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GREGORY E. WILHELM, J.D., M.A.

FORMER TEXAS TRIAL COURT JUDGE

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To the Honorable Chair and Honorable Members of the Texas House Committee on Judiciary and Civil Jurisprudence:

My name is Greg Wilhelm, and for more than a decade, I have dedicated a majority of my efforts, both as an attorney and as a former Texas Trial Court Judge, to maintaining the integrity of Texas families by advocating for the protection of abused and neglected children; zealously representing Fathers and Mothers whose parental rights are challenged; and, as a Trial Court Judge, following the law and the evidence when making decisions in the best interest of children who are the subject of abuse and neglect.

It is from this perspective that I offer the following abbreviated testimony in support of **HB 2557**:

Let me first state that grandparents who intervene, when their grandchildren are in conditions where their physical health or emotional well-being and development could be impaired, are the equivalent of modern day heroes.

As an attorney and as a judge, I saw firsthand how the lives of children were literally saved by their grandparents offering themselves as permanent caregivers, and further, how families are preserved by the love, attention, and commitment of caring grandparents.

Passage of HB 2557 would do *nothing* to prevent grandparents from continuing to play such a vital role in the lives of their grandchildren, but it would serve to affirm the constitutional right of parents to make decisions concerning their children.

More specifically, in my opinion HB 2557 would bring Texas law in greater harmony with the United States Supreme Court who, in *Troxel v. Granville*, 530 U.S. 57, 120 S.Ct. 2054, 2060-2061 (2000), recognized that parents have liberty interests that include, among other things, interest in the care, custody, and control of their children, which is perhaps one of the oldest fundamental liberty interests recognized by the court. *Troxel*, 120 S.Ct. at 2060. “[S]o long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent’s children.” *Troxel*, 120 S.Ct. at 2061.

Moreover, *Troxel* reaffirmed a historical series of cases which concluded that 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:

- *See Troxel v. Granville*, 530 U.S. 57, 65B66, 120 S. Ct. 2054, 2060, 147 L. Ed. 2d 49 (2000) (plurality op.);
- *See Stanley v. Illinois*, 405 U.S. 645, 651, 92 S. Ct. 1208, 1212, 31 L. Ed. 2d 551 (1972) (stating that the rights to conceive and to raise one's children have been deemed essential, basic civil rights of man, and rights far more precious . . . than property rights) (citations omitted); and
- *See Prince v. Massachusetts*, 321 U. S. 158, 166, 64 S. Ct. 438, 442, 88 L. Ed. 2d 645 (1944) (stating that it is cardinal with us that the custody, care, and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder).

As a result, in Texas, a non-parent has the burden to overcome the presumption that a “fit” parent acts in the best interest of the parent's child. The presumption (i.e., “parental presumption”) that the best interest of the child is served by awarding custody to the parent is deeply embedded in Texas law. *See Lewelling v. Lewelling*, 796 S.W.2d 164, 166 (Tex.1990) (citing *Mumma v. Aguirre*, 364 S.W.2d 220, 221 (Tex.1963) and *Legate v. Legate*, 87 Tex. 248, 28 S.W. 281, 282 (1894)).

The parental presumption is based upon the natural affection usually flowing between parent and child. *See Taylor v. Meek*, 154 Tex. 305, 276 S.W.2d 787, 790 (1955), and there is a strong presumption that preserving the parent-child relationship is in the best interest of a child. *See In re J.I.T.P.*, 99 S.W.3d at 846 (citing Tex. Fam. Code Ann. §§ 153.131(b), 153.191, 153.252 (Vernon 2008)).

Further, if a parent's “fitness” comes into question, such **may not** be based on evidence which merely raises a surmise or speculation of possible harm [emphasis added]. *M.W.*, 959 S.W.2d at 665; *Chavez*, 148 S.W.3d at 458. When a non-parent and a parent are both seeking managing conservatorship, “close calls” go to the parent. *Lewelling*, 796 S.W.2d at 168; *M.W.*, 959 S.W.2d at 665-666; *Ray v. Burns*, 832 S.W.2d 431, 434 (Tex.App.-Waco 1992, no writ).

Likewise, absent specific evidence (**clear and convincing**), general evidence that a non-parent would be a better custodian of the child is *inadequate* to rebut the parental presumption [emphasis added]. *Lewelling*, 796 S.W.2d at 167; *R.D.Y.*, 51 S.W.3d at 321.

Opponents of HB 2557 claim that it is poorly conceived; that it is bad policy; and that it will hurt Texas families. In response, I would ask this Committee, and the Legislature as a whole, to consider the following:

1. My experience, both as a sitting Judge and an attorney, have proven to me that children thrive when their grandparents have access to and are actively involved in the lives of their grandchildren, but -- as *clearly* stated by the U.S. Supreme Court -- *you and I*, as parents, have the fundamental right to be the ones to determine who has care, custody, and control, and govern the amount of time our children spend with nonparents (including grandparents) without unwarranted governmental interference.
2. Passage of HB 2557 will affirm the parent-child relationship, establishing a positive State policy that benefits (not hurts) Texas families.
3. Passage of HB 2557 will further codify this constitutional right by eliminating the current loophole that allows grandparents to gain possession of children from fit parents and will clarify that grandparents may not seek such possession until the child's parents are shown to be unfit.
4. Passage of HB 2557 will not eliminate judicial discretion, as to the “best interests” of a child, in matters of conservatorship. See *Holley v. Adams*, 544 S.W.2d 367 (Tex. 1976).
5. Passage of HB 2557 will not prohibit a grandparent from filing a suit for managing conservatorship of a child under Chapters 102, 153, or 156.

For each of the reasons set forth above (and many more of which this limited written forum prevents me from exploring), **I urge your support of HB 2557.**

On your request, I can make myself available to provide further written testimony and/or to present myself for testimony before this honorable Committee.

Most Respectfully,

A handwritten signature in black ink that reads "Greg Wilhelm". The signature is written in a cursive, flowing style.

GREG WILHELM