**Opinion issued May 2, 2011.**

**In The**

# Court of Appeals

**For The**

# First District of Texas

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**NO. 01-11-00198-CV**

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**IN RE TAMMY FOUNTAIN, Relator**

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**Original Proceeding on Petition for Writ of Mandamus**

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## MEMORANDUM OPINION ON REHEARING

Relator Tammy Fountain has filed a motion for en banc reconsideration of our March 25, 2011 memorandum order denying her petition for writ of mandamus without opinion. *See* TEX. R. APP. P. 52.8(d), 52.9. Having received a response from real party in interest Kathy Katcher, we withdraw our prior order and issue this opinion in its stead, rendering the motion for en banc reconsideration moot. *See Brookshire Bros., Inc. v. Smith*, 176 S.W.3d 30, 33 (Tex. App.—Houston [1st

Dist.] 2004, pet. denied). By her petition, Fountain seeks a determination that Katcher lacks standing to seek appointment as a managing conservator of Fountain's child. Our disposition remains the same. On this record, we conclude that Fountain is not entitled to mandamus relief from the trial court's conclusion that Katcher has standing to file her petition.

**Background**

As required under the applicable standard of review, we accept as true the jurisdictional fact allegations of the real party in interest for purposes of our standing analysis in this original proceeding.[1] Our recitation of the factual allegations is not intended to suggest anything about what the appropriate fact-finder should determine for purposes of future proceedings in this matter.

One year ago, Tammy Fountain and Kathy Katcher ended a relationship that lasted approximately seven years. Beginning in April 2008, before their separation, the two women began caring for an infant boy at the request of his biological father. According to the father's affidavit testimony, he initially agreed to share possession of and responsibility for the child with Katcher and Fountain.

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[1] *See Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 228 (Tex. 2004); *Hobbs v. Van Stavern*, 249 S.W.3d 1, 3 (Tex. App.—Houston [1st Dist.] 2006, pet. denied); *Smith v. Hawkins*, No. 01-09-00060-CV, 2010 WL 3718546, at *3 (Tex. App.—Houston [1st Dist.] Sept. 23, 2010, no pet. h.) (memo. op.); *In re M.J.G.*, 248 S.W.3d 753, 758 (Tex. App.—Fort Worth 2008, no pet.).

The arrangement was that the child, S.J.F., would spend the first half of the week with the biological father and his family, and he would spend the second half of the week at Katcher's house with her and Fountain. This arrangement continued for some time, but the father eventually became "comfortable with the idea" that Katcher would legally adopt S.J.F.

In October 2009, a change in circumstance prompted the two women to seek adoption of the child. S.J.F.'s biological mother gave birth to another child, and drugs were found in the newborn's system. Child Protective Services intervened. Fearing that S.J.F. would be placed in foster care, Fountain and Katcher sought an adoption. According to Katcher, Fountain proposed that an adoption could be finalized more expeditiously if she were named the sole adoptive parent. Katcher contends that the two women agreed to add Katcher as a second adoptive parent at a later date.[2] Katcher paid some or all of the attorney's fees incurred during the adoption proceedings. When the adoption became final in December 2009, Fountain was the only adoptive parent listed on the certificate of adoption.

Both women claim to have been the child's primary caretaker. During their relationship, Fountain and Katcher maintained separate residences located approximately three and one half miles apart. Though living separately, they often

[2] According to Fountain, there was no agreement to add Katcher as an adoptive parent. Fountain denies that the two women intended to co-parent or share periods of possession and access to S.J.F.

spent evenings and nights together with S.J.F. at the home of one or the other. Katcher testified that because she worked from home, she assumed primary responsibility for S.J.F.'s care for a substantial amount of the time she and Fountain were together. Specifically, she stated that S.J.F. was in her care 95 percent of the time and that she paid most of his expenses. Katcher bought food, clothing, toys, and medicine for S.J.F., all of which were kept at her house. She made improvements to her home to make it safe for the child, and she had a place for him to sleep there. In preparation for the adoption home study, Katcher also paid for improvements to Fountain's home. Katcher asserts that without such improvements Fountain's home would not have been suitable for a child.[3]

Katcher claims that she acted as a parent to S.J.F. by locating, investigating, and selecting his daycare provider. She also attended medical appointments with him. Katcher testified that the time she spent with S.J.F. increased in the months following the adoption due to Fountain's heavy workload. A friend and

[3] In contrast, Fountain maintains that her home was S.J.F.'s primary residence. She acknowledges that, prior to the adoption, S.J.F. spent equal amounts of time in the two women's homes. But she testified that she provided S.J.F.'s health insurance and made all decisions concerning his welfare. She also testified that she took S.J.F. to and from daycare 90 percent of the time, but that on occasion Katcher would either take S.J.F. to daycare or care for him at home while Fountain worked. Although Fountain conceded that the two women cared for S.J.F. together for a period of time and that Katcher paid the majority of S.J.F.'s daycare expenses, she characterized Katcher's role in S.J.F.'s life as that of a "fun-loving aunt."

professional colleague of Katcher testified by affidavit that Katcher "cared for the child several days a week through 2008, the entire year of 2009 and in 2010 on an almost daily basis." A neighbor of Fountain who sometimes performs work on Katcher's home testified that between September 2009 and April 2010, he observed Katcher caring for S.J.F. five or six days per week. According to Katcher, all of this evidence demonstrates that she developed a significant relationship with S.J.F. between April 2008 and April 2010.

The nature of the women's former relationship is disputed. Katcher asserts that the women enjoyed a committed relationship, pointing to Fountain's own testimony that the two women spent most evenings and nights together. Katcher also presented evidence that, for a period of time before S.J.F.'s adoption, she was listed as a domestic partner on Fountain's health insurance policy. The two women had considered adopting other children together in the past. After the adoption of this child, Fountain wrote to her attorney to inquire about the process of adding Katcher as an adoptive parent.[4] The child's biological father testified that the two women were in a committed relationship and that he intended that they would both become S.J.F.'s parents.

[4] Fountain testified that she and Katcher separated on 20 to 25 occasions and declined to characterize their relationship as serious. Fountain blamed the problems in their relationship on Katcher's drug use. Katcher disputes the allegations of drug use and recalled only two breakups.

The couple's permanent separation in April 2010 gave rise to the underlying suit. Katcher filed suit on May 21, 2010, alleging that Fountain began denying access to S.J.F. almost immediately after their break-up. Katcher's pleadings do not raise any issue relating to the result of the adoption proceedings, nor does she contend Fountain is an unfit parent. Instead, Katcher asserts her own claim of rights with respect to S.J.F., and she asks to be named sole managing conservator of the child. *See* TEX. FAM. CODE ANN. § 153.371 (West 2008). Alternatively, she seeks to establish a joint managing conservatorship with Fountain. *See id.* § 153.372 (West 2008).

Fountain responded by filing a motion to dismiss, challenging Katcher's standing to initiate an original suit affecting the parent-child relationship. An associate judge denied Fountain's jurisdictional challenge by written order on October 8, 2010. The order provides in pertinent part:

> 5. The Court finds that **KATHY KATCHER** has developed a significant relationship with the child;
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> 6. The Court finds that **KATHY KATCHER** has invested significant time raising and caring for the child;
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> 7. The Court finds that **KATHY KATCHER** and **TAMMY FOUNTAIN** have both had the care, control and possession of the child for a period of 6 months not ending 90 days prior to the filing of **KATHY KATCHER'S** Original Suit Affecting Parent Child Relationship; and

> 8. The Court finds that it is in the child's best interest for **KATHY KATCHER** to be able to proceed with her Original Suit Affecting Parent Child Relationship.

Fountain appealed the associate judge's ruling to the trial court. After a de novo hearing, including four days of testimony and argument, the trial court orally adopted the associate judge's ruling on December 28, 2010. It is this ruling that Fountain challenges in her petition for mandamus.[5]

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[5] Fountain did not immediately challenge the trial court's denial of her motion to dismiss. Instead, at the trial court's suggestion, the parties participated in mediation. At mediation, the parties entered into "Mediated Settlement Agreement Temporary Orders," which granted Katcher temporary possession of and access to S.J.F. on specified dates and times during the pendency of the underlying suit. The agreement recited that "[e]ach signatory to this settlement has entered into same freely and without duress after having consulted with professionals of his or her choice." Fountain and her counsel each signed the agreement. Fountain initialed each page, and she separately initialed a sentence set apart on the first page of the agreement, stating in boldfaced, underlined, and all-capital letters that "A PARTY TO THIS AGREEMENT IS ENTITLED TO JUDGMENT ON THIS MEDIATED SETTLEMENT AGREEMENT." The agreement also stated that it did not "prejudice or waive the right of the parties to pursue a mandamus or an appeal to a higher court." The trial court entered temporary orders granting Katcher visitation with S.J.F in accordance with the terms of the mediated agreement.

Because Fountain agreed to the entry of temporary orders, we do not consider that order within the proper scope of her challenge in this original proceeding. A party can hardly complain that a trial court committed a clear abuse of discretion by implementing a temporary order after agreeing to the terms and entry of the order. Despite the trial court's ruling on the standing question and the referral to mediation, we have no record to indicate that the trial court would have awarded temporary access to the child absent Fountain's consent to the terms.

## Analysis

### I. Standard of review

Mandamus relief is available if the relator establishes a clear abuse of discretion for which there is no adequate remedy at law. *In re AutoNation, Inc.*, 228 S.W.3d 663, 667 (Tex. 2007) (orig. proceeding). A trial court has no discretion in determining what the law is or applying the law to the facts. *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992) (orig. proceeding). If the trial court fails to analyze or apply the law correctly, the trial court abuses its discretion. *Id.* With respect to the resolution of factual issues, however, the reviewing court may not substitute its judgment for that of the trial court. *Id.* at 839. The relator must establish that the trial court could have reasonably reached only one conclusion. *Id.* at 840.

### II. Standing

Standing, which is implicit in the concept of subject-matter jurisdiction, is a threshold issue in a child custody proceeding. *See In re SSJ-J*, 153 S.W.3d 132, 134 (Tex. App.—San Antonio 2004, no pet.); *see also Tex Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 443–44 (Tex. 1993). Whether a party has standing to pursue a cause of action is a question of law. *See SSJ-J*, 153 S.W.3d at 134. In our de novo review of the trial court's determination of standing, we must take as true all evidence favorable to the challenged party and indulge every reasonable

inference and resolve any doubts in the challenged party's favor. *See Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 228 (Tex. 2004); *Hobbs v. Van Stavern*, 249 S.W.3d 1, 3 (Tex. App.—Houston [1st Dist.] 2006, pet. denied); *Smith v. Hawkins*, No. 01-09-00060-CV, 2010 WL 3718546, at *3 (Tex. App.—Houston [1st Dist.] Sept. 23, 2010, no pet. h.) (memo. op.).

When standing to bring a particular type of lawsuit has been conferred by statute, we use that statutory framework to analyze whether the petition has been filed by a proper party. *See Hunt v. Bass*, 664 S.W.2d 323, 324 (Tex. 1984); *Atty. Gen. of Tex. v. Crawford*, 322 S.W.3d 858, 862 (Tex. App.—Houston [1st Dist.] 2010, pet. filed). In an original suit affecting the parent-child relationship, the Texas Family Code governs the standing question. Section 102.003(a)(9) grants standing to "a person, other than a foster parent, who has had actual care, control, and possession of the child for at least six months ending not more than 90 days preceding the date of the filing of the petition." TEX. FAM. CODE ANN. § 102.003(a)(9) (West 2008). A determination of standing under section 102.003(a)(9) is necessarily fact specific and determined on a case-by-case basis. *See In re M.P.B.*, 257 S.W.3d 804, 808–09 (Tex. App.—Dallas 2008, no pet.). In computing the time necessary for statutory standing, "the court may not require that the time be continuous and uninterrupted but shall consider the child's

principal residence during the relevant time preceding the date of commencement of the suit." TEX. FAM. CODE ANN. § 102.003(b) (West 2008).

Fountain is S.J.F.'s only legal parent. She thus contends that Katcher, as a non-parent, lacks standing under section 102.003(a)(9) to seek appointment as sole managing conservator of S.J.F. absent any evidence that the legal parent abdicated her parental responsibility to care for the child, and in the absence of any legal document evidencing the parties' intention to share parenting responsibilities. Fountain's argument relies upon cases suggesting that for purposes of the standing determination, a parent and a non-parent cannot both exercise actual care, control, and possession of a child at the same time without the consent of a parent.[6] That notion, however, reads into the statute additional requirements not imposed by the Legislature. To the contrary, this Court and others have previously held that "[n]othing in section 102.003(a)(9) requires that care, custody, control and possession be exclusive." *Smith*, 2010 WL 3718546, at *3 (rejecting father's

[6] *See In re K.K.C.*, 292 S.W.3d 788, 793 (Tex. App.—Beaumont 2010, orig. proceeding) (rejecting standing of person who cohabited with parent and participated in supporting child, yet "had no legal right of control over the child and no authority to make decisions on behalf of the child"); *M.J.G.*, 248 S.W.3d at 758–59 (affirming rejection of grandparents' standing, even though children lived in their home and they "performed day-to-day caretaking duties for the children," because "parents were also living with the children in the home," there was no evidence that parents "did not also care for the children," or that parents "had abdicated their parental duties and responsibilities to the grandparents").

challenge to standing of aunt who consistently exercised care, custody, control, and possession along with grandmother who had previously been named managing conservator of child);[7] *see also M.P.B.*, 257 S.W.3d at 809 (rejecting father's challenge to standing of grandmother who had been consistently and significantly involved in raising child along with child's deceased mother over substantial period of time); *In re J.J.J.*, No. 14-08-01015-CV, 2009 WL 4613715, at *2 (Tex. App.—Houston [14th Dist.] Dec. 8, 2009, no pet.) (mem. op.).

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[7] On rehearing, Fountain contends that the Court's prior opinion in *Smith*, 2010 WL 3718546, at *3, cannot support the denial of mandamus relief in this case. Specifically, Fountain asserts that *Smith* must be distinguished because, unlike the parents there, she has not abdicated her parental rights over S.J.F. *Smith* involved an aunt who intervened to seek modification of the conservatorship of her nephew, and her standing was accepted by the trial court and affirmed on appeal. The aunt shared a household with the child's grandmother, who was the child's managing conservator. 2010 WL 3718546, at *1. The child's biological parents were possessory conservators. *Id.* The following facts were relevant to the Court's standing analysis: (1) the aunt used her income to provide for the child, including payments for the child's heath insurance and the mortgage for the home in which the child resided; (2) the aunt had been involved in the child's life consistently for a substantial period of time; (3) the child considered the aunt a mother; (4) the child's biological mother testified that the aunt was a wonderful parent; (5) the aunt was involved in the child's education; and (6) the aunt purchased the child's clothing. *Id.* at *3–4. The biological parents' abdication of their own responsibilities for the child was not a determinative factor in the conclusion that the aunt had standing. *See id.* Instead, the opinion noted that the person charged with parenting the child, his grandmother, had shared that responsibility with the aunt. *Id.* While we agree that the fact pattern involving Fountain and Katcher is different in important respects, we see no reason why the result in *Smith* requires us to grant relief in favor of Fountain in this original proceeding.

In the absence of any requirement that a person with standing exercise exclusive care, control, or possession, the question of Katcher's statutory standing hinges on whether she exercised "actual" care, control, or possession of the child. Taking as true all evidence favorable to Katcher, and indulging every reasonable inference and resolving any doubts in her favor, we conclude that statutory standard was satisfied. The trial court was presented with evidence that, although Katcher's care, control, and possession of S.J.F. was not exclusive, she provided the child with a place to sleep, food, clothing, toys, and medicine. Both women cared for him most nights. Katcher made improvements to both women's homes to make them suitable for a small child. She participated in important decisions related to S.J.F.'s welfare, including attending medical appointments and providing for his daycare. Viewed as a whole, the evidence does not suggest that, prior to the dissolution of the relationship, Katcher's pattern of care and possession was intended to be temporary. Fountain testified that Katcher possessed and cared for S.J.F. at times during their relationship, and she even discussed with a lawyer the possibility of Katcher adopting the child. Therefore, the trial court could reasonably conclude that the women shared parenting responsibilities, including the "actual care, control, and possession" of S.J.F., until their separation in April 2010.

On this record, the trial court did not clearly abuse its discretion in concluding that, for purposes of the statute, Katcher is a person, other than a foster parent, who had actual care, control, and possession of S.J.F. for at least six months ending not more than 90 days preceding the date of the filing of her petition to establish a managing conservatorship. *See* TEX. FAM. CODE ANN. § 102.003(a)(9).[8]

## III. Fundamental parental rights

In addition to her statutory interpretation argument that Katcher lacks standing, Fountain's mandamus petition also referred to interference with her constitutional right to parent her child as she desires. The petition stated that "[t]he interest of parents in the 'care, custody, and control' of their children 'is perhaps the oldest of the fundamental libery interests' recognized by the United States Supreme Court in cases like *Troxel v. Granville*," that "[t]he natural right existing between parents and their children is one of constitutional dimensions," and that a parent's interests "are a fundamental right protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution." But apart from reciting these principles of constitutional law, Fountain's initial petition to this Court presented no actual argument or authorities to the effect that Family Code

[8] Because Fountain's objection to standing is her only proper challenge to the trial court's temporary order, the entry of that agreed order will not separately support mandamus relief. *See supra* note 5.

section 102.003(a)(9) is unconstitutional, either on its face or as applied to her in these circumstances. Our review of the record does not reflect that any such argument was presented in the trial court either.[9]

In her motion for en banc reconsideration, Fountain again references *Troxel* and suggests that section 102.003(a)(9) is unconstitutional. That issue is inadequately briefed. *See* TEX. R. APP. P. 52.3(h); *Wheeler v. Methodist Hosp.*, 95 S.W.3d 628, 646 (Tex. App.—Houston [1st Dist.] 2002, no pet.). However, we observe that the primary problem identified by the plurality in *Troxel* was that the Washington statute at issue permitted "any person" to petition a court for visitation rights at "any time," and the statute authorized a court to grant such visitation rights whenever "visitation may serve the best interest of the child." *Troxel v. Granville*, 530 U.S. 57, 60, 120 S. Ct. 2054, 2057 (2000) (plurality op.). The United States Supreme Court held the statute offended principles of due process, noting that the statute was "breathtakingly broad" and accorded no deference to a fit parent's decision. *Id.* at 67, 120 S. Ct. at 2061. Those circumstances are not presented here, when the Legislature has provided a restricted and considerably

[9] In this respect Fountain's petition is distinguishable from the Texas Supreme Court's decision in *In re Mays-Hooper*, 189 S.W.3d 777 (Tex. 2006), in which a challenge to Family Code § 153.432 had been presented to and was rejected by the trial court. *See* 189 S.W.3d at 777.

more tailored standard for standing than "any person."[10] Moreover, although the mere fact of the filing of this suit constitutes at least some degree of intrusion "into

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[10] Family Code § 102.003(a) describes the general parameters of who has general standing to file a suit affecting the parent-child relationship, and provides that an original suit "may be filed at any time by:

> (1) a parent of the child;
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> (2) the child through a representative authorized by the court;
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> (3) a custodian or person having the right of visitation with or access to the child appointed by an order of a court of another state or country;
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> (4) a guardian of the person or of the estate of the child;
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> (5) a governmental entity;
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> (6) an authorized agency;
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> (7) a licensed child placing agency;
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> (8) a man alleging himself to be the father of a child filing in accordance with Chapter 160, subject to the limitations of that chapter, but not otherwise;
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> (9) a person, other than a foster parent, who has had actual care, control, and possession of the child for at least six months ending not more than 90 days preceding the date of the filing of the petition;
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> (10) a person designated as the managing conservator in a revoked or unrevoked affidavit of relinquishment under Chapter 161 or to whom consent to adoption has been given in writing under Chapter 162;

the private realm of the family," which ordinarily should not be disturbed by the state "so long as a parent adequately cares for his or her children (*i.e.*, is fit)," *id.* at 68, 120 S. Ct. at 2061, with respect to further proceedings Fountain still enjoys the protection of a statutory presumption that she, as the only parent, should be appointed sole managing conservator. TEX. FAM. CODE ANN. § 153.131(a) (West 2008) (applying presumption "unless the court finds that the appointment of the parent or parents would not be in the best interest of the child because the

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> (11) a person with whom the child and the child's guardian, managing conservator, or parent have resided for at least six months ending not more than 90 days preceding the date of the filing of the petition if the child's guardian, managing conservator, or parent is deceased at the time of the filing of the petition;
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> (12) a person who is the foster parent of a child placed by the Department of Protective and Regulatory Services in the person's home for at least 12 months ending not more than 90 days preceding the date of the filing of the petition;
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> (13) a person who is a relative of the child within the third degree by consanguinity, as determined by Chapter 573, Government Code, if the child's parents are deceased at the time of the filing of the petition; or
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> (14) a person who has been named as a prospective adoptive parent of a child by a pregnant woman or the parent of the child, in a verified written statement to confer standing executed under Section 102.0035, regardless of whether the child has been born."

TEX. FAM. CODE ANN. § 102.003(a) (West 2008).

appointment would significantly impair the child's physical health or emotional development.").[11] The Texas Supreme Court has characterized language similar to that contained in this presumption as a "high threshold" that represents an implementation of *Troxel*'s holding. *See In re Derzapf*, 219 S.W.3d 327, 333–34 (Tex. 2007) (analyzing grandparent access statute, TEX. FAM. CODE ANN. § 153.433(a)).

Fountain has provided no argument to explain why, despite these distinctions, we should invalidate the Texas statute on the authority of *Troxel*, or under what legal standard we should even consider doing so. *See, e.g.*, *Troxel*, 530 U.S. at 80, 120 S. Ct. at 2068 (Thomas, J., concurring) (observing that *Troxel* plurality opinion and separate opinions of Justices Kennedy and Souter did not articulate appropriate standard of review for evaluating whether statute impinges on fundamental right of parents to direct upbringing of their children); *In re Mays-Hooper*, 189 S.W.3d 777, 778 (Tex. 2006). In the absence of adequate legal briefing and any coercion by the trial court, we decline to do so. To be clear, we express no opinion about whether the trial court would have abused its discretion

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[11] We note in particular that the *Troxel* plurality specifically stated that the problem in that case was not that the Washington court intervened, but that when it did so it gave no special weight to the legal parents' determination of the children's best interests. *Troxel v. Granville*, 530 U.S. 57, 69, 120 S. Ct. 2054, 2062 (2000) (plurality op.).

by granting temporary visitation to Katcher absent Fountain's agreement to the terms on a temporary basis.

## Conclusion

We hold that the trial court did not clearly abuse its discretion in denying Fountain's motion to dismiss the underlying suit or in entering agreed temporary orders affording Katcher visitation with S.J.F. Accordingly, Fountain's petition for writ of mandamus is denied.

Michael Massengale
Justice

Panel consists of Justices Keyes, Massengale, and Brown.