

NO. 24-0881

IN THE SUPREME COURT OF TEXAS

IN THE INTEREST OF K.N., K.L., K.L., AND K.L., CHILDREN

On Petition for Review from the Seventh Court of Appeals,
Amarillo, Texas
Cause No. 07-24-00146-CV

**BRIEF OF THE TEXAS PUBLIC POLICY FOUNDATION AS
AMICUS CURIAE IN RESPONSE TO THE COURT'S REQUEST
FOR SUPPLEMENTAL BRIEFING ON THE APPLICATION OF
SECTION 37, ARTICLE I OF THE TEXAS CONSTITUTION**

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INTEREST OF *AMICUS CURIAE*

The Texas Public Policy Foundation (the “Foundation”) is a non-profit, non-partisan research organization dedicated to promoting liberty, personal responsibility, and free enterprise through academically sound research and outreach.

Since its inception in 1989, the Foundation has emphasized the importance of limited government, free market competition, private property rights, and freedom from regulation. In accordance with its central mission, the Foundation has hosted policy discussions, authored research, presented legislative testimony, and drafted model ordinances to reduce the burden of government on Texans. Specifically, the Foundation seeks to promote the welfare of children and the fundamental rights of Texas families to live free from unnecessary and unconstitutional government interference through its Family Success Project. During the 89th Texas Legislature, the Foundation contributed to the development and passage of Senate Joint Resolution 34, which led to the addition of Section 37 to Article I of the Texas Constitution.

It is with this background and experience that the Foundation files this Brief in response to the Court’s request of December 5, 2025, for supplemental briefing on the application of Section 37, Article I of the Texas Constitution to the existing statutory framework for termination of parental rights.

The Foundation has paid all of the costs and fees incurred in the preparation of this brief.

SUMMARY OF ARGUMENT

On December 5, 2025, this Court requested supplemental briefing on the “relationship between Section 37, Article I of the Texas Constitution and the existing statutory framework for termination of parental rights under Texas Family Code Chapter 161, including the clear-and-convincing standard referenced in Family Code Section 161.001(b).” Section 37, Article I of the Texas Constitution was enacted by the People of Texas to enshrine more than a century of holdings from this Court and the United States Supreme Court recognizing that the parent-child relationship is a fundamental right deserving of expansive protection against government interference. *See, e.g., Troxel v. Granville*, 530 U.S. 57, 65 (2000); *Wiley v. Spratlan*, 543 S.W.2d 349, 352 (Tex. 1976); *In re Scheller*, 325 S.W.3d 640, 644 (Tex. 2010); *In re C.J.C.*, 603 S.W.3d 804, 808 (Tex. 2020). This is particularly true when the state seeks to exercise its authority to legally terminate the relationship between a parent and child under Texas Family Code Chapter 161. This remedy, which results in “the total and irrevocable dissolution of the parent-child relationship,” is so severe that this Court has called it “the ‘death penalty’ of civil cases.” *In re K.M.L.*, 443 S.W.3d 101, 121 (Tex. 2014).

Due to the severity of termination as a legal remedy, both this Court and the United State Supreme Court have held that the state must prove its case under the clear-and-convincing evidence standard required by

the United States Supreme Court in *Santosky v. Kramer*, 455 U.S. 745 (1982). Moreover, this Court has held that any action of the state that seeks to impose limits upon the fundamental liberty interest of parents in the care, custody, and control of their children—particularly those which result in the permanent destruction of this relationship—must be analyzed under strict scrutiny. *Wiley*, 543 S.W.2d at 352 (stating that “actions which break the ties between a parent and child [...] should be strictly scrutinized.”).

Although the U.S. Supreme Court in *Santosky* held that clear-and-convincing evidence is required for all orders terminating parental rights, the Court emphasized that clear-and-convincing evidence is the bare minimum for satisfying due process and safeguarding the rights of parents, and state legislatures and state courts are free to require a burden greater than clear-and-convincing evidence for termination decisions. *Santosky*, 455 U.S. at 769-70. The United States Congress, in the Indian Child Welfare Act, requires states seeking to terminate parental rights with respect to an Indian child to prove termination by the higher proof beyond a reasonable doubt standard. Similarly, the state of New Hampshire requires proof beyond a reasonable doubt for all orders terminating parental rights regardless of the race or ethnicity of the child. Texas can and should follow this example by requiring the proof beyond a reasonable doubt evidentiary standard for all termination of parental rights orders.

By enacting Section 37, Article I of the Texas Constitution, the People of the State of Texas expressed their desire for the strong protections for the parent-child relationship that have been established through more than a century of cases decided by the United States Supreme Court and the Supreme Court of Texas to remain intact for generations to come. This Court should interpret and apply Section 37, Article I in accordance with this desire as well as the long history and tradition of the State of Texas and the United States of America.

ARGUMENT

I. SECTION 37, ARTICLE I CODIFIES IN THE TEXAS CONSTITUTION THE NATURAL AND FUNDAMENTAL RIGHT OF PARENTS IN THE CARE, CUSTODY, AND CONTROL OF THEIR CHILDREN THAT HAS LONG BEEN RECOGNIZED BY THIS COURT AND THE UNITED STATES SUPREME COURT.

For more than a century, both this Court and the United States Supreme Court have recognized that the parent-child relationship is a fundamental right deserving of expansive protection against government interference. *See, e.g., Troxel v. Granville*, 530 U.S. 57, 65 (2000) (“[...] 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.”); *Wiley v. Spratlan*, 543 S.W.2d 349, 352 (Tex. 1976) (“The natural right which exists between parents and their children is one of constitutional dimensions.”); *In re Scheller*, 325 S.W.3d 640, 644 (Tex.

2010) (“Parental control and autonomy is a ‘fundamental liberty interest.”); *In re C.J.C.*, 603 S.W.3d 804, 808 (Tex. 2020) (holding that “a fit parent presumptively acts in the best interest of his or her child and has a ‘fundamental right to make decisions concerning the care, custody, and control’ of that child [...].”). Since the earliest days of its statehood, Texas has recognized and protected the right of parents “in the control, management, rearing, and education” of their children. *Byrne v. Love*, 14 Tex. 81, 91 (1855). In the 170 years that have elapsed since *Byrne v. Love*, this Court has been remarkably consistent in protecting the presumptive and expansive rights of parents in the custody of their children and to direct their care, education, and upbringing free from State intervention. *See, e.g., Wiley*, 543 S.W.2d at 352 (recognizing “the strong presumption that the best interest of a minor is usually served by keeping custody in the natural parents” and holding that “the legal system should generally defer to the wishes of a child’s parents, obliging the state to bear a serious burden of justification before intervention.”); *In re Mays-Hooper*, 189 S.W.3d 777, 778 (Tex. 2006) (per curiam) (“so long as a parent adequately cares for his or her child (i.e. is fit), there will normally be no reason for the state to inject itself into the private realm of the family.”); *In re Derzapf*, 219 S.W.3d 327, 334 (Tex. 2007) (“A court may not lightly interfere with child-rearing decisions [...] simply because a ‘better decision’ may have been made.”) (quoting *Troxel*, 530 U.S. at 73). Given the supreme importance of the natural right of parents and children in

the sanctity of their relationship with one another, this Court and the United States Supreme Court have held that any state statute or action seeking to place limits on or otherwise interfere with the parent-child relationship is subject to strict scrutiny. *See, e.g., Troxel*, 530 U.S. at 80 (Thomas, J. concurring) (noting that strict scrutiny is the proper standard of review to apply to “infringements of fundamental rights.”); *Wiley*, 543 S.W.2d at 352 (stating that “actions which break the ties between a parent and child [...] should be strictly scrutinized.”).

Throughout the last decade, and particularly in the years since the COVID-19 pandemic and this Court’s landmark decision in *In re C.J.C.*, the right of parents in the custody of their children and to direct their care, education, and upbringing has been a major concern of the people of Texas and their elected representatives in the Texas Legislature. Notable infringements upon this right by government, specifically in the areas of education and child protective services, have led Texas and other states to enact laws seeking to strengthen safeguards for parental rights and prevent their erosion at the hand of the state. It is within this context that the 89th Texas Legislature enacted Senate Joint Resolution 34, which led to the addition of Section 37 to Article I of the Texas Constitution affirming the rights and responsibilities of parents in relation to their children. The Legislature recognized that although the right of parents in the care, custody, and control of their children is constitutionally protected, the protections for this right are detailed

solely in case law, which “can change and disappear over time with the appointment of new judges.” S.J.R. 34 Bill Analysis. 2025. Senate Research Center. 89th Texas Legislature. Regular. (2025, June). <https://capitol.texas.gov/tlodocs/89R/analysis/pdf/SJ00034F.pdf#navpanes=0>. Accordingly, the Legislature enacted Senate Joint Resolution 34 to propose a constitutional amendment to the People of Texas to place “the right of parents in the Texas constitution” with the goal of ensuring “the longevity of these rights for future generations;” *Id.* This Court, therefore, should interpret and apply Section 37, Article I of the Texas Constitution consistent with the intentions of the People of Texas. Namely, that the amendment enshrines and safeguards the truths reflected in the jurisprudence discussed above and which are deeply rooted in the history and traditions of the State of Texas and the United States of America—that it is parents, not the state, who have the ultimate responsibility and exclusive, fundamental right to direct the care and upbringing of their children.

II. APPLICATION OF SECTION 37, ARTICLE I OF THE TEXAS CONSTITUTION TO TEXAS FAMILY CODE CHAPTER 161.

- 1. Since termination of parental rights results in “the total and irrevocable dissolution of the parent-child relationship,” Section 37, Article I of the Texas Constitution guarantees that parents will continue to receive heightened protection against the termination of their parental rights and that Chapter 161, Texas**

Family Code will be strictly scrutinized in favor of parents.

This Court, in its letter dated December 5, 2025, requested supplemental briefing on “the relationship between Section 37 of Article I of the Texas Constitution and the existing statutory framework for termination of parental rights under Texas Family Code Chapter 161, including the clear-and-convincing evidence standard referenced in Family Code Section 161.001(b).”

Although Section 37, Article I of the Texas Constitution establishes strong protections for the right of parents to raise their children free from government interference, it also recognizes that in limited cases, the state has the authority to step in when the parent fails in their responsibility to nurture and protect their children to such an extent that actual harm comes to the child or the child is placed in imminent danger of harm. It is critical that the state be judicious and constrained in exercising this authority, recognizing the constitutional dimensions of the parent-child relationship, and only apply it in “very limited circumstances.” *In re Scheller*, 325 S.W.3d at 644. This is particularly true when the state seeks to exercise its authority to terminate parental rights. This remedy, which results in “the total and irrevocable dissolution of the parent-child relationship,” is so severe that this Court has called it “the ‘death penalty’ of civil cases.” *In re K.M.L.*, 443 S.W.3d 101, 121 (Tex. 2014). Due to the severity of termination, this Court has

repeatedly emphasized that both the United States and Texas Constitutions provide parents with extensive “due process rights as to the care, custody, and control of their children,” which requires “heightened protection against government interference” with the parent-child relationship. *In re N.G.*, 577 S.W.3d 230, 234 (Tex. 2019) (quoting *Troxel*, 530 U.S. at 65). The language of Section 37, Article I solidifies this heightened protection in the text of the Constitution itself. The amendment intentionally incorporates language found in both *Troxel* and *N.G.* respecting parents’ “fundamental right to exercise care, custody, and control of their children” to ensure that parents continue to receive the heightened protections that have been consistently applied by courts for more than a century whenever the government seeks to intervene in the parent-child relationship. The incorporation of “fundamental rights” language into the text of Section 37, Article I ensures that courts continue to apply strict scrutiny to any state statute or action that seeks to limit the ability of parents to exercise their right to the care, custody, and control of their children. Nowhere is this limit on government power more essential than when government seeks to separate children from their parents or forever terminate the relationship. *See, e.g., In the Interest of G.M.*, 596 S.W.2d 846 (Tex. 1980) (holding that “The termination of this right is complete, final, and irrevocable. It divests forever the parent and child of all legal rights, privileges, duties, and powers between each other [...]. For these reasons

the proceedings below must be strictly scrutinized.”) (citing *Wiley*, 543 S.W.2d 349 (Tex. 1976) and *Holley v. Adams*, 544 S.W.2d 367 (Tex. 1976); *Holick v. Smith*, 685 S.W.2d 18, 21 (Tex. 1985) (“With the view that termination is such a drastic and grave measure that involuntary termination statutes are strictly construed in favor of the parent, we decline to adopt such an interpretation.”). In *Holick*, this Court declined to adopt an interpretation of the Texas Family Code’s termination statute that would allow for the termination of parental rights “based on whether the parent is acutely indigent.” *Holick*, 685 S.W.2d at 21. In its opinion, the Court found that such an interpretation would be incompatible with the profound impact of termination of parental rights and erode the heightened protections the United States and Texas Constitutions guarantee to parents facing this ultimate infringement of their fundamental rights. Accordingly, this Court should interpret Section 37, Article I of the Texas Constitution as affirming the strong protections that the Court has long guaranteed to parents protecting them from the involuntary destruction of their family at the hands of the state.

2. Section 37, Article I of the Texas Constitution requires, at minimum, that the state prove its case for termination of parental rights by clear-and-convincing evidence.

Under Texas Family Code Section 161.001(b), the state bears the burden of proving by *clear-and-convincing evidence* that termination of parental rights is justified under one of 21 grounds enumerated in statute

and that termination is in the best interest of the child. Clear-and-convincing evidence is defined in Texas Family Code Section 101.007 as “the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established.”

In applying the clear-and-convincing evidence standard to termination cases, the test is two-pronged. It is not enough for the trier of fact to form a firm belief or conviction that the parent engaged in conduct consistent with one of the 21 grounds enumerated in Section 161.001(b)(1), they must also form a firm belief or conviction that applying the drastic remedy of termination is in the best interest of the child. This two-pronged test recognizes that parental rights are not rights solely enjoyed by the parent, they exist for the benefit of the parent’s child and the child also has a constitutionally protected interest in maintaining the “emotional attachments that derive from the intimacy of daily association” with parents and siblings. *See Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816, 844 (1977). Again, recognizing the dramatic, life-long impact that termination orders have on both parents and children, this Court has held that if a court weighing a termination decision “determines that no reasonable finder of fact could form a firm belief or conviction” that *both* matters the state bears the burden of proving are true, then it “must conclude that the evidence is

legally insufficient” to support termination. *In re Interest of K.M.L.*, 443 S.W.3d at 112.

Clear-and-convincing evidence became the national minimum standard for termination decisions in 1982 following the United States Supreme Court’s landmark ruling in *Santosky v. Kramer*, 455 U.S. 745 (1982). In that case, the Court held that the Due Process Clause of the Fourteenth Amendment requires that the state, when seeking to terminate parental rights, prove its allegations by “*at least* clear and convincing evidence.” *Id.* at 748 (emphasis added). The Court rooted its holding in both “the fundamental liberty interest of natural parents in the care, custody, and management of their child” as well as the severity of the termination remedy, noting that “[i]n parental rights termination proceedings, the private interest affected is commanding” and that a “substantial” risk of error exists if the courts applied a standard lower than clear-and-convincing evidence. *Id.* at 758.

Although Texas, like many states in the wake of *Santosky*, codified the clear-and-convincing evidence standard in its termination statute, it is important to note that the Court’s holding in *Santosky* sets this standard as the bare minimum for satisfying due process and safeguarding the rights of parents. In fact, the Court expressly stated that state legislatures and state courts are free to require a burden greater than clear-and-convincing evidence for termination decisions. *Id.* at 769-70.

Nationally, there are at least two examples where the law requires parties seeking involuntary termination of parental rights to prove their case under the higher evidentiary standard of “proof beyond a reasonable doubt.” The first is the federal Indian Child Welfare Act, which requires that orders terminating parental rights with respect to Indian children “be supported by evidence beyond a reasonable doubt.” 25 U.S.C. 1912(f). Enacted by Congress in 1978, the Indian Child Welfare Act (hereinafter “ICWA”) governs legal standards and procedures for child custody cases involving children who are members of an Indian tribe or qualify for membership in a tribe. 25 U.S.C. 1903(4). All states are required to abide by the standards and procedures established by ICWA in any case involving an eligible Indian child. In all other cases that involve children who are not covered by ICWA, states are free to adopt different standards and procedures, which arguably creates a system in which one class of children is afforded greater protections and services intended to preserve their relationship with their parents than other similarly situated children based solely on their racial or ethnic background. This imbalance can be clearly seen in an Oregon case, *In re A.W.*, which involved half-brothers, known as A. and J., who were removed from their family. In *A.W.*, the half-brothers shared the same mother but had different fathers, one of whom was a member of the Comanche Nation. Since A.’s father was a member of the Comanche Nation, A. qualified for membership in the Comanche Nation, meaning that ICWA requirements

applied to his removal. In its opinion, the Court of Appeals of Oregon emphasized the strange injustice this created by noting that ICWA required the Oregon Department of Human Services to “do more to attempt to reunify A. with his parents than it must do to reunify J. with mother.” *In re A.W.*, 284 P.3d 1233, 1240 (Or. App. 2012). It is cases like this that have led many, including members of the Texas Legislature, to advocate for changing the law to require that the standards and procedures ICWA requires for Indian children to apply to all children, regardless of racial or ethnic background. See C.S.H.B. 2216 Bill Analysis. 2025. Doc. No. 89R 22859. 89th Texas Legislature. Regular. <https://capitol.texas.gov/tlodocs/89R/analysis/pdf/HB02216H.pdf#navpanes=0>.

Outside of ICWA, New Hampshire stands out as one of the only states that requires the “proof beyond a reasonable doubt” standard for all parental termination orders. In the 2001 case, *In re Shannon M.*, the New Hampshire Supreme Court held that “because parental rights are fundamental under the New Hampshire Constitution, ‘the party seeking to terminate parental rights must prove the statutory ground for termination beyond a reasonable doubt.’” *In re Shannon M.*, 766 A.2d 729 (N.H. 2001) (quoting *In re Sheena B.*, 651 A.2d 7 (N.H. 1994)).

Although primarily utilized in criminal law, the examples above illustrate that the standard may be applied in the context of civil child welfare proceedings. Under the U.S. Constitution, proof beyond a

reasonable doubt is required for all criminal convictions because the accused “has at stake interests of immense proportions” due to “the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction.” *In re Winship*, 397 U.S. 358, 363 (1970). The stakes in termination of parental rights cases are just as high, if not higher, than those in a criminal case. As discussed above, there are few harsher punishments the state may impose than the permanent destruction of the relationship between a parent and child—a relationship that courts have recognized is “far more precious than any property right.” *Santosky*, 455 U.S. at 758. Indeed, termination of parental rights is unique among all the powers of the state because by exercising it the state seeks “not to simply infringe upon” a parent’s relationship with his or child, “but to end it.” *Lassiter v. Department of Social Svcs.*, 452 U.S. 18, 27 (1981). Yet, the existing statutory framework in most states, including Texas, affords citizens fewer protections against the permanent loss of this fundamental liberty interest than it affords to individuals facing criminal charges that may result in fines or few years in prison. In recent years Texas has become a leader among states in recognizing the sanctity of the family by establishing some of the strongest protections for parental rights in the nation. The enactment of Section 37, Article I of the Texas Constitution is just the latest in a long line of examples of the state’s efforts to safeguard the institution of the family against government interference.

Texas can, and should, continue to be a beacon for elevating the parent-child relationship to its proper place of honor in society by requiring the proof beyond a reasonable doubt evidentiary standard for all termination of parental rights orders.

CONCLUSION

The People of Texas, through the enactment of Section 37, Article I of the Texas Constitution, have made clear that they expect their government to treat the parent-child relationship with the utmost respect and safeguard it accordingly. They have also shown that they desire for the strong protections for the parent-child relationship that have been established through more than a century of cases decided by the United States Supreme Court and the Supreme Court of Texas to remain intact for generations to come by taking the historic step of voting to make Texas the first state in the nation to enshrine parental rights as a fundamental right in its constitution. Therefore, the Texas Public Policy Foundation respectfully requests that this Court interpret and apply Section 37, Article I of the Texas Constitution consistent with the jurisprudence discussed in this brief and in accordance with the clear wishes of the People of the State of Texas.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with the typeface requirements of Tex. R. App. P. 9.4(e) because it has been prepared in a conventional typeface no smaller than 14-point for text and 12-point for footnotes. This document also complies with the word-count limitations of Tex. R. App. P. 9.4(i), because it contains 3,840 words, excluding any parts exempted by Tex. R. App. P. 9.4(i)(1).

/s/Robert Henneke

ROBERT HENNEKE

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been delivered to each party and/or their attorney of record via the Court's electronic filing system this 5th day of January 2026 in accordance with Tex. R. App. P. 9.5.

/s/Robert Henneke

ROBERT HENNEKE

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