equitable principles is apparent in this court's opinion in *Fletcher v. Scorza*, 2010 Ark. 64, 359 S.W.3d 413 (2010), where we said:

> It is within the circuit court's discretion to make a determination as to whether a parent is qualified and suitable. *See Freeman v. Rushton*, 360 Ark. 445, 202 S.W.3d 485 (2005). Moreover, the natural-parent preference is but one factor that the circuit court must consider in determining who will be the most suitable guardian for the child. *See Blunt* [*v. Cartwnght*, 342 Ark. 62, 30 S W 3d 737 (2000)],. . . . *Any inclination to appoint a parent or relative must be subservient to the principle that the child's interest is of paramount consideration. See Blunt, supra.*

Id., 359 S.W.3d at 421(emphasis added).

Of course, the case of *Blunt*, predated the Supreme Court's holding in *Troxell*, and *Freeman v. Rushton*, 360 Ark. 445, 202 S.W.3d 485 (2005) failed to even mention *Troxell* in holding that the inclination to appoint a parent or relative must be subservient to the child's best interest and that the child's best interest is of paramount consideration, both in custody and in guardianship situations.[2] However, *Troxell* held that:

> *. . . the Fourteenth Amendment's Due Process Clause has a substantive component that "provides heightened protection against government interference with certain fundamental rights and liberty interests," Washington v. Glucksberg, 521 U. S. 702, 720, including parents' fundamental right to make decisions concerning the care, custody, and control of their*

[2]This language, referring to "the child's best interest" seems to be at the root of the confusion surrounding the proper standard to be applied in guardianship cases. First, it is incorrect, because the statute references only "the ward's best interest." Second, it appears to be easily confused with the "best interest of the child" analysis used in domestic relations cases. Unfortunately, both *Graham* and *In Re S.H. I* use the term "best interest of the child." However, a careful reading of both of these cases shows that the intended meaning is that a guardianship is necessary where the parent is unfit, or where some other harm to the ward would result if the guardianship were terminated. Certainly, any particular guardianship may be terminated if termination is in the ward's best interest, even if guardianship is still necessary.

Of course, as stated previously, *Blunt* predates *Troxell*, and *Freeman* does not even mention the presumption in favor of a fit parent. But, as Justice Glaze pointed out in his dissent in *Freeman*:

> [*T]he proper analysis must commence with the presumption that Freeman was acting in his son's best interest*, however, Freeman was not given the benefit of that presumption: Our court, therefore, cannot be assured that, if it had utilized the correct legal principles and analysis the trial court would have ruled the way it did. . . . It appears to me that Freeman's argument that the trial court erred as a matter of law is correct under the tenets established in *Troxell* and *Linder*. In my view, confusion exists in this case and we are the only ones who can alleviate that confusion – better now than later.

Freeman v. Rushton, 360 Ark. at 452, 202 S.W.3d at 489, Glaze J., dissenting (emphasis added).

Justice Glaze was correct, and the confusion has only gotten worse as evidenced by this court's holding in *Fletcher*. However, *Blunt*, *Freeman*, and *Fletcher* all predate our holding in *In Re S.H. I* where we first recognized that Ark. Code Ann. § 28-65-401 is unconstitutional as applied to a fit parent. Earlier decisions are implicitly overruled by subsequent decisions to the contrary. *Oldner v. Villines*, 328 Ark. 296, 943 S.W.2d 574 (1979).

While the dissent may, "shudder to think" that this court, "now having the vote" to basically overrule "without so stating" our holding in *In Re S.H. I*, this statement is as incorrect as it is inflammatory and hyperbolic. If this court were to conclude that the holding in *In Re S.H. I* misapplied the law, it is our duty to so hold. This is particularly true where, as here, we are dealing with a statutory infringement on a fundamental right that is subject to review under a strict scrutiny standard. *See Linder*. Therefore, the dissent should not "shudder to think" that this court will preform its duty and overrule any prior

precedent that is inconsistent with the constitutional guarantee of due process. However, despite the dissent's baseless characterization, the majority does no such thing. While I reach my conclusions from a different analysis than that employed by the majority, I do agree with their conclusion that the circuit court in this case impermissibly required Tamera to prove a change of circumstances in order to justify terminating the guardianship in direct violation of our holding in *In Re S.H. I.* For that reason alone, this case must be reversed.

As for the dissent's assertion that the proper course to take when the circuit court has committed error, in a case such as this, is to reverse and remand for *further proceedings*, I am, quite frankly, appalled. This is a probate case, a case at law, and we do not defer to the circuit court on matters of law; but, instead, review the case de novo on the record.[3] In this case, Tamera, a fit parent, has been struggling through five years of legal proceedings to regain custody of her child. That the dissent could possibly believe that further proceedings would benefit anyone, especially S.H., defies both logic and common sense. In this regard, I again quote Justice Glaze's wisdom from his dissent in *Freeman*,

[3]In this regard, both the majority and the dissent err in citing to *Ingle v. Ark. Dep't of Human Servs.*, 2014 Ark. 53, 431 S.W.3d 303. *Ingle* was a juvenile case, sounding in equity, in which the circuit court maintained continuing jurisdiction. Thus, in *Ingle*, a new petition could be filed in the case encompassing circumstances that had arisen following the entry of the previous order, which we reversed. Yet, even in equity, the moving party must show a material change in circumstances has transpired since the time of the previous order. *See generally*, *Jones v. Jones*, 326 Ark. 481, 931 S.W.2d 767 (1996). In *In re S.H. I*, a probate case, there was no continuing jurisdiction. The order at issue in that case was the order denying Tamera's initial petition to terminate the guardianship. We reversed that order and remanded the case for the circuit court to reconsider its ruling and apply the correct constitutional standard.

"confusion exists in this case and we are the only ones who can alleviate that confusion – better now than later."

HART, J., joins.

PAUL E. DANIELSON, Justice, dissenting. Because I cannot abide by the majority's substitution of its judgment for that of the circuit court and because I do not agree that the circuit court clearly erred in denying Tamera's petition to terminate the guardianship, I respectfully dissent.

Our standard of review in these cases is longstanding and quite clear: we review probate proceedings de novo, *but* we will not reverse a finding of fact by the circuit court unless it is clearly erroneous. *See Graham v. Matheny*, 2009 Ark. 481, 346 S.W.3d 273. A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made. *See id.* When reviewing the proceedings, we give *due regard* to the opportunity and *superior position* of the probate judge to determine the credibility of the witnesses. *See id.* The majority's opinion, however, represents quite a sea change in the manner by which this court will now review a case such as this one. Instead of adhering to our standard of review, the majority opinion wholly ignores the circuit court's decision in this case and replaces it with its own—annihilating our role as an appellate court to *review*. By its doing so, I am left to wonder if there is any longer a need to allow the circuit court to even

consider these matters first.[1] At the very least, I am troubled by the precedent being set by the majority's actions.

In addition, I believe that the majority opinion has removed any discretion by the circuit court in deciding a petition to terminate guardianship. Ark. Code Ann. § 28-65-401(b)(3) (Repl. 2012) (providing that a "guardianship *may* be terminated by court order after such notice as the court may require . . . [i]f, for any other reason, the guardianship is no longer necessary or for the best interest of the ward"). While stating its recognition of this court's precedent in the first appeal in this matter, the majority basically overrules that decision, without so stating, and holds that merely "informing the court that the conditions necessitating the guardianship no longer exist" is all that is required. That, in my opinion, flies in the face of our earlier decision, wherein we specifically held that "when a natural parent, who has not been deemed unfit and who has consented to a guardianship, files a petition to terminate that guardianship, that parent *must put forth evidence that the guardianship is no longer necessary*." *In re Guardianship of S.H.*, 2012 Ark. 245, at 15, 409 S.W.3d 307, 316 (*S.H. (I)*) (emphasis added).

Here, the circuit court held Tamera to the showing required in *S.H. (I)* and concluded in its letter opinion that the "conditions still indicate an unstable situation."[2]

[1]In its attempt to justify the substitution of its judgment for that of the circuit court, the majority states that it can do so because the circuit court applied an incorrect standard and because the matter has been pending for several years. Even if the circuit court applied an incorrect standard, which I in no way concede that it did, the proper remedy would be a reversal of the circuit court's decision and a remand for *the circuit court* to apply the correct standard. *See Graham*, 2009 Ark. 481, 346 S.W.3d 273. More importantly, it is not, and has never been, this court's function, no matter the circumstances, to ever "consider the evidence and apply the appropriate standard," as asserted by the majority. To do so under the guise of de novo review is simply wrong.

Despite the fact that the circuit court did precisely as this court instructed in *S.H. (I)*, the majority nonetheless reverses the circuit court's decision. I shudder to think that the majority's reversal is nothing more than the result of the dissent in *S.H. (I)* now having a majority to reverse our prior holding. But whatever the majority's rationale, I simply cannot say that the circuit court clearly erred in its decision, based on my review of the record and the circuit court's findings under our standard of review. For this reason, I would affirm the circuit court's denial of Tamera's petition.

While not necessary to its decision, the circuit court did go further and concluded that even if Tamera had put forth evidence that the conditions necessitating the guardianship had been removed, the Herringtons had rebutted the presumption that termination of the guardianship was in S.H.'s best interest. The majority concludes that this decision was erroneous as well because the circuit court "failed to credit Tamera's fundamental right to care for her daughter and gave no weight to her rights as the natural parent." In *S.H. (I)*, we held that a parent, who has not been found unfit and who consented to a guardianship, is entitled to the presumption that she or he is acting in the child's best interest in a proceeding to terminate that guardianship. *See S.H. (I)*, 2012 Ark. 245, 409 S.W.3d 307.

The majority's observation, however, indicates a flawed understanding of our further holding in *S.H. (I)*—that a natural parent's fundamental right to the care, custody, and control of her or his child is recognized and afforded weight by virtue of the

[2]The circuit court incorporated its letter opinion into its order denying Tamera's petition.

rebuttable presumption given that parent that termination of the guardianship is in the child's best interest. *See id.* The fact that a presumption is afforded to that parent *is* itself the recognition and protection of the parent's fundamental right to parent. *See Black's Law Dictionary* 1378 (10th ed. 2014) (defining "rebuttable presumption" as "[a]n inference drawn from certain facts that establish a prima facie case, which may be overcome by the introduction of contrary evidence"). When the circuit court in the instant case gave Tamera the benefit of the presumption and required the Herringtons to rebut it, the circuit court gave the requisite weight to Tamera's fundamental right and protected it, just as we held in *S.H. (I)*.

On a final note, I would be remiss if I did not point out the danger in the majority's directive to the circuit court to return S.H. to Tamera's custody, when it does not have the benefit of knowing the events and circumstances since the filing of this appeal. *See Ingle v. Ark. Dep't of Human Servs.*, 2014 Ark. 53, 431 S.W.3d 303 (Danielson, J., concurring in part and dissenting in part). It was a dangerous precedent in *Ingle*, from which I vigorously dissented, and I remain steadfast in my position, most certainly after my very fears were confirmed in that case. *See Ingle v. Ark. Dep't of Human Servs.*, 2014 Ark. 471, 449 S.W.3d 283. As I have already noted, even if the circuit court had erred, the proper remedy would be a reversal of the circuit court's decision and a remand to the circuit court for further proceedings. *See Graham*, 2009 Ark. 481, 346 S.W.3d 273.

Because the majority's opinion and its actions therein far exceed our role as a court of appellate review, and because, after having exercised the appropriate review in such

cases, I would affirm the circuit court's order denying Tamera's petition to terminate the guardianship, I respectfully dissent.

HANNAH, C.J., joins.

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