203, 218 (2003) (ruling third party must show parent is unfit or that child has been or will be harmed by denial of visitation demanded over fit parent's objection); *Doe v. Doe*, 116 Haw. 323, 172 P.3d 1067, 1069, 1080 (2007) (Hawaii's grandparent visitation statute, which required only a showing that grandparent visitation was in the best interests of the child, could not pass strict scrutiny unless grandparents showed child would suffer significant harm without visitation petitioner demanded); *In re Herbst*, 1998 OK 100, 971 P.2d 395, 398 ("Without the requisite harm or unfitness, the

state's interest does not rise to a level so compelling as to warrant intrusion upon the fundamental rights of parents"); *Lamberts v. Lillig*, 670 N.W.2d 129, 133 (Iowa 2003) (Iowa's grandparent visitation statute did not meet strict scrutiny demands, in part, because it did not require grandparent to show parent was unfit or that child would be harmed by lack of visitation demanded); *Blixt*, 774 N.E.2d at 1061 (grandparents must prove "failure to grant visitation will cause the child significant harm by adversely affecting the child's health, safety, or welfare"); *Jones v. Jones*, 2013 UT App 174, 307 P.3d 598, *as amended* (Apr. 9, 2024), *aff'd,* 2015 UT 84, 359 P.3d 603 (holding paternal grandparents failed to show that state's interest in ordering visitation under Grandparent Visitation Statute was compelling; though father was deceased and grandparents enjoyed substantial relationship with child before mother ended visitation, grandparent failed to establish harm to child); *Koshko v. Haining*, 398 Md. 404, 921 A.2d 171 (2007) (grandparents petitioning for visitation under grandparent visitation statute first required to show *prima facie* evidence of parental unfitness or exceptional circumstances demonstrating current or future detriment to child absent visitation demanded by grandparents, before court can proceed to best interest assessment); *Glidden v. Conley*, 2003 VT 12, 175 Vt. 111, 820 A.2d 197 (2003) (statute governing grandparent visitation not violative of parent's due process right because grandparent, to overcome parent's decision, required to show circumstances such as parental unfitness or significant harm to child in absence of court order); *Brooks v. Parkerson*, 265 Ga. 189, 454 S.E.2d 769 (1995) ("state interference with parental rights to custody and control of children is

permissible only where the health or welfare of a child is threatened"); *Bowman v. Study*, 2022 WY 139, ¶ 13, 519 P.3d 985 (Wyo. 2022) ("To interpret § 20-7-101(a) consistent with these constitutional principles, the grandparents must demonstrate the state has a compelling reason to interfere with the parents' rights, which requires proof by clear and convincing evidence 'the parents are unfit or their visitation decision is harmful to the child[ren]. This threshold requirement ensures the parents' decision is given 'special weight' in accordance with *Troxel's* directive.'")

The second group of states, including Pennsylvania, holds that a showing of harm is not required, and that *Troxel* held only that the Washington statute there was too broad, *see, e.g.*, *Matter of B.J.A.S.*, 2023-Ohio-4514, ¶ 27, 231 N.E.3d 514 ("Appellant contends that as a 'fit parent,' his wishes, even though not supported by any articulable and credible reason, must override all other considerations, including the best interests of the child. However, Appellant's assertion is not supported by Ohio law. In Ohio, the wish of the parent is only one consideration that is to be carefully balanced against other factors that affect the best interest of the minor child, who cannot assert his wishes on his own. While in Ohio the wishes of the parent are to be accorded 'at least some special weight,' the Ohio Supreme Court has clarified that 'nothing in *Troxel* suggests that a parent's wishes should be placed before a child's best interest . . . '")

Some states, including Pennsylvania (*Hiller v. Fausey*, 588 Pa. 342, 904 A.2d 875 (2006)), have noted *Troxel's* silence on whether harm is required to

mean that a court is not required to find any harm and may order grandparent visitation simply when shown to be in the child's best interest, *In re Adoption of C.A.*, 137 P.3d 318 (Colo. 2006); *Vibbert v. Vibbert*, 144 S.W.3d 292 (Ky. Ct. App. 2004) ("We believe that a modified 'best interest' standard can be used in cases where grandparent visitation is sought within the constitutional framework of Troxel. What Troxel requires us to recognize is that a fit parent has a superior right, constitutionally, to all others in making decisions regarding the raising of his or her children, including who may and may not visit them. A fit parent's decision must be given deference by the courts, and courts considering the issue must presume that a fit parent's decision is in the child's best interest"); *Blakely v. Blakely*, 83 S.W.3d 537 (Mo.), *as modified on denial of reh'g* (Aug. 27, 2002) ("While the Supreme Court found the Washington statute unconstitutional as applied, it declined the invitation to address whether the statute would have been unconstitutional had it been more narrowly interpreted by the Washington Supreme Court . . . and specifically declined to address the mother's claim that all grandparent visitation statutes are unconstitutional unless they require a showing of harm as a condition precedent to visitation . . . Instead, the Supreme Court held that the constitutionality of any standard for awarding visitation should turn on the specific manner in which that standard was applied, stating that 'the constitutional protections in this area are best 'elaborated with care.' . . . Because much state-court adjudication in this context occurs on a case-by-case basis, we would be hesitant to hold that specific nonparental visitation statutes violate the Due Process Clause as a per se matter.'"); *In re*

*Marriage of O'Donnell-Lamont*, 337 Or. 86, 91 P.3d 721 (2004) ("*Troxel* holds only that the Due Process Clause requires that 'some special weight' be given to the interest of the legal parent").

Other state court decisions are vague on the issue, *e.g.*, *In re Adoption of C.A.*, 137 P.3d at 325 (noting parental wishes are entitled to "extreme deference" but state may "override[ ] parental wishes only if the parent is unfit to make the decision or when denying visitation would harm or substantially harm the child's emotional health").

The differing approaches to whether harm is required to be shown in turn affects the constitutional assessment that states employ.

One approach is to avoid identifying a level of scrutiny but typically does not require a showing that the child has or will suffer harm, *In re Adoption of C.A.*, 137 P.3d at 328–29 (stating "intermediate standard—more stringent than a preponderance of the evidence but less stringent than a substantial harm standard—is appropriate to reconcile the General Assembly's intent and *Troxel*"); *Polasek v. Omura*, 2006 MT 103, 332 Mont. 157, 136 P.3d 519, 523; *Walker*, 382 S.W.3d 862. Such courts assess the constitutionality of grandparent visitation statutes by comparing them to the Washington statute in *Troxel*, with most of these state courts concluding that the Washington statute was simply too broad in providing who could petition for visitation or custody. *Moriarty*, 827 A.2d at 219–20. To incorporate the substantive due process requirement of *Troxel*, these courts simply alter the

weighing process used to balance multiple factors related to the best interests of the child by giving "special weight" to the parent's decision and identifying "special factors" upon which a grandparent visitation order must be based, *see*, *e.g.*, *Polasek*, 136 P.3d at 523 ("The close scrutiny that we apply to any infringement on a person's right to parent a child requires that the petitioning grandparent prove by clear and convincing evidence that it is in the child's best interest to have contact with the grandparent, and, in the case of an objecting fit parent, that the presumption in favor of the parent's wishes has been rebutted"); *Walker*, 382 S.W.3d at 868–70 (approving "modified best interest standard" incorporating a presumption in favor of fit parent decision).

The Colorado Supreme Court used such an approach to analyze that state's grandparent visitation statute in *In re Adoption of C.A.*, 137 P.3d at 322 (discussing Colo. Rev. Stat. Ann. § 14-10-124.4 (West 2005)). Unlike the "breathtakingly broad" Washington state statute in *Troxel* that allowed "any person" to apply for visitation rights with a child, the Colorado statute significantly narrowed the situations where grandparent visitation could be ordered by requiring a showing that the parents' marriage had been dissolved, someone other than a parent had custody of the child, or the child's parent had died. *Id.* at 322, 326. Following the lead of *Troxel*, the Colorado court did not articulate or employ typical due process review. *Id.* at 325. Instead, the Colorado court explained the due process requirements imposed on grandparents seeking visitation as follows:

> [I]n order to effectuate the General Assembly's intent consistent with *Troxel*, we construe Colorado's statute to contain a presumption that parental determinations about grandparent visitation are in the child's best interests. *See Troxel*, 530 U.S. at 67, 120 S.Ct. 2054 ("[T]here is a presumption that fit parents act in the best interests of their children."). However, this presumption is rebuttable in the context of a section 19–1–117 petition when the grandparent articulates facts in the petition and goes forward with clear and convincing evidence at a hearing that the parent is unfit to make the grandparent visitation decision, or that the visitation determination the parent has made is not in the best interests of the child. If the grandparent meets this evidentiary burden, the burden then shifts to the parent to adduce evidence in support of the parental determination. The grandparent bears the ultimate burden of proving by clear and convincing evidence that the parental determination is not in the child's best interests and the visitation schedule grandparent seeks is in the child's best interests. [*Id.* at 327–28]

Another approach applies traditional strict scrutiny review to grandparent visitation statutes, *see Moriarty*, 827 A.2d at 218–19. Grandparents must overcome a presumption in favor of parental decision-making and establish that the state has a compelling interest in granting grandparent visitation over the parent's

objection. *Id.* at 218. The petitioner must show that the parent is unfit or that the child has been or will be harmed by the denial of the visitation or custody the grandparent is demanding, *Moriarty*, 827 A.2d at 218–19; *see Doe*, 172 P.3d at 1069, 1080 (Hawaii's grandparent visitation statute, which required only a showing that grandparent visitation was in best interest of child, could not pass strict scrutiny unless grandparent showed child would suffer significant harm in absence of visitation); *In re Herbst*, 971 P.2d at 398 ("Without the requisite harm or unfitness, the state's interest does not rise to a level so compelling as to warrant intrusion upon the fundamental rights of parents"); *Lamberts*, 670 N.W.2d at 133 (Iowa's grandparent visitation statute did not meet strict scrutiny demands, in part, because it did not require grandparent to show parent was unfit or child would be harmed by lack of visitation); *Blixt*, 774 N.E.2d at 1061 (requiring grandparent to prove "failure to grant visitation will cause the child significant harm by adversely affecting the child's health, safety, or welfare").

This Court should grant Certiorari here to clarify the type of evidence that is sufficient to establish harm in such cases. The New Jersey Supreme Court in *Moriarty*, for instance, did not state what type of evidence would be sufficient to establish harm, noting the "possibilities are as varied as the factual scenarios presented." *Moriarty*, 827 A.2d at 223–24. The New Jersey court said, however, that harm might include when a surviving parent restricts a child's contact with grandparents after the death of a parent, the breakup of the child's home through divorce or separation, and/or the termination of a long-standing relationship

between the grandparents and the child, *see also Blixt*, 774 N.E.2d at 1060 ("[t]he requirement of significant harm presupposes proof of a showing of a significant preexisting relationship between the grandparent and the child").

### D. Ms. Stone's case illustrates how state courts are disregarding *Troxel*'s fundamental holding.

A fundamental part of the plurality opinion in *Troxel* is that a court may not override a fit parent's decision simply because a judge "believes a 'better' decision could be made." Ms. Stone's case illustrates that state court judges are doing just what *Troxel* said they cannot do—paying lip service to the "special weight" that *Troxel* says must be afforded to a fit parent's decision and deciding a grandparent's demand for custody or visitation based entirely on what the judge personally believes is in the child's best interest.

In Ms. Stone's case, for instance, once standing was found for the petitioning grandparents, no "special weight" was applied to afford any meaningful presumption in favor of Ms. Stone's decision. The judge simply engaged in the best interest assessment that *Troxel* holds is impermissible, *Troxel*, 530 U.S. at 67. As the Superior Court said in affirming Ms. Stone's case, "'[t]he ultimate decision is based on the amount of prior contact that grandparents had with the child, whether an award would interfere with the parent-child relationship, and what is in the best interest of the child.' . . . This is precisely what the Hearing Officer considered when reaching her decision."

How is that assessment any different from what at least four of the nine Justices in *Troxel* said is constitutionally impermissible? The Hearing Officer who decided Ms. Stone's case said that providing the partial custody the grandparents demanded "would not be overly burdensome or interfere with the child's scheduled activities." That's not even close to the showing that *Troxel* requires, we submit.

The pleading and evidence that the Paternal Grandparents presented to the state court demonstrates this further. In their Complaint, the Grandparents alleged, "The best interests and permanent welfare of the Minor Child will be served by granting the relief requested herein as Paternal Grandparents have, and should continue to have a meaningful relationship with the Minor Child." The Grandparents argued, "[a]n abrupt discontinuation of same can have serious detrimental effects on the physical and emotional well-being of the Minor Child, who has already experienced significant trauma with the loss of her father . . . " The Grandparents did not introduce any evidence to even establish those allegations, let alone evidence of harm that has or would befall the child. The Grandparents did not present any evidence of the "significant trauma" they claimed that the child, only two years at the time, had experienced from her father's death.

All that the Grandparents presented in support of their petition was their own testimony, telling the Hearing Officer that they loved their granddaughter, describing the circumstances that led to the decision of the parents to restrict them to supervised visitation, and describing the breakdown in their relationship

with the Mother (Ms. Stone) that culminated in the grandparent's lawsuit.

Counsel for the Grandparents argued a simple best interest assessment in asking the Hearing Officer to grant partial custody over the Mother's objection, contending to the Hearing Officer, "[t]he ultimate decision is based on the amount of prior contact that grandparents had with the child, whether an award would interfere with the parent-child relationship, and what is in the best interest of the child." "Now more than ever, it's important for grandparents to continue this relationship with the child," counsel said:

> They just want to continue the relationship that they already established with their grandchild. Additionally, it will be in [G's] best interest to continue her relationships with her paternal grandparents. *** It would be against [G's] best interest not to allow Mr. and Mrs. Worner to continue their relationship with the child. Whatever happened to Ms. Stone, she changed her mind. She wants them to have nothing to do with the child, is not demonstrated through her actions, which occurred after the June 2021 incident. And [G] should not be punished for whatever ill will or resentment Ms. Stone would like to create as revisionist history in this matter. I urge you that it would be contrary to the statute, the factors that you consider not to award them partial, physical custody of their granddaughter.

These are often critical issues for a parent and the child involved. In Ms. Stone's case, for example, the state courts compelled visitation over the mother's objection even though the Paternal Grandmother had pulled the young child's arm out of its socket in the past—which had led to the decision of both parents to cease unsupervised visitation in the first place. The Hearing Officer acknowledged that after the child (G.) was injured at the Paternal Grandparents' home, "both Mother and Father decided together to revoke their consent and deny Paternal Grandparents any unsupervised time with the child." The Hearing Officer acknowledged, further, that this decision by Mother and Father (alive at that time) "following the child's injury demonstrates that they made a choice as parents designed with their child's best interest in mind . . . " Yet the Hearing Officer, affirmed by the state courts thereafter, overrode this fit mother's decision and placed the young child back—unsupervised—with these same grandparents, simply overriding the Mother's decision on what is best for her own daughter. The Court should grant Certiorari here to correct this state court decision as violating Ms. Stone's constitutional right as a fit parent, and to clarify for all lower courts the kind of evidence and findings that are required before a court may overrule the decision of a fit parent on what type and manner of visitation and custody is best for her child.

## CONCLUSION

The Court should grant this Petition for a Writ of Certiorari.

Respectfully submitted,

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# APPENDIX

# APPENDIX

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## APPENDIX A

**IN THE SUPREME COURT OF PENNSYLVANIA**
**EASTERN DISTRICT**

**No. 68 EAL 2024**

**[Filed April 9, 2024]**

| | |
|---|---|
| THEODORE WORNER AND ADELINA WORNER, Respondent | ) |
| v. | ) |
| LAUREN N. STONE, Petitioner | ) |

Petition for Allowance of Appeal
from the Order of the Superior Court

**ORDER**

**PER CURIAM**

**AND NOW**, this 9th day of April, 2024, the Petition for Allowance of Appeal is **DENIED**.

## APPENDIX B

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT O.P. 65.37**

**IN THE SUPERIOR COURT OF PENNSYLVANIA**

**No. 2260 EDA 2023**

**[Filed February 2, 2024]**

| | |
|---|---|
| THEODORE WORNER AND ADELINA WORNER | ) |
| v. | ) |
| LAUREN N. STONE Appellant | ) |

Appeal from the Order Entered August 23, 2023
In the Court of Common Pleas of Philadelphia County
Domestic Relations at No(s): XC2200813

BEFORE: LAZARUS, P.J., PANELLA, P.J.E., and COLINS, J.*

MEMORANDUM BY PANELLA, P.J.E.:

**FILED FEBRUARY 2, 2024**

* Retired Senior Judge assigned to the Superior Court.

Lauren N. Stone ("Mother") appeals from the order filed in the Philadelphia County Court of Common Pleas that denied her exceptions and granted Theodore Worner and Adelina Worner ("Paternal Grandparents"), partial physical custody of their granddaughter, G.W. (d.o.b. 11/2018). We affirm.

Mother and G.W.'s father, Joey Worner ("Father"), separated in 2021, and Father subsequently died in March 2022. On November 28, 2022, Paternal Grandparents filed a Complaint for partial custody of G.W. pursuant to section 5325(1) of the Grandparents' Custody Act, which provides, in pertinent part, that "grandparents and great-grandparents may file an action … for partial physical custody or supervised physical custody … where the parent of the child is deceased[.]" 23 Pa.C.S.A. § 5325(1). The Custody Hearing Officer held a two-day hearing on the Complaint on February 1, 2023 and March 6, 2023, at which the following relevant facts were adduced.

Prior to June 2021, G.W. shared a close relationship with Paternal Grandparents and spent a significant amount of time with them. In 2019, Paternal Grandparents shared childcare responsibilities with Lisa Stone ("Maternal Grandmother") when Mother returned to work. ***See*** N.T. Hearing, 2/01/23, at 20. In September 2020, Paternal Grandparents assumed full-time care of G.W. on Tuesdays through Fridays. ***See id.*** at 18-21, 61-62; N.T. Hearing, 3/06/23, at 56. Paternal Grandparents introduced videos into evidence that showed how happy G.W. was in their care. ***See*** N.T. Hearing, 2/01/23, at 22-26.

In June 2021, G.W. suffered an elbow dislocation while at Paternal Grandparents' home. Paternal Grandmother explained that G.W. forcefully pulled away while she was changing her, almost falling off the table. ***See id.*** at 49-50. In an effort to avoid the fall, Paternal Grandmother caught G.W.'s elbow, causing it to come out of its socket, a condition called, "nursemaid's elbow." ***Id.*** at 50; ***see id.*** at 51-52, 100. Paternal Grandfather contacted Mother, who immediately took G.W. to the hospital, where staff easily put her elbow back in its socket. G.W. did not require x-rays or follow-up care, has no long-term injury, and neither hospital staff nor Mother or Father contacted DHS about the incident. ***See id.*** at 108.

Soon after the incident, Paternal Grandfather texted Mother to check on G.W., and Mother said that G.W. was "feeling fine Just a little sore." N.T. Hearing, 3/06/23, at 81-82, 84. Mother admitted she had experienced nursemaid's elbow as a child herself and it "wasn't a big deal." N.T. Hearing, 2/01/23, at 57, 68. However, Mother testified that, after the June 2021 incident, Mother and Father decided to no longer have Paternal Grandparents take care of G.W. ***Id*** at 1, 106. This conflicted with text message evidence introduced by Paternal Grandparents that reflected Mother and Father told them that they no longer needed to care for G.W. because she had been on a waiting list to attend a particular daycare and finally had been approved around that time. Mother claimed that they only told Paternal Grandparents this story so as not to hurt their feelings.

Over the years, Father had been in and out of drug rehabilitation facilities for his substance abuse issues. ***See id.*** at 77; N.T. Hearing, 3/06/23, at 36. After Mother and Father separated in October 2021, Father lived with Paternal Grandparents who saw G.W. during his periods of custody, which Mother conceded G.W. enjoyed. ***See*** N.T. Hearing, 2/01/23, at 59, 65-67. In October 2021, Father even left G.W. alone with Paternal Grandparents for a couple of hours. ***Id.*** at 67. In January 2022, Father entered an in-patient rehabilitation program. He was discharged in February 2022, but subsequently died on March 27, 2022. ***Id.*** at 63.

After Father's funeral, Mother brought G.W. to Paternal Grandparents' home to pick up a check, which contained donations Paternal Grandmother had requested for G.W. and Mother in lieu of flowers. ***See id.*** at 29. Mother also brought G.W. to the home one other time to pick up Father's death certificate so she could apply for social security benefits. ***See id.*** at 14-15, 71. After that, Mother "ghosted" Paternal Grandmother and would not let Paternal Grandparents see G.W., including preventing them from having any contact when they dropped off Easter and Halloween gift baskets for her. ***Id.*** at 79; ***see id.*** at 15, 27-28.

Although Mother and Paternal Grandmother have no relationship anymore and Mother does not communicate with any other members of G.W.'s paternal family, Mother testified that she and Paternal Grandfather text regularly, have a good relationship and that she trusted him to care for G.W. ***See id.*** at 84; N.T. Hearing, 3/06/23, at 71. In fact, in July 2021,

Mother texted Paternal Grandfather to wish him a happy birthday. ***See*** N.T. Hearing, 3/06/23, at 88.

Because the parties did not conclude testimony on February 1st, the Hearing Officer scheduled a second day to continue the hearing, March 6th. At the commencement of the March 6th hearing, Mother mentioned her intent to present the testimony of Maternal Grandmother for the first time. ***See id.*** at 7. When asked for a proffer, Mother's counsel explained that Maternal Grandmother would testify about her interactions with Paternal Grandparents, what she witnessed of them and how they treated G.W. and Mother. ***See id.*** at 8. Paternal Grandparents' counsel stipulated that Maternal Grandmother's testimony would be negative toward his clients. The Hearing Officer precluded Maternal Grandmother from testifying due to the unfair surprise and the fact that her testimony would be cumulative.

On March 10, 2023, the Hearing Officer entered the Proposed Order and Findings of Custody Hearing Officer. She recommended that Paternal Grandparents have partial physical custody of G.W. for at least four hours, once a month, at a time agreed to by Mother, but if the parties could not agree, custody would be on the third Saturday of each month. The Officer found that G.W. and Paternal Grandparents "enjoyed a significant [and] loving relationship[,] [and that] limited partial custody, overseen by Paternal Grandfather," was not only in the best interest of G.W. but it also addressed any safety concerns of Mother. Proposed Order and Findings of Custody Hearing Officer, 3/10/23, at 4.

Mother timely filed fifteen exceptions to the recommendation, and the trial court held a hearing on them on August 23, 2023. It denied the exceptions and adopted the Proposed Order and Findings. Mother timely appealed and contemporaneously filed a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(a)(2)(i) and (b). She also filed a motion for stay pending appeal that the court denied.

On appeal, Mother raises one claim for our review in which she argues that the trial court abused its discretion in adopting the Proposed Order and Findings of the Hearing Officer and granting partial physical custody of G.W. to Paternal Grandparents over her objection. ***See*** Mother's Brief, at 1. She maintains the court did not apply either the "special weight" to her decision about G.W. that federal law requires under ***Troxel v. Granville***, 530 U.S. 57 (2000), or the "clear and convincing evidence" standard required by Pennsylvania law. ***See id.*** In the argument section of her brief, Mother also complains that the Hearing Officer erred when she precluded maternal grandmother from testifying.[1] ***See id.*** at 31.

Our standard of review of these claims is deferential:

> Our standard of review over a custody order is for a gross abuse of discretion. Such an abuse of discretion will only be found if the trial court,

---

[1] Although it is well-settled that "[n]o question will be considered unless it is stated in the statement of questions involved or is fairly suggested thereby," we will provide a brief review of this claim. Pa.R.A.P. 2116(a).

> in reaching its conclusion, overrides or misapplies the law, or exercises judgment which is manifestly unreasonable, or reaches a conclusion that is the result of partiality, prejudice, bias, or ill-will as shown by the evidence of record.
>
> In reviewing a custody order, we must accept findings of the trial court that are supported by competent evidence of record, as our role does not include making independent factual determinations. In addition, with regard to issues of credibility and weight of the evidence, we must defer to the trial court who viewed and assessed the witnesses first-hand. However, we are not bound by the trial court's deductions or inferences from its factual findings. Ultimately, the test is whether the trial court's conclusions are unreasonable as shown by the evidence of record. We may reject the conclusions of the trial court only if they involve an error of law, or are unreasonable in light of the sustainable findings of the trial court.

***Rogowski v. Kirven***, 291 A.3d 50, 60-61 (Pa. Super. 2023) (internal citations, brackets, and quotation marks omitted).

Here, the trial court adopted the Proposed Order and Findings of the Custody Hearing Officer after the parties appeared at a custody conference before her. In such a situation we have explained:

> Where ... the parties proceed by agreement before a hearing officer on the issues of standing

> and partial custody for purposes of visitation, the trial court is required to make an independent review of the record to determine whether the hearing officer's findings and recommendations are appropriate. ***See generally*** Pa.R.C.P. 1915.4-1, 1915.4-2. Although advisory, the hearing officer's report and recommendations are given the fullest consideration particularly on the issue of credibility of witnesses, which the trial court is not empowered to second-guess. ***See generally Neil v. Neil***, 731 A.2d 156 (Pa. Super. 1999) (holding that reviewing court may not second-guess hearing officer's credibility determinations).

***K.B. v. M.F.***, 247 A.3d 1146, 1150 (citation omitted).

Mother first claims the trial court abused its discretion by adopting the Findings and Proposed Order because granting partial custody to Paternal Grandparents violated her federal due process rights and failed to give her decisions regarding G.W. the "special weight" identified in ***Troxel***. Mother's Brief, at 1.

We first consider whether this argument is properly before us or whether, as the trial court found and Paternal Grandparents maintain, Mother waived the argument by raising it for the first time in her Rule 1925(b) statement. ***See*** Trial Court Opinion, 10/03/23, at 15-16; Appellees' Brief, at 10-11.

It is well-settled that "[i]ssues not raised in the trial court are waived and cannot be raised for the first time

on appeal." Pa.R.A.P. 302(a); As such, issues raised for the first time in a Rule 1925(b) statement are waived. ***see Estate of O'Connell ex. rel. O'Connell v. Progressive Ins. Co.***, 79 A.3d 1134, 1140 (Pa. Super. 2013)..

Our review of the record confirms the observation of the trial court and Paternal Grandparents that Mother raised her arguments about the Hearing Officer's failure to apply the "special weight" identified in ***Troxel*** or that granting Paternal Grandparents partial physical custody violates her federal due process rights for the first time in her Rule 1925(b) statement. Therefore, these claims are waived. ***See Estate of O'Connell***, 79 A.3d at 1140; Pa.R.AP. 302(a).

However, even if not waived, Mother's claims would not merit relief.

Similar to the circumstances before us, ***Troxel*** involved a grandparent seeking partial physical custody of a grandchild after a parent's death. The United States Supreme Court found the Washington statute on which the grandparent relied to be unconstitutionally broad because it directed "that **any** person may petition the court for visitation at **any** time." ***J. & S.O. v. C.H.***, 206 A.3d 1171, 1177 (Pa. Super. 2019) (citing ***Troxel***, 530 U.S. at 67) (emphases in original). However, in ***J. & S.O.*** this Court concluded that ***Troxel***'s holding was inapplicable to the Pennsylvania Grandparents' Custody Act because section 5325(1) is narrowly tailored to grandparents whose child has died. ***See id.*** at 1177-78.

Additionally, although Mother argues the Grandparents' Custody Act is "constitutionally infirm because it does not require [] a showing of harm" before a court may intervene into a fit parent's authority, the Pennsylvania Supreme Court rejected such an argument in ***Hiller v. Fausey***, 904 A.2d 875 (Pa. 2006). Mother's Brief, at 17-18 n.1. There, the Court concluded that, although proof of "significant harm" could justify longer periods of visitation, such harm is implicit in the statute and "requiring grandparents to demonstrate that the denial of visitation would result in harm in every [section 5325(1)] case would set the bar too high, vitiating the purpose of the statute and the policy [of ensuring] the continued contact between grandchildren and grandparents when a parent is deceased." ***Id.*** at 890; ***see id.*** at 890 n.24.

Moreover, Mother's focus on the language of ***Troxel*** that she should have been afforded "special weight" that is somehow more than the presumption already afforded to such parents is not availing. As explained further in Justice Newman's concurrence in ***Hiller***, in cases involving grandparent custody, "the court must presume that a fit parent's decision is in the best interest of the child, and the court may reach a decision contrary to the wishes of the parent only if there is evidence sufficient to overcome that presumption. ***Troxel*** goes no further." ***Id.*** at 902; ***see also J. & S.O.***, 206 A.3d at 1177 (holding that the Pennsylvania Grandparents' Custody Act does not violate the surviving parent's due process rights).

Therefore, as aptly observed by the Paternal Grandparents, "[t]he ultimate decision [of when to

grant custody to grandparents] is based on the amount of prior contact that grandparents had with the child, whether an award would interfere with the parent-child relationship, and what is in the best interest of the child." ***See*** N.T. Hearing, 3/06/23, at 161; ***see also*** 23 Pa.C.S.A. § 5328(c). This is precisely what the Hearing Officer considered when reaching her decision. ***See*** Proposed Order and Findings of Custody Hearing Officer, 3/10/23, at 4 (finding G.W. spent approximately four days a week with Paternal Grandparents with whom she had loving, close relationship until Mother stopped all contact; that a narrowly tailored custody order would not interfere with G.W. and Mother's relationship; and spending time with her deceased father's family is in G.W.'s best interest). Mother's claim that the custody order violates her federal constitutional rights and ***Troxel*** lacks merit.

Mother next argues her Pennsylvania Constitutional rights were violated because the Custody Hearing Officer failed to apply the clear and convincing evidence standard before granting Paternal Grandparents partial physical custody. ***See*** Mother's Brief, at 21.[2]

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[2] Paternal Grandparents maintain that Mother is relying on an incorrect legal burden for this argument because this burden is found in Section 5327, which only applies where a party is seeking primary physical custody. ***See*** Paternal Grandparents' Brief, at 13; 23 Pa.C.S.A. § 5327(b). This is not persuasive because a review of Mother's brief reveals she only mentioned Section 5327(b) when directly quoting the Hearing Officer. ***See*** Mother's Brief, at 11; Proposed Order and Findings of Custody Hearing Officer, 3/10/23, at 3..

"[I]n a dispute between a parent and … a grandparent, the parent has a *prima facie* right to custody which will be forfeited only if convincing reasons appear that the child's best interest will be served by an award to [the grandparent]." ***Douglas v. Wright***, 801 A.2d 586, 590-91 (Pa. Super. 2002) (citation omitted). "The burden is on grandparents seeking rights under [section 5325(1)] to demonstrate that partial custody or visitation in their favor is in the child's best interest and will not interfere with the parent-child relationship." ***Id.*** (citations omitted).

In addition to the sixteen custody factors outlined in section 5328(a), when deciding whether to award partial physical custody to a grandparent who has standing pursuant to section 5325(1), as we stated previously, the tribunal must consider: (1) the amount of personal contact between the child and the party prior to the filing of the action, (2) whether the award interferes with any parent-child relationship, and (3) whether the award is in the best interest of the child. ***See*** 23 Pa.C.S. § 5328(c); ***see also*** 23 Pa.C.S.A. § 5328(a).

"[T]he goal in each case is to foster those relationships which will be meaningful for the child, while protecting the child from situations which would have a harmful effect. Factors to consider in determining the best interests of the child include the child's 'physical, intellectual, emotional and spiritual well-being.'" ***Douglas***, 801 A.2d at 591 (citations omitted).

Instantly, the Custody Hearing Officer explained:

> Paternal Grandparents are requesting partial physical custody of the child. Mother, however, feels that Paternal Grandparent[s] should not be afforded any custodial time with the child. Paternal Grandparents shared a loving, close relationship with the child until she was injured. Then, both Mother and Father decided together to revoke their consent and deny Paternal Grandparents unsupervised time with the child. Unfortunately, the [c]ourt does not have the benefit of Father's testimony to know how strongly Father felt about the situation. The [c]ourt cannot ascertain whether Father agreed with Mother to keep the peace or whether he felt as vehemently as Mother did. Prior to Father's death, he was living with Paternal Grandparents and their custody rights would have been derivative of Father's rights. Sadly, Father has passed and the [c]ourt must now consider if it is in child's best interest to never see her grandparents again as Mother has requested.
>
> Prior to the child's injury, the child enjoyed a significant relationship with Paternal Grandparents. The child saw them nearly every day and it is clear from the demeanor of Paternal Grandparents, video evidence presented, and text message evidence discussed in the hearing that the child shared a loving relationship with Paternal Grandparents. An award of partial physical custody would not

> interfere with the parent child relationship. Mother testified she and the child share a close bond. An appropriately tailored award of custodial time to Paternal Grandparents would not be overly burdensome or interfere with the child's scheduled activities. As Paternal Grandparent[s'] counsel argued, their intent is not to replace Mother or Father in the child's affection but to maintain the loving relationship they had developed with their granddaughter. Finally, this Custody Hearing Officer believes it would be in the child's best interest to award Paternal Grandparents partial physical custody. One of the factors the [c]ourt must consider in determining the best interest of the child is the availability of extended family. Now more than ever, it is important for the child to remain connected to Father's extended family. Mother testified that she has lost contact with other members of Father's extended family following the discord with Paternal Grandparents. Providing limited custodial time, overseen by Paternal Grandfather, provides the child the opportunity to remain connected with Father's extend[ed] family while addressing Mother's safety concerns.

Custody Hearing Officer's Report and Recommendation, 3/10/23, at 4.

Based on our independent review of the record, we discern no abuse of discretion. The record confirms that prior to Mother denying Paternal Grandparents any contact with G.W., they had a loving relationship with

her in which they saw her multiple times per week. The state has a strong interest in preserving this relationship between G.W. and her deceased father's family. The narrowly tailored order only grants Paternal Grandparents four hours per month with their grandchild, with Paternal Grandfather, with whom Mother admits she has a good relationship, present at all times. Mother's claim that the Paternal Grandparents failed to produce sufficient evidence to support the partial custody award lacks merit.

Nor are we persuaded by Mother's summary claims that the Custody Hearing Officer failed to apply certain custody factors.

The Custody Act provides, in pertinent part, that, "in ordering any form of custody, the court shall determine the best interest of the child by considering …

> (4) The need for stability and continuity in the child's education, family life and community life[,] … (9) Which party is more likely to maintain a loving, stable, consistent and nurturing relationship with the child adequate for the child's emotional needs[, and] (13) The level of conflict between the parties and the willingness and ability of the parties to cooperate with one another. A party's effort to protect a child from abuse by another party is not evidence of unwillingness or inability to cooperate with that party.

23 Pa.C.S.A. § 5328(a)(4), (9), (13).

Mother's entire argument in support of this issue is that:

> [T]he lower court incorrectly applied factor 4 in light of the evidence showing that mother has been the primary source of stability and safety for the child. The lower court incorrectly applied factor 9 in light of the evidence showing that the mother has maintained a loving, stable, consistent, and nurturing relationship with the child and has supported her emotional needs. The lower court incorrectly applied factor 13 in light of the evidence showing a high degree of conflict between the mother and the paternal grandparents at the time of the grandparents' petition.

Mother's Brief, at 30-31.

No one disputes that Mother has been G.W.'s primary source of stability who maintains a loving environment for her. Paternal Grandparents' four hours per month certainly will not conflict with this. Also, although Mother and Paternal Grandmother seem to have a contentious relationship, Mother and Paternal Grandfather have a good one and he will be present during any custodial time. Mother's argument lacks merit.

Finally, Mother contends that the Custody Hearing Officer abused her discretion when she precluded Maternal Grandmother from testifying, thereby infringing on Mother's due process rights to a fair trial. ***See*** Mother's Brief, at 31. We disagree.

It is well-settled that our standard of review of the Custody Hearing Officer's evidentiary ruling is for an abuse of discretion. ***See Commonwealth v. Walter***, 93 A.3d 442, 450 (Pa. Super. 2014) (citation omitted). "[P]rocedural due process requires, at its core, adequate notice, opportunity to be heard, and the chance to defend oneself before a fair and impartial tribunal having jurisdiction over the case. Due process is flexible and calls for such procedural protections as the situation demands." ***Interest of K.L.***, 296 A.3d 1267, 1272 (Pa. Super. 2022) (citation omitted).

In this case, Mother had the opportunity to be heard over the course of a two-day hearing. Specifically, the Custody Hearing Officer conducted a hearing on February 1, 2023, and when it became evident that the parties would not finish, she scheduled a second day for March 6, 2023. Mother, who was represented by two different counsel, had the opportunity to testify on her own behalf, present evidence and cross-examine Paternal Grandparents.

At the March 6, 2023 hearing, Mother advised, for the first time, that she intended to present Maternal Grandmother as a witness, proffering that Maternal Grandmother would testify "about her interactions with the Paternal Grandparents, and what she's witnessed, with how the Paternal Grandparents are with [G.W.], as well as how the Paternal Grandparents are with [Mother]." N.T. Hearing, 3/06/23, at 8. Paternal Grandparents' counsel argued that Maternal Grandmother's testimony was irrelevant and he agreed to stipulate that she would "say negative things about

[his] client[s], and they behaved badly, and that they don't behave well with the child." ***Id.*** at 124.

We discern no abuse of discretion in the Hearing Officer's preclusion of this testimony on the bases that the lack of notice prejudiced Paternal Grandparents and because her proposed testimony would be cumulative of Mother's. ***See id.*** at 130. Mother's final issue lacks merit.[3]

In their response brief, Paternal Grandparents seek attorney's fees, arguing that this appeal is frivolous and brought only to delay their seeing G.W. ***See*** Paternal Grandparents' Brief, at 21-23. It is well-settled that "[t]he general rule is that the parties to litigation are responsible for their own counsel fees and costs unless otherwise provided by statutory authority, agreement of the parties, or some other recognized exception." ***Wrenfield Homeowners Ass'n, Inc. v. DeYoung***, 600 A.2d 960, 962 (Pa. Super. 1991). Pursuant to Pa.R.A.P. 2744, this Court may award reasonable counsel fees if we "determine[] that an appeal is frivolous or taken solely for delay or that the conduct of the participant against whom costs are to be imposed is dilatory, obdurate or vexatious." Pa.R.A.P. 2744(1).

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[3] We are not persuaded by Mother's reliance on ***Commonwealth v. Ward***, 605 A.2d 796 (Pa. Super. 1992), in support of this issue. ***See*** Mother's Brief, at 32. ***Ward*** was a criminal case in which the trial court precluded the testimony of a police detective that individuals other than the defendant had a motive to commit the crime at issue. This is wholly irrelevant to the situation here, where Mother sought to introduce a surprise witness in a custody trial whose testimony would have been cumulative.

We deny Paternal Grandparents' request. While ultimately we conclude that Mother's appeal lacks merit, we cannot find that, on their face, the issues raised by Mother could only be perceived as frivolous delay tactics justifying sanctions.

Order affirmed.

Judgment Entered.

/s/ Benjamin D. Kohler
Benjamin D. Kohler, Esq.
Prothonotary

Date: 2/2/2024

## APPENDIX C

**IN THE COURT OF COMMON PLEAS**
**PHILADELPHIA COUNTY**
**FAMILY COURT DIVISION**

**Docket No. XC2200813**

**Superior Court**
**Docket No. 2260 EDA 2023**

**[Filed October 4, 2023]**

| | |
|---|---|
| Theodore Worner and | ) |
| Adelina Worner, | ) |
| Appellees, | ) |
| | ) |
| v. | ) |
| | ) |
| Lauren N. Stone, | ) |
| Appellant. | ) |
| | ) |

Palmer, J.

### OPINION

Appellant Mother, Lauren N. Stone is the mother of G.W., age 4, born [redacted], 2018. Appellees Theodore Worner and Adelina Worner are the paternal grandparents of G.W.. The child's Father, Joseph Worner, is deceased, having died on March 27, 2022.

This appeal, filed by Mother, arises from a Final Custody Order entered on August 23, 2023 denying

Mother's Exceptions filed to the Proposed Order of Custody for Paternal Grandparents to have partial physical custody by agreement of the Mother or for a period of four hours each month. This court requests that the Superior Court of Pennsylvania affirm the order of August 23, 2023. The factual and procedural history are set forth below.

## FACTUAL BACKGROUND & PROCEDURAL HISTORY

Paternal Grandparents filed a Complaint for Custody on November 28, 2022, seeking partial physical custody of their grandchild G.W. following the death of their son, Joseph Worner, seven months prior. Mother had cut off contact between G.W. and her Paternal Grandparents and paternal relatives following the funeral of Father.

Mother and Paternal Grandparents participated in a two-day record hearing pursuant to Pa. R.C.P. 1915.4-2(b) before Hearing Officer Lauren McCulloch, Esquire on February 1, 2023 and on March 6, 2023. Both parties were represented by counsel at the hearing dates, however, Mother retained new counsel after the first day of testimony.

The hearing testimony showed that Paternal Grandparents live alone in a three-bedroom house. Mother and the child reside with Maternal Grandmother. Mother has always been the child's primary caregiver. Mother and Father lived together with the child in their own apartment until October 31, 2021. After their separation, Father then resided with Paternal Grandparents and Mother resided with

Maternal Grandmother. Father suffered from a substance use disorder and had been in and out of drug rehabilitation centers over the years, most recently in January 2022. Father was discharged from a rehabilitation center sometime in February 2022 and died in March 2022.

Mother indicated that the Department of Human Services (DHS) has never been involved with this child. Mother has no known criminal history in Pennsylvania.

Mother attends to the daily physical and emotional needs of the child and testified that she and the child share a strong bond. Mother reports that the child is thriving, participates in gymnastics, and attends Christian school on Sundays. Mother maintains a loving, stable, and consistent relationship with the child.

Neither counsel requested to have the Hearing Officer interview the child. Therefore, it was not possible to ascertain the preference of the child. However, since the child was only 4 years old, the child was too young to testify.

Paternal Grandmother testified that she began providing care for the child two to three days a week in 2019 and then began watching the child fulltime in September 2020 when the parents were working. Mother testified that she stayed home with the child for the first year following her birth and then went back to work on a part-time basis. Mother stated that Maternal Grandmother and Father watched the child while Mother worked. Mother's testimony was contradictory in this regard. She initially agreed that

Paternal Grandmother participated in babysitting the child during this period but subsequently insisted that Paternal Grandmother did not watch the child until September 2020. The parties all agreed that Paternal Grandparents provided care for the child while the parents worked from Tuesday through Friday beginning in September 2020.

All parties agreed that Paternal Grandparents were no longer permitted to provide childcare following an incident in June 2021 in which the child's arm was pulled from the socket by Paternal Grandmother. Paternal Grandparents testified that Paternal Grandmother was checking the child's diaper and the child pulled away in a manner where the child was going to fall, and Paternal Grandmother caught the child by her arm which caused it to come out of socket - a condition called, "nursemaid's elbow." Mother was not present for the incident. When the injury occurred, Paternal Grandfather contacted Mother to take the child to the hospital.

Mother alleged that Paternal Grandmother pulled on the child's arm forcefully enough to pull it from the socket, but also testified that Mother herself had the same condition as a child. The parents took the child to the hospital. The child's arm was easily repaired, no x-ray was required, and she has no lasting injury. She was discharged from the hospital the same day. Neither Mother, Father, nor anyone at the hospital, contacted DHS regarding the child's injury. There was no child abuse or neglect investigation.

The following day, Paternal Grandmother came to the house to apologize to the parents and the child for

the accident, bringing gifts and flowers. Paternal Grandmother testified that Mother told her it "wasn't a big deal." N.T. February 1, 2023, p. 57.

Mother testified that she and Father discussed the child's injury and agreed not to leave the child alone with Paternal Grandparents going forward. The child was enrolled in daycare and Mother and Father split the cost. Paternal Grandparents' counsel presented text message evidence that Mother and Father told Paternal Grandparents that the child had been on a waitlist at a particular preschool for more than a year and had been accepted. Mother testified that they told Paternal Grandparents that because Father did not want to hurt their feelings. Mother testified that Father was present with the child for subsequent visits at Paternal Grandparent's home until the time Father passed away. Paternal Grandparents testified Father left the child in their care in October 2021 for a couple of hours.

In September 2021, Father relapsed, and Mother found him either "asleep or dead" in his car outside and she called Paternal Grandparents to come over to help. When Father was revived, Father and Paternal Grandfather had a physical altercation about the incident.

The text message evidence presented by Paternal Grandparent's counsel also illustrated that Mother had a friendly relationship with Paternal Grandfather. Mother testified that she trusted Paternal Grandfather with the child and texted back and forth with him frequently. Even after the child's injury, Paternal Grandparents were seeing the child monthly when

Father brought her over or when they came over to see the child. Mother continued a cordial text relationship with Paternal Grandfather. Mother described their relationship as "genuine."

Following the funeral for Father, Mother ended the child's contact with Paternal Grandparents. Prior to the funeral, Mother and Paternal Grandfather continued to communicate and Mother agreed they continued to have a "nice" relationship. "Yeah, especially after he passed away. It was very traumatic." N.T., March 6, 2023, p. 115.

Paternal Grandmother testified that after the funeral, in April 2022, Mother brought the child to their house to pick up a check for $2,355. Paternal Grandmother had requested donations for Mother and the child in lieu of flowers for the funeral and wanted to give the check to Mother. Mother came over one other time to pick up the death certificates so Mother could apply for Social Security. Paternal Grandmother testified that after those two times, Mother "ghosted" them. Mother testified that Paternal Grandmother confronted her threatening custody litigation about their "rights" to the child and Mother then cut off contact and retained counsel. Paternal Grandparents contacted Mother and sought contact with the child on Easter and Halloween as they had done in the past. They dropped off Easter baskets and Halloween gifts for the child but were not permitted to see the child by Mother.

The hearing testimony reflected that it was uncontested that Paternal Grandparent's relationship with the child began with the consent of both Mother

and Father. Paternal Grandparents shared a loving, close relationship with the child until she was injured. After June 2021, while they no longer provided daily childcare for the child, they still maintained a grandparent relationship with monthly contact until the parties' separation and Father's in-patient drug rehabilitation program in January and February 2022, just prior to his death in March 2022.

> Prior to the child's injury, the child enjoyed a significant relationship with Paternal Grandparents. The child saw them nearly every day and it is clear from the testimony and demeanor of Paternal Grandparents, video evidence presented, and text message evidence discussed in the hearing that the child shared a loving relationship with Paternal Grandparents.

Report, March 10, 2023, p. 4.

Mother conceded that her relationship with Paternal Grandfather was "very cordial" and she trusted him with the child. Even after the June 2021 incident, Mother and Paternal Grandfather texted about the child very frequently and told each other "We love you." The Hearing Officer found that an award of partial physical custody would not interfere with the parent child relationship:

> Mother testified that she and the child share a close bond. An appropriately tailored award of custodial time to Paternal Grandparents would not be overly burdensome or interfere with the child's scheduled activities. As Paternal Grandparent's counsel argued, their intent is not

> to replace Mother or Father in the child's affection but to maintain the loving relationship they had developed with their granddaughter.

Report, March 10, 2023, p. 4.

Finally, the Custody Hearing Officer found it would be in the child's best interest to award Paternal Grandparents partial physical custody:

> One of the factors the Court must consider in determining the best interest of the child is the availability of extended family. Now more than ever, it is important for the child to remain connected to Father's extended family. Mother testified that she has lost contact with other members of Father's extended family following the discord with Paternal Grandparents. Providing limited custodial time, overseen by Paternal Grandfather, provides the child the opportunity to remain connected with Father's extend family while addressing Mother's safety concerns.

Report, March 10, 2023, p. 4.

Following the Hearing, the Hearing Officer identified and properly applied all the relevant statutes to testimony presented in the case and detailed those in her Report and Recommendation to the Court as follows:

While neither counsel raised any objection as to standing for the Paternal Grandparents, the Hearing Officer addressed the relevant statutes, finding that, Paternal Grandparents have standing under 23 Pa.

C.S. § 5325(1). It was uncontested that Father, Joseph Worner, passed away on March 27, 2022. Paternal Grandparents presented an original death certificate at the hearing. Paternity was established and all parties agreed that Joseph Worner was the child's father. As Paternal Grandparents are only requesting partial physical custody, they have standing pursuant to 23 Pa.C.S. § 5325(1).

In her Report, the Hearing Officer also identified and addressed the sixteen custody factors set forth in 5328(a) and the additional considerations for grandparent custody set forth in 23 Pa. C.S. § 5328(c), which includes, "the amount of personal contact between the child and the party prior to the filing of the action, whether the award interferes with any parent-child relationship, and whether the award is in the best interest of the child."

The Hearing Officer addressed in the Report the presumption and burden set forth in 23 Pa. C.S. § 5327(b), that custody shall go to the parent in an action between a parent and a third-party. That presumption can be rebutted by clear and convincing evidence.

Lastly, the Hearing Officer's Report addressed the safety concerns and enumerated convictions pursuant to 23 Pa. C.S. § 5329. The Hearing Officer properly conducted the initial evaluation of Paternal Grandfather's enumerated conviction under 23 Pa. C.S. § 5329(c) finding that the most recent conviction is from 1997. "Given the age of these convictions and the fact that Mother and Father trusted Paternal Grandfather with the child's care, this Custody

Hearing Officer finds that Paternal Grandfather poses no risk of harm to the child ." Report, March 10, 2023, p. 3. Additionally, the Hearing Officer noted that neither party nor their counsel raised the issue at the hearing. Paternal Grandmother and Mother have no known criminal history in Pennsylvania.

The Hearing Officer prepared the Report and Recommendation and Proposed Order on March 10, 2023 in consideration of the testimony, credibility determinations, and evidence offered at the hearing by petitioner Paternal Grandfather, co-petitioner Paternal Grandmother, and respondent Mother, including all the factors listed under 23 Pa. C.S. § 5328(a), finding the following to be in the child's best interest:

> The Complaint for Partial Physical Custody regarding the child G.W., born [redacted], 2018, filed 11/29/2022 by Paternal Grandparents, Theodore and Adelina Worner, is hereby granted.
>
> Mother, Lauren Stone, shall have sole legal and primary physical custody of the child.
>
> Paternal Grandparents shall have partial physical custody of the child as agreed and arranged with Mother. Paternal Grandparents shall have at least one day-visit each month spending at least four hours with the child. If the parties cannot agree, then Paternal Grandparents shall have partial physical custody of the child the third Saturday of each month from 10:00 a.m. to 2:00 p.m. at Paternal Grandparents' home.

> Paternal Grandparents' custodial time shall be overseen by Paternal Grandfather. The child shall not be left alone with Paternal Grandmother. Paternal Grandfather shall keep Mother informed of where the child will be during Paternal Grandparent's custodial time and of the child's wellbeing. Mother shall not interfere with Paternal Grandparents' custodial time.

Mother timely filed Exceptions on April 4, 2023, raising fifteen Exceptions to the Proposed Order of Custody issued on March 10, 2023 as follows:

> a. The Hearing Officer failed to act in the best interest of the Child.
>
> b. The Hearing Officer incorrectly recommended partial physical custody to the Plaintiffs.
>
> c. The Hearing Officer incorrectly recommended Theodore Worner supervise Adelina Worner.
>
> d. The Hearing Officer incorrectly sustained Plaintiffs' objections and thus precluded Mother from testifying and introducing evidence of Plaintiffs' violent behavior and abuse.
>
> e. The Hearing Officer incorrectly disallowed Defendant's mother from testifying despite her being an eyewitness to much of the abuse inflicted by Plaintiffs.

f. The Hearing Officer failed to recognize evidence of Father's intent for the Child not to have a relationship with Plaintiffs prior to his passing.

g. The Hearing Officer incorrectly assumed that the Child would be safe within the Plaintiffs' care.

h. The Hearing Officer misapplied the law by expanding the Plaintiffs' rights by recommending they have more time with the Child than prior to when the Child's Father passed and prior to their filing.

i. The Hearing Officer failed to give the appropriate weight to the considerations required pursuant to 23 Pa.C.S. Section 5328(c), by recommending a partial physical custody schedule that substantially increases the personal contact between the Child and Plaintiffs prior to the filing of the action, interferes with the parent-child relationship, and is against the best interest of the Child.

j. The Hearing Officer incorrectly applied custody factor 2 wherein Mother had significant concerns regarding the paternal grandparents' history of violence. Mother attempted to testify regarding more violence she witnessed and it was improperly objected to at the time of the proceeding. Despite this, the Hearing Officer seemingly recommended that the Plaintiffs' are to supervise themselves.

k. The Hearing Officer incorrectly applied custody factor 4 wherein Mother is and has been the primary source of stability and safety of the child. Despite this, she has always attempted to allow the Child to have a safe relationship with her family and has used proper parental judgement with regard to her hesitation in allowing the Child around the Plaintiffs.

l. The Hearing Officer incorrectly applied custody factor 9 wherein Mother has maintained a loving, stable, consistent, and nurturing relationship with the child and has supported the child's emotional needs.

m. The Hearing Officer incorrectly applied custody factor 13 wherein it was clearly demonstrated in court the high conflict between the parties at the time of Plaintiffs' filings.

n. The Hearing Officer incorrectly applied custody factor 14 where in the Plaintiffs have a history of drug abuse within their home.

o. The Hearing Officer incorrectly applied custody factor 16 wherein, as a result of the child's biological parents making a decision on what is best for the child during Father's lifetime, Father's sporadic and infrequent contact with the child, Mother has been the primary caregiver, nurturer and stabilizing parent of the minor child from birth.

The Exceptions hearing was then scheduled for oral argument and the hearing transcripts and record were transmitted to this Judge. The Exceptions hearing was

held before this Judge on August 23, 2023, wherein counsel for Mother and counsel for Paternal Grandparents each presented oral argument on the Exceptions.

Following the hearing and upon an independent review of the record for the case, including the transcripts of the two-day hearing and the detailed proposed order, this Court entered an order denying the Exceptions and making the proposed order a final order of court. This appeal by Mother followed and was timely filed on September 5, 2023.

Mother also filed a Motion for Stay pending the appeal on September 5, 2023, which was denied on September 21, 2023.

**ISSUES RAISED ON APPEAL**

Mother filed a 1925(B) Statement of Errors Complained of on Appeal contemporaneously with her Notice of Appeal, setting forth nine errors of law as follows:

A. Whether granting custody and visitation rights for the paternal grandparents over the objection of the mother violates the mother's (appellant's) fundamental due process right as G.W.'s parent under the United States Constitution and Troxel v. Granville, 530 U.S. 57, 64, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000). where the decision is not based upon sufficient evidence and findings to overcome the decision of appellant, a fit parent. on what is in the best interests of her child, and where the decision failed to accord sufficient "special weight"' to the interest of appellant in making decisions regarding her child.

B. Whether granting custody and visitation rights for the paternal grandparents over the objection of the mother violates the mother's federal constitutional right where there was insufficient proof by the grandparents, and insufficient finding by the Court, that denial of the visitation the grandparents sought would result in harm to the child, but see Hiller v. Fausey, 588 Pa. 342, 904 A.2d 875 (2006), cert. denied, 549 U.S. 1304, 127 S.Ct. 1876, 167 L.Ed.2d 363 (2007) (upholding constitutionality of prior Pennsylvania statute with regard to petitioning grandparent where natural parent is deceased); J. & S.O. v. C.H. 2019 PA Super 91 (Mar. 27, 2019) (upholding constitutionality of current statute on same grounds).

C. Whether the Court violated Pennsylvania and federal law under Troxel, supra, in granting custody and visitation rights to the petitioning grandparents without sufficient finding and proof that the grandparents had carried their clear and convincing burden under 23 Pa.C.S. § 5327.

D. Whether the Court incorrectly applied and considered the statutory factors in granting unsupervised partial custody and visitation to the grandparents despite the evidence showing that the paternal grandmother, Adelina had abused or neglected the child; the mother and father previously had stopped visitation for the grandparents because of the abuse or neglect inflicted on the child, and the father had supervised visitation with the grandparents all other times; the paternal grandfather, Theodore, has a history of criminal convictions; and in light of the mother's overall concerns about. in particular,

unsupervised visitation by the paternal grandparents with the child.

E. Whether the Court incorrectly applied custody factor 4 in light of the evidence showing that the mother has been the primary source of stability and safety for the child.

F. Whether the Court incorrectly applied custody factor 9 in light of the evidence showing that the mother has maintained a loving, stable, consistent, and nurturing relationship with the child and has supported her emotional needs.

G. Whether the Court incorrectly applied custody factor 13 in light of the evidence showing a high degree of conflict between the mother and the paternal grandparents at the time of the grandparents' petition.

H. Whether the Court incorrectly applied custody factor 14 in light of the evidence showing that the grandparents have a history of drug abuse within their home.

I. Whether appellant's (mother's) right to a fair trial was violated by the hearing officer speaking to the attorney for the grandparents, and viewing evidence proffered by the grandparents, without the presence and participation of counsel for the mother; by disallowing testimony from the mother about other violence by the paternal grandparents; and by disallowing testimony by the maternal grandmother about abuse and neglect inflicted on the child by the paternal grandparents.

**ANALYSIS OF ISSUES RAISED ON APPEAL**

The standard of review for a final child custody order is well-established:

> In reviewing a custody order, our scope is of the broadest type and our standard is abuse of discretion. We must accept findings of the trial court that are supported by competent evidence of record, as our role does not include making independent factual determinations. In addition, with regard to issues of credibility and weight of the evidence, we must defer to the presiding trial judge who viewed and assessed the witnesses first-hand. However, we are not bound by the trial court's deductions or inferences from its factual findings. Ultimately, the test is whether the trial court's conclusions are unreasonable as shown by the evidence of record. We may reject the conclusions of the trial court only if they involve an error of law, or are unreasonable in light of the sustainable findings of the trial court.

C.R.F. v. S.E.F., 45 A.3d 441, 443 (Pa. Super. 2012) (citation omitted).

In this case, the parties appeared before a Hearing Officer for a two-day hearing, and this trial court adopted the Report and Recommendation of the Hearing Officer when the Exceptions were denied on August 23, 2023. The Superior Court has discussed a trial court's responsibilities with respect to custody actions that proceed before a hearing officer as follows:

> Where ... the parties proceed by agreement before a hearing officer on the issues of standing and partial custody for purposes of visitation, the trial court is required to make an independent review of the record to determine whether the hearing officer's findings and recommendations are appropriate. See generally Pa.R.C.P. 1915.4-1, 1915.4-2. Although advisory, the hearing officer's report and recommendations are given the fullest consideration particularly on the issue of credibility of witnesses, which the trial court is not empowered to second-guess. See generally Neil v. Neil, 731 A. 2d 156 (Pa. Super. 1999) (holding that reviewing court may not second-guess hearing officer's credibility determinations).

T.B. v. L.R.M., 753 A.2d 873, 881-882 (Pa. Super. 2000) (en banc).

Appellant Mother raises nine points of error in her 1925(B) Statement filed with her Notice of Appeal, which are consolidated and addressed below.

**Points A & B**
**Due Process Under United States Constitution**

The issues set forth in Points A and B allege an error that granting custodial rights to a grandparent over the objection of a parent violates a parent's fundamental rights to due process under the United States Constitution. Counsel for Mother did not bring a facial challenge to the constitutionality of 23 Pa. C.S. Section 5425 that grants grandparents standing in

child custody cases where a parent is deceased. The issues raised in Points A and B were raised for the first time in the 1925(B) Statement filed with this Notice of Appeal and are therefore waived. See Pa. R.A.P. 302(a) ("Issues not raised in the lower court are waived and cannot be raised for the first time on appeal").

Typically, in child custody procedure, objections as to a third party's right to file a custody case against a parent are raised in the form of Preliminary Objections pursuant to Pa. R.Civ.P. 1028(a)(5) as to standing. See C.G. v. J.H., 193 A.3d 891 (Pa. 2018). Mother's counsel never filed any responsive pleadings in the form of Preliminary Objections or an Answer, raising the issue of standing or the Constitutionality of the statute.

This issue was also not raised by counsel for mother at the two hearing dates before the Hearing Officer. In fact, both attorneys for Mother conceded the issue of standing at the hearing before the Hearing Officer – agreeing that 23 Pa. C.S. Section 5325(1) applied to this case where the child's Father is deceased, and parental grandparents seek only partial physical custody. N.T. February 1, 2023, p. 7-8.

Nowhere in the 15 Exceptions filed by counsel for Mother is there an assertion that granting custodial rights to a grandparent over the objection of a parent violates fundamental due process under the United States Constitution. Pa. R.C.P. 1915.4-2(b)(4) requires a party to raise such objections in the form of Exceptions or such objections are waived.

Pa. R.C.P. 1915.4-2(b)(4) sets forth as follows:

> Each exception shall set forth a separate objection precisely and without discussion. Matters not covered by exceptions are deemed waived unless, prior to the entry of the final order, leave is granted to file exceptions raising those matters.

Further, Mother's counsel did not present this issue at oral argument on the Exceptions on August 23, 2023. Mother's counsel did not request leave of the court to amend the Exceptions to include this argument.

Even if this issue is not waived, this question of whether the grandparent custody statute violates a parent's right to due process has already been addressed by the Pennsylvania appellate courts. The Superior Court has concluded that Section 5325(1), which allows grandparents to seek partial physical custody or supervised physical custody of their deceased child's children, does not violate the living parent's due process rights. J. & S.O. v. C.H., 206 A.3d 1171, 1177 (Pa. Super. 2019), appeal denied, --- Pa. ----, 216 A.3d 230 (2019). Mother's counsel even cites this case in the 1925(B) Statement of Errors. The Superior Court further noted:

> While recognizing that a parent has the fundamental right to make decisions regarding the care, custody, and control of their child, this Court found that the statutory provisions contained in Section 5325(1) are necessary to advance a compelling state interest in the protection of the health and emotional welfare of children, including ensuring that the child has an opportunity to have a relationship with the

> family of the child's deceased parent. Id. This Court also found that Section 5325(1) is "narrowly tailored to provide grandparents and great-grandparents standing to file for partial physical custody where the parent of the child is deceased."

Id. at 1176.

Therefore, the issues set forth in Appellant Mother's Points A and B do not set forth any cognizable errors of law.

**Point C**
**Failure to Meet Burden under Presumption at 23 Pa. C.S. Section 5327**

The error raised in Point C relates to the Court's application of the presumption set forth in 23 Pa. C.S. Section 5327 in cases between a parent and a third party. The crux of Mother's argument in C is that the Parental Grandparents failed to present clear and convincing evidence to rebut the statutory presumption in favor of awarding custody to Mother.

Section 5327 of the Custody Act provides that, "[i]n any action regarding the custody of the child between a parent of the child and a nonparent, there shall be a presumption that custody shall be awarded to the parent. The presumption in favor of the parent may be rebutted by clear and convincing evidence." 23 Pa. C.S. § 5327(b). The Superior Court has defined clear and convincing evidence "as presenting evidence that is so clear, direct, weighty, and convincing so as to enable the trier of fact to come to a clear conviction, without hesitation, of the truth of the precise facts in issue."

M.J.S. v. B.B. v. B.B., 172 A.3d 651, 660 (Pa. Super. 2017) (citations and internal quotation marks omitted).

In this case, Mother was awarded both primary physical and sole legal custody. Some cases have found that the statutory presumption set forth in Section 5327 is inapplicable in cases where a party seeks only partial or supervised custody, although the statute itself is not clear on this point. "[F]avoring an award of custody to parents over third-parties is inapplicable where grandparents seek only partial physical custody. K.T. v. L.S., 118 A.3d 1136, 1159 (Pa. Super. 2015)(citing 23 Pa. C.S.A. § 5327(b) (setting forth presumption in cases concerning primary physical custody)). Finally, a court must consider Pennsylvania's strong public policy "favoring grandparent involvement in a child's life." Id. at 1164.

In custody cases between a parent and a third party, "even before the proceedings start, the evidentiary scale is tipped, and tipped hard, to the biological parents' side." V.B. v. J.E.B., 55 A.3d 1193, 1199 (quoting Charles v. Stehlik, 744 A.2d 1255, 1258 (Pa. 2000). When making a decision to award primary physical custody to a nonparent, the trial court must "hear all evidence relevant to the child's best interest, and then, decide whether the evidence on behalf of the third party is weighty enough to bring the scale up to even, and down on the third party's side." Id. (quoting McDonel v. Sohn, 762 A.2d 1101, 1107 (Pa. Super. 2000)). There is no requirement that the third party prove that a parent is "unfit" as her counsel argued in the hearing. The standard has been described as follows:

> These principles do not preclude an award of custody to the nonparent but simply instruct the trial court that the nonparent bears the burden of production and the burden of persuasion and that the nonparent's burden is heavy. Jones v. Jones, 884 A.2d 915, 918 (Pa. Super. 2005). It is well settled, "[w]hile this Commonwealth places great importance on biological ties, it does not do so to the extent that the biological parent's right to custody will trump the best interests of the child. In all custody matters, our primary concern is, and must continue to be, the well-being of the most fragile human participant—that of the minor child." Charles, 744 A.2d at 1259. "Once it is established that someone who is not the biological parent is in loco parentis, that person **does not need to establish that the biological parent is unfit,** but instead must establish by clear and convincing evidence that it is in the best interests of the children to maintain that relationship or be with that person." Jones, 884 A.2d at 917 (emphasis in original).

R.L. v. M.A., 209 A.3d 391, 396 (Pa. Super. 2019)

Therefore, in this case, once the Paternal Grandparents were deemed to have standing, they did not need to establish that Mother was "unfit" or deficient in any of the Section 5328 custody factors; Paternal Grandparents merely needed to establish that it was in child's best interest to maintain a relationship with them. See Jones, 884 A.2d at 917.

Here, the Hearing Officer engaged in an analysis of the Section 5328 custody factors, applied the Section 5327(b) statutory presumption in favor of Mother, found that clear and convincing evidence rebutted that presumption, found that a limited partial physical custody schedule was in the child's best interest. This trial court agreed in approving the March 10, 2023 Report and Recommendations and properly denying Mother's exceptions. Accordingly, Appellant's issue raised in Point C, lacks merit.

**Points D, E, F, G, & H**
**Application of the Custody Factors Set Forth in 23 Pa. C.S. 5328(a)**

The errors alleged by Mother in Points D, E, F, G, and H are related to the Hearing Officer's application of the custody factors set forth in 23 Pa. C.S. § 5328(a) at factors 2, 4, 9, 13, and 14.

The Custody Act requires trial courts to consider all of the sixteen best interest factors set forth in Section 5328 in "ordering any form of custody." 23 Pa. C.S. § 5328(a). Specifically, Section 5328(a) of the Act provides as follows:

> § 5328. Factors to consider when awarding custody
>
> (a) Factors.–In ordering any form of custody, the court shall determine the best interest of the child by considering all relevant factors, giving weighted consideration to those factors which affect the safety of the child, including the following:

(1) Which party is more likely to encourage and permit frequent and continuing contact between the child and another party.

(2) The present and past abuse committed by a party or member of the party's household, whether there is a continued risk of harm to the child or an abused party and which party can better provide adequate physical safeguards and supervision of the child.

(2.1) The information set forth in section 5329.1(a)(1) and (2) (relating to consideration of child abuse and involvement with protective services).

(3) The parental duties performed by each party on behalf of the child.

(4) The need for stability and continuity in the child's education, family life and community life.

(5) The availability of extended family.

(6) The child's sibling relationships.

(7) The well-reasoned preference of the child, based on the child's maturity and judgment.

(8) The attempts of a parent to turn the child against the other parent, except in cases of domestic violence where reasonable safety measures are necessary to protect the child from harm.

(9) Which party is more likely to maintain a loving, stable, consistent and nurturing

relationship with the child adequate for the child's emotional needs.

(10) Which party is more likely to attend to the daily physical, emotional, developmental, educational and special needs of the child.

(11) The proximity of the residences of the parties.

(12) Each party's availability to care for the child or ability to make appropriate child-care arrangements.

(13) The level of conflict between the parties and the willingness and ability of the parties to cooperate with one another. A party's effort to protect a child from abuse by another party is not evidence of unwillingness or inability to cooperate with that party.

(14) The history of drug or alcohol abuse of a party or member of a party's household.

(15) The mental and physical condition of a party or member of a party's household.

(16) Any other relevant factor.

23 Pa. C.S. § 5328(a).

Further, in awarding partial physical custody or supervised physical custody to a grandparent who has standing under Section 5325(1), the trial court must consider:

> (i) the amount of personal contact between the child and the party prior to the filing of the action;
>
> (ii) whether the award interferes with any parent-child relationship; and
>
> (iii) whether the award is in the best interest of the child.

23 Pa. C.S. § 5328(c)(1).

The trial court does not have to give any specific "required amount of detail" when it explains a custody award; all that is necessary is that enumerated factors are considered and that the court's custody decision is based on those considerations. M.J.M. v. M.L.G., 63 A.3d 331, 336 (Pa. Super. 2013).

Pursuant to Pa. R.C.P. 1915.4-2(b), the Hearing Officer conducted a record hearing, taking testimony and hearing argument from counsel, which formed the basis for her report and recommendation, which detailed her findings. The application of the factors pursuant to 23 Pa. C.S. Section 5328 were primarily based upon credibility determinations made upon the testimony presented. For example, Mother's testimony on the second day of the hearing was in direct conflict with her testimony on the first day of the hearing. These credibility determinations cannot be second-guessed by this trial court as noted in T.B. v. L.R.M.:

> Although advisory, the hearing officer's report and recommendations are given the fullest consideration particularly on the issue of credibility of witnesses, which the trial court is

> not empowered to second-guess. See generally Neil v. Neil, 731 A.2d 156 (Pa. Super. 1999) (holding that reviewing court may not second-guess hearing officer's credibility determinations).

T.B. v. L.R.M., 753 A.2d 873, 881-882 {Pa. Super. 2000) (en banc).

Each of the alleged errors raised by Mother in her 1925(B) Statement in Points D, E, F, G, and H related to the application of the custody factors in Section 5328(a) and are addressed separately below as follows:

**Point D - Allegations of Abuse, Neglect & History of Criminal Convictions**

Mother raises in Point D an alleged error of law as follows:

> D. Whether the Court incorrectly applied and considered the statutory factors in granting unsupervised partial custody and visitation to the grandparents despite the evidence showing that the paternal grandmother, Adelina had abused or neglected the child; the mother and father previously had stopped visitation for the grandparents because of the abuse or neglect inflicted on the child, and the father had supervised visitation with the grandparents all other times; the paternal grandfather, Theodore, has a history of criminal convictions; and in light of the mother's overall concerns about. in particular, unsupervised visitation by the paternal grandparents with the child.

While not specifically, cited, this issue relates to Factor 2 and 2.1 of 23 Pa. C.S. Section 5328 as follows:

> (2) The present and past abuse committed by a party or member of the party's household, whether there is a continued risk of harm to the child or an abused party and which party can better provide adequate physical safeguards and supervision of the child.
>
> (2.1) The information set forth in section 5329.1(a)(1) and (2) (relating to consideration of child abuse and involvement with protective services).

In the Report, the Hearing Officer noted that neither party nor this counsel raised the issue of Paternal Grandfather's criminal history at the hearing or requested Paternal Grandfather to undergo any forensic evaluation related to his 1997 criminal conviction. Report, March 10, 2023, p. 3. Therefore, this issue has been waived pursuant to Pa. R.C.P. 1915.4-2(b)(4) and Pa. R.A.P. 302(a) ("Issues not raised in the lower court are waived and cannot be raised for the first time on appeal").

Even if this issue was not waived, the Hearing Officer heard testimony from the parties to the case as to the incident in 2021 and from Mother as to her safety concerns for the child. Mother testified that her safety concerns were related to Paternal Grandmother, not Paternal Grandfather. Additionally, the Hearing Officer properly conducted the initial evaluation of Paternal Grandfather's 1997 conviction pursuant to 23 Pa. C.S. § 5329(c). There were no child abuse

investigations or protection from abuse proceedings to consider pursuant to 23 Pa. C.S. § 5328(2) and (2.1).

This court did not find that the Hearing Officer made any error in the application of factor 2 or Section 5329. Specifically, the Hearing Officer did make a finding that: Paternal Grandfather's most recent conviction is from 1997. "Given the age of these convictions and the fact that Mother and Father trusted Paternal Grandfather with the child's care, this Custody Hearing Officer finds that Paternal Grandfather poses no risk of harm to the child."

Therefore, there was no error of law as to the application of Factor 2 or Section 5329.

**Points E & F - Factors 4 & 9**

Mother raises in Point E an alleged error of law as follows:

> E. Whether the Court incorrectly applied custody factor 4 in light of the evidence showing that the mother has been the primary source of stability and safety for the child.

Mother raises in Point F an alleged error of law as follows:

> F. Whether the Court incorrectly applied custody factor 9 in light of the evidence showing that the mother has maintained a loving, stable, consistent, and nurturing relationship with the child and has supported her emotional needs.

Section 5328(a)(4) requires consideration of "[t]he need for stability and continuity in the child's

education, family life and community life" in awarding any form of custody.

Section 5328(a)(9) requires consideration of "Which party is more likely to maintain a loving, stable, consistent and nurturing relationship with the child adequate for the child's emotional needs."

The Hearing Officer did make a finding that Mother has always been the primary caregiver for the child. Further, the Hearing Officer made findings related to the child's stability and emotional needs as follows:

> Mother attends to the daily physical, and emotional needs of the child and testified that she and the child share a strong bond. Mother reports that the child is thriving, participates in gymnastics, and attends Christian school on Sundays. Mother maintains a loving, stable, and consistent relationship with the child.

Report, March 10, 2023 p. 3.

The Hearing Officer also made a finding that "as Paternal Grandparent's counsel argued, their intent is not to replace Mother or Father in the child's affection but to maintain the loving relationship they had developed with their granddaughter."

Stability for the child, and adequately meeting the child's emotional needs, would require maintaining connections to extended family after the death of a parent, and Factors 4, 9, and Factor 5 together (availability of extended family), resulted in the following finding:

> One of the factors the Court must consider in determining the best interest of the child is the availability of extended family. Now more than ever, it is important for the child to remain connected to Father's extended family. Mother testified that she has lost contact with other members of Father's extended family following the discord with Paternal Grandparents. Providing limited custodial time, overseen by Paternal Grandfather, provides the child the opportunity to remain connected with Father's extend family while addressing Mother's safety concerns.

Report, March 10, 2023 p. 4.

Therefore, there was no error of law as to the application of Factors 4 and 9 of section 5328(a) because continued contact between the child and Paternal Grandparents after the death of Father would serve to maintain stability for the child and meet her emotional needs in her best interests.

**Point G - Factor 13**

Mother raises in Point G an alleged error of law as follows:

> G. Whether the Court incorrectly applied custody factor 13 in light of the evidence showing a high degree of conflict between the mother and the paternal grandparents at the time of the grandparents' petition.

Factor 13 of 23 Pa. C.S. 5328(a) requires consideration of "[t]he level of conflict between the parties and the willingness and ability of the parties to cooperate with one another. A party's effort to protect a child from abuse by another party is not evidence of unwillingness or inability to cooperate with that party."

The Hearing Officer did consider the relationship between the parties and willingness to cooperate and the "discord" that resulted in this custody litigation where Mother severed the relationship the child previously shared with Paternal Grandparents after Father's death. Specifically, the Hearing Officer found that:

> The text message evidence presented by Paternal Grandparent's counsel also illustrated that Mother had a friendly relationship with Paternal Grandfather. Mother testified that she trusted Paternal Grandfather with the child and texted back and forth with him frequently. Even after the child's injury when Paternal Grandparents were only seeing the child when Father brought her over, Mother continued a cordial text relationship with Paternal Grandfather. Mother described their relationship as "genuine."

Report, March 10, 2023 p. 4.

Therefore, there was no error of law as to the application of Factor 13 of section 5328(a) and the Exceptions were properly denied.

**Point H - Factor 14**

Mother raises in Point H an alleged error of law as follows:

> H. Whether the Court incorrectly applied custody factor 14 in light of the evidence showing that the grandparents have a history of drug abuse within their home.

Section 5328(a)(14) requires consideration of "[t]he history of drug or alcohol abuse of a party or member of a party's household."

The record reflects that the parties stipulated that Father had a history of drug abuse. Father was in and out of drug rehabilitation facilities many times over the years, most recently, just one month prior to his death. It is an uncontested fact that Father suffered from drug addiction issues while living with Mother and the child and while living with Paternal Grandparents.

There was no allegation by either party that Mother or Paternal Grandparents themselves currently suffer from any drug or alcohol issues. There was no request for any party to submit to drug or alcohol testing. This issue of Father's drug and alcohol abuse was addressed extensively in the hearing and was not a significant factor in this case as the party who had drug and alcohol issues is now deceased and this case is between Mother and Paternal Grandparents.

Therefore, there was no error of law as to the application of Factor 14 of section 5328(a).

In this case, this trial court found the Hearing Officer's application of the statutory factors set forth in Section 5328 to the facts of the case to be reasonable, properly applied, and in the best interests of the child. This trial court gave the Hearing Officer's Report, which was based upon the testimony and evidence presented, the fullest consideration, especially with respect to credibility determinations, which cannot be second-guessed by this trial judge. Mother's testimony on the second day of the hearing after changing counsel contradicted the first day of hearing testimony on many points. Further, her testimony that she did not want the child to have a relationship with the Paternal Grandparents was not consistent with the extent and nature of the communications she had with Paternal Grandfather after June of 2021 as demonstrated in the record. Therefore, the Exceptions were properly denied and there was no error of law in the application of 23 Pa. C.S. Section 5328(a).

**Point I**
**Violation of Right to a Fair Trial**

The errors alleged in Point I are related to whether the hearing officer denied mother's right to a fair trial by allegedly "speaking to the attorney for the grandparents, and viewing evidence proffered by the grandparents, without the presence and participation of counsel for the mother; by disallowing testimony from the mother about other violence by the paternal grandparents; and by disallowing testimony by the maternal grandmother about abuse and neglect inflicted on the child by the paternal grandparents."

There is no record or evidence that the Hearing Officer engaged in any ex parte communications in this case. In fact, this issue raised in Point I of "speaking to the attorney for the grandparents, and viewing evidence proffered by the grandparents, without the presence and participation of counsel for the mother," is being raised for the first time in the 1925(B) Statement for this the Notice of Appeal. It was not included in the fifteen Exceptions filed by Mother's counsel and as such, it is waived. See Pa. R.C.P. 1915.4-2(b)(4). See also Pa. R.A.P. 302(a) ("Issues not raised in the lower court are waived and cannot be raised for the first time on appeal").

The issue of the Hearing Officer's rulings on objections related to "disallowing testimony from the mother about other violence by the paternal grandparents and disallowing testimony by the maternal grandmother about abuse and neglect inflicted on the child by the paternal grandparents" does not set forth a cognizable error. The record reflects that neither the Hearing Officer nor counsel for Paternal Grandparents were notified that Mother sought to have a witness testify at the continued hearing. N.T. March 6, 2023, p. 7-8. Further, Mother herself did not testify to any violence, abuse, or neglect of the child by Paternal Grandparents other than the June 2021 incident, which was covered extensively in the hearing.

This Court did not find the Hearing Officer's rulings on the objections to be improper or in error. The Hearing Officer heard testimony from the parties to the case as to the incident in 2021 and from Mother as to

her safety concerns for the child. The Hearing Officer properly conducted the initial evaluation of Paternal Grandfather's 1997 conviction pursuant to 23 Pa. C.S. 5329(c). There were no child abuse investigations or protection from abuse proceedings to consider pursuant to 23 Pa. C.S. Section 5328(2) and (2.1).

This Court made an independent review of the findings of the Hearing Officer based upon the transcripts of the two-day hearing and proposed order and found no evidence that the Hearing Officer acted inappropriately or in any manner that denied Mother a fair trial. Mother was represented by counsel at each day of the hearing. Mother presented testimony and evidence and Mother's counsel had the opportunity to cross examine the Paternal Grandparents. Maternal Grandmother was not permitted to testify as a witness because she was not disclosed as a witness prior to the hearing. Therefore, the alleged errors in Point I are without merit.

**CONCLUSION**

Therefore, for all the foregoing reasons, this court requests that the Order of August 23, 2023 be affirmed.

Dated: October 4, 2023 /s/ Tiffany L. Palmer
TIFFANY L. PALMER, J.

## APPENDIX D

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY**

**FAMILY COURT DIVISION**

**CASE ID. XC2200813**

**[Dated March 10, 2023]**

| | |
|---|---|
| THEODORE WORNER | ) |
| PETITIONER | ) |
| | ) |
| VS. | ) |
| | ) |
| LAUREN N. STONE | ) |
| RESPONDENT | ) |
| | ) |

**PROPOSED ORDER OF CUSTODY**

Now, to wit, This **10TH** day of **MARCH, 2023,** the undersigned Permanent Hearing Officer, having filed a report with the Court, a copy of which is attached hereto and copy of which was

GIVEN TO (PETITIONER) (RESPONDENT) ON _____ , _____

MAILED TO (PETITIONER) (RESPONDENT) ON March 15 , 2023

And the parties having been advised that any Exceptions must be filed by 4/5/2023; And no

Exceptions having been filed by said date, the Permanent Hearing Officer hereby recommends that the Court enter the following order in the above-captioned matter;

Jurisdiction: the Court of Common Pleas of Philadelphia County, Family Court Division shall retain jurisdiction of this matter until further order of this court. It is acknowledged that Pennsylvania is the home state of the child/children and that any violation of this custody order may subject the violating party to civil and/or criminal penalties.

Legal Custody: Legal Custody shall mean the right of a party to make major life decisions concerning the child/children including but not limited to medical care, schooling, and religious upbringing. Unless specified to the contrary below, the parties shall be presumed to have joint legal custody.

Relocation: any party subject to this order shall not relocate to an address that would make the carrying out of this order impractical, without first seeking permission of this court to relocate. Neither party shall remove the child/ children from the Continental United States without written agreement of the other party or leave of court.

NOTICE OF THE RIGHT TO FILE EXCEPTIONS TO THE REPORT AND RECOMMENDATION OF THE CUSTODY HEARING OFFICER

**HEARING DATE: March 6, 2023**
**DOCKET/CASE NO.: XC2200813**

Any party may file Exceptions in writing to the report or any part thereof; to rulings on objections to evidence; to statements of findings of fact; to conclusions of law or to any other matter occurring during the hearing. Each Exception shall see forth a separate objection precisely and without discussion. Matters not covered by Exceptions are deemed waived unless, prior to entry of the Final Order, leave is granted to file Exceptions raising these matters. If Exceptions are filed, any other party may file Exceptions within 20 days of the date of service of the original Exceptions.

If no Exceptions are filed within the 20-day period, the Court shall review the report and, if approved, enter a final order.

If Exceptions are filed, the Court shall hear argument on the Exceptions and enter an appropriate final order. No Exceptions may be filed to the final order.

EXCEPTIONS IN THIS CASE MUST BE FILED BY: 4/5/23.

EXCEPTIONS MUST BE FILED AT:
*(by mail or in person in a timely manner)*

Clerk of Family Court
1501 Arch Street, 11th floor,
Philadelphia, PA 19102

A Copy of the Exceptions must be served upon the opposing party and/or counsel and with the undersigned Hearing Officer. Any party or counsel who intends to rely on the Notes of Testimony at the Hearing on Exceptions must order the Notes of Testimony in writing from: Clerk of Family Court/Notes of Testimony, 1501 Arch Street, 11th floor, Philadelphia, PA 19102. If you have any questions, please call the Custody Unit at 215-686-9208.

If you wish to order the Notes of Testimony in person, please go to the Clerk of Family Court's Office (8:30 am to 4:00 pm) at 1501 Arch Street, 11th floor, Philadelphia, PA 19102. Please bring with you, or include in your letter, the following information: hearing date, name of the Custody Hearing Officer, the parties' full names and the Docket/Case number. The party ordering the Notes of Testimony is responsible for the cost of preparation. A processing fee of $50.00 *per hearing date* is required at the time the transcript is ordered ($25.00 as a non-refundable processing fee and $25.00 as a deposit toward the court's cost in obtaining the requested Notes of Testimony). In addition to the $25.00 processing fee, a charge of $1.70 per page (for regular processing), $1.85 per page (expedited processing), $2.35 per page (for daily processing) will be due immediately upon notification that the Notes of Testimony are ready for pickup. Additional copies are available at a fee of $.30 per page. The full transcription cost is payable even if you determine that you do not need the Notes of Testimony after the court has processed your request for notes. Ordering the Notes of Testimony for regular processing requires at least 21 days' notice.

METHOD OF PAYMENT:

Only *money orders, bank checks, attorney checks* (with attorney ID# on each attorney check) *or certified checks,* made payable to the Prothonotary, will be accepted for payment. No personal checks will be accepted.

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A copy of the Report of the Custody Hearing Officer and Notice of the Right to File Exceptions are to be sent by First Class Mail to the following:

1) Petitioner: ***Theodore Worner***

2) Respondent: ***Lauren N. Stone***

**Custody Hearing Officer:**

/s/ [signature]

A copy of the Report of the Custody Hearing Officer and Notice of the Right to File Exceptions were sent First Class Mail on the date shown below to the following:

1) Petitioner: [✓] ***Theodore Worner (Adelina)***

2) Respondent: [✓] ***Lauren Stone***

[✓] Yoninah Orestein, ESQ.

[✓] Caroline Osborn, ESQ.

/s/ [signature] 3/15/23

## APPENDIX E

**FIRST JUDICIAL DISTRICT OF PENNSYLVANIA**
**COURT OF COMMON PLEAS OF**
**PHILADELPHIA COUNTY**
**FAMILY COURT DIVISION – DOMESTIC RELATIONS BRANCH**

**D.R. # XC2200813**

**Action in Custody**

**[Filed March 10, 2023]**

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| Theodore Worner (Paternal Grandfather)<br>Adelina Worner (Paternal Grandmother)<br>Petitioners | ) |
| v. | ) |
| Lauren N. Stone (Mother)<br>Respondent | ) |

**PROPOSED ORDER AND FINDINGS OF CUSTODY HEARING OFFICER**

**Date of Hearings:** February 1, 2023 and March 6, 2023

**Parties and Counsel present:** Petitioners appeared with Yoninah Orestein, Esq.

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| | Respondent appeared with Caroline Osborn, Esq. |
| **Current Order:** | There is no Order in effect in this case |
| **Petition(s) Filed:** | Complaint for Custody filed by Paternal Grandparents on November 29, 2022 |
| **Child or Children:** | G.W., born [redacted], 2018 |

**Summary of Pertinent Testimony:**
In their Complaint for Custody, Paternal Grandparents requested partial physical custody of the child, G.W., born [redacted], 2018. Because no agreement could be reached by the parties, testimony was taken for consideration of this report and recommendation.

In ordering any form of custody, under 23 Pa.C.S.A. § 5328(a), the Court shall determine the best interest of the child by considering all relevant factors, giving weighted consideration to those factors which affect the safety of the child. The testimony of the parties and additional relevant information, summarized below, was considered when evaluating the factors under 23 Pa.C.S.A. § 5328(a).

(1) Which party is more likely to encourage and permit frequent and continuing contact between the child and another party.
(2) The present and past abuse committed by a party or member of the party's household, whether there is a continued risk of harm to the child or an abused party and which party can better provide adequate physical safeguards and supervision of the

child.
(2.1) The information set forth in section 5329.1(a) (relating to consideration of child abuse and involvement with protective services).
(3) The parental duties performed by each party on behalf of the child.
(4) The need for stability and continuity in the child's education, family life and community life.
(5) The availability of extended family.
(6) The child's sibling relationships.
(7) The well-reasoned preference of the child, based on the child's maturity and judgment.
(8) The attempts of a parent to turn the child against the other parent, except in cases of domestic violence where reasonable safety measures are necessary to protect the child from harm.
(9) Which party is more likely to maintain a loving, stable, consistent and nurturing relationship with the child adequate for the child's emotional needs.
(10) Which party is more likely to attend to the daily physical, emotional, developmental, educational and special needs of the child.
(11) The proximity of the residences of the parties.
(12) Each party's availability to care for the child or ability to make appropriate child-care arrangements.
(13) The level of conflict between the parties and the willingness and ability of the parties to cooperate with one another. A party's effort to protect a child from abuse by another party is not evidence of unwillingness or inability to cooperate with that party.
(14) The history of drug or alcohol abuse of a party or member of a party's household.
(15) The mental and physical condition of a party or

member of a party's household.
(16) Any other relevant factor.

Before addressing the factors set forth under 23 Pa.C.S.A. § 5328(a), a determination must be made as to whether Paternal Grandparents have standing to request partial physical custody. There are two statutes that could apply in this situation, 23 Pa.C.S. §§ 5324 and 5325.

Under 23 Pa.C.S. § 5325, grandparents and great-grandparents may file an action under this chapter for partial physical custody or supervised physical custody in the following situations:

(1) where the parent of the child is deceased, a parent or grandparent of the deceased parent may file an action under this section;

(2) where the relationship with the child began either with the consent of a parent of the child or under a court order and where the parents of the child:

(i) have commenced a proceeding for custody; and

(ii) do not agree as to whether the grandparents or great-grandparents should have custody under this section; or

(3) when the child has, for a period of at least 12 consecutive months, resided with the grandparent or great-grandparent, excluding brief temporary absences of the child from the home, and is removed from the home by the parents, an action must be filed within six months after the removal of the child from the home

In the instant case, Paternal Grandparents have standing under 23 Pa.C.S. § 5325(1). Father, Joseph Worner, passed away on March 27, 2022. Paternal Grandparents presented an original death certificate at the hearing. Mother agreed that Father is deceased and clearly mourned Father's passing along with Paternal Grandparents. Paternity was established per PTS and all parties agreed that Joseph Worner was the child's father. As Paternal Grandparents are only requesting partial physical custody, they have standing under 23 Pa.C.S. § 5325(1).

Although Paternal Grandparents may have standing, this does not automatically mean that Paternal Grandparents will be afforded custodial time with the child. A determination must be made that an Order is in the child's best interest. 23 Pa.C.S. § 5328(c) instructs that when granting custody to a third-party under § 5325(1), the Court must consider "the amount of personal contact between the child and the party prior to the filing of the action, whether the award interferes with any parent-child relationship, and whether the award is in the best interest of the child." Additionally, under 23 Pa.C.S. § 5327(b), there is a presumption that custody shall go to the parent in an action between a parent and a third-party. That presumption must be overcome by clear and convincing evidence.

Paternal Grandparents live in alone in a three-bedroom house. Paternal Grandfather has enumerated convictions under 23 Pa.C.S. § 5329. The most recent conviction is from 1997. Given the age of these convictions and the fact that Mother and Father

trusted Paternal Grandfather with the child's care, this Custody Hearing Officer finds that Paternal Grandfather poses no risk of harm to the child, Additionally, neither party nor their counsel raised the issue at the hearing. Paternal Grandmother has no known criminal history in Pennsylvania.

Mother and the child reside with Maternal Grandmother. Mother has always been the child's primary caregiver. Mother and Father lived together with the child in their own apartment until October 2021. Mother and Father continued to co-parent on good terms until Father's death. Mother indicated that the Department of Human Services (DHS) has never been involved with this child. Mother has no known criminal history in Pennsylvania. Mother attends to the daily physical, and emotional needs of the child and testified that she and the child share a strong bond. Mother reports that the child is thriving, participates in gymnastics, and attends Christian school on Sundays. Mother maintains a loving, stable, and consistent relationship with the child. No party had previously asked to have the Hearing Officer interview the child. Therefore, it was not possible to ascertain the preference of the child.

Paternal Grandmother testified that she began watching the child two to three days a week in 2019 and then began watching the child fulltime in September 2020. Mother testified that she stayed home with the child for the first year following her birth and then went back to work parttime. Mother stated that Maternal Grandmother and Father watched the child while Mother worked. Mother's testimony was

contradictory in this regard. She initially agreed that Paternal Grandmother participated in babysitting the child during this period but subsequently insisted that Paternal Grandmother did not watch the child until September 2020. The parties agree that Paternal Grandparents began watching the child Tuesday-Friday beginning September 2020.

All parties agreed that Paternal Grandparents were no longer permitted to watch the child following an incident in June 2021 in which the child's arm was pulled from the socket. Paternal Grandparents testified that the child was going to fall and Paternal Grandmother caught the child by her arm which caused it come out of socket. Mother alleged that Paternal Grandmother pulled on the child's arm forcefully enough to pull it from the socket. When the injury occurred, Paternal Grandfather contacted Mother to have her take the child to the hospital. The child's arm was easily repaired, and she has no lasting injury. Neither Mother and Father nor anyone at the hospital contacted DHS regarding the child's injury.

Mother testified that she and Father discussed the child's injury and agreed not to leave the child alone with Paternal Grandparents going forward. The child was enrolled in daycare and Mother and Father split the cost. Paternal Grandparents' counsel presented text message evidence that Mother and Father told Paternal Grandparents that the child had been on a waitlist at a particular preschool for more than a year and had been accepted. Mother testified that they told Paternal Grandparents that because Father did not want to hurt their feelings. Mother testified, and

Paternal Grandparents testimony corroborates, that Father was present with the child for all subsequent visits at Paternal Grandparent's home until the time Father passed away. Mother and Father's behavior following the child's injury demonstrates that they made a choice as parents designed with their child's best interest in mind.

The text message evidence presented by Paternal Grandparent's counsel also illustrated that Mother had a friendly relationship with Paternal Grandfather. Mother testified that she trusted Paternal Grandfather with the child and texted back and forth with him frequently. Even after the child's injury when Paternal Grandparents were only seeing the child when Father brought her over, Mother continued a cordial text relationship with Paternal Grandfather. Mother described their relationship as "genuine."

Paternal Grandparents are requesting partial physical custody of the child. Mother, however, feels that Paternal Grandparents should not be afforded any custodial time with the child. Paternal Grandparent's relationship with the child began with the consent of both Mother and Father. Paternal Grandparents shared a loving, close relationship with the child until she was injured. Then, both Mother and Father decided together to revoke their consent and deny Paternal Grandparents unsupervised time with the child. Unfortunately, the Court does not have the benefit of Father's testimony to know how strongly Father felt about the situation. The Court cannot ascertain whether Father agreed with Mother to keep the peace or whether he felt as vehemently as Mother did. Prior

to Father's death, he was living with Paternal Grandparents and their custody rights would have been derivative of Father's rights. Sadly, Father has passed and the Court must now consider if it is in the child's best interest to never see her grandparents again as Mother has requested.

Prior to the child's injury, the child enjoyed a significant relationship with Paternal Grandparents. The child saw them nearly every day and it is clear from the demeanor of Paternal Grandparents, video evidence presented, and text message evidence discussed in the hearing that the child shared a loving relationship with Paternal Grandparents. An award of partial physical custody would not interfere with the parent child relationship. Mother testified that she and the child share a close bond. An appropriately tailored award of custodial time to Paternal Grandparents would not be overly burdensome or interfere with the child's scheduled activities. As Paternal Grandparent's counsel argued, their intent is not to replace Mother or Father in the child's affection but to maintain the loving relationship they had developed with their granddaughter. Finally, this Custody Hearing Officer believes it would be in the child's best interest to award Paternal Grandparents partial physical custody. One of the factors the Court must consider in determining the best interest of the child is the availability of extended family. Now more than ever, it is important for the child to remain connected to Father's extended family. Mother testified that she has lost contact with other members of Father's extended family following the discord with Paternal Grandparents. Providing limited custodial time, overseen by Paternal

Grandfather, provides the child the opportunity to remain connected with Father's extend family while addressing Mother's safety concerns.

**Recommendation:**

In consideration of the testimony and evidence offered at the hearing by petitioner Paternal Grandfather, co-petitioner Paternal Grandmother, and respondent Mother, including all the factors listed under 23 Pa.C.S.A. § 5328(a), the undersigned custody Hearing Officer finds the following recommendation to be in the child's best interest:

> The Complaint for Partial Physical Custody regarding the child G.W., born November 14, 2018, filed 11/29/2022 by Paternal Grandparents, Theodore and Adelina Worner, is hereby granted.
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> Mother, Lauren Stone, shall have sole legal and primary physical custody of the child.
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> Paternal Grandparents shall have partial physical custody of the child as agreed and arranged with Mother. Paternal Grandparents shall have at least one day-visit each month spending at least four hours with the child. If the parties cannot agree, then Paternal Grandparents shall have partial physical custody of the child the third Saturday of each month from 10:00 a.m. to 2:00 p.m. at Paternal Grandparents' home.
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> Paternal Grandparents' custodial time shall be overseen by Paternal Grandfather. The child shall not be left alone with Paternal Grandmother. Paternal Grandfather shall keep Mother informed

of where the child will be during Paternal Grandparent's custodial time and of the child's wellbeing. Mother shall not interfere with Paternal Grandparents' custodial time.

/s/ Lauren McCulloch 3/10/2023
Lauren McCulloch, Esq. Date
Hearing Officer in Custody

Holidays and vacations: a vacation schedule with the child/children shall supersede the regular schedule and a holiday schedule shall supersede both the vacation and regular schedule.

It is also recommended that the order provide that the parties notify the Domestic Relations Section in writing or by personal appearance within seven (7) days of any change of address, employment or any change of address of their children.

It is further recommended that the Order provide:

PROPOSED ORDER:
THE COMPLAINT FOR PARTIAL PHYSICAL CUSTODY REGARDING THE CHILD G.W., BORN [redacted], 2018, FILED 11/29/2022 BY PATERNAL GRANDPARENTS, THEODORE AND ADELINA WORNER, IS HEREBY GRANTED.

MOTHER, LAUREN STONE, SHALL HAVE SOLE LEGAL AND PRIMARY PHYSICAL CUSTODY OF THE CHILD.

PATERNAL GRANDPARENTS SHALL HAVE PARTIAL PHYSICAL CUSTODY OF THE CHILD AS

AGREED AND ARRANGED WITH MOTHER. PATERNAL GRANDPARENTS SHALL HAVE AT LEAST ONE DAY-VISIT EACH MONTH SPENDING AT LEAST FOUR HOURS WITH THE CHILD. IF THE PARTIES CANNOT AGREE, THEN PATERNAL GRANDPARENTS SHALL HAVE PARTIAL PHYSICAL CUSTODY OF THE CHILD THE THIRD SATURDAY OF EACH MONTH FROM 10:00 A.M. TO 2:00 P.M. AT PATERNAL GRANDPARENTS' HOME.

PATERNAL GRANDPARENTS' CUSTODIAL TIME SHALL BE OVERSEEN BY PATERNAL GRANDFATHER. THE CHILD SHALL NOT BE LEFT ALONE WITH PATERNAL GRANDMOTHER. PATERNAL GRANDFATHER SHALL KEEP MOTHER INFORMED OF WHERE THE CHILD WILL BE DURING PATERNAL GRANDPARENT'S CUSTODIAL TIME AND OF THE CHILD'S WELLBEING. MOTHER SHALL NOT INTERFERE WITH PATERNAL GRANDPARENTS' CUSTODIAL TIME.

/s/ Lauren McCulloch
Permanent Hearing Officer

**Order of Court**

Now, TO WIT THIS ____ DAY OF _____ , 20 Upon consideration of the foregoing recommendation, the above proposed Order is approved and made the Order of Court.

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Honorable MARGARET MURPHY J.