ORIGINAL

IN THE SUPREME COURT OF OHIO

IN RE GUARDIANSHIP OF S.H.	:	CASE NO. 2013-1778
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	:	ON APPEAL FROM THE COURT OF APPEALS, NINTH APP. DISTRICT
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	:	COURT OF APPEALS CASE NO. 13CA0066-M
	:	
	:	TRIAL COURT CASE NO. 13 07 GM 00029
	:	

MOTION FOR RECONSIDERATION OF FEBRUARY 19, 2014 ORDER DENYING JURISDICTION, CITATION OF ADDITIONAL RELEVANT AUTHORITY PURSUANT TO MEMORANDUM FOR JURISDICTION OF APPELLANTS, PARENTS OF S.H., AND ENTRY OF APPEARANCE

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INTRODUCTION

This Court must reconsider its 4-3 vote[1] denying the Motion for Jurisdiction of Andy and Anna Hershberger, who, as result of that denial, are faced with a loss of their parental rights to make potentially life and death health care choices for their eleven-year-old daughter. And upon reconsideration, Appellants Proposition of Law No. 1 should be accepted for review. That proposition states as follows: **Proposition of Law No. 1: A guardian may not make decisions regarding life-sustaining medical treatment absent a termination of parental rights.**

S. Ct. Prac. R. 18.02(A) states "any motion for reconsideration must be filed within ten days after the Supreme Court's judgment entry or order is filed with the Clerk of the Supreme Court." Division (B) of that Rule adds "A motion for reconsideration shall not constitute a reargument of the case and may be filed only with respect to the following Supreme Court decisions: (1) Refusal to accept a jurisdictional appeal * * *."

As is the norm, this Court's decision denying jurisdiction does not cite underlying rationales. However, this Court may have concluded, due to Appellees' jurisdictional memorandum, that this case is moot. Further, the significance of the issues in this case may not have been sufficiently emphasized in the Hershbergers Motion for Jurisdiction, crafted by their prior counsel.[2] For the reasons articulated below, this issues raised by this controversy are substantial constitutional questions, as well as questions of great public importance.

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[1] Justices O'Connor, O'Neill, and O'Donnell voted to accept Jurisdiction; and Justices Kennedy, Pfeiffer, French, and Lanzinger voted to deny jurisdiction.

[2] The undersigned counsel assumed direct representation of the Hershbergers subsequent to the filing of their Motion for Jurisdiction; and their prior counsel, who drafted and filed that Motion, withdrew. That withdrawal is on record in the Ninth District and Medina County Court of Common Pleas: On February 10, 2014, the Ninth District issued an order granting attorney John Oberholtzer's Motion to Withdraw, holding "another attorney has made an appearance on behalf of Appellants, therefore, the motion to withdraw is granted." The Probate Court had earlier separately granted the withdrawal. To the extent necessary, this Court should treat this filing as the undersigned counsel's entry of appearance as counsel of record in this case.

Consequently, this Court should reconsider its denial of jurisdiction and grant jurisdiction because (1) this issue is anything but moot: the Probate Court's guardianship over the Hershbergers' daughter remains in force, even after resignation of the first guardian; (2) though perhaps understated by Appellants' Proposition of Law No. 1, this case implicates fundamental rights, the role of parents in a free society, and the right to be free from forced health care; and (3) additional factors not before the Court in the parties' jurisdictional memoranda, chronicled below, are decisive.

ANALYSIS

A. This case is not moot, and the issues it presents remain salient.

The Hershbergers' parental and health care rights remain in grave jeopardy at the time of this filing. In their December 11, 2013 Response to the Hershbergers' Motion for Jurisdiction, Appellees claimed "This case will soon be moot," due to the then-impending resignation of then-guardian Maria Schimer.[3]

This suggestion may well have played a role in the decisions of the four Justices who refused to hear this case. However, the statement was wrong at the time Appellees posited it; and it remains wrong today. As Appellees themselves argued just several days later, "removal of the original guardian does not terminate the guardianship," and "the jurisdiction of the court is a continuing one, as long as the guardianship exists."[4]

Indeed, while the Probate Court accepted the resignation of Maria Schimer through an oral order from the bench on February 13, 2014 (it has yet to issue a written judgment entry), it specifically stated that the guardianship remains intact. This means that some person other than the parents, even if not Maria Schimer, remains vested with the power to overrule the parents decision to save the life of their daughter through use of an alternative treatment, and to force chemotherapy that they believe will kill her, sterilize her, and otherwise jeopardize her life and well-being.

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[3] Appellees Response to Appellants' Motion for Jurisdiction, p. 1.

[4] See Appellees January 7, 2014 Memorandum Regarding Jurisdiction [to the Probate Court], at p. 3, citing *Weigle v. Grossnickle*, 100 Ohio App. 106 (1954); *In re: Guardianship of Daugherty*, 1984 WL 7676.

Perhaps some of the Justices viewed this matter as featuring insufficient adversity of interests, in the wake of Ms. Schimer's resignation. However, guardianship hearings are inherently non-adversarial proceedings - - "rather, they are *in rem* proceedings involving only the probate court and the ward."[5]

Further, this Court's precedent makes clear that issues such as this are justiciable and worthy of review even in the absence of adversity. This Court has recently and frequently, within the context of its jurisdictional mootness jurisprudence, rejected the notion that each party maintain an individualized personal stake for constitutional matters of public importance to be decided. In *Franchise Developers, Inc. v. City of Cincinnati,*" this Court explained that "[a]lthough a case may be moot with respect to one of the litigants, this court may hear the appeal where there remains a debatable constitutional question to resolve, or where the matter appealed is one of great public or general interest."[6] The Court added "[u]pon a careful review of the entire record, we believe that although the instant matter is technically moot with respect to the plaintiffs, there still remains a *debatable constitutional question for this court to resolve*," and "[i]n addition, we believe that the cause sub judice involves matters of great public interest, thereby vesting this court with jurisdiction to entertain this appeal, even though the controversy is moot with respect to the plaintiffs."[7] In other words, important constitutional questions should be decided even in the absence of an individualized personal stake for the non-governmental litigant. This adjudication of matters of constitutional importance in such circumstances was reaffirmed in 2002 and 2005.[8]

B. The Appellate Court maintains that it is *this* Court's job to consider the constitutionality of the guardianship statutes, as applied here, and refused to examine the issue.

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5 *In re Guardianship of Santrucek,* 120 Ohio St. 3d 67.

6 *Franchise Developers, Inc. v. Cincinnati* (1987), 30 Ohio St.3d 28, paragraph one of the syllabus.

7 Id., citing See *Wallace v. University Hospitals of Cleveland* (1961), 171 Ohio St. 487. *In re Popp* (1973), 35 Ohio St.2d 142, and *State, ex rel. Rudes, v. Rofkar* (1984), 15 Ohio St.3d 69.

8 *State ex rel. White v. Kilbane Koch,* 96 Ohio St.3d 395, 2002-Ohio-4848, ¶ 16, quoting *Franchise Developers, Inc. v. Cincinnati* (1987), 30 Ohio St.3d 28, paragraph one of the syllabus.

The Appellate Court wrongly refused to consider the fundamental constitutional rights presented by this case. Twice. The Appellate Court remarked in its October 1, 2013 ruling that, "[t]he parties have never raised whether R.C. 2111.06 is constitutional as applied," and then expressly abstained from considering the constitutionality of the matter.[9] Prior to that, however, the Probate Court decided the case on constitutional grounds, expressly and correctly holding that "[t]he legal standard - whether the guardianship would promote the child's interests - is not narrowly tailored to achieve a compelling state interest. If a guardianship is established, the case will not survive a strict scrutiny challenge on appeal."[10]

Furthermore, in their initial Brief to that Court, the Hershbergers insisted that "[a] determination of parental unsuitability is necessary" (1) "prior to appointment of a guardian;" and (2) "before parents may be deprived of their custodial rights as natural guardians."[11] In doing they cited salient Ohio precedent that explicitly relies upon the constitutional background principles at work in every parental rights dispute.[12] Further, they cite the governing United States Supreme Court precedent of *Troxel v. Granville* for the propositions that "parental rights are paramount," the constitutional "presumption that fit parents act in the best interests of their children," and (referring to "the constitutional rights of parents") "[t]he Due Process Claus does not permit a State to infringe on the fundamental rights of parents to make child rearing decisions simply because a state judge believes a 'better' decision could be made."[13]

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[9] *In re Guardianship of S.H.,* 2013-Ohio-3708. There may well be some room between whether an issue has been "raised" and whether it has been "waived" or "forfeited." The Hershbergers have clearly raised the fact that their suitability forbids government from taking their child because government disagrees with the careful health care choices they have made.

[10] September 3, 2013 Judgment Entry of the Medina County Court of Common Pleas, Probate Division, p. 5.

[11] August 21, 2013 Brief of Appellees Andy and Anna Hershberger, pp. 5, 7.

[12] Id., at pp. 7-8, citing *Hockstock v. Hockstock,* 98 Ohio St.3d 238 (2002), *In re Perales,* 52 Ohio St.2d 89 (1977), *In re Guardianship of Stein,* 105 Ohio St.3d 30 (2004).

[13] Id, pp. 8-9, citing 570 U.S. 57 (2000).

Nevertheless, on February 14, 2014, subsequent to the filing of the jurisdictional memoranda before this Court, the same Court again refused to adjudicate these constitutional issues.[14] Specifically, the Court overruled the following Appellants' Assignment of Error: "Second-guessing and overruling the health care decisions of suitable, caring, attentive, and non-neglectful parents creates constitutional difficulties that Ohio Courts must construe R.C. 2111.06 and other Guardian statutes to avoid."[15]

At oral argument (for which there is no recording or transcript), each member of the Court indicated that the Ohio Supreme Court would take this case and address these issues, and it was therefore unnecessary for it to wade into the constitutional issues presented. One Judge even believed that this Court had already accepted the case for review, and appeared to believe that the Hershbergers' filing of a Notice of Appeal meant that this Court would hear the case. Another simply indicated that Appellees' arguments were arguments for the Ohio Supreme Court, rather than it. Because lower appellate courts refuse to engage in a probing judicial review of the Hershbergers' parental rights in this life and death matter, despite the issue being placed before those courts, this Court should accept Appellants' Proposition of Law No. 1.

C. Failure to review this case would leave intact as precedent an Appellate Decision that is inconsistent with constitutional safeguards and threatens child-rearing decisions of every Ohio parent.

Second-guessing and overruling the health care decisions of suitable, caring, attentive, and non-neglectful parents creates constitutional incompatibility that Ohio Courts must construe R.C. 2111.06 and other Guardian statutes to avoid. However, rather than avoiding these constitutional infirmities, the Ninth District's ruling exacerbates them, leaving a federal court even more likely to strike down the applicable statute(s), should this Court fail to review and construe it. Meanwhile, this case presents substantial constitutional questions (including the first opportunity to interpret Section 21, Article I of the Ohio

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[14] S.Ct.Prac.R. 7.04. (A)(2) states "If a relevant authority is issued after the deadline has passed for filing a party's jurisdictional memorandum, that party may file a citation to the relevant authority but shall not file additional argument."

[15] See Case No. 13 CA 0089-M, February 14, 2014 Order of the Court of Appeals for the Ninth District, with the Fifth District sitting on assignment.

Constitution (added to the Ohio Constitution in 2011); the Ninth District's decisions is entirely inconsistent with United States and Ohio Supreme Court precedent; and this case affects literally every Ohioan.

As the Probate Court indicted in its last decision, a federal court will almost certainly declare this Ohio guardianship statute to be, on its face, insufficiently narrowly tailored to advance a compelling state interest; and will entirely enjoin it. And the Hershbergers fully intend to take their claims to federal court absent relief. But it is this Court that should decide novel issues of state law, since this Court can save the statute by construing it narrowly.

i. Ohio's Guardian statues must be construed as consistent with constitutional safeguards; and this Court can limit and narrow the reach of Ohio's Guardianship statutes, while federal courts can only strike them.

The Court of Appeals for this Circuit has ruled that ""Federal courts lack authority and power to give a limiting, narrowing construction to a *state* statute.," A federal court "has very limited powers in construing state statutes or municipal ordinances," and "a federal court must take the state statute or municipal ordinance as written and cannot find the statute or ordinance constitutional on the basis of a limiting construction supplied by it."[16]

However, in Ohio, "it is a canon of construction that courts will seek to give to statutes a construction that is consistent with the provisions of the Constitution of the state," "in enacting a statute, it is presumed that compliance with the constitutions of the state and of the United States is intended,"[17] and

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[16] *Record Revolution No. 6, Inc. v. City of Parma,* 638 F.2d 916, 926 (6th Cir.1980). *See also Michigan State Chamber of Commerce v. Austin,* 642 F.Supp. 1078, 1079 (E.D.Mich.1986) (District Court asserting that it could not "authoritatively narrow Michigan's statute" and that "[j]udicial construction cannot save Michigan's statute because the statute needs substantial revision").

[17] *State ex rel. Donahey v. Edmondson,* 89 Ohio St. 93, 105 N.E. 269 (1913). R.C. 1.47(A). *See also State v. Carswell,* 114 Ohio St.3d 210, 2007-Ohio-3723, 871 N.E.2d 547, ¶ 6.

"Courts are to construe a statute in such a way as to save it from constitutional *infirmity.*"[18] Courts therefore "have a duty to liberally construe statutes to save them from constitutional infirmities."[19]

Mindful of this "mandate," an Ohio court is required to color its construction, interpretation, and application of R.C. 2111.02, R.C. 2111.06, and R.C. 2111.50 in light of constitutional parental rights, health care freedom, and vagueness concerns presented by the texts of the state and federal constitutions, as well as precedent applying those texts. In holding that those statutes conferred "plenary" power on Ohio courts to second-guess and overrule the direction of a child's health care needs by suitable and qualified parents, the Appellate Court and Probate Court (albeit only in response to the mandate of the Appellate Court) each rendered those statutes constitutionally infirm - - without limits shielding suitable Ohio parents in the Hershbergers' circumstances, those sections would necessarily violate the procedural and substantive guarantees of the Fourteenth Amendment to the United States Constitution, and Sections 1 and 21 of Article I of the Ohio Constitution.

First, R.C. 2111.02(B)(1) is untethered by any consideration whatsoever of the suitability of the parents or deference to their carefully-weighed decisions, stating as follows: "<u>If the probate court finds it to be in the best interest of an incompetent or minor,</u> it may appoint pursuant to divisions (A) and (C) of this section, on its own motion or on application by an interested party, a limited guardian with specific limited powers."

Second, R.C. 2111.06 likewise ignores the suitability of the parents and provides no deference to their right to direct the upbringing of their children, proclaiming "[a] guardian of the person of a minor shall be appointed as to a minor having no father or mother, whose parents are unsuitable persons to have the

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18 *State v. Sinito* (1975), 43 Ohio St.2d 98, 101, 72 O.O.2d 54, 56, 330 N.E.2d 896, 898–899.

19 *Desenco, Inc. v. Akron,* 84 Ohio St.3d 535, 538, 706 N.E.2d 323 (1999); *Wilson v. Kennedy* (1949), 151 Ohio St. 485, 492, 39 O.O. 301, 86 N.E.2d 722.

custody of the minor and to provide for the education of the minor as required by section 3321.01 of the Revised Code, *or* whose interests, in the opinion of the court, will be promoted by the appointment of a guardian."

These statutes would *appear* to empower, and even mandate, Ohio Courts to play God, ignoring parents' moral and constitutional interests, and substitute their judgment for those of the parents, with no deference whatsoever. *Without construction otherwise*, these statutes fail constitutional scrutiny, both facially, and as applied here.

For instance, this Appellate Court in this case has previously concluded that "R.C. 2111.02 and 2111.06 vest the probate court with broad power * * * Upon a mere finding that it is in the "best interest of a * * * minor," R.C. 2111.02(B)(1) authorizes a probate court to supplant a parent's rights and responsibilities through appointment of a limited guardian. Similarly, R.C. 2111.06 authorizes a probate court to appoint a guardian of a minor not only where the court finds the child's natural parents to be "unsuitable persons" but also upon the mere finding that the child's "interests * * * will be promoted thereby."[20]

In stark and irreconcilable contrast to the Appellate Court's holding below, for over 135 years, the Supreme Court of Ohio has recognized "the superior guardianship rights and obligations of a child's parents over those of a nonparent," explaining "parents who are 'suitable' persons have a 'paramount' right to the custody of their minor children unless they forfeit that right by contract, abandonment, or by becoming totally unable to care for and support those children."[21]

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[20] Id.

[21] *Clark v. Bayer* (1877), 32 Ohio St. 299; *Perales v. Nino,* 52 Ohio St. 89. 97, 369 N.E.2d 1047(1977). Although *Perales* concerned a custody petition under R.C. 2115.23(A)(2), the holding has been extended to guardianship proceedings. *In re Guardianship of Wright,* 3rd Dist. Defiance No. 4–01–20, 2002–Ohio–404, citing *In re Jewell,* 4th Dist. Athens No. 1190, 1984 WL 5681 (Dec. 6, 1984).

ii. Leaving the Appellate Court's Decision here intact results in a construction of Ohio's Guardianship statutes that are inconsistent with constitutional guarantees of parental rights.

The Appellate Court's holding below is wholly inconsistent with Supreme Court interpretations of the United States and Ohio Constitutions. The liberty interest at issue in this case—"the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by the [United States Supreme] Court,"[22] which has recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children.[23]

Most recently and saliently for this case, in *Troxel v. Granville*, the Supreme Court concluded that a statute nearly identical to Ohio's R.C. 2111.06, Washington State Section 26.10.160(3), "as applied to Granville and her family in this case, unconstitutionally infringes on that fundamental parental right" because it was "breathtakingly broad."[24]

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[22] *Troxel v. Granville* (2000), 530 U.S. 57.

[23] See, *e.g., Stanley v. Illinois,* 405 U.S. 645, 651, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972) ("It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children 'come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements' " (citation omitted)); *Wisconsin v. Yoder,* 406 U.S. 205, 232, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition");*Quilloin v. Walcott,* 434 U.S. 246, 255, 98 S.Ct. 549, 54 L.Ed.2d 511 (1978) ("We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected");*Parham v. J. R.,* 442 U.S. 584, 602, 99 S.Ct. 2493, 61 L.Ed.2d 101 (1979) ("Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course"); *Santosky v. Kramer,* 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982) (discussing "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child"); *Glucksberg, supra,* at 720, 117 S.Ct. 2258("In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes the righ [t] ... to direct the education and upbringing of one's children" (citing *Meyer* and *Pierce*)). In light of this extensive precedent, 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.

[24] *Troxel v. Granville* (2000), 530 U.S. 57.

The statute at issue in *Troxel* provided that "*[a]ny person* may petition the court for visitation rights *at any time,*" and that a court could grant such visitation rights whenever "visitation may serve *the best interest of the child.*"[25] The Court explained as follows:

> that language effectively permits any third party seeking visitation to subject any decision by a parent concerning visitation of the parent's children to state-court review. Once the visitation petition has been filed in court and the matter is placed before a judge, a parent's decision that visitation would not be in the child's best interest is accorded no deference. [That Section] contains no requirement that a court accord the parent's decision any presumption of validity or any weight whatsoever. Instead, the Washington statute places the best-interest determination solely in the hands of the judge. Should the judge disagree with the parent's estimation of the child's best interests, the judge's view necessarily prevails. Thus, in practical effect, in the State of Washington a court can disregard and overturn *any* decision by a fit custodial parent * * * based solely on the judge's determination of the child's best interests."[26]

The Court concluded that the Washington statute "as applied, exceeded the bounds of the Due Process Clause" because (1) "the Superior Court's order was not founded on any special factors that might justify the State's interference with Granville's fundamental right to make decisions concerning the rearing of her two daughters;" and (2) "the Troxels did not allege, and no court has found, that Granville was an unfit parent. That aspect of the case is important, for there is a presumption that fit parents act in the best interests of their children;" and (3) The problem here is not that the Washington Superior Court intervened, but that when it did so, it gave no special weight at all to Granville's determination of her daughters' best interests. The decisional framework employed by the Superior Court directly contravened the traditional presumption that a fit parent will act in the best interest of his or her child. In that respect, the court's presumption failed to provide any protection for Granville's fundamental constitutional right to make decisions concerning the rearing of her own daughters."[27]

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25 Id.

26 Id.

27 *Troxel*, supra, at 69-70.

However, "our constitutional system long ago rejected any notion that a child is the mere creature of the State and, on the contrary, asserted that parents generally have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations.... The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children."[28]

Accordingly, "so 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."[29]

In his concurrence, Justice Souter succinctly summarized the Court's analysis striking down the "free-ranging best-interests-of-the-child standard": because the state statute authorizes any person at any time to request (and a judge to award) visitation rights, subject only to the State's particular best-interests standard, the state statute sweeps too broadly and is unconstitutional on its face," since "[i]t is not within the province of the state to make significant decisions concerning the custody of children merely because it could make a 'better' decision,"[30] and "the best-interests provision 'contains no requirement that a court accord the parent's decision any presumption of validity or any weight whatsoever. Instead, the Washington statute places the best-interest determination solely in the hands of the judge.'"[31]

Meanwhile, the Ohio Supreme Court has already specifically applied the holding and principles of *Troxel* in the medical guardianship context, also pursuant to R.C. 2111.06 and the other Guardianship

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28 *Parham* 442 U.S., at 602, 99 S.Ct. 2493 (alteration in original) (internal quotation marks and citations omitted).

29 *Troxel,* at 69; see, *e.g., Flores,* 507 U.S., at 304, 113 S.Ct. 1439.

30 Id. (Souter, concurring), citing 137 Wash.2d, at 20, 969 P.2d, at 31

31 Id.

statutes. In *In re Guardianship of Stein,* the Court considered "the narrow legal issue of whether the Summit County Probate Court exceeded its statutory authority when it appointed a guardian with the power to authorize the withdrawal of all life-sustaining support and treatment for Aiden Stein, an infant."[32] Chief Justice Moyer crystalized the issue in his concurring opinion, explaining "[e]thical people of good will disagree as to what is in the best interest of a person under such circumstances. I agree with the majority that the ultimate inquiry before us is not whether life-supporting treatment should be continued. Rather, the ultimate question we must resolve is whether Aiden's parents retain the legal right to make that decision * * *".[33] The facts there, with respect to the hospital's actions, were nearly identical - - the hospital elected to attempt to force guardianship upon the parents through a nurse/attorney who had never met the child.[34]

The Court concluded that the Probate Court exceeded its authority in appointing the guarding to make critical life and death health care decisions for the child, holding "without a full and proper adjudication of parental rights concluding in a termination of those rights, a probate court has no authority to allow a guardian to make a decision that will terminate the life of a child, when parental rights have not been permanently terminated."[35] The Court reasoned that "[A] parent's desire for and right to 'the companionship,

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[32] 105 Ohio St.3d 30, 821 N.E.2d 1008, 2004 -Ohio- 7114.

[33] Id., at Paragraph 49.

[34] Id., stating "Due to Aiden's diagnosis and prognosis, the Children's Hospital Ethics Committee was consulted regarding ethical issues involved in continuing, limiting, or withdrawing life-supporting treatment for Aiden. * * * the committee recommended that due to the significant potential for a conflict of interest, a guardian should be appointed to help make medical decisions for Aiden. In addition, the ethics committee recommended that life-supporting treatment be withdrawn and comfort care be administered to Aiden. On April 6, 2004, at the request of Children's Hospital, appellee Ellen Kaforey applied to the Summit County Probate Court for appointment as Aiden's guardian 'to evaluate and determine the withdrawal of life-sustaining medical treatment currently being administered' to Aiden. Kaforey is an attorney and a registered nurse who is often called upon by the probate court to assist families in cases where medical decisions need to be made for a family member."

[35] Id.

care, custody and management of his or her children' is an important interest that 'undeniably warrants deference and, absent a powerful countervailing interest, protection.'"[36]

This was true even though the Child's parents there "*had* been considered unsuitable."[37] The Clear import of *Stein* is that parental rights over decisions with life-altering consequences for their children may not be denied absent evidence of parental unsuitability, and this import is required by the Constitution.

This is verified by the Concurrences. Concurring separately, Justice O'Donnell explained that "[d]ecisions of this kind involving minors are properly left to parents. Unless or until their rights as to their child are terminated, they are the proper parties to make the decision with respect to their own child."[38]

Chief Justice Moyer provided greater depth on the constitutional issues presented by the case, explaining that (1) "the right of natural parents to direct the care and upbringing of a child is a fundamental liberty interest of constitutional dimension," (2) "[a]fter *Troxel* it is unclear whether, and under what circumstances, a state may constitutionally override a fit parent's decision as to the care or upbringing of a child based on the state's disagreement with the parent's conclusion as to a child's best interests;" and (3) "It seems clear, however, that 'the Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better' decision could be made, and that a court must accord 'special weight' to a fit parent's determination of the child's best interests."[39]

Denying review also leaves Ohio jurisprudence standing in stark contrast to rulings of other states. Specific to the issue of forced chemotherapy against suitable parents' wishes, the Delaware Supreme Court,

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36 Id., citing *Lassiter v. Dept. of Social Serv.* (1981), 452 U.S. 18, 27, 101 S.Ct. 2153, 68 L.Ed.2d 640, quoting *Stanley v. Illinois* (1971), 405 U.S. 645, 651, 92 S.Ct. 1208, 31 L.Ed.2d 551.

37 Id., at Paragraph 32.

38 Id. (O'Donnell, Concurring).

39 Id. (Moyer, Concurring), at 43.

in *Newmark v. Williams*, even prior to *Troxel,* recognized "[p]arents enjoy a well established legal right to make important decisions for their children," and "the State is simply not an adequate surrogate for the judgment of a loving, nurturing parent."[40] Further, applying *Cruzan v. Dir., Missouri Dep't of Health*, the Court held that the State failed to meet its burden because the parents were not unsuitable and child was not neglected simply because the parents refused to accede to medical demands that the child receive chemotherapy with a limited chance of success.[41]

Here, the Guardian statutes at issue are akin to the Washington State statute at issue in *Troxel.* They permit the Court to determine the "best interests of the child" without regard to the suitability of the parents, and without deference to suitable parents' decisions. And they permit an Ohio judge to substitute his or her judgment, whether pursuant to a hearing and evidence or otherwise, for that of suitable parents.

This is precisely what the Supreme Court in *Troxel v. Granville*, characterized too "breathtakingly broad"[42] to be constitutionally permissible - - containing "no requirement that a court accord the parent's decision any presumption of validity or any weight whatsoever," and leaving "the best-interest determination solely in the hands of the judge," all without reference "to any special factors that might justify the State's interference with [the] fundamental right to make decisions concerning the rearing of [one's children]."

Instead, the statutes are "free-ranging," and essentially allow "any person" at "any time," as has been done here, to make application for medical guardianship and overrule suitable parents' will. These are precisely the factors that caused the Supreme Court to conclude that "the state statute sweeps too broadly and is unconstitutional on its face," since "[i]t is not within the province of the state to make significant decisions concerning the custody of children merely because it could make a 'better' decision."[43]

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40 *Id.*

41 *Id.*

42 *Troxel v. Granville*

43 Id. (Souter, concurring), citing 137 Wash.2d, at 20, 969 P.2d, at 31

It is only due to this overbreadth that the Probate Court was able to appoint a medical guardian to overrule and second-guess the Hershbergers' treatment plans even despite the findings that "[t]here is no evidence the parents are unfit or unsuitable. To the contrary, these parents are caring, attentive, protective, and concerned."[44] And it is only due to this overbreadth that that Probate Court was able to overrule and second-guess the Hershbergers despite evidence of the immense risk of harm attendant with the state's preferred course of treatment -- a life and death decision. Indeed, the short-term and long-term effects of chemotherapy are serious and include the following: "S.H.'s hair falling out," "fatigue and nausea," "uncontrolled bleeding," "developing infections" "infertility", an increased risk of "developing cardiovascular disease," "damage [to] her other organs" "an increased risk of contracting other cancers." and finally " S.H. has a small but appreciable risk of dying from the treatment itself."[45]

Further In *Steele v. Hamilton Cty. Cmty. Mental Health Bd.*, the Ohio Supreme Court held that "[t]he right to refuse medical treatment" is "rights inherent in every individual,"[46] and "Section 1, Article I of the Ohio Constitution ensures that every Ohioan is provided with "personal security, bodily integrity, and autonomy."[47] More specifically and more recently, Ohioans in November of 2011 overwhelmingly approved the "Healthcare Freedom Amendment," which the undersigned counsel wrote and sponsored. The Amendment is located in Section 21 of Article I - - Ohio's Bill of Rights. The Amendment preserves the freedom to choose health care: Section 21(A) makes it clear that, *inter alia,* no "state, or local law or rule shall compel, directly or indirectly, any person, employer, or health care provider to participate in a health

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44 *Id.*

45 *Id.*

46 90 Ohio St. 3d 176, 180-81, 736 N.E.2d 10, 15-16 (2000).

47 *Id.*

care system."[48] The Appellate Court's decision simply cannot be squared with either this Court's precedent in *Steele* or Section 21, Article I of the Ohio Constitution.

Consequently, to exist harmoniously with the guarantees of the state and federal constitutions, Guardian statutes must be narrowed through a limiting construction that takes account of the suitability of the parents, and provides deference to the health care choices (and attendant weighing of risks) made by such parents. Failure to narrowly construe these statutes would render them unconstitutionally overbroad.

In conclusion, the necessary result of narrowing R.C. 2111.02, R.C. 2111.06, and R.C. 2111.50 to their constitutional confines is a holding that the decisions of suitable parents may not be attacked by anyone anytime in an Ohio Probate Court, and that these careful and gut-wrenching life and death decisions cannot be second-guessed and overruled where the parents are suitable, and simply seek to try a less invasive treatment first. As such, the Appellate Court's decision in this case, mandating appointment of a guardian to force chemotherapy on the Hershbergers' child, must be overruled.

CONCLUSION

This is an issue of Ohio law that should be decided by Ohio courts on Ohio-specific grounds, rather than by federal courts. Accordingly, Appellants' Proposition of Law No. 1 must be accepted for review. The Ohio Constitution provides protection to competent, fit parents to make medical decisions on behalf of their children, particularly when there are significant risks on each side of the equation. This case affects the rights of every Ohio parent, and this Court should not brush it aside.

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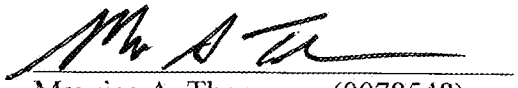
[48] Ohio Const. Section 21, Art I.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Citation of Additional Relevant Authority* was served upon the following counsel via electronic mail on the 3rd of March, 2014:

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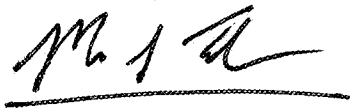
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