THE FUNDAMENTAL RIGHTS OF PARENTS IN AN EVER-CHANGING WORLD

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As a former practicing attorney and chancellor, I have seen the law evolve throughout my career. My current role as an associate justice of the Mississippi Supreme Court, however, challenges me to take a broader view of those changes, requiring more significant forethought to consider the repercussions of our court's decisions. Lately, I have focused on dynamic social changes and their impact on the fundamental rights of parents. My past experiences and present responsibilities piqued my interest in writing this essay. While the fundamental rights of parents are foundational to family law, I believe these rights are also sacred to our society and of the utmost importance in holding steadfast for the sake of our children.

More than twenty years have passed since the United States Supreme Court's *Troxel v. Granville* decision reinforced an elevated view of parents' fundamental rights, reaffirming more than a half-century's worth of Supreme Court precedent.[1] Previously, in 1923, the Court decided in *Meyer v. Nebraska* that the Fourteenth Amendment's Due Process Clause provides parents the substantive constitutional right to "establish a home and bring up children" and "control the education of their own."[2] This right has expanded substantially in the subsequent century and, in general terms, now provides parents with rights to make decisions "concerning the care, custody, and control of their children."[3]

The Court effectively summarized its reasoning for creating these fundamental rights for parents in *Moore v. City of East Cleveland*, writing, "[o]ur decisions establish that the Constitution

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[1] *See generally* Troxel v. Granville, 530 U.S. 57 (2000).

[2] Meyer v. Nebraska, 262 U.S. 390, 399, 401 (1923).

[3] *Troxel*, 530 U.S. at 66 (citing Stanley v. Illinois, 405 U.S. 645, 651 (1972); Wisconsin v. Yoder, 406 U.S. 205, 232 (1972); Quilloin v. Walcott, 434 U.S. 246, 255 (1978); Parham v. J. R., 442 U.S. 584, 602 (1979); Santosky v. Kramer, 455 U.S. 745, 753 (1982); Washington v. Glucksberg, 521 U.S. 702, 720 (1997)).

protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural."[4] The Court recognizes the importance of parents' fundamental rights and maintains its position, as evidenced by *Troxel*.[5] Even before the United States Supreme Court's *Meyer* decision, the Mississippi Supreme Court recognized the importance of parental rights as early as 1879 in *Moore v. Christian*.[6] Since then, by the State's historical recognition of their importance and with due deference to federal law, our court has enshrined with heightened significance the fundamental rights of parents.[7]

While underscoring emerging challenges to parents' fundamental rights, the following discussion highlights that irrespective of societal changes, parents maintain certain fundamental rights ardently protected under United States law. The cases I want to focus on are custody, visitation, and the fundamental rights of parents, considering modern society. The lines that I thought were once crystal clear on the fundamental rights of parents are becoming a little more challenging to untangle as multiple people are involved in caring for a child. Due to the dynamic changes in the family structure, more than just the natural parents are litigating for custody and visitation rights.

In loco parentis is a doctrine that is becoming increasingly relevant in American society as the prevalence of nontraditional families continues to grow.[8] *In loco parentis* provides certain rights to one who stands in place of a parent, having assumed the status and obligations of a parent, and it can include "[a]ny person who takes a child of another into his home and treats it as a member of

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[4] Moore v. City of E. Cleveland, 431 U.S. 494, 503-04 (1977) (footnotes omitted).

[5] While the referenced decisions speak on a broad array of parental rights, this essay's primary focus is parental custody rights; all other rights are beyond the scope of this discussion.

[6] *See* Moore v. Christian, 56 Miss. 408 (1879); Hibbette v. Baines, 29 So. 80 (Miss. 1900).

[7] *See*, *e.g.*, Strickland v. Day, 239 So. 3d 486 (Miss. 2018); Waites v. Ritchie (*In re* Int. of Waites), 152 So. 3d 306 (Miss. 2014).

[8] *See generally* Daniel A. Cox, *Emerging Trends and Enduring Patterns in American Family Life*, AM. ENTERPRISE INST. (Feb. 9, 2022), https://www.americansurveycenter.org/research/emerging-trends-and-enduring-patterns-in-american-family-life/ [https://perma.cc/65KS-77XV].

his family, providing parental supervision, support and education, as if it were his own child . . . ."[9]

Our court has found that while this doctrine can assist in rebutting the natural parent presumption, it does not elevate the rights of the stand-in parent above the natural parents' fundamental rights.[10] Our court has consistently favored natural parents, finding "[t]he law recognizes that parents are the natural guardians of their children, and 'it is presumed that it is in the best interest of a child to remain with the parent as opposed to a third party.'"[11]

The natural-parent presumption may be rebutted only when one of the elements below has been met, thereby protecting a parent's fundamental right to custody. Under Mississippi Code Annotated section 93-5-24(1)(e), the third party seeking to overcome the natural-parent presumption must show through "clear and convincing evidence that '(1) the parent has abandoned the child; (2) the parent has deserted the child; (3) the parent's conduct is so immoral as to be detrimental to the child; or (4) the parent is unfit, mentally or otherwise, to have custody.'"[12]

In *Davis v. Vaughn*, our court ruled that the natural-parent presumption was not adequately rebutted when a maternal grandmother who had stood *in loco parentis* and cared for her grandchild since infancy after the child's mother died sought custody of her grandchild over the objection of the child's natural father.[13] The child's parents were never married, and, at the time the case was pending, the child's mother had died, and the father was attending school, working full-time, and living in an apartment with two roommates.[14] Given his circumstances, he agreed that the child would live with the grandmother until he became financially

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[9] Wells v. Smith (*In re* Petition of Smith), 97 So. 3d 43, 47 (Miss. 2012) (quoting J.P.M. v. T.D.M., 932 So. 2d 760 (Miss. 2006)) (alteration in original) (internal quotation marks omitted).

[10] *See* Smith v. Smith, 97 So.3d 43, 48 ¶12 (Miss. 2012) (reasoning that in chid-custody cases, the doctrine of *in loco parentis* does not, by itself, overcome the natural-parent presumtion.)

[11] Summers v. Gros, 319 So. 3d 479, 487 (Miss. 2021) (internal quotation marks omitted) (quoting Garner v. Garner, 283 So. 3d 120 (Miss. 2019)).

[12] *Id.* (quoting Garner v. Garner, 283 So. 3d 120, 129 (Miss. 2019). *See also* MISS. CODE. ANN. § 93-5-24(1)(e) (2021).

[13] Davis v. Vaughn, 126 So. 3d 33, 39-40 (Miss. 2013).

[14] *Id.* at 35.

stable.[15] Consequently, during that time, his interactions with his daughter were sporadic.[16]

Previously, the chancellor found the grandmother had rebutted the natural parent presumption, and our court reversed the finding that the grandmother could not prove the father's unfitness.[17] While he was absent for a couple of years, bearing in mind the importance of natural parents and his fundamental rights, we found that the father "had neither abandoned his child nor was he unfit to have custody."[18] As previously emphasized by our court, giving preference to natural parents, even against those who have stood in their place, honors and protects the fundamental right of natural parents to rear their children.[19]

Conversely, in *Garner v. Garner*, a custody dispute arose between a natural parent and a third party.[20] Our court held that the maternal uncle who sought custody of his sister's child had rebutted the natural parent presumption.[21] The child's mother suffered from drug and alcohol addiction and was found unfit to care for her child.[22] Following an *Albright* analysis, the court found that living with his uncle would best serve the child's best interest.[23] Custody was awarded correctly to the uncle, and the mother's fundamental rights were not infringed.[24]

In both *Davis* and *Garner,* although outcomes diverged, our court protected the fundamental rights of parents.[25] We did so by following proper, heightened procedures that protect parents' fundamental rights against third parties but also that protect the

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[15] *Davis*, 126 So. 3d at 39-40.

[16] *Id.*

[17] *Id.* at 36.

[18] *Id.* at 39-40.

[19] Vance v. Lincoln Cnty. Dep't of Pub. Welfare, 582 So. 2d 414, 417 (Miss. 1991) (citing Prince v. Massachusetts, 321 U.S. 158, 166-67 (1944)).

[20] Garner v. Garner, 283 So. 3d 120, 129 (Miss. 2019).

[21] *Id.* at 134.

[22] *Id.* at 131.

[23] *Id.* at 129-130.

[24] *Id.* at 145.

[25] *See* Davis v. Vaughn, 126 So. 3d 33, 39-40 (Miss. 2013); *Garner*, 283 So. 3d at 145.

best interest of children when justice so requires.[26] Furthermore, each touched on grandparent visitation, which is essential to this discussion.[27] In both cases, our court affirmed that *in loco parentis* does not give other parties, like natural grandparents, rights stronger than the rights of the child's natural parents, which necessarily includes single mothers and fathers.[28]

An additional illustration exists in *Martin v. Coop*, when the grandparents petitioned the chancery court for visitation with their grandchildren after the death of their son.[29] While our court found that awarding visitation to the grandparents was not unconstitutional, it did find that the visitation awarded was excessive.[30] We rejected the chancellor's visitation schedule, which was based on a system used for natural-parent visitation, stating, "It is clear to this Court that visitation granted to grandparents should not be equivalent to that which would be granted to a non-custodial parent unless the circumstances overwhelmingly dictate that it should be."[31]

The court recognized that the fundamental rights of natural parents found in the Due Process Clause deserved a higher level of protection than grandparents' statutorily created visitation rights. "The determination whether parents are unreasonable in denying visitation . . . to grandparents is not a contest between equals. Parents with custody have a paramount right to control the environment, physical, social, and emotional, to which their

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[26] This court has made a very limited and unique exception for a nonbiological parent's *in loco parentis* status to be used to reach a custody or visitation analysis without first rebutting the natural parent presumption when justice so required this result for the best interest of the child. *See,* J.P.M. v. T.D.M., 932 So. 2d 760 (Miss. 2006); Griffith v. Pell, 881 So. 2d 184 (Miss 2004); Ballard v. Ballard, 289 So. 3d 725 (Miss. 2019). There, the nonbiological fathers were believed to be the fathers and cared for the children as if they were the fathers until the truth of the biology came into play in the custody battle. *See J.P.M.*, 932 So. 2d at 760; *Griffith*, 881 So. 2d at 184; *Ballard*, 289 So. 3d at 725. Our court found, under these certain circumstances, that the children's best interests were served by maintaining a relationship with the fathers they had known, without the fathers having to rebut the natural parent presumption. *See J.P.M.*, 932 So. 2d at 779; *Griffith*, 881 So. 2d at 187; *Ballard*, 289 So. 3d at 733.

[27] *See Davis*, 126 So. 3d at 39-40; *Garner*, 283 So. 3d at 145.

[28] Martin v. Coop, 693 So. 2d 912, 916 (Miss. 1997).

[29] *Id.* at 914.

[30] *Id.* at 915.

[31] *Id.* at 916.

children are exposed."[32] As previously noted, the United States Supreme Court reaffirmed this buttressed position in *Troxel*, highlighting that a state infringes on parents' fundamental rights when a state's judge believes a "better" decision could be made.[33]

In *Troxel*, Justice O'Connor affirmed the judgment of the Washington Supreme Court, which had ruled against the rationale the trial court employed that, according to the state statute at issue in the case, fit natural parents must carry the burden of proving that grandparent visitation rights would be against the child's best interests.[34] The trial court's conclusion directly contravened the natural-parent presumption and could not stand given its unconstitutionally broad interference with parents' fundamental rights.[35] *Troxel* illustrates, as do the other federal and state cases mentioned above, that courts are committed to the natural-parent presumption and its heightened protection of parental rights regarding custody and visitation.[36]

Artificial insemination is also becoming increasingly relevant. Following *Obergefell v. Hodges*,[37] our court addressed same-sex parents' fundamental rights and reproductive technology in *Strickland v. Day*.[38] Our court assessed whether anonymous sperm donors, whose donations were used by then-married women for artificial insemination, possess parental rights over children born from their donations.[39] We concluded that there was no basis to warrant parental rights to anonymous sperm donors.[40] Instead, we found a strong presumption of parentage for both then-married women, ascertainable from ample evidence that they both

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[32] Stacy v. Ross, 798 So. 2d 1275, 1280 (Miss. 2001) (citing Plaxico v. Michael, 735 So. 2d 1036 (Miss. 1999); McKee v. Flynt, 630 So. 2d 44 (Miss. 1993); Carter v. Taylor, 611 So. 2d 874 (Miss. 1992); Ethredge v. Yawn, 605 So. 2d 761 (Miss. 1992); White v. Thompson, 569 So. 2d 1181 (Miss. 1990); Simpson v. Rast, 258 So. 2d 233 (Miss. 1972); *In re* Guardianship of Faust, 239 Miss. 299, 123 So. 2d 218 (1960)).

[33] Troxel v. Granville, 530 U.S. 57, 72-73 (2000).

[34] *Id.* at 69.

[35] *Id.* at 69-70.

[36] *See generally id.*

[37] *See* Obergefell v. Hodges, 576 U.S. 644, 665 (2015) (holding "same-sex couples may exercise the fundamental right to marry in all States").

[38] 239 So. 3d 486, 494 (Miss. 2018).

[39] *Id.* at 491-93.

[40] *Id.* at 493.

intentionally agreed to have a child through artificial insemination as that child's equal co-parents.[41]

The then-married women, not the anonymous sperm donor, maintained parental rights over the child.[42] *Strickland* is just the beginning of the changes that will reach our court. I have discussed only one subject area of parents' fundamental rights challenges. Since the pandemic in 2020, we have seen an increase in parents' concerns over their rights beyond custody and visitation, including their children's education or medical care.[43] We can expect these novel challenges to reach Mississippi soon.

Even now, after more than one hundred years since *Meyer*, the fundamental rights of parents are foundational to so much in our society, and the United States Constitution, in which these fundamental rights have their roots, is not changing. Parental rights are "perhaps the oldest of the [recognized] fundamental liberty interests."[44] My role on the Mississippi Supreme Court involves upholding the federal and state Constitutions, promoting justice, and ensuring parental rights are protected. As we advance, the challenge to the court is to look at our Constitution, keeping the child's best interest as a critical consideration when faced with social changes that bring novel and complex litigation.

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[41] *Id.* at 494.

[42] *See id.*

[43] *See e.g.*, C.B. v. D.B., 155 N.Y.S.3d 631, 633-36 (N.Y. Sup. Ct. 2021); Burrow v. Sieler, 497 P.3d 921, 927 (Wyo. 2021); State v. Loe, No. 23-0697, slip op., 2024 WL 3219030 (Tex. 2024); Caldwell v. Jaurigue, No. 30-MAP-2023, 2024 WL 2789167 (Pa. 2024).

[44] Troxel v. Granville, 530 U.S. 57, 65 (2000).