IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: MAY 24, 2012
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2011-SC-000511-MR

WILLIAM PETE SLACK, ET AL. — APPELLANTS

V.

ON APPEAL FROM COURT OF APPEALS
NO. 2011-CA-001356-OA
OHIO CIRCUIT COURT NO. 11-CI-00140

HON. MIKE McKOWN, JUDGE,
OHIO CIRCUIT COURT, ET AL. — APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellants, William Pete Slack and Heidi E. Kerekgyarto, petitioned the Court of Appeals for a Writ of Prohibition and/or Mandamus asking it to (1) prohibit the Ohio Circuit Court from enforcing its Orders concerning custody, and/or (2) mandate the Ohio Circuit Court to dismiss for lack of standing. The Court of Appeals denied the petition and Appellants now appeal to this Court as a matter of right. Ky. Const. § 115; CR 76.36(7)(a). For reasons that follow, we affirm the order of the Court of Appeals.

I. BACKGROUND

In 2001, Appellants had a daughter, H.E.S.[1] H.E.S. resided primarily with Heidi until January 2006 when William sought and obtained primary

[1] It is undisputed that, although they were never married, Appellants are H.E.S.'s biological parents.

residential custody.[2] That same month, William married the Real Party in Interest, Edwina Slack.

In mid-to-late 2006, William began working on the road and eventually relocated to Texas. From the time that William began working on the road until December 2010, Edwina was H.E.S.'s primary caregiver and financial supporter. However, William visited occasionally, provided H.E.S. with healthcare, and sent financial support. Heidi also visited occasionally, but irregularly.

In 2008, William, who was still married to Edwina, began dating and living with another woman. William and his paramour established a new home together in West Virginia, but H.E.S. remained in Kentucky with Edwina. Two years later, on December 17, 2010, William decided to divorce Edwina, and moved with H.E.S. into his parents' home. This prompted Edwina to move for custody of her stepdaughter. William and Heidi then objected to their daughter being placed with a non-parent third-party and argued that, as such, Edwina lacked standing to even seek custody.

Following a hearing on April 28, 2011, the trial court found:

1. That Respondent, William Pete Slack, has waived or partially waived his superior right to custody.
2. That shortly after Petitioner, Edwina Slack, and Respondent, William Pete Slack, were married, Respondent, William Pete Slack left the residence for work travel and *did not return.*

[2] William filed a motion to amend the prior custody order because Heidi was using illegal drugs and was in an abusive relationship. In January 2006, Heidi committed herself to a drug rehabilitation center. In September 2007, Heidi moved out of the rehabilitation center and into the home of the individual with whom she had previously been involved in an abusive relationship. Heidi's drug problems then continued.

3. Respondent, William Pete Slack, would on occasion come back to this area for short periods, however, even upon his return, he did not spend much time with the minor child involved herein.
4. . . . that it is significant that the Respondent, William Pete Slack, had developed another relationship with another individual at some point after he left the residence. The Court finds *this could very well indicate an intention by said Respondent to build a family elsewhere and said Respondent chose not to include the minor child in this possible new family.*
5. That Petitioner, Edwina Slack, has been acting as a parent for approximately four (4) years and has provided an emotional bond, cared for and supported the child.

(Emphasis added). Accordingly, the court overruled William's motion and, on May 26, 2011, ordered a temporary custody and timesharing arrangement. Specifically, the court ordered joint custody among Edwina, William, and Heidi, with Edwina being the primary residential custodian.

Following the family court's entry of a decree of dissolution of William and Edwina's marriage on June 24, 2011, William moved the trial court to reconsider its previous ruling regarding Edwina's standing to seek custody because she no longer had any cognizable legal relationship with her former stepchild. Following a hearing on the matter, held July 8, 2011, the family court re-ordered joint custody between William, Heidi, and Edwina, with Edwina retaining primary residential custody.[3]

Appellants thereafter petitioned the Court of Appeals for a Writ of Prohibition (with respect to the custody order) and/or Mandamus (with respect

[3] The family court further ordered "that no party shall be allowed to use corporal punishment on the child and especially Respondent, William Pete Slack, shall not flick the child . . . ." It also found William in contempt for actions related to the April 28th hearing.

to the standing determination). The Court of Appeals rejected their arguments that "being without custody of one's children (even for a day) is a harm no appeal could remedy," and that the beginning of the school year warranted extraordinary relief. The Court of Appeals then determined that: (1) the trial court properly considered that H.E.S. had been in Edwina's care and custody for several years; and (2) school placement was an issue for the trial court to consider, and that Appellants had not requested that the trial court consider it. Thus, the Court of Appeals denied Appellant's petition.

II. ANALYSIS

The standards for granting petitions for writs of prohibition and mandamus are the same. *Mahoney v. McDonald-Burkman*, 320 S.W.3d 75, 77 n.2 (Ky. 2010) (citing *Martin v. Admin. Office of Courts*, 107 S.W.3d 212, 214 (Ky. 2003)). This Court set forth that standard in *Hoskins v. Maricle*:

> A writ of prohibition *may* be granted upon a showing that (1) the lower court is proceeding or is about to proceed outside of its jurisdiction and there is no remedy through an application to an intermediate court; or (2) that the lower court is acting or is about to act erroneously, although within its jurisdiction, and there exists no adequate remedy by appeal or otherwise and great injustice and irreparable injury will result if the petition is not granted.

150 S.W.3d 1, 10 (Ky. 2004). And in *Kentucky Employers Mutual Insurance v. Coleman*, we reiterated the long-standing, lofty standards which must be attained before a writ will be granted:

> [T]he writs of prohibition and mandamus are extraordinary in nature, and the courts of this Commonwealth "have always been cautious and conservative both in entertaining petitions for and in

granting such relief." *Bender v. Eaton*, 343 S.W.2d 799, 800 (Ky. 1961).

> This careful approach is necessary to prevent short-circuiting normal appeal procedure and to limit so far as possible interference with the proper and efficient operation of our circuit and other courts. If this avenue of relief were open to all who considered themselves aggrieved by an interlocutory court order, we would face an impossible burden of nonappellate matters.

Id. This policy is embodied in a simple statement from a recent case: "Extraordinary writs are disfavored . . . ." *Buckley v. Wilson*, 177 S.W.3d 778, 780 (Ky. 2005).

236 S.W.3d 9, 12 (Ky. 2007). Appellants invoke the second class of writ cases, alleging that the trial court acted erroneously but within its jurisdiction, resulting in great injustice and irreparable injury, with no adequate remedy by appeal.

A. Standing

Appellants petitioned the Court of Appeals to issue a writ mandating the trial court to dismiss Edwina's custody action for lack of standing. Kentucky's codification of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) is the statute that confers standing to pursue custody. *Mullins v. Picklesimer*, 317 S.W.3d 569, 574-75 (Ky. 2010). "The construction and application of statutes is a matter of law." *Commonwealth v. McBride*, 281 S.W3d 799, 803 (Ky. 2009). Because Appellants' case falls under the second class of writ cases and a question of law is at issue, we review de novo. *Grange Mut. Ins. Co. v. Trude*, 151 S.W.3d 803, 810 (Ky. 2004). Thus, we must first

determine whether they have established the threshold criteria of lack of an adequate remedy by appeal and great injustice and irreparable injury. *Id.*

Appellants allege two reasons why there is no adequate remedy by appeal. First, they contend that "being without custody of one's children (even for a day) is a harm that no appeal could remedy." Second, they argue that their right as parents "to direct the education of H.E.S. is being thwarted, which is a severe infringement of their constitutional rights." Both arguments fail.

Appellants' first argument fails because they have *joint custody.* Thus, they are not "without custody" of H.E.S. Whether being without custody of one's child, even for a day, would in fact be a harm that no appeal could remedy is not an issue presented by this case.

Appellants' second argument fails for a similar reason. While it is true that biological parents have a constitutional liberty interest in directing their children's education, *Pierce v. Soc. of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 534-35 (1925), Appellants have joint custody of H.E.S. and are therefore entitled to joint decision-making rights with respect to education. Thus, we fail to see how Appellants' liberty interest is being infringed upon so severely as to warrant invocation of a writ. Furthermore, proper school placement is a matter to be considered by the trial court; as the Court of Appeals noted, Appellants have not requested that the trial court consider it. If and when they do, they will have an appealable order.

Because Appellants have not established the threshold criteria for lack of adequate remedy by appeal, we need not address whether they have suffered great harm and irreparable injury. The petition for a writ of mandamus with respect to the issue of standing is denied.

B. Custody Order

Appellants also petitioned the Court of Appeals for a writ prohibiting the circuit court from enforcing its custody order granting Edwina and Appellants joint custody and designating Edwina as the child's primary residential custodian. As with the writ of mandamus, Appellants' argument falls within the second class of writ cases. However, because the Court of Appeals found a lack of great injustice and irreparable injury in declining to grant the petition, we review for clear error.[4] *See Grange*, 151 S.W.3d at 810.

With respect to its findings of fact, the Court of Appeals' decision states:

> Petitioners' claim that the beginning of the school year is a basis for extraordinary relief [is not well taken]. . . . [T]he proper school placement for the child is [a] matter to be considered by the trial court. It does not appear that petitioners have requested that the trial court consider the matter.

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[4] When a case falls under the second class of writ case, the court with which the writ was filed must first make a factual determination that the alleged error of the trial court, if true, would cause a great injustice and irreparable injury, and that there is no adequate remedy by appeal. *Grange*, 151 S.W.3d at 810. If the court makes that finding, it must then make a determination that the lower court acted erroneously. *Id.* If it answers that question in the affirmative, it may then act in its discretion to issue or deny issuance of the writ. *Id.* If the petitioner appeals the denial of that decision, we review for abuse of discretion. *Id.* We assume that Appellants dispute the Court of Appeals' findings of fact, rather than merely its conclusion, because the court could not grant the petition *unless it first found great injustice and irreparable injury. See, e.g., id.*

Although sparse, we cannot conclude that the Court of Appeals' findings are clearly erroneous. Because the Court of Appeals found that Appellants had not satisfied the threshold criteria of great injustice and irreparable injury, it had no discretion to issue the writ. Accordingly, it properly denied Appellants' petition.

III. CONCLUSION

Because Appellants have failed to establish that they have no adequate remedy by appeal with respect to the standing issue, and because we find no clear error in the Court of Appeals' findings of fact, we affirm the judgment of the Court of Appeals.

Cunningham, Schroder, Scott, and Venters, JJ., concur. Noble, J., dissents by separate opinion in which Minton, C.J., and Abramson, J., join.

NOBLE, J., DISSENTING: The trial court in this case allowed the former spouse of one of the Appellants (and former step-parent of the child in question) to petition for and obtain temporary joint custody and primary physical custody of the child. In granting a temporary custody right to the former step-parent, the trial court believed the outcome was controlled by the legal framework laid out in *Mullins v. Picklesimer*, 317 S.W.3d 569 (Ky. 2010), a case addressing a custody fight between an unmarried couple, one of whom had given birth to a child who was conceived through artificial insemination. Acting under that case, the court found that the former step-parent, who admittedly had been the primary caregiver to the child for four years, had "been acting as a parent." Presumably the trial court also thought the

arrangement was in the best interest of the child, though the court's order does not include such a finding.

Today, the Court holds that the child's biological parents, who have never been found unfit in any way, cannot get relief by way of an extraordinary writ to bar the granting of temporary joint custody to the child's former step-parent, despite the lack of any legal relationship between the former step-parent and child. While I am on record stating that extraordinary writs are "disfavored" and, as a result, that the appellate courts of this state should reserve them for "extraordinary cases," *Cox v. Braden*, 266 S.W.3d 792, 796 (Ky. 2008), the simple fact is that the former step-parent has no right to seek custody of the child. Perhaps more importantly, the fundamental constitutional rights involved in this case require heightened review of the circumstances and a great deal of deference to the preferences of the biological parents of the child. Because that heightened review suggests that the fundamental rights of the parents in this case are being violated without sufficient cause, intervention by this Court is necessary. For these reasons, I respectfully dissent.

To begin with, the Appellants are correct that Ms. Slack does not have standing to intervene between two fit parents and ask for custody of their child. As noted above, the trial court found that Ms. Slack had been acting as a parent and thus, under *Mullins*, she had standing to pursue custody of the child in this case. *Mullins* essentially held that under KRS 403.822, a "person acting as a parent" has standing to pursue custody of a child. *Id.* at 574–75.

The phrase "person acting as a parent" is defined at KRS 403.800(13). It requires two things, the first of which is that the person has had physical custody of the child for at least six months within one year of the commencement of the custody action. But, as this Court held in *Mullins*, even if a person can meet the first prong of this definition, because the child resided with her in the marital home for the requisite time period, she also must satisfy a second requirement. Specifically, she must have "been awarded legal custody by a court or claim[] a right to *legal custody* under Kentucky law." *Id.* at 575 (emphasis added); *see also* KRS 403.800(13)(b). In *Mullins*, the non-birth mother had an agreed order entered by the court wherein the birth mother partially waived her superior right to custody, which gave the non-birth mother legal custody. This, along with her having had physical custody of the child for at least six months (the child having lived with her), gave her standing as a person acting as a parent to further pursue custody in the courts when challenged by the birth mother.

Absent an existing court order granting legal custody, a person who otherwise meets the requirements of "acting as a parent" only has standing to seek custody when she can claim legal custody under some statute. The controlling statute is KRS 403.270. That statute specifically names parents and *de facto custodians*. Step-parents are not mentioned. And while Ms. Slack might satisfy one prong of "a person acting as a parent," she does not satisfy the second prong because she does not fit under KRS 403.270, as she is neither a parent nor a de facto custodian.

To be a de facto custodian, a non-parent must "have been the primary caregiver for, *and financial supporter of*, a child who has resided with the person for a period." KRS 403.270(1)(a) (emphasis added). While Ms. Slack was no doubt the child's caregiver, it appears that Mr. Slack, the child's biological father, was her financial supporter, as he continually sent money to be used for the child's care. Moreover, as *Mullins* itself noted at the outset, "[P]arenting the child alongside the natural parent does not meet the de facto custodian standard in KRS 403.270(1)(a). Rather, the nonparent must literally stand in the place of the natural parent." 317 S.W.3d at 573–74 (citations and quotation marks omitted). While Ms. Slack no doubt served parallel to Mr. Slack in the parental role and arguably in some instances supplanted him (e.g., in much of the day-to-day care of the child), it cannot be said that she completely displaced him and acted as the sole parent for the child.

Ms. Slack's caregiver status was the legal status of a step-parent who has rights to access to the child because of her marriage to the child's father, not that of a third party who assumes care, custody and control of the child with no legal duty to do so when the child's parents either cannot or will not do so. Certain responsibilities for caring for the child of a spouse come with the legal status of marriage to that spouse, and enable the step-parent to act *in loco parentis*. When that marriage ends, so does any vestige of *legal* responsibility to the child. Certainly a step-parent can walk away after a divorce and have no further contact with a step-child without any legal

repercussions. Conversely, after divorce, a step-parent has no legal right to continued custody of the child.

And, unlike in *Mullins*, both the child's parents in this case are opposed to Ms. Slack having any custody over their child, and neither has in any way waived any rights or consented to her continued contact with the child after the divorce from Mr. Slack. This is important because a fit biological father and mother are statutorily entitled to custody of their children. *See* KRS 405.020(1) ("The father and mother shall have the joint custody, nurture, and education of their children who are under the age of eighteen (18). If either of the parents dies, the survivor, if suited to the trust, shall have the custody, nurture, and education of the children who are under the age of eighteen (18)."). The statute allows intervention in this order only by a *de facto custodian*. *See* KRS 405.020(2) ("Notwithstanding the provisions of subsections (1) and (2) of this section, a person claiming to be a de facto custodian, as defined in KRS 403.270, may petition a court for legal custody of a child."). While this statutory preference in favor of both parents clearly is not absolute, since a true de facto custodian may intervene and a court may, within a proper custody action, award sole custody to a proper petitioner, it nevertheless shows the statutory importance of allowing a child's *biological parents* to have custody, to the exclusion of other parties unless they are de facto custodians. (And the fact that a purported de facto custodian must prove that status by clear and convincing evidence, a high burden of proof exceeded only by the

criminal standard of beyond a reasonable doubt, shows that the law disfavors de facto custodians.)

Ms. Slack thus does not have standing to seek custody of this child, who has two fit parents.

The writ should be granted in this case because, while the trial court does have general subject matter jurisdiction over the case, Ms. Slack's lack of standing further complicates what I perceive as irreparable harm—depriving the natural parents of physical possession of their child and giving a third party equal decision-making authority over their child for a number of years—cannot be appropriately remedied by appeal because of the impossibility of giving back parenting time that has been taken from the rightful custodians. This differs from a dispute between two parents over custody and timesharing, because both are *rightful* custodians, and regardless of how an appellate court might settle custody or timesharing disputes, each parent rightfully spent the time with the child during the appeal process. Such is not the case here.

But even if the situation here is not considered to be irreparable harm, a writ still should issue because this case falls within the special class of writs that are issued when the actions of a trial court interfere with the orderly administration of justice relating to fundamental rights.

There is a fundamental federal constitutional question that would require issuance of the writ. This case must ultimately be viewed through the lens of the United States Constitution. In 2000, the United States Supreme Court affirmed longstanding nationwide precedent that a parent who is not unfit has

the right under the Fourteenth Amendment to the United States Constitution to make decisions as to the care, custody and control of his or her child. Further, the Court called this right "fundamental." *Troxell v. Granville*, 530 U.S. 57, 65 (2000). Indeed, the Court went so far as to say that "[t]he liberty interest at issue in th[at] case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Id.*[5]

Troxell squarely addressed whether the "best interests" of the child question could trump the wishes of the child's fit biological parents. The Troxells were the grandparents of two girls through their deceased father, Brad Troxell. Brad and Granville, the girls' mother, had never married. After their breakup, Brad lived with his parents and had frequent visitation with the girls in his parents' home. After he committed suicide, the grandparents continued to see the children on a regular basis until Granville determined that she wanted to limit the visits to one short visit a month. The Troxells went to court seeking more time under the Washington state statutes allowing "any person" to petition the court for visitation "at any time" and further allowing the court to order such visitation "when visitation may serve the best interest of the child." *Id.* at 60 (quoting Wash. Rev. Code § 26.10.160(3)). The local trial court

[5] Even Justice Kennedy pointed out in his dissent: "[T]here is a beginning point that commands general, perhaps unanimous, agreement in our separate opinions: As our case law has developed, the custodial parent has a constitutional right to determine, without undue interference by the state, how best to raise, nurture, and educate the child. The parental right stems from the liberty protected by the Due Process Clause of the Fourteenth Amendment." *Troxell*, 530 U.S. at 95 (Kennedy, J., dissenting).

ordered additional visitation, and as part of its reasoning found that the Troxells were "part of a large, central, loving family, all located in this area" and that "[t]he children would be benefitted from spending quality time with the Petitioners, providing that that time is balanced with time with the childrens' *[sic]* nuclear family." *Id.* at 62 (mistake notation in original).

Despite recognizing the societal changes that have involved extended family and even third parties in the care of children today, the Supreme Court wrote to "highlight the fact that these statutes can present questions of constitutional import" when they elevate the best interest of the children as viewed by a court over the specific rights of a parent. *Id.* at 64–65.

After a lengthy review of prior cases establishing the fundamental right to parent, the Court reiterated, "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." *Id.* at 66. Then, looking to the statutes in question, the Court pointed out that, as applied, they were unconstitutional because "[t]he Washington Superior Court failed to accord the determination of Granville, a fit custodial parent, any material weight." *Id.* at 72. Because the case involved "nothing more than a simple disagreement between the Washington Superior Court and Granville concerning her children's best interests," the Court explained that "the Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing

decisions simply because a state judge believes a 'better' decision could be made." *Id.* at 72–73.

In short, the Fourteenth Amendment protects the rights of fit biological parents against undue interference by the state, whether at its own initiative or at the behest of a third party who is also not the child's parent. That protection requires "more than fair process." *Id.* at 65 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 719, 117 S.Ct. 2258 (1997)). The protection "also includes a substantive component that 'provides *heightened protection* against government interference ....'" *Id.* (emphasis added) (quoting *Glucksberg*, 521 U.S. at 720). Or, as Justice Thomas pointed out in his concurring opinion, absent a compelling state interest, the state should not be "second-guessing a fit parent's decision regarding visitation with third parties." *Id.* at 80 (Thomas, J., concurring). In fact, Justice Thomas stated that because the rights involved were agreed by all to be *fundamental constitutional rights*, only strict scrutiny of the government's action would suffice to protect those rights. *Id.*

Both *Troxell* and this case involve applying the best interest standard when third parties are seeking timesharing, or physical possession of the child. As discussed by Justice O'Connor in the plurality opinion, this situation arises due to the proliferation of nonparental visitation statutes nationwide that were enacted in response to societal changes resulting in more single parents, the demographics of a mobile society, and the employment of both parents outside the home. In an effort to promote the welfare of children, the states have attempted to factor in the effect of the relationships children form with third

party caretakers into their custody and time sharing statutes. In doing so, the Court pointed to the "obvious cost": burdening the traditional parent-child relationship. *Id.* at 64. Thus, rather than saying such statutes are per se unconstitutional, the *Troxell* plurality merely pointed out that such statutes cannot ignore the constitutional interest of a fit parent to determine the care, custody and control of his or her child. Because the statute as applied to Granville did just that, it's application was declared unconstitutional.

With *Troxell,* trial courts' best interest determinations must be examined in light of what the parental wishes might be, if the parents are fit. And here, there has been no termination of the parental rights of either parent. Indeed, by granting joint custody, the trial court at least impliedly found them to be fit. (And "[t]here is a presumption that fit parents act in their children's best interests; there is normally no reason for the State to inject itself into the private realm of the family to further question fit parents' ability to make the best decisions regarding their children." *Id.* at 58 (citations omitted).) That both parents object to the continued presence of Ms. Slack in their lives and the child's life is manifested by the fact that they are before this Court.

The nonparental aspect of KRS 403.270 is limited to de facto custodians. And even if Ms. Slack were a de facto custodian instead of just standing *in loco parentis* to the child, under *Troxell* the trial court is required to state a compelling reason for why the wishes of two fit parents should be ignored. Our courts have acknowledged this. *Consalvi v. Cawood,* 63 S.W.3d 195 (Ky. App. 2001).

That reason cannot be simply that the trial court, or appellate court, disagrees with the parents as to what is in the child's best interest, when a third party is seeking visitation or custody. And while the plurality in *Troxell* stopped short of banning *any* statute that interferes with fit parents' fundamental right to exercise the care, custody and control of their child, two members of the Court would have done so, and *all* members of the Court agreed that the parents do have that fundamental right. Our own case law requires a finding that not only is third party custody in the best interest of the child, but also that the parent is not *suitable* before third party custody can be granted. *Chandler v. Chandler,* 535 S.W.2d 71 (Ky. 1975).

It is tempting to agree with the sentiment of the majority in this case because of the long and apparently loving relationship between Ms. Slack and the child. Indeed, many of the reasons expressed by the trial court and the majority were echoed in Justice Kennedy's dissent. In fact, he references the very scenario that occurred in this case where the parents had not always been the child's primary caregiver, and the third party has an established relationship with the child. In that instance, he disagrees that there should be an absolute parental veto to a future relationship, but he does not articulate a standard to apply. And, perhaps unfortunately, he is a minority of one. This Court cannot choose to follow his reasoning in the face of a clear ruling to the contrary on a federal question. Fit parents *can* veto future relationships with third parties absent a compelling reason not to do so. Best interest disagreements alone are not compelling without the additional factor of a

parent's unsuitability to make the decisions regarding with whom his or her child associates.

It should be noted again that this reasoning applies between a parent and a third party. As between parents, both of whom are presumptively suited to the trust of rearing their child, the best interest standard does not require compelling reasons for a court to make a best interest decision. This is because however the court decides custody or apportions time sharing, the person enjoying that time with the child is a *parent,* and by virtue of the parents' inability to live together, neither has a superior right to the other. The reality is that the child cannot live full time in two separate households, and the separation requires a neutral magistrate to decide when the parents cannot agree.

Rather than granting a writ to stop what is a clear violation of the Appellants' fundamental constitutional rights, the Court has decided that the Appellants cannot meet the requirements of a writ under the law of this Commonwealth. Without repeating what the Court has already laid out in depth, it suffices to say that the Appellants must show both that they have no adequate remedy by the ordinary appellate process and that they will suffer great injustice and irreparable harm. The trial court's decision to allow a person who is not the child's biological parent satisfies both requirements. The writ process has already taken close to a year to resolve, during which Ms. Slack has been allowed to exercise a great deal of custodial control over the child. The appellate process, which is sure to take even longer, cannot undo

that custodial control, which the child's biological parents clearly perceive to be unwanted and unwarranted interference in their care, custody, and control of the child. An appeal simply cannot restore that lost time and lost control. Moreover, given that the right to the care, custody, and control of a child by a fit biological parent is one of the oldest fundamental constitutional rights recognized in this country, the trial court's decision to improperly interfere with that right cannot be anything other than great injustice and irreparable harm. Even assuming that the violation falls short of that mark, the effect of this case on the Appellants' fundamental rights would fit under the "certain special cases" exception, as intervention would be necessary for the orderly administration of justice.

Consequently, I would reverse the Court of Appeals, and order that the writ be entered.

Minton, C.J., and Abramson, J., join.

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