COMMONWEALTH OF KENTUCKY
CIRCUIT COURT FOR JEFFERSON COUNTY
DIVISION NINE (9) No: 14-CI-003541

IN THE INTEREST OF ISSAC LOPEZ *(A MINOR)* **HON: JUDITH McDONALD-BURKMAN**

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RESPONDENT'S SUPPLEMENTAL BRIEF IN SUPPORT

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I. THE UNITED STATES SUPREME COURT RECOGNIZES A FUNDAMENTAL INTEREST IN A PARENTS RIGHT TO MAKE DECISIONS REGARDING THAT PARENT'S CHILD AS BEING PROTECTED BY THE 14TH AMMENDMENT

The United States Supreme Court in - ***Troxel v. Granville*, 530 U.S. 57 (2000)** has recognized that a parent's interest in the care, custody and control of that parent's child is a

fundament liberty interest protected under the 14th amendment of the United States Constitution. The Court opined that:

> *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.*
>
> *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.*
>
> *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. More importantly, it appears that the Superior Court applied exactly the opposite presumption.*
>
> *The Due Process Clause does not permit a State to infringe on the fundamental right of parents to make childrearing decisions simply because a state judge believes a 'better' decision could be made.*

The Court here echoing its earlier decision in *Santosky v. Kramer*, 455 U.S. 745, 769-70, 102 S. Ct. 1388 discussed in *D.K. Movant v Commonwealth of Kentucky, Through the Cabinet for Health and Family Services; et al, Respondents*, 221 S.W. 3d 382 wherein the Kentucky Courts weighed in on the issue. The U.S. Supreme Court stated that "...The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State..." *Santosky* at 753-754. "...If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures. " *Id* at 753-54, 102 S.Ct. 1388. The theme recurs with the Court's pronouncement in a host of decisions.

In *Quilloin v. Walcott*, 434 U.S. 247 (1978) the Court said the following:

> *We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected. We have little doubt that the Due Process Clause would be offended "if a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest."*

In *Reno v. Flores*, 507 U.S. 292 (1993) the Court said:

> *"The best interests of the child," a venerable phrase familiar from divorce proceedings, is a proper and feasible criterion for making the decision as to which of two parents will be accorded custody. But it is not traditionally the sole criterion-much less the sole* constitutional *criterion-for other, less narrowly channeled judgments involving children, where their interests conflict in varying degrees with the interests of others.*
>
> *"The best interests of the child" is not the legal standard that governs parents' or guardians' exercise of their custody: So long as certain minimum requirements of child care are met, the interests of the child may be subordinated to the interests of other children, or indeed even to the interests of the parents or guardians themselves.*

Perhaps it is the higher level of scrutiny that is implicated with the invocation of Constitutional protections which Kosair erroneously seeks to avoid by initiating their petition to the Court, a petition which, per *Santosky,* involves the ultimate termination of parental rights. *Santosky* stating that " when the State initiates a parental rights termination proceeding, it seeks not merely to infringe that fundamental liberty interest, but to end it." *Id* at 759, 102 S. Ct. 1388.

Whatever Kosair's rationale, no interest which they advance exceeds that of the parent(s) of Baby Boy Issac warranting the termination of the rights of Iveth Garcia, Issac's mother.

II. KOSAIR HAS NO STANDING BY WHICH IT MIGHT USURP THE RIGHT OF A PARENT

Kosair's interest in seeking to withdraw life support from baby boy Issac is unsupported by any statutory scheme with no statutory authority existing which authorizes it, a private entity, acting in and for its own interest and not that of either the parent or the Commonwealth of Kentucky, to petition the Court such that the Court would terminate Iveth Garcia's parental

rights, rights that remain unchallenged and intact. While Kosair has offered various theories as to its instant actions, e.g., the interpretation of the "death statute"; presumptively KRS 446.400, neither KRS 446.400, nor any statute, chapter, provision, or interpretation, including provisions found under KRS 600 *et seq.* thru KRS 645, *et seq.* authorize a private cause be afforded to Kosair, *i.e.,* offers standing to Kosair.

In point of fact, one needs look no further than the title of Kosair's action to discern their true intent "Motion for Order Allowing Withdrawal of Life Support For a Minor" . Said title belies Kosair's stated purpose presumptively offered to avoid the clear implications of a request such as that made to the Court, i.e., that Kosair seeks surreptitious egress into a position as "custodian" of Baby Boy Issac which it knows it cannot obtain, i.e., has no standing to assert.

The Kentucky legislature has adopted a mechanism by which one who seeks to make parental decisions as "custodian" is determined to be in the proper posture *(standing)* in which to assert such rights. KRS 403.270(1)(a)(b) establish both the criteria for and the mechanism by which one wishing to assert authority to make a health care decision, especially one involving cessation of life, would proceed. Kosair has chosen not to follow the dictates of the legislature as statutorily expressed as they are cognizant of the fact that this mechanism is closed to them.

Like matters as to those present before the Court in the instant action have determined that this is not a mere academic exercise but strike at the very heart of parental authority. *Harrison v. Leach,* 323 S.W. 3d 702 (KY 2010) a case which addresses standing on the part of one seeking custody of a minor child from what was alleged to be an abusive home, discussed two (2) cases *B.F. v. T.D.*, 194 S.W. 3d 310 (KY 2006) discussing in turn an unpublished opinion *Nicely v. Smith,* 2008-CA-001684-ME (*offered for the Court's consideration consistent with CR*

76.28(4)(c)) wherein custody was sought by one other than a parent amidst allegations of abuse and neglect. The Court refused to extend de facto custodian status to the applicant citing applicant's failure to meet the criteria established by the statute. The Court here is asked and indeed encouraged to do likewise.

III. FULL SPEED AHEAD AND DAMN THE CONSTITUTION

Kosair has offered little in the way of legal authority that would allow this Court to grant to them standing to apply to the Court to withdraw life support of a child with whom they have little to no relationship recognized by the Constitution, at law, or by statute.

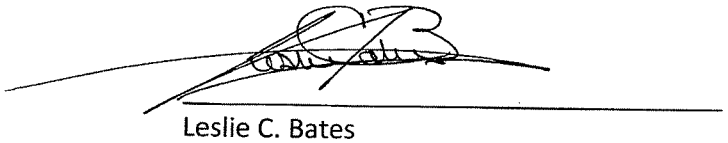
In the ultimate parent trap, Kosair is asking this Court to sanction the usurpation of "parental authority" without the benefit of the constitutional process being afforded the natural parent while, at the same time, compelling the Natural Parent(s), whose rights are Constitutionally recognized, to resort to the Court in order that they might seek of that Court, the authority to do that which they already possess the right to do, i.e., make decisions regarding the care, custody and treatment of their own children. What is noteworthy is that this philosophical approach would allow hospitals and other private entities unregulated decision making power as to what happens to a child not only in the place of the Natural Parents, but with greater authority than that granted to the State which has a statutory (*KRS Chap 600 et seq.*) and therefore regulated interest in the health and well-being of child placed into its custody and care.

Kosair rejects the fact that a statutory scheme exists (*KRS Chap 600 et seq.* among others) and is in place wherein medical decisions for a child might be made where the natural parent is unable to make those decisions, disdaining Constitutional and legal authority; that

disdain seemingly rooted in the notion that one's purview as a medical care provider endows that person or entity with wisdom, sensitivity, compassion and responsibility greater than firstly, a parent, and secondly the legislature, which has provided statutory authority allowing access to the Court while protecting the fundamental rights of the parent in just the situation with which this Court is now faced. As such Kosair's petition to this Court wherein Kosair seeks authority to end the life of Issac Lopez Garcia against the wishes of the Constitutionally and Statutorily vested and intact rights of the mother, must fail.

WHEREFORE, IVETH GARCIA, RESPECTFULLY DEMANDS that the motion filed by Kosair be denied and dismissed.

Respectfully Submitted,



Leslie C. Bates
(Counsel for Respondent Mother)

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CERTIFICATE OF SERVICE

This is to certify that on the 18th day of July, 2014, true and accurate copies of the foregoing were served by hand or via electronic mail on those with email addresses listed with the State Bar of Kentucky.

Respectfully Submitted,

Leslie C. Bates
(Counsel for Respondent Mother)