SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203 Court of Appeals, Colorado, Case No. 13 CA 2280 District Court, Clear Creek County, Colorado, Case No. 12JR34 and 12JR 35	
IN THE INTEREST OF MINOR CHILDREN: BABY A AND BABY B, **Petitioners:** **T.W., and A.W.,** **And** **Petitioner:** **Adoption Choices of Colorado, Inc.,** **v.** **Respondent:** **M.C.**	▲ ▲ **COURT USE ONLY**
Colorado Office of the Child's Representative 1300 Broadway, Ste. 320 Denver, CO 80203 303.860.1517 ext. 106 Dorothy M. Macias, Staff Attorney dorothymacias@coloradochildrep.org Attorney Reg. # 36298 Amanda Donnelly, Staff Attorney amandadonnelly@coloradochildrep.org Attorney Reg. # 34952	Case Number: **14 SC 1045**

COLORADO OFFICE OF THE CHILD'S REPRESENTATIVE
***AMICUS CURIAE* BRIEF**

CERTIFICATE OF COMPLIANCE

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

> The amicus brief complies with C.A.R. 28(g) in that it contains 5,364 words or does not exceed 30 pages. The amicus brief complies with C.A.R. 29.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

Colorado Office of the Child's Representative

By: Dorothy Macias, Attorney Reg. #36298
Amanda Donnelly, Attorney Reg. #34952

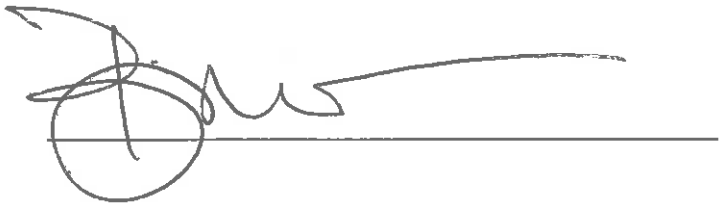


TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST 1

STATEMENT OF ISSUES PRESENTED FOR REVIEW 3

SUMMARY OF ARGUMENT 4

FACTS 5

STANDARD OF REVIEW 8

ARGUMENT 8

I. Children and Their Fit Parent Share an Interest in Protecting Their Family of Origin 8

A. The parent and child's interest in a Relationship is Protected by the Constitution and State Statutes 8

B. Children Are Entitled to a Presumption that Their Fit Parent's Decision to Raise Them is in Their Best Interests 15

C. Individuals Who have Filed an Adoption Petition Do Not have a Fundamental Interest In Parenting the Child Subject to the Petition 17

II. The *Troxel* Presumption Applies in Private Termination Proceedings under Article Five of the Children's Code 20

CONCLUSION 25

TABLE OF AUTHORITIES

United States Supreme Court Cases

Hodgson v. Minnesota, 497 U.S. 417 (1989) 13

In re Gault, 387 U.S. 1 (1967) 10

Lassiter v. Dept. of Soc. Services, 452 U.S. 18 (1981) 9

Lehr v. Robertson, 463 U.S. 248 (1983) 5

Matthews v. Eldridge, 424 U.S. 319 (1976) 17

Meyer v. Nebraska, 262 U.S. 390 (1923) 8

Michael H. v. Gerald D., 491 U.S. 110 (1989) 14

Moore v. City of East Cleveland, 431 U.S. 494 (1977) 10

Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925) 9

Planned Parenthood of Central Mo. v. Danforth, 428 U.S. 52 (1976) 10

Prince v. Massachusetts, 321 U.S. 158 (1944) 9

Quilloin v. Wilcott, 434 U.S. 246 (1978) 8

Santosky v. Kramer, 455 U.S. 745 (1982) 4

Smith v. Org. of Foster Families for Equality and Reform, 431 U.S. 816 (1977) 11

Stanley v. Illinois, 405 U.S. 645 (1972) 8

Tinker v. Des Moines Indep. Comty. Sch. Dist., 393 U.S. 503 (1969) 10

Troxel v.Granville, 530 U.S. 57 (2000) 4

Wisconsin v. Yoder, 406 U.S. 205 (1972) 8

Colorado Cases

A.M. v. A.C., 296 P.3d 1026 (Colo. 2013) 20

In re Adoption of C.A., 137 P.3d 318 (Colo. 2006) 10

In re Parental Responsibilities Concerning B.J., 242 P.3d 1128 (Colo. 2010) 16

In re People in Interest of M.M., 520 P.2d 128 (Colo.1974) 10

In the Matter of D.I.S., 249 P.3d 775 (Colo. 2011) 15

People in Interest of A.J.L., 243 P.3d 244 (Colo. 2010) 8

M.S. v. People, 303 P.3d 102 (Colo. 2013) 18

People in Interest of A.M.D., 648 P.2d 632 (Colo. 1982) 15

People in Interest of C.A.K., 652 P.2d 603 (Colo. 1982) 10

People in Interest of C.E., 923 P.2d 383 (Colo.App. 1996) 17

People in Interest of E.A., 638 P.2d 278 (Colo. 1981) 10

Watso v. Colo. Dept. of Soc. Services, 841 P.2d 299 (Colo. 1992) 17

Colorado Statutes

§ 13-91-105(1), C.R.S. (2014) 1

§ 13-91-105(1)(a), C.R.S. (2014) 2

§ 19-1-102(1), C.R.S. (2014) 12

§ 19-1-102(1)(a), C.R.S. (2014) 1

§ 19-1-103(13), C.R.S. (2014) 14

§ 19-1-115(1)(a), C.R.S. (2014) 12

§ 19-1-115(3)(a), C.R.S. (2014) 12

§ 19-3-100.5, C.R.S. (2014) 23
§ 19-3-213(1)(c)(I), C.R.S. (2014) 12
§ 19-3-403(1), C.R.S. (2014) 12
§ 19-3-403(3.5)(a)(I), C.R.S. (2014) 12
§ 19-3-403(3.6)(a)(IV), C.R.S. (2014) 12
§19-3-403(3.6)(a)(V),C.R.S. (2014) 12
§ 19-3-506(1)(c), C.R.S. (2014) 12
§ 19-3-507(4), C.R.S. (2014) 12
§ 19-3-508(1)(b), C.R.S. (2014) 12
§19-3-508(5)(b), C.R.S. (2014) 12
§ 19-3-605(1), C.R.S. (2014) 12
§ 19-5-100.2(1), C.R.S. (2014) 18
§ 19-5-105(3), C.R.S. (2014) 20
§ 19-5-105(3.1), C.R.S. (2014) 22
§ 19-5-105(3.4), C.R.S. (2014) 23
§ 19-5-105(3.5), C.R.S. (2014) 20
§19-5-105(3.6), C.R.S. (2014) 5
§19-5-202.5, C.R.S. (2014) 18
§ 19-5-203(1), C.R.S. (2014) 12
§19-5-203(1)(a), C.R.S. (2014) 18
§ 19-5-203(1)(b), C.R.S. (2014) 18
§ 19-5-201(2), C.R.S. (2014) 19
§ 19-5-210(2)(a), C.R.S. (2014) 12

§ 19-5-210(2)(a)-(e), C.R.S. (2014) 19
§ 19-5-210(4), C.R.S. (2014) 19
§19-5-211(1), C.R.S. (2014) 17
§ 19-5-214, C.R.S. (2014) 19

Other Authority

Chief Justice Directive (CJD) 04-06 I. B. (2013) 1
OCR 2014 General Assembly Report, pp. 2 & 6 (2014) 1

STATEMENT OF INTEREST

The general assembly created the Colorado Office of the Child's Representative (OCR) in 2000 for the purpose of improving and advancing best interests legal representation by attorneys appointed as Guardians *ad litem* (GAL) for children in judicial proceedings. § 13-91-105(1), C.R.S. (2014). The GAL is the child's voice and legal advocate in the Colorado court system. § 19-1-102(1)(a), C.R.S. (2014).

OCR serves children who have been abused and neglected, impacted by high-conflict parenting time disputes, and/or charged with delinquent acts without a parent or guardian able to protect the child's best interests during the proceedings. OCR is responsible for the "[p]rovision of GAL services in adoption proceedings under Title 19 when one or more parties qualify as indigent." Chief Justice Directive (CJD) 04-06 I. B. (2013).

In Fiscal Year 2014, the OCR provided best interests legal services for nearly 17,000 children by contracting with over 230 attorneys across Colorado, employing staff attorneys at the OCR's El Paso County GAL Office, and contracting with three pilot multidisciplinary staff offices in Denver and Arapahoe Counties. § 13-91-105(1)(a)(X), C.R.S. (2014); CJD 04-06 (2013); OCR 2014 General Assembly Report, pp. 2 & 6 (2014). The OCR's responsibilities include

but are not limited to enhancing the provision of state-paid GAL services in Colorado by providing training to attorneys and judicial officers, making recommendations to the Chief Justice of the Colorado Supreme Court concerning the establishment of minimum training requirements and best practice standards, and overseeing the practice of state-paid GALs to ensure compliance with all relevant statutes, orders, rules, directives, policies, and procedures. § 13-91-105(1)(a), C.R.S. (2014). The OCR is the sole agency responsible for overseeing and training state-paid GAL representation for children. As is the state-wide agency charged with advancing the interests of children involved in the court system the OCR has an interest in ensuring that proceedings under the Children's Code focus on the best interests of children, protect children's interests in their natural family relationships, and prevent non-parents' interests from controlling the children's interests.

The OCR seeks to inform the Court of the state-wide implications of its decision on children who are the subject of private termination and adoption proceedings and their interest in protecting the integrity of their natural family. Allowing non-parents to assert an interest commensurate with a fit parent is contrary to the intent of the Children's Code and the best interests of children, diverts the focus of the proceedings, and leads to unnecessary interference with the

functioning of the natural family, protracted litigation, and the accompanying delay in permanency for children.

Resolution of the issues presented for review requires consideration of the interests of children subject to private termination and adoption proceedings, as well as rights and procedures set forth by the Constitution and Colorado statute to ensure the protection and advancement of these interests. The OCR seeks to provide the Court with information and analysis that may be helpful to the resolution of the issue presented.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the court of appeals erred in its application of a special presumption in favor of the birth father to Colorado's statutory procedure and criteria for termination of parental rights set forth in section 19-5-105, C.R.S. (2014).
2. Whether the court of appeals erred in holding that adoptive parents had no cognizable rights or interests in this action.
3. Whether the court of appeals erred in holding that the trial court abused its discretion in only considering biological father's one payment of child support during a three-month period in determining whether he has taken "substantial responsibility" for the children.

4. Whether the court of appeals erred in failing to consider the needs and interests of the children in its analysis and interpretation of section 19-5-105, C.R.S. (2014).

SUMMARY OF ARGUMENT

Amicus requests this court affirm the court of appeals decision. The interests of children, parent, and society in protecting children's relationship with their biological parent is heightened during a termination of parental rights hearing. *Santosky v. Kramer*, 455 U.S. 745, 764 (1982). If the parent-child relationship is terminated, the child forever loses all rights inherent in their relationship with their biological parent. *Id.* Children and fit parents are not adversaries in a parental rights termination proceeding and share an interest in avoiding erroneous termination. *Id.* at 764-65. Thus, the interests of the child and the parent in preserving the biological family "coincide" until the parent is proven to be unfit. *Id.*

A fit biological parent, as steward of the family, is entitled to assert the fundamental liberty interest of the family's right to exist. A fit parent is presumed to act and make decisions in the best interests of the child. *Troxel v. Granville,* 530 U.S. 57, 68 (2000). Due Process requires a trial court to "accord at least some special weight to the parent's own determination" when the parent's decision

becomes subject to judicial review. *Id.* at 70. An unwed father, by status alone, does not lose the *Troxel* presumption that his decisions are in his children's best interests. *Lehr v. Robertson*, 463 U.S. 248 (1983). The *Troxel* presumption and protections apply in custody proceedings under Article 5. At a minimum, the same presumption and protections must apply to private terminations under Article 5.

Pre-adoptive parents who have filed an adoption petition do not have cognizable rights or interests commensurate with that of fit natural or validly decreed adoptive parents. Pre-adoptive parents' interests are limited to intervening in order "to present evidence to the court regarding the nonrelinquishing parent's contact, communication, and relationship with the child." § 19-5-105(3.6), C.R.S. (2014).

FACTS

Amicus takes the following facts from the court of appeals decision and briefs; the facts appear largely undisputed.

Biological mother J.Z. and Respondent M.C. (Father) were in a relationship when she revealed that she was expecting their child. J.Z. left Grand Junction, Colorado and moved to Father's home in Des Moines, Iowa where the two parents readied to jointly raise their family. Shortly after moving in with Father, J.Z. claimed to have suffered a miscarriage.

Soon thereafter J.Z returned to Colorado. Eventually, J.Z and Father's relationship ended. J.Z. never informed Father that the pregnancy was in fact viable.

J.Z. contacted Petitioner Adoption Choices of Colorado, Inc. (Agency) to relinquish her parental rights and assist her in placing Father's unborn children for adoption. J.Z. intentionally and fraudulently failed to identify Father and provide Agency with his contact information. Agency published notice to the "unknown" father of Agency's intention to seek termination of his parental rights.

On September 13, 2012, J.Z. gave birth to twin boys and placed them for adoption with Intervenors, clients of Agency. Intervenors acknowledged the inherent risks associated with adoption: a father could assert his right/desire to parent the children, the placement of the children did not ensure finalization of the adoption, the children could be removed from their home, and the birthparents could "hinder" adoption because termination was not guaranteed or could be undone by the birthparents changing their minds or if fraud or duress existed.

The order relinquishing J.Z.'s rights entered on September 21, 2012. On the same day, when the children were 7 days old, the court terminated the "unknown" father's parental rights.

On December, 18, 2012, through Face Book messaging, Father discovered J.Z.'s deception; his children had just turned three months old. In February, 2013, when the children were four and a half months old, Father grasped the only opportunity he had to parent his children by initiating proceedings seeking to gain custody of his children. This was no small feat as relinquishment and adoption proceedings are confidential. He incorrectly guessed that venue was in Mesa County where he believed J.Z. lived. A clerk in Mesa County forwarded his pleadings to the proper county.

On May 31, 2013, the Clear Creek County District Court determined that termination of Father's parental rights was based upon fraud and therefore invalid. The court set a two-day hearing for June 25 and 26, 2013 to resolve the remaining issues in the case.

Father was allowed to meet his children for the first time on June 1, 2013; his children were eight and a half months old at the time. During the ensuing months, Father was granted limited parenting time with his children, much of it shared with or limited by Intervenors.

The court, *sua sponte* continued the June hearing to October 2 and 3, 2013. The court appointed a guardian *ad litem* (GAL) who was privately-paid by Father,

Intervenors, and Agency. At the conclusion of the October hearing, the court found that Father was "not unfit," but nevertheless terminated his parental rights.

Father appealed and the court of appeals reversed the trial court's order.

STANDARD OF REVIEW

The Court reviews findings of fact under a clear error or abuse of discretion standard, while conclusions of law are reviewed under a de novo standard. *People in Interest of A.J.L.*, 243 P.3d 244 (Colo. 2010).

ARGUMENT

I. Children and Their Fit Parent Share an Interest in Protecting Their Family of Origin.

A. The parent and child's interest in a Relationship is Protected by the Constitution and State Statutes.

The relationship between a natural parent and child is a constitutionally protected fundamental liberty interest. *Quilloin v. Wilcott*, 434 U.S. 246 (1978); *Wisconsin v. Yoder*, 406 U.S. 205, 231-233 (1972); *Stanley v. Illinois,* 405 U.S. 645, 651 (1972); *Meyer v. Nebraska*, 262 U.S. 390, 399-401 (1923). It is "perhaps the oldest of the fundamental liberty interests" recognized by courts. *Troxel*, 530 U.S. at 65. The natural parent's interest is based on the "primary role of the

parents in the upbringing of their children." *Yoder*, 406 U.S. at 232; *see Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *Pierce v. Soc'y of Sisters,* 268 U.S. 510, 535 (1925). As such, a natural "parent's desire for and right to 'the companionship, care, custody, and management' of his or her children is an important interest that 'undeniably warrants deference and, absent a powerful countervailing interest, protection.'" *Lassiter v. Dept. of Soc.* Services, 452 U.S. 18, 27 (1981)(quoting *Stanley,* 405 U.S. at 651). The *Stanley* Court explains:

> The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed "essential," *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), "basic civil rights of man," *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942), and "[r]ights far more precious … than property rights," *May v. Anderson*, 345 U.S. 528, 533 (1953).
>
> 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. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, *Meyer*, [262 U.S.] at 399, the Equal Protection Clause of the Fourteenth Amendment, *Skinner v. Oklahoma,* [316 U.S. at 541] and the Ninth Amendment, *Griswold v. Connecticut*, 381 U.S. 479, 496 (1965)(Goldberg, J., concurring).

Stanley, 405 U.S. at 651. The natural parent is thereby the steward of his minor children's rights.

"Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution, and possess constitutional rights." *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 74 (1976). Children are entitled to Due Process in delinquency adjudicatory proceedings, *In re Gault,* 387 U.S. 1 (1967), and have a First Amendment right of freedom of speech and expression, *Tinker v. Des Moines Indep. Comty. Sch. Dist.*, 393 U.S. 503 (1969). Children share in the family's fundamental rights to live together, *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), practice religious beliefs, *Yoder,* 406 U.S. at 216, and choose an educational setting, *Pierce,* 268 U.S. at 534-535.

Colorado courts have long recognized the protection afforded the parent-child relationship. *In re Adoption of C.A.*, 137 P.3d 318, 322 (Colo. 2006); *People in Interest of E.A.,* 638 P.2d 278, 285 (Colo. 1981); *In re People in Interest of M.M.*, 520 P.2d 128, 131 (Colo.1974). This relationship is not one-sided as children have a reciprocal interest in a relationship with their natural parent. *People in the Interest of C.A.K.,* 652 P.2d 603, 607 (Colo. 1982); *In re People in Interest of M.M.*, 520 P.2d at 131. "[P]arental rights are personal between each parent and child ." *In re People in Interest of M.M.*, 520 P.2d at 132.

The U.S. Supreme Court's analysis of the importance of the relationship between parent and child has stressed the biological genesis of family. *Smith v. Org. of Foster Families for Equality and Reform (OFFER),* 431 U.S. 816, 843 (1977). The right to "conceive and to raise one's children" is an essential right. *Stanley,* 405 U.S. at 651. "[T]he liberty interest in family privacy has its source, and its contours are ordinarily to be sought, not in state law, but in intrinsic human rights, as they have been understood in this Nation's history and tradition." *OFFER*, 431 U.S. at 846 (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503)(1977)(internal quotations marks omitted)).

The Colorado Children's Code also recognizes the importance of children's ties to their biological family and reflects "an understanding and appreciation of the societal interest in maintaining and protecting the natural parents' interests in the child, and those of the child in the parents." *In re People in Interest of M.M.*, 520 P.2d at 131 (quoting *People in Interest of K.S. and M.S.*, 515 P.2d 130 (Colo. App. 1973)). The primary purpose of Title 19 is to preserve the natural family and maintain children's interests in their family of origin:

> (a) To secure for each child subject to these provisions such care and guidance, preferably in his own home, as will best serve his welfare and the interests of society,
> (b) To preserve and strengthen family ties whenever possible, including improvement of home environment; [and]

> (c) To remove a child from the custody of his parents only when his welfare and safety or the protection of the public would otherwise be endangered and, in either instance for the courts to proceed with all possible speed to a legal determination that will serve the best interests of the child.

§ 19-1-102(1), C.R.S. (2014).

The general assembly has enacted provisions which promote its mandate that children's biological family connections take precedence in every proceeding under Title 19. Natural family members receive placement preferences in all custody determinations. §§ 19-1-115(1)(a) and (3)(a), C.R.S. (2014). Adoptive parents' parental rights may vest only after proper relinquishment or termination of the biological paternal rights. §§ 19-5-203(1) and 19-5-210(2)(a), C.R.S. (2014). For children subject to the child welfare provisions of Article 3, placement with biological family is preferred at emergency removal, §§ 19-3-403(1) and (3.6)(a)(V), C.R.S. (2014), the dispositional stage, §§ 19-3-508(1)(b) and (5)(b), C.R.S. (2014), and when termination of parental rights is at issue, § 19-3-605(1), C.R.S. (2014). Throughout child welfare proceedings the state must exercise due diligence to find biological family members and support the child's relationship with biological siblings. §§ 19-3-403(3.5)(a)(I) and (3.6)(a)(IV), 19-3-213(1)(c)(I), 19-3-507(4), 19-3-506(1)(c), C.R.S. (2014).

Children's interest in protection of a familial relationship with a biological father is not diminished simply because the father is not married to their mother. *See Stanley v. Illinois*, 405 U.S. 645 (1972). "A natural parent who has demonstrated sufficient commitment to his … children is thereafter entitled to raise the children free from undue state interference." *Hodgson v. Minnesota*, 497 U.S. 417, 447 (1990). In *Lehr v. Robertson*, 463 U.S. 248 (1983), Justice Stevens summarized the prerequisites giving rise to constitutional protections of the parental interests of unwed fathers:

> When an unwed father demonstrates a full commitment to the responsibilities of parenthood by "[coming] forward to participate in the rearing of his child," *Caban [v. Mohammed],* 441 U.S. [380,] 392 [(1979), his interest in personal contact with his child acquires substantial protection under the Due Process Clause. At that point it may be said that he '[acts] as a father toward his children." *Id.* at 389, n.7.
>
> …
>
> The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development.

Lehr, 463 U.S. at 261-63. The line of cases concerning unwed fathers' rights make clear that an unmarried biological father able and willing to parent and who timely steps forward to assert those rights will enjoy the deference offered other biological fathers.

In this case, Father held himself out as the children's father before they were born and prepared for their birth. But for J.Z.'s concealment and fraud, he would have enjoyed a home with his children. Upon learning of J.Z.'s concealment and fraud on the court, he immediately began this proceeding to assert his desire to parent and establish a relationship with the children. The children were under five months old at the time he asserted his parental rights. He has attempted to accept responsibility for the children's future and made clear throughout this matter that he seeks to raise his children. He has seized the only opportunity he available to parent -- initiating this action.

Father is both the biological and legal father of Baby A and Baby B under Colorado law. *See* § 19-1-103(13), C.R.S. (2014). He is the only parent of the children. As such, Intervenors' reliance on *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), in order to minimize his parentage is misplaced. In *Michael H.* an unwed biological father sought recognition as a parent in addition to the legal father, who was married to the biological mother at the time of the child's birth. The U.S. Supreme court rejected his claim reasoning that state law established parentage and no constitutional authority required otherwise. *Michael H.,* 491 U.S. at 129-130.

B. Children Are Entitled to a Presumption That Their Fit Parent's Decision To Raise Them is in Their Best Interests.

The interest of children, parents, and society in preserving children's relationship with their biological parent is heightened during a termination of parental rights hearing. *Santosky*, 455 U.S. at 764; *People in the Interest of M.M.*, 520 P.2d at 131. If the parent-child relationship is terminated, the child forever loses all rights inherent in their relationship with their biological parent. *Santosky*, 455 U.S. at 764. Children and a fit natural parent are not adversaries in a termination proceeding and share an interest in avoiding erroneous termination. *Id.* at 764 - 765. Thus, the interests of the child and the parent in preserving the biological family "coincide" until the parent is proven to be unfit. *Id.*

A fit parent's assertion of the fundamental liberty interest in the companionship, care, custody, and management of their children is protected by the Fourteenth Amendment's Due Process clause. *Troxel*, 530 U.S. at 65-66; *Santosky,* 455 U.S. at 752-755; *Stanley*, 405 U.S. at 651; *Pierce*, 268 U.S. at 534-35; *Meyer,* 262 U.S. at 399; *People in Interest of A.M.D.,* 648 P.2d 632 (Colo. 1982). "Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life." *Santosky*, 455 U.S. at 753. Custody is not a pre-requisite to invoking due process protections due fit parents. *See In the Matter of D.I.S.*, 249 P.3d 775 (Colo. 2011). Parents and their children are entitled

to fundamentally fair procedures in order to "prevent the irretrievable destruction of their family life." *Santosky*, 455 U.S. at 753.

The *Troxel* Court struck down a "breathtakingly broad" visitation statute because it permitted the trial court to disregard or override a parent's wishes based on the trial judge's personal view of the children's best interests. 530 U.S. at 67. The *Troxel* Court found that a fit parent is presumed to act and make decisions in the best interests of the child. *Id.* at 68. Due Process requires a trial court to "accord at least some special weight to the parent's own determination" when the parent's decision becomes subject to judicial review. *Id.* at 70.

Colorado courts have applied the *Troxel* presumption in proceedings in which non-parents seek to infringe familial rights. In cases in which a non-parent seeks to interfere with a child's relationship with a fit parent, the court presumes that the parent's position on the issue is in the child's best interests. *In re Adoption of C.A.,* 137 P.3d 318 (Colo. 2006); *In the Matter of D.I.S.*, 249 P.3d 775 (Colo. 2011). This court has applied the *Troxel* presumption in cases involving visits by former foster parents, *In re Parental Responsibilities Concerning B.J.*, 242 P.3d 1128 (Colo. 2010), and grandparents, *In re Adoption of C.A.,* 137 P.3d 318 (Colo. 2006), and when fit parents seek to withdraw their consent to guardianship, *In the Matter of D.I.S.*, 249 P.3d 775 (Colo. 2011).

C. Individuals Who Have Filed an Adoption Petition Do Not Have a Fundamental Interest In Parenting The Child Subject to the Petition.

Intervenors request this court to provide them with the same protections provided to natural and properly decreed adoptive parents. Such a broad interest would have far-reaching implications, all requiring a shift away from the focus on the natural parent's and children's rights and leading to lack of permanency and stability to which children are entitled. Intervenors' proposed "liberty interest" is not supported by case law or the Children's Code.

Courts employ a two-prong analysis in assessing due process interests. *Matthews v. Eldridge,* 424 U.S. 319 (1976); *Watso v. Colo. Dept. of Soc. Services*, 841 P.2d 299, 304 (Colo. 1992). The court must first define the nature and extent of the asserted interest. *Watso*, 841 P.2d at 304. In the event the asserted interest is constitutionality protected, the court must then evaluate the adequacy of the challenged process. *Id.*

While properly decreed adoptive parents also enjoy the same fundamental interest in their adopted children, *see* §19-5-211(1), C.R.S. (2014), Colorado courts have refused to recognize equivalent rights for individuals that are not natural or adoptive parents. Extended family members are not entitled to assert a liberty interest commensurate with that of the natural parents. *People in Interest of C.E.*,

923 P.2d 383, 386-387 (Colo. App. 1996) (maternal aunt did not have a fundamental liberty interest in the society and custody of her nephew despite ability to petition dependency and neglect court for custody). Foster parents, including those labeled "pre-adoptive" parents, do not have a similar liberty interest in Colorado prior to termination of parental rights. *M.S. v. People,* 303 P.3d 102 (Colo. 2013).

The *M.S.* court left open the question of whether the filing of an adoption petition elevates the pre-adoptive parent's interest to that of a natural parent. A review of the statutory scheme and the risks assumed by those petitioning for adoption establish that they do not have an interest protected by the Fourteenth Amendment.

The general assembly's intent in enacting Article 5 is to establish a statutory scheme in which children may be adopted when the "birth parents are unable or unwilling to provide proper parental care." § 19-5-100.2(1), C.R.S. (2014). An adoption petition must fail if the birth parents' rights have not been properly relinquished or terminated. §§ 19-5-203(1)(a) and (b), C.R.S. (2014).

A properly filed petition for adoption entitles the petitioner(s) to a hearing within six months of the filing of the petition. §19-5-202.5, C.R.S. (2014). At the hearing, the court cannot grant the petition unless it is satisfied (1) the child is

available for adoption, (2) each petitioner is of good moral character able to support and educated the child in a suitable home, (3) each petitioner's criminal history, as reflected in the mandatory home study accompanying the petition, does not preclude the adoption, (4) the child's mental and physical needs can be met by the petitioner(s), (5) the child's best interest will be served by the adoption, and (6) it is in the best interest of a sibling group to be jointly placed for adoption, if applicable. §19-5-210(2)(a)-(e), C.R.S. (2014). If the court is not satisfied that the requirements of section 19-5-210(2) have been met, the court must either continue or dismiss the petition for adoption. §19-5-210(4), C.R.S. (2014). Even if petition is granted, the adoption order is subject to appeal and annulment. § 19-5-214, C.R.S. (2014).

Additionally, adoption agency contracts and disclosures, as reflected in this case, inform prospective adoptive parents that the adoption may not be completed, the biological parents' rights take precedence, and fraud may prevent the adoption. In light of the statutory scheme and warnings, prospective adoptive parents do not enjoy a protected liberty interest in children they hope to adopt upon the filing of a petition for adoption.

The general assembly has defined the interests of custodians in terminations under Article 5. Custodians are allowed to intervene "to present evidence to the

court regarding the nonrelinquishing parent's contact, communication, and relationship with the child." § 19-5-105(3.6), C.R.S. (2014).[1]

II. The *Troxel* Presumption Applies in Private Termination Proceedings under Article Five of the Children's Code.

"The interests to be protected in a termination of parental rights case include the interests of the parent and child in a continuing family relationship; the interests of the parent in preserving the integrity and privacy of the family unit; the interest of the child in a permanent, secure, stable, and loving environment; and the interests of the State in protecting the child." *People in Interest of C.A.K.*, 652 P.2d at 607 (citation omitted).

The general assembly mandates that the court consider in termination proceedings the children's interests, and places paramount consideration of the physical, mental, and emotional conditions and needs of the children, §§ 19-5-105(3) and (3.5), C.R.S. (2014). The best interests standard set forth in § 19-5-105(3) and (3.5), C.R.S. (2014), promotes a comprehensive assessment of the

[1] This Court's decision in *A.M. v. A.C.*, 296 P.3d 1026 (Colo. 2013) does not require a different result. The statutory authority for foster parent participation in D&N proceedings is found in § 19-3-507(a), C.R.S. (2014). That section does not limit the foster parent's participation as the general assembly did in section 19-5-105(3.6), C.R.S. (2014).

children's needs. Such an assessment must include the children's interest in a relationship with their biological father. *See People in the Interest of C.A.K.*, 652 P.2d at 607; *In re People in Interest of M.M.*, 520 P.2d at 131-132. The heritage, traditions, culture, educational and religious preferences, medical history, indeed "intrinsic human rights" of the biological family are the starting point in the assessment of the children's best interests. *See Moore v. City of East Cleveland*, *supra*. The best interests standard does not include whether the biological parent or non-relative custodians would provide the better home. *Santosky*, 455 U.S. at 759. The best interests standard, however, should be informed by the presumption that a fit parent challenging the adoption is acting the child's best interests under *Troxel*.

Absent application of the *Troxel* presumption, Title 19, Article 5, would allow private organizations and individuals to interfere with and limit a fit parent's right to raise his children and even seek termination of parental rights over the fit parent's objections. The statutory scheme requires that the relinquishing parent receive counseling and procedural protections to ensure she understands the full, final, and serious nature of her decision to relinquish her parental rights and place the children for adoption while potentially forcing a fit parent and his children into

extensive litigation in an effort to preserve their family unit; leaving the children's natural family in turmoil for several years.

Section 19-5-105(3), C.R.S. (2014), provides,

> If the other birth parent or a person representing himself or herself to be the other birth parent appears and demonstrates the desire and ability to personally assume legal and physical custody of the child, taking into account the child's age, needs, and individual circumstances, the court shall proceed to determine parentage under article 4 of this title. If the court determines that the person is the other birth parent, the court shall set a hearing as expeditiously as possible, to determine whether the interests of the child or of the community require that the other parent's rights be terminated or, if they are not terminated, to determine whether:
>
> (a) To award custody to the other birth parent or to the physical custodian of the child; or
> (b) To direct that a dependency and neglect action be filed pursuant to part 5 of article 3 of this title with appropriate orders for the protection of the child during the pendency of the action.

When the "other" parent appears, Article 5 requires the court to first set a termination hearing "if the interests of the child or of the community require that the other parent's rights be terminated." *Id.* The court may terminate the parent-child relationship of a fit parent under § 19-5-105(3.1), C.R.S. (2014):

> The court may order the termination of the other birth parent's parental rights upon a finding that termination is in the best interests of the child and that there is clear and convincing evidence of **one** or more of the following:
>
> (a) That the parent is unfit. ...
> (b) That the parent has not established a substantial, positive relationship with the child. ...

> (c) That the parent has not promptly taken substantial parental responsibility for the child. …

(emphasis added). The plain language of the statute makes father's fitness irrelevant to a court's termination decision based on sections (b) and (c).

Presumably, the court's decision to invoke the dependency and neglect (D&N) provisions of Article 3 is based on the parent posing a threat to the child's health and safety. § 19-3-100.5, C.R.S. (2014). In a D&N, the parent enjoys several protections including the state's obligation to assist the family with appropriate services and employ reasonable efforts to unify it thus ending state interference with family life. *Id.* In Article 5, if no such threat is presented, the court may dissolve the natural family without any efforts to preserve the family relationships. The statutory scheme in Article 5 makes it more likely the "unfit" parent whose rights are protected under Article 3 will be able to raise his children than a fit parent under Article 5. This absurd result may lead to undue interference in and destruction of family life and erroneous decisions under the provisions of section 19-5-105(3.1), C.R.S. (2014).

If the court does not terminate or refer the matter to a D&N, the court must set a hearing "to determine custody of the child, parenting time with the child, duty of support, and recovery of child support debt." § 19-5-105(3.4) C.R.S. (2014). In

such custody proceeding, this court *requires* the *Troxel* presumption. *In re Adoption of C.A.,* 137 P.3d 318 (Colo. 2006).

In *In re Adoption of C.A.,* this court considered the "special weight" and "special factors" requirements of *Troxel* in the context of a grandparent request for visitation under § 19-1-117, C.R.S. (2014). This court held that the appropriate standard for issuance of a visitation order requires:

> (1) a presumption in favor of the parental visitation determination;
>
> (2) to rebut this presumption, a showing by grandparents through clear and convincing evidence that the parental visitation determination is not in the child's best interests; and
>
> (3) placement of the ultimate burden on grandparents to establish by clear and convincing evidence that the visitation schedule they seek is in the best interests of the child.
>
> The court must apply this standard when a in grandparent visitation cases and, if it orders grandparent visitation, it must make findings of fact and conclusions of law identifying those "special factors" on which it relies.

137 P.3d at 322.

This standard protects parents and children when a non-parent seeks to intrude in the functioning of the family. At a minimum, the standard applied in determining mere custody must be applied in private termination of parental rights proceedings as the termination proceeding challenges the very existence of the family relationship.

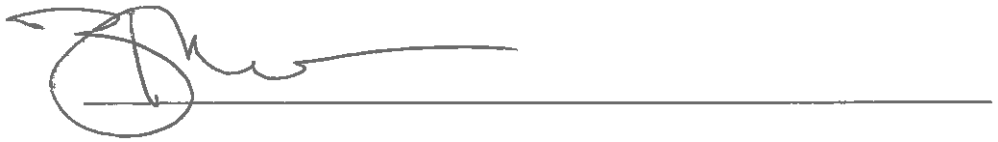
CONCLUSION

The OCR respectfully requests this court find children have important interests at stake in preserving their natural family and that their fit parent's decision to maintain the family unit is entitled to the presumption that such decision is in their best interests.

Respectfully submitted this 12th day of May 2015,

Colorado Office of the Child's Representative

By: Dorothy Macias, Attorney Reg. #36298
Amanda Donnelly, Attorney Reg. #34952



CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of May, 2015, a true and correct copy of the foregoing Colorado Office of the Child's Representative Amicus Curiae brief was served electronically via ICCES or by US mail on the following:

S. Scott Lasher, Attorney for Respondent M.C.
Lasher Legal Resolution, P.C.
6000 East Evans Ave., Suite 1-121
Denver, CO 80222
scott@lasherlegalresolution.com

Catherin A. Madsen, Attorney for Appellee Adoption Choices of Colorado, Inc.
Caterhine A. Madsen, P.C.
P.O. Box 351300
Westminster, CO 80035
cathymadsen@mykolab.com

Rajesh K. Kukreja, Attorney for Intervenors-Appellees T.W. & A.W.
Sherman & Howard L.L.C.
633 17th Street, Suite 3000
Denver, CO 80202
rkukreja@shermanhoward.com

Dorothy Macias