

Robert E. Talton



✓ CAPITOL OFFICE:
P.O. BOX 2910
AUSTIN, TEXAS 78768-2910
(512) 463-0460

DISTRICT OFFICE:
P.O. BOX 8681
PASADENA, TEXAS 77508
(281) 487-8818

District 144
House of Representatives

April 18, 2006

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OPINION COMMITTEE

RQ-0484-GA

The Honorable Greg Abbott
Texas Attorney General
ATTN: Opinion Committee
Office of the Attorney General
P.O. Box 12548
Austin, TX 78711-2548

FILE # ML-44782-06
I.D. # 44782

Re: Request for Attorney General Opinion

Dear General Abbott:

I write to request an Opinion from your Office regarding:

1. The constitutionality of TEX. FAM. CODE §153.433 in light of the enactment of HB261 and the precedent announced in Troxel v. Granville, 530 U.S. 57 (2000);¹ and
 - a. the amended language allowing for actual "possession" of a child by a grandparent;² and
 - b. the standard of evidence required to allow "access to or possession of" a child over a fit parent's objections;³ and

¹ See, U.S. CONST. AMEND. 14; and TEX. CONST. ART. I, § 19.

² See, E.C. v. Graydon, 28 S.W.3d 825 (Tex. App.—Corpus Christi 2000, no pet.) (Clarifying and defining, with great detail, the legal distinction between "access" to a child and "possession" of a child; and the implied rights and duties of conservatorship when a court grants "possession" of a child.)

³ See, In re Pensom, 126 S.W.3d 251 (Tex. App.—San Antonio 2003, no pet.) (Holding: "The power of a trial court to adjudicate such disputes...clearly implicates parents' fundamental liberty interests in the care and custody of their children. Because a fundamental right is implicated here, we apply strict scrutiny... See, Troxel ... (Thomas, J., concurring) (noting that strict scrutiny is the appropriate standard for reviewing the infringement of fundamental rights such as parental right to direct child's upbringing).")



- c. the necessity to require an actual finding of parental unfitness⁴ by a Texas Court before the State may intrude into any parent-child relationship.⁵

This request is re-submitted following my February 17, 2006 letter and your February 27, 2006 reply.⁶ Please note that the case which precluded your previous action has been adjudicated by the Texas Supreme Court. Therefore, no conflict exists which would proscribe your valued opinion in this matter.

In 2004, your Office issued an Opinion regarding this same statute at the request of Senator Jeff Wentworth.⁷ This Opinion was a major catalyst in the filing and passage of HB261. However, there remain questions as to the statute's constitutionality; which has prompted this request.

This area of law has been the subject of numerous appellate opinions, with conflicting interpretations throughout the judiciary. The Texas Supreme Court's recent decision⁸ does help to resolve conflicting appellate opinions, but does not resolve constitutional questions of statutory construction in TEX. FAM. CODE §153.433.

I recognize the Attorney General is entrusted with the duty to give legal advice in writing to all executive officers as to the meaning of the law.⁹ Such opinions are entitled to careful consideration by the courts and are quite generally regarded as highly persuasive, although they are not binding on the judiciary as to determining the

⁴ See, Troxel, 530 U.S. 57 (2000), which states, in part, "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 this Court. ... [W]e have recognized the fundamental right of parents to make decisions concerning the care, custody and control of their children. ... 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. ... [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. ..." (Justice O'Connor, writing for the Majority; and joined by Justices Rehnquist, Ginsburg and Breyer). The plurality opinion also stated that statutes allowing grandparent visitation imposed over parental objection "can present questions of constitutional import" *Id.*

⁵ See, OP. TEX. ATT'Y GEN. NO. GA-0260 ["a court must require a grandparent to "overcome the presumption that a fit parent acts in the best interest of his or her child""] (citing: See, In re Pensom, 126 S.W.3d 251 (Tex. App.-San Antonio 2003, no pct.)).

⁶ Your Document Reference: "ML-44639-06"

⁷ See, OP. TEX. ATT'Y GEN. NO. GA-0260

⁸ See, IN RE Karen Mays-Houper, NO. 04-1040.

⁹ See, TEX. CONST. ART. IV, § 22

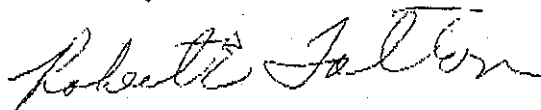
legislative intent.¹⁰ Additionally, the interpretation will not be adopted if found to be contrary to the legislative intent as disclosed by the provisions of the act.¹¹

The Legislative Acceptance Doctrine § D(5) does not apply to Attorney General Opinions when a statute is reenacted without change.¹² However, because HB261 was passed during the Regular Session of the 79th Texas Legislature,¹³ your Opinion in this matter is quite germane; and will be of considerable value to my legislative colleagues, as well as to the judiciary.

During the 79th Legislature's Regular Session, I learned firsthand the effect this area of law has had on families; and the enactment of HB261 is certainly a marked improvement over the previous statute. While I certainly appreciate the duties and responsibilities of your Office to "...represent the state...and defend the laws and the Constitution of the State of Texas",¹⁴ I implore you to examine these issues with careful scrutiny, so that Texas may act proactively to abate the potential of any negative rulings toward our existing laws; or an unconstitutional infringement on the individual rights and liberties of any of the citizens of our State.¹⁵

Thank you for your consideration of this matter.

Sincerely,



Robert E. Talton
State Representative

¹⁰ See, Commissioner Courts of Titus Cty. v. Agan, 940 S.W.2d 77, 82 (Tex. 1997); Holmes v. Morales, 924 S.W.2d 920, 924 (Tex. 1996); Jessen Associates, Inc. v. Bullock, 531 S.W.2d 593, 598 n.6 (Tex. 1976); Eddins-Walcher Butane Co. v. Calvert, 298 S.W.2d 93, 96 (Tex. 1957); Jones v. Williams, 121 Tex. 94, 45 S.W.2d 130, 131 (Tex. 1931).

¹¹ See, Eddins-Walcher Butane Co. v. Calvert, 298 S.W.2d at 96.

¹² See, Birnbaum v. Alliance of American Insurers, 994 S.W.2d 766, 774 (Tex. App.—Austin 1999).

¹³ Act of May 30, 2005, 79th Leg., R.S., ch. 153, § 4, sec. 153.433 (codified as an amendment of TEX. FAM. CODE §153.433).

¹⁴ From the Attorney General's website, www.oag.state.tx.us; "Duties & Responsibilities of the Office of the Attorney General".

¹⁵ See, IN RE B.R.S., 166 S.W. 3d 373 (Tex. App.—Waco [10th Dist.] 2005) (Review Chief Justice Gray's DISSENT, which is very detailed and instructive on a proper facial, constitutional analysis of TEX. FAM. CODE §153.433.)