BEFORE THE SENATE COMMITTEE ON JUDICIARY

THE MAINE LEGISLATURE

TESTIMONY OF SCOTT A. WOODRUFF, ESQ., PARENTALRIGHTS.ORG

ON LD 472

LD 472 will put the Maine legislature on record as to how parental rights should be protected.

As long as the Maine legislature remains silent, it creates an opportunity for a judge to follow his own preferences and downgrade parental rights. 24 courts across the nation have already done so. It's vital that the Maine legislature step up and declare how parental rights must be protected.

There are three categories of rights: absolute, fundamental, and ordinary.

> An absolute right is one which the government cannot burden in any manner. For example, the right to choose a faith is an absolute right which the government cannot regulate or limit at all. The right of a parent to direct the upbringing of his child has never been considered absolute, and LD 472 will not make it so.
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> A fundamental right is one which the government can burden or restrict only if there is a super good reason—often called a "compelling" reason--and it is done with the least intrusion possible. This is referred to as applying "strict scrutiny" to the government action. The right of a parent with regard to rearing a child has historically been considered fundamental.
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> Other fundamental rights the courts have recognized are: the right to move from one state to another; the right to move around within a state; the right to privacy; procreative rights; and the right to choose a form of education other than a public school.
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> An ordinary right is one which the government can infringe or burden for virtually any reason, so long as its reason is "rational." However, it's laughably easy to show that a government action is "rational," so the citizen almost always loses the ability to enjoy his ordinary right if the government chooses to restrict it.

> The courts treat the following rights as ordinary: the right to welfare benefits; the right to a public education; the right to engage in commercial activity; the right to carry on a trade or profession; and the right to contract.

No one is suggesting that parental rights ought to be absolute. On the other hand, parental rights have been considered fundamental for nearly a hundred years—at least since *Meyer v. Nebraska* in 1923 and *Pierce v. Society of Sisters* in 1925.

So the case for LD 472 could be summarized as: should the Maine Legislature require that parental rights continue to be treated as fundamental, or should it remain silent and give judges the latitude to downgrade them to ordinary, thus making them subject to restrictions similar in magnitude to those that encumber a person applying for welfare benefits or a business license?

LD 472 will protect the status quo on parental rights. Failure to enact LD 472 leaves the door open for a transition toward parental rights being treated as ordinary.

Here are some questions that may arise, with responses.

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1. Will parents be able to abuse their kids if parental rights are fundamental?

No. The laws forbidding abuse and neglect harmonize well with parents' rights being fundamental. This is because it is undisputed that the state has a compelling interest in forbidding abuse and neglect. All the abuse and neglect laws around the country continue to operate as intended even with parental rights being fundamental in most jurisdictions, as they are now. It's not experimental for parents' rights to be fundamental. We have 100 years of experience. And during that time it was never ruled that the fundamentality of parents' rights prevented the state from prohibiting abuse or neglect.

2. Why not just let parents' right continue to be developed through common law?

Judge-made law, or common law, is relevant only in areas where the legislature is silent. If the Maine Legislature continues to be silent, the job of protecting parental rights will fall by default into the laps of judges. But this is the least satisfactory solution because judge-made law is the least democratic form of law.

3. Will it upset domestic custody decisions?

No. Domestic custody disputes are contests between one parent and another parent—not contests between the government and parents. In this context it does

not matter how parental rights are categorized because the rights of the contestants are equal.

4. Will it upset adoptions?

No. Most adoptions involve a parent who has voluntarily surrendered his parental rights, and who thus would not have standing to object. Even with parental rights being fundamental, as they are in most jurisdictions, the state still has a compelling interest in terminating parental rights against the wishes of the parent in the appropriate situation.

5. Does it change the definition of "parent"?

No. The legislature has the authority to define "parent" as it believes is appropriate. LD 472 neither adds to nor detracts from the legislature's power to define "parent."

6. Will it overturn the "best interests" rule?

On a day-to-day basis, parents—not the government—decide what is in the best interests of their children. LD 472 will not change that. In some non-typical situations, like parents who are divorced or parents who have been found guilty of abuse or neglect, a judge is empowered to make the decision of what is in the best interests of a child. LD 472 will not change that. Even with parental rights being fundamental, as they are in most jurisdictions, the legislature has a compelling interest in some situations in authorizing a judge, rather than a parent, to make decisions with respect to what is best for a child.

7. Does LD 472 change the status quo?

No. Parental rights were universally regarded as fundamental at least since *Meyer v Nebraska* in 1923 and *Pierce v. Society of Sisters* in 1925. But in the 2000 case of *Troxel v. Granville*, the U.S. Supreme Court for the first time refused to clearly acknowledge that strict scrutiny should be applied to government actions that burden parental rights. While the decision certainly did not downgrade them to "ordinary," it was so muddled that 24 courts since that time have failed to treat parental rights as fundamental.

The status quo in Maine is that parental rights are fundamental. *See Rideout v. Riendeau* 2000 ME 198, 761 A.2d 291*; Guardianship of David C.* 2010 ME 136, 10 A.3d 684.

However, if the legislature refuses to give the courts guidance, it cannot be taken for granted that judges will continue to treat them as fundamental in the future, especially with the confusion spawned by the *Troxel* case.

8. Will LD 472 give parents the right to dictate what public schools teach?

No. In the *Fields v. Palmdale School District* case, 447 F.3rd 1187, the school district gave young children a survey that included questions of a sexual nature. A group of parents sued the school district asserting that this violated their parental rights. The federal Ninth Circuit Court of Appeals said that the only avenue for parents to control the content of instruction is through their elected school boards and state legislation. The Court said that the right of parents to direct the upbringing of their children "does not extend beyond the threshold of the school door." 427 F. 3rd at 1207 The Court said parents cannot "enjoin school board from providing information the boards deem appropriate" for children. *Id*. In *Myer vs. Loudoun County School Board* (251 F.Supp.2d 1262, 2003), a federal trial court ruled that even though parental rights are fundamental, schools can still have the students recite the pledge of allegiance.

9. Can government agencies place appropriate restrictions on parents when their rights are fundamental?

Yes. In the *Schleifer v. City of Charlottesville* case, 159 F.3d 843, 4th Cir. 1998, the federal Fourth Circuit Court of Appeals, in ruling that a daytime curfew for minors was not unconstitutional, said: "...This fundamental right [to bring up children as one sees fit] is not unbounded. Indeed the state can legitimately impose restraints and requirements that touch the lives of children in direct conflict with the wishes of their parents."

Compulsory education laws and child labor laws have uniformly been upheld because they arise from a compelling governmental interest.

10. Does the public agree that the rights of parents should be fundamental?

Yes. A 2010 Zogby poll asked: "In general, parents have the constitutional right to make decisions for their children without government interference unless there is proof of abuse or neglect. Do you agree or disagree with this view of parental rights?" 93.6% of those responding agreed. There is a solid social consensus to protect traditional parental rights. The right to raise your kids is a bipartisan issue.

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In our time-honored system of government, the legislature creates the laws and the courts interpret them. But what are the courts to do when there simply is no law on a particular subject? Maine has no law establishing how the rights of parents should be protected. This gives the courts a breathtaking opportunity to--in effect--usurp the responsibility of the legislature and legislate on their own. The legislature must not abandon the field.

The winds of change are stirring. 24 courts have moved toward downgrading parental rights. This is not a hypothetical threat. The Maine Legislature can either speak plainly and simply, or it can abandon the people of Maine to the winds of change and give its tacit approval to individual judges to erode a right so basic, so fundamental, so obvious, that it was heretofore unnecessary to legislate on the subject.

But now it is necessary.

APPENDIX

State and Federal Court Decisions, Decided since *Troxel*, which have Explicitly Rejected the use of Strict Scrutiny in Parental Rights Cases

Bethany v. Jones, 378 S.W.3d 731, 2011 Ark. 67, (holding that even though "the Due Process Clause of the Fourteenth Amendment protects the rights of parents to direct and govern the care, custody, and control of their children," *id.* at *8, "our law is well settled that the primary consideration in child-custody cases [where a step-parent seeks visitation over the objection of a biological parent] is the welfare and best interest of the children; all other considerations are secondary" *id.* at *9).

Hensler v. City of Davenport, 790 N.W.2d 569, 581 (Iowa 2010) (applying rational basis scrutiny to a parental responsibility ordinance because "the ordinance does not intrude directly and substantially into a parent's parental decision-making authority, but instead only minimally impinges on a parent's fundamental right to direct the upbringing of his or her child," notwithstanding the general rule that whenever the power of the state "improperly intrude[s] into the parent's decision-making authority over his or her child," there is "an infringement of this fundamental parental right, triggering strict scrutiny," citing *Troxel*, 530 U.S. at 67).

In re Reese, 227 P.3d 900, 902-3 (Colo. Ct. App. 2010) (employing a "rebuttable presumption" in favor of parental visitation determinations, which can be rebutted by "clear and convincing evidence that the parent is unfit or that the parent's visitation determination is not in the best interests of the child," *id*. at 903; the rebuttable presumption is employed because *Troxel* did not "state[] how the presumption affects the proof process or how courts must accord special weight to it," *id.* at 902).

Cannon v. Cannon, 280 S.W.3d 79, 86 (Mo. 2009) (in a marriage dissolution proceeding regarding child custody, the court described *Troxel* as holding that "while a parent's interest in his or her children is entitled to 'heightened protection,' it is not entitled to 'strict scrutiny'").

Weigand v. Edwards, 296 S.W.3d 453, 458 (Mo. 2009) (applying a balancing-of-interest test to a statute governing modification of custody because "the Supreme Court utilized a

balancing-of-interests standard in the context of a grandparent visitation statute" and "decided to leave the determination of the propriety of particular statutes to a case-by-case analysis").

Price v. New York City Bd. Of Educ., 51 A.D.3d 277, 292 (A.D. N.Y. 2008) (holding that "even if we were to hold that a fundamental liberty interest is at stake [because of a school rule prohibiting students from having cell phones], we would not apply strict scrutiny" because "there is no clear precedent requiring the application of strict scrutiny to government action which infringes on parents' fundamental right to rear their children" given that *Troxel* "did not articulate any constitutional standard of review").

In re Guardianship of Victoria R., 201 P.3d 169, 173, 177 (N.M. Ct. App. 2008) (affirming a trial court's decision to award guardianship of a child to "psychological parents," to whom the mother had voluntarily given placement of the child, because evidence of potential psychological harm to the child overcame the presumption in favor of the biological parent, *id.* at 177; the court did not employ strict scrutiny, noting that "only Justice Thomas, in a concurring opinion, relied upon a fundamental rights-strict scrutiny analysis" and that "some authorities, noting that only Justice Thomas expressly relied upon textbook fundamental rights-strict scrutiny analysis, have read *Troxel* as moving away from the rigid strict scrutiny mode of analysis of state legislation that impinges on parents' control over the upbringing of their children," *id.* at 173 n. 4).

In re Adoption of C.A., 137 P.3d 318, 319 (Colo. 2006) (adopting a rebuttable presumption in favor of parental decisions, which can be rebutted by "clear and convincing evidence that the parental visitation determination is not in the child's best interests," because *Troxel* "left to each state the responsibility for enunciating how its statutes and court decisions give "special weight" to parental determinations").

Douglas County v. Anaya, 694 N.W.2d 601, 607 (Neb. 2005) ("It is true that "the custody, care and nurture of the child reside first in the parents." However, the Court has never held that parental rights to childrearing as guaranteed under the Due Process Clause of the 14th Amendment must be subjected to a strict scrutiny analysis. See *Troxel*. "[T]he Supreme Court has yet to decide whether the right to direct the upbringing and education of one's children is among those fundamental rights whose infringement merits heightened scrutiny." *Pierce* and *Yoder* do not support an inference that parental decisionmaking requires a strict scrutiny analysis") (internal citations omitted).

McDermott v. Dougherty, 869 A.2d 751, 808-9 (Md. 2005) (Adopting a balancing test where "the constitutional right [of parents] is the ultimate determinative factor; and only if the parents are unfit or extraordinary circumstances exist is the "best interest of the child" test to be considered").

Barker v. Barker, 98 S.W.3d 532, 535 (Mo. 2003) (holding that, under *Troxel*, "the trial court was required to consider the parents' right to make decisions regarding their children's upbringing, determine the reasonableness of those decisions, and then balance the

interests of the parents, child, and grandparents in determining whether grandparent visitation should be ordered").

Doe v. Heck, 327 F.3d 492, 519-20 (7th Cir. 2003) (applying a "reasonableness" test, akin to Fourth Amendment analysis, when balancing "the fundamental right to the family unit and the state's interest in protecting children from abuse," *id.* at 520, because "after *Troxel*, it is not entirely clear what level of scrutiny is to be applied in cases alleging a violation of the fundamental constitutional right to familial relations," *id.* at 519).

In re Marriage of Winczewski, 72 P.3d 1012, 1034 (Or. Ct. App. 2003) ("In *Harrington*, we expressly rejected the strict scrutiny standard asserted by Justice Thomas in *Troxel* and indicated that 'the plurality opinion [in *Troxel*] gives the best guidance on the effect of the constitution in this situation'").

Blakely v. Blakely, 83 S.W.3d 537, 546 (Mo. 2002) (Although the majority [in *Troxel*] did not articulate the specific standard of review it was applying, it did not apply the strict scrutiny standard advocated by Justice Thomas. Instead, after identifying the kinds of factors that led it to invalidate the application of the Washington statute to the facts before it, the Court decided to leave the determination of the propriety of particular statutes to a case-by-case analysis").

In re Custody of C.M., 74 P.3d 342 (Colo. Ct. App. 2002) (noting that the court in *Troxel* "did not specify the appropriate level of scrutiny for statutes that infringe on the parent-child relationship" and "did not decide whether the state's interest was a compelling one.").

Leebaert ex rel. Leebaert v. Harrington, 193 F.Supp.2d 491, 498 (D. Conn. 2002) ("Supreme Court precedent is less clear with regard to the appropriate standard of review of parental rights claims. However, the Second Circuit has concluded that a parental rights challenge to a school's mandatory community service requirement warranted only rational basis review. *Troxel* does not establish a different rule requiring strict scrutiny of parental challenges to educational policies of public schools").

Nicholson v. Williams, 203 F.Supp.2d 153, 245 (E.D. N.Y. 2002) (noting that "[t]he plurality [in *Troxel*] apparently saw no need to vocalize a standard of review," and that "[u]nderstandably, the Supreme Court and other courts have hesitated to apply strict scrutiny mechanically and invariably to government legislation and policy that infringes on familial rights. Even as it has recognized the sanctity of familial rights, the Court has always acknowledged the necessity of allowing the states some leeway to interfere sometimes").

State Dept. of Human Resources v. A.K., 851 So.2d 1, 8 (Ala. Ct. App. 2002) (holding, over the dissent's objection based on *Troxel*, that "[a]lthough a parent has a prima facie right to custody of his or her child, the foremost consideration in deciding whether to terminate parental rights is the child's best interests. Where clear and convincing evidence establishes that the termination of parental rights is in the child's best interests, that consideration outweighs the parent's prima facie right to custody of the child").

Williams v. Williams, 50 P.3d 194, 200 (N.M. Ct. App. 2002) (affirming an order of visitation, over the objection of the parents, based solely on statutory factors including the best-interest of the child with no apparent presumption in favor of the parents' decision; "We agree with Parents that, as a general proposition, *Troxel* does require courts to give special consideration to the wishes of parents, and appropriately so. However, we do not read *Troxel* as giving parents the ultimate veto on visitation in every instance. *Troxel* may have altered, but it did not eradicate, the kind of balancing process that normally occurs in visitation decisions").

State v. Wooden, 184 Or. App. 537 (Or. Ct. App. 2002) ("*Troxel* now establishes that the court must give significant weight to a fit custodial parent's decision").

Crafton v. Gibson, 752 N.E.2d 78, 92 (Ind. Ct. App. 2001) (affirming an earlier decision which used of "rational basis" scrutiny to evaluate a grandparent visitation statute because "the Supreme Court in *Troxel* did not articulate what standard would be applied in determining whether nonparental visitation statutes violate the fundamental rights of parents;" thus, "because the issue of what standard should be applied was not reached by the *Troxel* court, it is unnecessary for us to reevaluate the conclusions we reached in *Sightes* with regard to this issue").

Littlefield v. Forney Independent School Dist., 268 F.3d 275, 289 (5th Cir. 2001) ("The dispositive question at issue is whether the sweeping statements of the plurality opinion in *Troxel* regarding the "fundamental" "interest of parents in the care, custody, and control of their children," mandate a strict standard of scrutiny for the Parents' Fourteenth Amendment challenge to the Uniform Policy. We do not read *Troxel* to create a fundamental right for parents to control the clothing their children wear to public schools and, thus, instead follow almost eighty years of precedent analyzing parental rights in the context of public education under a rational-basis standard") (internal citations omitted).

Santi v. Santi, 633 N.W.2d 312, 317-18 (Iowa 2001) (holding that, under the Iowa Constitution, "the infringement on parental liberty interests implicated by the statute must be "narrowly tailored to serve a compelling state interest," *id.* at 318, even though "the *Troxel* plurality did not specify the appropriate level of scrutiny for statutes that infringe on the parent child relationship," *id.* at 317).

Jackson v. Tangreen, 18 P.3d 100, 106 (Ariz. Ct. App. 2000) (holding that "*Troxel* cannot stand for the proposition that [a state visitation statute] is necessarily subject to strict scrutiny" because "only Justice Thomas would have applied strict scrutiny to the statute in *Troxel*" and "[n]one of the other five opinions explicitly stated the level of scrutiny that it applied").