No. 17-0326

IN THE SUPREME COURT OF TEXAS

IN THE INTEREST OF J.R.W., A CHILD

ON PETITION FOR REVIEW FROM THE COURT OF APPEALS
FOR THE FIFTH JUDICIAL DISTRICT OF TEXAS

CASE NO. 05-15-01479-CV

BRIEF OF AMICUS CURIAE CHILD JUSTICE, INC., IN SUPPORT OF THE PETITIONER'S PETITION FOR REVIEW

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IDENTITY OF PARTIES AND COUNSEL

Amicus curiae, Child Justice, Inc. (Child Justice), respectfully adopts and incorporates by reference the Identity of Parties and Counsel set forth in the Petition for Review.

TABLE OF CONTENTS

Index of Authorities v

Statement Regarding Oral Argument viii

Statement of the Case viii

Statement of Jurisdiction viii

Issues Presented viii

Interest of Amicus Curiae 1

Summary of Argument 2

Argument 5

I. THE TRIAL COURT'S RULING FAILED TO ADEQUATELY CONSIDER ABUSIVE FATHER'S ACCESS TO J.R.W. THROUGH JOINT MANAGING CONSERVATOR GRANDMOTHER 5

II. THE DECISION BY THE COURT OF APPEALS ENDANGERS CHILDREN BY DETERRING PARENTS FROM REPORTING SUSPECTED CHILD ABUSE 10

A. The Ruling by the Court of Appeals Creates a Catch-22 for Custodial Parents Who Witness Signs of Child Abuse. 12

B. Absent Bad Intent, Parents Should Not Be Punished For Reporting Suspected Abuse. 14

1. Trial Court Did Not Find That Mother Reported Abuse in Bad Faith. 15

2. Child Disclosures Are Often the Best Evidence in Support of Abuse. 16

3. Parents Always Should Err on the Side of Reporting Potential Abuse. 18

C. The Ruling by the Court of Appeals Empowers Abusers and Will Deter Adults and Children Themselves from Reporting Suspected Child Abuse. 20

III. THE BASIS FOR GRANDMOTHER'S APPOINTMENT AS JOINT MANAGING CONSERVATOR RESTS ON TWO GROUNDS THAT FAIL TO SATISFY THE "SIGNIFICANT IMPAIRMENT" REQUIREMENT 22

A. The Court of Appeals misapplied the Family Code's stringent standard for nonparent conservatorship in finding significant impairment in the present case... 22

1. The punishment of a parent for being vigilant in her efforts to protect her child and report potential abuse is unsupported by Texas law and contradicts public policy 25

2. In addition to the reports of child abuse, the Court of Appeals' ruling relied on mischaracterization of Mother's actions to find risk of significant impairment. 28

B. The Court of Appeals' Ruling Improperly Relied on a Speculation of Potential Harm to Affirm a Finding of Significant Impairment.. 30

Prayer for Relief 34

Certificate of Compliance 36
Certificate of Service 37

INDEX OF AUTHORITIES

CASES

Burak v. Burak,
168 A.3d 883 (Md. 2017) 2, 8

Chavez v. Chavez,
148 S.W.3d 449 (Tex. App.—El Paso 2004, no pet.) 23, 24

Compton v. Pfannenstiel,
428 S.W.3d 881 (Tex. App.—Houston [1st Dist.] 2014, no pet.)....................23

Critz v. Critz,
297 S.W.3d 464 (Tex. App.—Fort Worth 2009, no pet.)....................23, 30

In re B.B.M.,
291 S.W.3d 463 (Tex. App.—Dallas 2009, pet. denied)....................30, 31

In re De La Pena,
999 S.W.2d 521 (Tex. App.—El Paso 1999, no pet.) 26, 27, 29, 31, 32

In re J.C.,
346 S.W.3d 189 (Tex. App.—Houston [14th Dist.] 2011, no pet.) 31

In re L.D.F.,
445 S.W.3d 823 (Tex. App.—El Paso 2014, no pet.) 5

In re M.W.,
959 S.W.2d 661 (Tex. App.—Tyler 1997, writ denied)....................30

In re Mays-Hooper,
189 S.W.3d 777 (Tex. 2006) 22

In re S.T.,
508 S.W.3d 482 (Tex. App.—Fort Worth 2015, no pet.)....................23, 24

In re Scheller,
325 S.W.3d 640 (Tex. 2010) 30

Lewelling v. Lewelling,
796 S.W.2d 164 (Tex. 1990) 9, 23, 24, 25, 29

McClanahan v. Wash. Cnty. Dep't of Soc. Servs.,
129 A.3d 293 (Md. 2015) 12

Troxel v. Granville,
530 U.S. 57 (2000) 22, 23

STATUTES

Tex. Fam. Code § 153.002 .... 5, 6

Tex. Fam. Code § 153.131(a) 5, 22

Tex. Fam. Code § 261.101(a) 10, 12, 14

Tex. Fam. Code § 261.106(a) 14

Tex. Fam. Code § 261.107 15

Tex. Fam. Code § 261.107(b) 15

Tex. Fam. Code § 261.109 .... 10, 12

OTHER AUTHORITIES

Andrea Ball and Eric Dexheimer, *Dozens of CPS caseworkers caught lying, falsifying documents*, AUSTIN AMERICAN-STATESMAN, Jan. 13, 2015, *available at* http://projects.statesman.com/news/cps-missed-signs/wrongdoing.html 16

D. P. H. Jones & J. M. McGraw, *Reliable and Fictitious Accounts of Sexual Abuse to Children,* 2 J. INTERPERSONAL VIOLENCE 27 (1987) 17

Douglas J. Besharov, *Responding to Child Sexual Abuse: The Need for a Balanced Approach*, 4 FUTURE OF CHILD., 135, 148 (1994) 18

E. J. Mikkelsen et al., *False Sexual-Abuse Allegations by Children and Adolescents: Contextual Factors and Clinical Subtypes,* 46 AM. J. PSYCHOTHERAPY 556 (1992) 17

JOYANNA SILBERG ET AL., CRISIS IN FAMILY COURT: LESSONS FROM TURNED AROUND CASES 34 (Sept. 30, 2013), *available at* http://www.protectiveparents.com/crisis-fam-court-lessons-turned-around-cases.pdf 18, 21

Lucy Berliner & J. R. Conte, *The Process of Victimization: The Victims' Perspective*, 14 CHILD ABUSE & NEGLECT 29 (1990) 18

Nicholas Bala & John Schuman, *Allegations of Sexual Abuse When Parents Have Separated*, 17 CANADIAN FAM. L.Q. 191 (2000) 21

R. K. Oates et al., *Erroneous Concerns about Child Sexual Abuse*, 24 CHILD ABUSE & NEGLECT 149 (2000) 17

TEX. DEP'T OF FAMILY AND PROTECTIVE SERVICES, RECOGNIZE THE SIGNS OF CHILD ABUSE, https://www.dfps.state.tx.us/Child_Protection/Child_Safety/recognize_abuse.asp 19

TEX. DEP'T OF FAMILY AND PROTECTIVE SERVICES, REPORT ABUSE, NEGLECT, OR EXPLOITATION, https://www.dfps.state.tx.us/contact_us/report_abuse.asp 18

U.S. DEP'T OF HEALTH AND HUMAN SERVS., ADMIN. ON CHILDREN, YOUTH AND FAMILIES, CHILD MALTREATMENT 1997: REPORTS FROM THE STATES TO THE NATIONAL CHILD ABUSE AND NEGLECT DATA SYSTEM § 3.6 (1997), *available at* https://archive.acf.hhs.gov/programs/cb/pubs/ncands97/index.htm.................. 17

STATEMENT REGARDING ORAL ARGUMENT

Amicus curiae, Child Justice, believes that oral argument by the parties would aid this Court in its decision making but does not, itself, separately request oral argument.

STATEMENT OF THE CASE

Child Justice respectfully adopts and incorporates by reference the Statement of the Case, including procedural history, set forth on Page v of the Petition for Review.

STATEMENT OF JURISDICTION

Child Justice respectfully adopts and incorporates by reference the Statement of Jurisdiction set forth on Page vii of the Petition for Review.

ISSUES PRESENTED

Child Justice respectfully adopts and incorporates by reference the Issues Presented set forth on Page ix of the Petition for Review.

INTEREST OF AMICUS CURIAE

Child Justice is a non-profit organization that advocates on behalf of at-risk, abused, or neglected children and analyzes the practices of mental health professionals providing services to such children. Child Justice also provides public policy recommendations, community service referrals, court-watching services, research, and education, and seeks appropriate judicial solutions to the threats at-risk, abused, and neglected children face. Child Justice has a substantial interest in this case because the effects of the appellate court's decision may potentially undermine Child Justice's efforts to protect children from abuse and to encourage parents and society to diligently report suspected child abuse.

TO THE HONORABLE SUPREME COURT OF TEXAS:

Child Justice respectfully submits this Brief of *Amicus Curiae* in Support of Petitioner's Petition for Review. This brief is prepared *pro bono* and Child Justice states that no fee has been paid or will be paid for the preparation or filing of this brief.

SUMMARY OF ARGUMENT

No child should live under threat of abuse, and it is often the responsibility of the judiciary to ensure that. The trial court in this case did not properly consider the best interest of J.R.W. when it granted Grandmother, who is Father's mother, joint managing conservatorship. In particular, it failed to sufficiently scrutinize the likelihood of Grandmother allowing Father, who physically abused Mother, access to J.R.W. This situation is not unique; Child Justice has seen cases in several states where the grandparents of a child seek custody and serve the role of "proxies" through which the known abuser can retain some access to the child. For example, Child Justice recently filed an *amicus curiae* brief in *Burak v. Burak*, 168 A.3d 883 (Md. 2017), a case in which the Maryland Court of Appeals reversed an award of custody to the parents of an abusive father and returned custody to the child's mother. In the present case, Mother testified at trial that Grandmother had left J.R.W. alone with Father on multiple occasions, despite a court order

prohibiting unsupervised visitation. Notwithstanding this evidence, the trial court's ruling appointed Grandmother as joint managing conservator, which may have the practical effect of granting abusive Father unsupervised access to J.R.W. The potential for harm to J.R.W. in this arrangement is significant. It is Child Justice's position that Texas courts should not appoint as managing conservator a nonparent who may provide access to the child to an abuser without giving due and careful attention to the potential for abuse and making a determination that such appointment is in the best interest of the child.

Further, Child Justice believes that the Court of Appeals' affirmation of the trial court's decision will have a chilling effect on the reporting of child abuse. The State of Texas not only favors proactive reporting of suspected child abuse, it statutorily mandates such reporting. Absent a finding of bad intent, no parent should be punished for reporting suspected child abuse. This is particularly true given the recent revelations regarding the inadequacy of investigations conducted by Child Protective Services in Texas. Punishing the good-faith reporting of child abuse discourages parents from contacting authorities and provides a powerful tool for abusers. Allowing the decision below to stand will have perilous ramifications for the most vulnerable children.

Finally, the trial court abused its discretion in its ruling and the Court of Appeals' affirmation misapplied the Family Code's stringent standard for

nonparent conservatorship in a manner that is inconsistent with applicable law and conflicts with noble and well-reasoned policy objectives. The holding by the Court of Appeals is primarily based on two inappropriate grounds: (1) Mother's good-faith reporting of suspected child abuse of J.R.W. and (2) Mother's attempts, as a survivor of child abuse herself, to properly protect J.R.W. while navigating her own family arrangement in an unfamiliar legal setting. Texas jurisprudence does not provide any basis for limiting the constitutional rights of Mother and denying her sole conservatorship on these grounds, and Texas public policy in fact suggests the contrary: that these should *not* be grounds for denying sole conservatorship. By relying on these two items, the Court of Appeals' decision has perversely limited Mother's rights as a parent based in large part on her status as a survivor of sexual abuse and her reporting of potential child abuse of her own son.

The decision by the trial court and affirmation by the Dallas Court of Appeals sets a dangerous precedent for the State of Texas and its children. This Court should take this opportunity to provide clear guidance for Texas courts on these issues of utmost importance.

ARGUMENT

I. THE TRIAL COURT'S RULING FAILED TO ADEQUATELY CONSIDER ABUSIVE FATHER'S ACCESS TO J.R.W. THROUGH JOINT MANAGING CONSERVATOR GRANDMOTHER

Granting a person with a history of violence and substance abuse with access to a minor child, including possible cohabitation, is not in the best interest of the child. Unfortunately, that is what the trial court's decision has effectively done by granting joint managing conservatorship to Grandmother. The ability of Father to access J.R.W. through Grandmother is of grave concern and the associated risks indicate that Grandmother's appointment as joint managing conservator is not in J.R.W.'s best interest.

Under Texas law, one or both parents shall be appointed as managing conservator(s) unless a court finds that appointment of the parent or parents would significantly impair the child's physical health or emotional development. Tex. Fam. Code § 153.131(a). However, even if the significant impairment requirement is met, a court must *also* determine that the appointment of a nonparent conservator is in the child's best interest. *See* Tex. Fam. Code § 153.002; *In re L.D.F.*, 445 S.W.3d 823, 829 (Tex. App.—El Paso 2014, no pet.). As Mother, the Texas Association against Sexual Assault, the Texas Advocacy Project, and Child Justice all argue to this Court, the "significant impairment" standard was not properly applied by the Dallas Court of Appeals and furthermore is not satisfied.

See infra Part III. Additionally, Father's substance abuse issues and well-documented propensity for physical violence cannot be insulated from affecting J.R.W. with Grandmother, Father's mother, as joint managing conservator. CR.50; 2.RR.4. Therefore, appointing Grandmother as joint managing conservator is not in the best interest of J.R.W., which is the primary consideration in questions of conservatorship. *See* Tex. Fam. Code § 153.002.

Grandmother's petition to the trial court states that Father "has a history or pattern of committing family violence." CR.50. The parenting facilitator testified that Father "is chronically ill, mentally ill" and should "have no visitation until he gets mental health treatment, probably some inpatient treatment for his addiction issues." 5.RR.30, 43. Although the record is unclear as to whether Father has a fixed place of residence, he provided Grandmother's address as his own on his petition seeking joint custody of J.R.W. and as his mailing address in a motion for temporary orders. CR.31, 137. J.R.W.'s counselor testified at a status hearing that she believes that if J.R.W. "is put back in this abusive environment with dad and paternal grandparents he will be abused again." 4.RR.31.

Even though Father is legally prohibited from contact with J.R.W., testimony given at trial raises significant concerns regarding Grandmother's supervision of J.R.W. Grandmother explained that, when she filed her petition to intervene, she had "asked the Court to be removed as the supervisor [of Father's

visitations], because at the time [Father] was not in a stable psychological . . . situation" and she "did not want to be held responsible for [Father's] behavior . . . during the child's visit at [her] home if [she] were to be supervising it." 5.RR.67. Mother testified in regard to this period at trial that Grandmother left J.R.W. alone with Father "[s]everal times" in violation of the court order that required supervised visitation. 5.RR.115. Mother explained that, in one such instance, she arrived at Grandmother's house to find Father alone with J.R.W. 5.RR.116–17. In Mother's opinion, Father was "very nervous and sweating profusely", which concerned Mother "because usually that's what he looks like when he's drinking." 5.RR.117.

Moreover, Grandmother testified that Father was arrested the week before trial after Grandmother called the police because Father "appeared to be drunk and disorderly" while her husband "was trying to diffuse . . . the situation." 5.RR.75. Additional testimony from Grandmother at trial involved an incident in which Father lit his car on fire in the driveway of Grandmother's house in an apparent suicide attempt. 2.RR.4; 3.RR.13–14, 41; 5.RR.81; 6.RR.12. Following this event, Grandmother had requested that supervised visitations be moved from her house. 2.RR.4. At a hearing regarding this request, Grandmother's lawyer had explained that "[Father's] situation has deteriorated enough that it's a danger to the child . . . and because of his situation, it's not safe at the residence." 2.RR.4.

While it is reasonable that Grandmother may want to provide her son with shelter, care, or assistance, her decision to do so at the detriment of J.R.W.'s safety indicates that the appointment of Grandmother as joint managing conservator places J.R.W. in an unstable and volatile situation that is not in his best interest.[1]

Child Justice has observed an increasing frequency of custody disputes in which the parents of a known abuser—whose access to the child has been restricted due to his or her abuse—seek custody of the child.[2] Understandably, but not excusably, these grandparents are naturally reluctant to deny their own child access to their custodial grandchild. In these cases, the grandparents of the child often serve as "proxies" through which the known abuser can retain some access to the child. This creates a fragile situation in which the grandparents' competing relationships can undermine the best interest of the child. The risk in this case of an abusive parent gaining access to his child should have been given far more consideration by the trial court.

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[1] Another child of Grandmother has apparently expressed concerns about Grandmother's interactions with and supervision of children. At the hearing on the motion for new trial, Grandmother was asked whether her other son and his wife had placed restrictions on Grandmother's access to their children. 6.RR.80. Grandmother acknowledged that "[t]here have been some times that we have not been able to see them." 6.RR.81.

[2] Child Justice was founded in April of 2013 by Eileen King, a children's rights advocate with more than 20 years of experience fighting for abuse victims and survivors. Since its founding, Child Justice has provided an estimated $5,000,000 worth of *pro bono* representation in child-custody cases involving interpersonal violence including child abuse, child-sexual abuse, and domestic violence. Child Justice recently filed an *amicus curiae* brief in *Burak*, a case in which the lower courts had awarded custody to the parents of an abusive father, a pattern whose expansion Child Justice has witnessed in recent years. 168 A.3d 883. Thankfully, in *Burak* the Maryland Court of Appeals reversed the lower courts and returned custody to the child's mother. 168 A.3d at 944.

This Court has already warned against granting custody to grandparents who may provide an abusive parent with access to the child. *See Lewelling v. Lewelling*, 796 S.W.2d 164 (Tex. 1990), *subsequent mandamus proceedings sub nom. Lewelling v. Bosworth*, 840 S.W.2d 640 (Tex. App.—Dallas 1992, no writ). In Justice Cook's concurrence to the majority, he observed that, because the "evidence [] suggested that the [father] frequently lived with his parents[, t]he effect of granting custody to the grandparents . . . may have the practical effect of granting custody to the father." *Id.* at 169–70 (Cook, J., concurring). Taking this notion even further, in his dissenting opinion in *Lewelling*, Justice Hecht argued that "[l]eaving the child with his mother, who might return to his abusive father sometime, would hardly seem to expose the child to more risk than moving him to his father's parents, with whom his father also lives." *Id*. at 175 (Hecht, J., dissenting). Justices Cook and Hecht both recognized that access of an abusive parent to the child via custodial grandparents is an important factor to be considered when assessing the best interest of the child. *See id*. at 169–70 (Cook, J., concurring); *id*. at 175 (Hecht, J., dissenting). However, in the present case, despite claiming to understand "mom's concerns based on past incidences [sic]" and acknowledging that Grandmother was "in a tough spot between [her] child and [her] grandchild," the trial court nevertheless appointed Grandmother as joint managing conservator. 5.RR.159.

Child Justice does not desire to punish Father for his illness or Grandmother for her love of her son; its priority is to keep J.R.W. and other children safe, healthy, and happy. In this regard, letting the trial court's decision stand would set a dangerous precedent in Texas, giving domestic abusers potentially unfettered access to children. Child Justice urges this Court to remand this case with instructions for the trial court to consider whether appointing Grandmother joint managing conservator would provide Father with access to J.R.W. that endangers him physically and emotionally, thereby making such appointment not in the best interest of J.R.W.

II. THE DECISION BY THE COURT OF APPEALS ENDANGERS CHILDREN BY DETERRING PARENTS FROM REPORTING SUSPECTED CHILD ABUSE

Under both Texas's mandatory reporting statutes and accepted practice, when a child reports sexual abuse, or the parent believes that the child has been abused, the parent must make a report to the appropriate authorities or face criminal liability. Tex. Fam. Code §§ 261.101(a), 261.109. The decision of the Court of Appeals rejects this proactive and sensible approach and instead presents parents with a choice: either report suspected abuse and risk accusations of unfit parenting if the abuse is not proven, or stay silent and allow the abuse to go uninvestigated (and possibly undeterred) in violation of Texas law. This decision

places parents in a very difficult position, particularly parents with limited resources to determine the appropriate action.

Parents are not the only ones negatively impacted by the opinion of the Court of Appeals. Children will also suffer because, by penalizing parents who report abuse in good faith, the Court of Appeals has denied abused children their primary protector and advocate: a non-abusive parent who observes and reports suspected abuse. Children who fear that they may be removed from the custody of their non-abusive parent may also suffer abuse in silence in an effort to ensure that they do not lose the one adult who cares for and does not harm them. Children now have a reason to fear punishment of their non-abusive parent if they report sexual abuse.

The ruling in this case creates a perverse incentive to not report suspected or experienced child abuse and therefore should be reversed.[3]

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[3] In December of 2015, the Maryland Court of Appeals—facing a similar scenario as presented here—specifically cited to and quoted from an *amicus curiae* brief Child Justice authored and filed with that Court:

> Indeed, the [Opposition's] view would undermine the paramount statutory purpose of Subtitle 7—child protection. *See* FL § 5-702. ***Amici curiae help elucidate why***. A parent who in good faith reports suspected child abuse and seeks a SAFE exam can be a critical "protector and advocate" of that child. ***Brief of Child Justice, Inc., et al. as Amici Curiae in Support of Mother***, at 5. If we read the statutory and regulatory scheme as the [Opposition] does, however, the parent faces potential inclusion on the central registry merely by reporting. Thus the parent receives a badge of dishonor even if she had no intent to harm the child. The parent must now consider her "own interests and potential liability before" her child's welfare. ***Id.*** at 6. And if the reporting parent is penalized, then that parent has a disincentive to report future abuse. The child, then, will lose the effective protection and advocacy her parent can provide through reporting. ***Id.***

A. The Ruling by the Court of Appeals Creates a Catch-22 for Custodial Parents Who Witness Signs of Child Abuse.

The holding below creates an unfair calculus for parents who become aware of evidence that their children have been abused. Parents could now face severe repercussions if they report their child's disclosure in good faith but are then accused of "repeated false suggestions of sexual abuse," even where there is no evidence that the reporting was made in bad faith. Slip Op. 11. Section 261.101(a) of the Texas Family Code mandates that any person "having cause to believe that a child's physical or mental health or welfare has been adversely affected by abuse or neglect by any person *shall* immediately make a report" (emphasis added). Such a person who knowingly fails to make a report commits a Class A misdemeanor. Tex. Fam. Code § 261.109. By enacting mandatory reporting laws, the State of Texas has indicated that the safety of children is a top priority. However, the decision below forces parents to determine whether they would cause their child more harm by electing not to report the suspected abuse or reporting and thereby opening themselves up to accusations that could lead to the removal of the child from the parent's care. This dichotomy forces parents to

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> at 5. Indubitably, Subtitle 7 of the Family Law Article was not designed to dissuade parents from reporting allegations of child abuse. ***See id.*** at 8, 9. For these reasons, we conclude that the [Opposition] interprets the child abuse statutory scheme in a manner that is "'unreasonable, illogical [and] inconsistent with common sense.'" *Shrader*, 324 Md. at 463, 597 A.2d at 943 (citations omitted).

McClanahan v. Wash. Cnty. Dep't of Soc. Servs., 129 A.3d 293, 302–03 (Md. 2015) (citing *amicus curiae* brief of Child Justice) (emphasis added).

attempt to ascertain whether there will be sufficient evidence of abuse for a Child Protective Services worker to substantiate the abuse allegations, which has potentially dangerous consequences for children and is likely to have a chilling effect on reporting suspected child abuse.

Mother testified at trial that her concerns about child abuse were based on J.R.W.'s verbal statements. 5.RR.144–45. She is not a medical professional, psychologist, or social worker. But as a mother entrusted with her child's care, she was concerned that J.R.W. might be exposed to harm and acted accordingly.

However, based on the trial court's ruling, this apparently was the wrong action for Mother to take. The holding of the trial court penalized Mother and limited her constitutional rights due to her reporting of suspected child abuse, even though J.R.W.'s statements of abuse were sufficiently credible and concerning that the child's counselor also reported suspected abuse, a fact that the Court of Appeals did not address in its opinion. 4.RR.13. The Court of Appeals, moreover, does not provide any explanation as to what the Mother should have done instead. To have ignored her child's statements would have been a violation of state law and a contravention of protective instincts. No parent should be forced to choose between protecting a child from abuse or maintaining parental rights with respect to that child.

The reality is that no decision by any Texas court should guide parents in deciding whether their child displays medical symptoms indicating sexual abuse or mental injury. Texas law already errs on the side of disclosure. *See, e.g.*, Tex. Fam. Code § 261.101(a). No one, including a child's parent, should be analyzing whether a report should be made where there is some evidence of child abuse; state law requires reporting. The holding below therefore works in opposition to Texas law. Unless reversed, the ruling by the Court of Appeals does not protect children, but rather creates a "Catch-22" for parents who observe signs of abuse but lack the scientific, investigative, or psychological tools to determine whether the abuse actually occurred. Parents should not be forced to engage in expert analysis to decide whether to believe or disclose suspected abuse to avoid being penalized for reporting in good faith. And the physical safety and emotional health of a child should not depend upon the analytical or medical skills of their parent. When a parent has reason to suspect that a child is being abused, the parent should be able to immediately report it without fear of losing access to his or her child.

B. Absent Bad Intent, Parents Should Not Be Punished For Reporting Suspected Abuse.

The lower court's decision is inconsistent with Texas law, which recognizes immunity for any individual who reports, in good faith, a suspected incident of child abuse. *See* Tex. Fam. Code § 261.106(a) (conveying immunity "from civil or criminal liability" on those who report child abuse or neglect in good faith). The

decision by the Court of Appeals is contrary to the reasoning behind this statutory protection. Punishing parents for reporting suspected sexual abuse by restricting their parental rights, especially where those parents do not evidence bad intent, harms Texas's children and is contrary to law and sound public policy.[4]

1. Trial Court Did Not Find That Mother Reported Abuse in Bad Faith.

In this case, Mother took the correct and appropriate steps: her child complained he had been abused, and Mother reported it. The decision by the Court of Appeals used those reports against Mother to reach the conclusion that J.R.W. would be exposed to significant impairment if he remained in the sole custody of his mother. However, the trial court did not find that Mother encouraged J.R.W. to lie or that Mother believed her child was lying. The trial court did not find that the child was coached to report abuse or that Mother was lying. And the trial court did not find that Mother intentionally harmed her child or that the reports of child abuse were false, merely that they had been ruled out. Therefore, with no evidence that Mother made reports in bad faith, it is irresponsible (and dangerous for the children of Texas) for the decision below to punish Mother by limiting her constitutional rights.

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[4] False reports are already addressed by the Family Code, which lays out criminal and civil penalties for such reports. Tex. Fam. Code § 261.107. Furthermore, a specific remedy is already provided in the event of false reporting in suits affecting the parent-child relationship. Tex. Fam. Code § 261.107(b).

Imposing such limitation based only on the fact that reports were made that were later ruled out is contrary to accepted standards of criminal, civil, and family law. This is particularly true given the recent scandals that call into question the adequacy and effectiveness of investigations by Child Protective Services in Texas. Since 2009, at least 50 employees of Texas Child Protective Services have been caught "lying to prosecutors, ignoring court orders, falsifying state records or obstructing law enforcement investigations."[5] The overarching theme of these scandals is clear: "An unmanageable workload and intense pressure to close cases compels workers to cut corners."[6] Child Justice does not take a position on whether it appears that J.R.W. was actually abused, even though statistically the best evidence of sexual abuse is disclosure by the child. Texas should encourage parents to disclose suspected abuse: if you see something, say something.

2. Child Disclosures Are Often the Best Evidence in Support of Abuse.

The holding by the Court of Appeals makes no mention of the fact that the Mother made her reports of abuse in response to disclosures by J.R.W., and that these disclosures were taken seriously enough by J.R.W.'s counselor that the counselor also made a report. 4.RR.13. Spontaneous reports of sexual abuse (i.e., those given without prompting or coaching) by a child to a parent or other adult

[5] Andrea Ball and Eric Dexheimer, *Dozens of CPS caseworkers caught lying, falsifying documents*, AUSTIN AMERICAN-STATESMAN, Jan. 13, 2015, *available at* http://projects.statesman.com/news/cps-missed-signs/wrongdoing.html.

[6] *Id.*

have been found to be reliable evidence in determining whether abuse has occurred. *See infra* nn.8, 9 & 11. Here, J.R.W. told Mother and his counselor separately, apparently without prompting, that he was being abused by Father.[7] The lower court's decision will instill fear in parents that may cause them to ignore or minimize such disclosures from their children and consequently puts those children in harm's way.

Further, the holding at issue is contrary to well-accepted research establishing that children rarely lie about instances of sexual abuse.[8] One prominent study concluded that intentionally false reports of sexual abuse by children comprise less than 1% of all unsubstantiated reports of child abuse.[9] Thus, the benefit of the doubt should be given to a child who discloses abuse, particularly with respect to the decision to notify authorities. Parents should not be encouraged to ignore voluntary disclosures of their children regarding sexual abuse.

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[7] J.R.W.'s counselor testified in a status hearing that she did not believe that Mother was "programming" J.R.W. to report abuse to the counselor. 4.RR.27–28.

[8] *See generally* D. P. H. Jones & J. M. McGraw, *Reliable and Fictitious Accounts of Sexual Abuse to Children*, 2 J. INTERPERSONAL VIOLENCE 27 (1987); E. J. Mikkelsen et al., *False Sexual-Abuse Allegations by Children and Adolescents: Contextual Factors and Clinical Subtypes*, 46 AM. J. PSYCHOTHERAPY 556 (1992); R. K. Oates et al., *Erroneous Concerns about Child Sexual Abuse*, 24 CHILD ABUSE & NEGLECT 149 (2000).

[9] *See* U.S. DEP'T OF HEALTH AND HUMAN SERVS., ADMIN. ON CHILDREN, YOUTH AND FAMILIES, CHILD MALTREATMENT 1997: REPORTS FROM THE STATES TO THE NATIONAL CHILD ABUSE AND NEGLECT DATA SYSTEM § 3.6 (1997), available at https://archive.acf.hhs.gov/programs/cb/pubs/ncands97/index.htm.

3. Parents Always Should Err on the Side of Reporting Potential Abuse.

Sexual abuse of children is underreported. This is due to several factors, including the secrecy and shame surrounding sexual abuse, a victim's fear of retaliation, and the dependent status of the victim.[10] When children overcome their fear and disclose abuse they are most likely to tell their mother—especially if they have a close relationship with her.[11] Victims who report sexual abuse should be supported in all instances, but particularly when the victim is a young child with no ability to control their circumstances.

In addition to the mandatory obligation to disclose potential abuse, experts advise parents to err on the side of disclosure when it comes to the potential abuse of their children.[12] Indeed, "[p]otential reporters are not expected to determine the truth of a child's statements. As a general rule, therefore, all doubts should be resolved in favor of making a report."[13] Texas follows this same advice.[14]

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[10] *See* Lucy Berliner & J. R. Conte, *The Process of Victimization: The Victims' Perspective*, 14 CHILD ABUSE & NEGLECT 29 (1990).

[11] *See* JOYANNA SILBERG ET AL., CRISIS IN FAMILY COURT: LESSONS FROM TURNED AROUND CASES 34, 52 (Sept. 30, 2013), *available at* http://www.protectiveparents.com/crisis-fam-court-lessons-turned-around-cases.pdf.

[12] The statutory protection of immunity for persons who report sexual abuse is a reflection of this policy.

[13] Douglas J. Besharov, *Responding to Child Sexual Abuse: The Need for a Balanced Approach*, 4 FUTURE OF CHILD. 135, 148 (1994).

[14] *See* TEX. DEP'T OF FAMILY AND PROTECTIVE SERVICES, REPORT ABUSE, NEGLECT, OR EXPLOITATION, https://www.dfps.state.tx.us/contact_us/report_abuse.asp ("Texas law says anyone who thinks a child, or person 65 years or older, or an adult with disabilities is being abused, neglected, or exploited must report it to DFPS.").

Notably, however, the State of Texas does not provide guidance on its website (or elsewhere to Child Justice's knowledge) to parents regarding methods for distinguishing between disclosures of actual abuse by children and potentially false disclosures. In fact, the State does not provide any warning signs of false reports of abuse on its website, and instead only provides information to help detect possible signs of abuse.[15] This omission highlights that there is generally no bright line rule to apply to conclude whether a child has been abused. A parent should simply act on their best instinct and best evidence and, when in doubt, make a report.

Lastly, *no* parent wants to ever find out that their child was being abused and they could have prevented it. Regardless of whether J.R.W. has been abused, it is clear from the record that Mother cares deeply about her son and the evidence suggests that she sincerely believed that he was in danger when she made reports to Child Protective Services. Mother has now been reprimanded and had her rights limited in a court of law for reporting suspected abuse. If Mother sees evidence in the future suggesting that J.R.W. is being abused, how will she trust that the legal system will support her and J.R.W. if she reports that abuse? The opinion below creates an unconscionable rule that would punish a parent for their good-faith attempt to protect their child from what can be a distinctly harrowing experience.

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[15] *See* TEX. DEP'T OF FAMILY AND PROTECTIVE SERVICES, RECOGNIZE THE SIGNS OF CHILD ABUSE, https://www.dfps.state.tx.us/Child_Protection/Child_Safety/recognize_abuse.asp.

C. The Ruling by the Court of Appeals Empowers Abusers and Will Deter Adults and Children Themselves from Reporting Suspected Child Abuse.

The record evidence of any potential "substantial impairment" that Mother could cause to J.R.W. is woefully undeveloped. Because the opinion below only briefly and generally articulates the harm to J.R.W. or bad acts committed by Mother, there has been a vague and risky precedent set for everyone who works, lives, or interacts with children. Rather than support those who disclose and report suspected child abuse, the opinion below lays out a roadmap for potential abusers on how to wield power over their victims and persecute those who challenge them.

The standing opinion sends a strong message to abusive parents or parents engaged in a custody dispute: a non-abusive parent now has just as much to lose as an abusive parent. As a result, a parent who suspects a co-parent of abuse but lacks sufficient proof has an incentive not to report their suspicions. Further, under the opinion by the Court of Appeals, an abusive parent, or an abusive parent's parent, has precedent to argue that there is "a high probability that emotional abuse of [the child] could occur" as a result of reports made by the reporting parent. Slip Op. 11. As no level of culpability was articulated by the Court of Appeals to support such a finding, a nonparent seeking custody can expose the non-abusive parent to loss of custody or limited custody without any of the evidence required to

support an allegation of bad faith or false reporting. This in turn weakens the ability of a non-abusive parent to monitor and protect their child.

The decision below gives abusive parents (and their proxies) a new and powerful weapon for continuing abuse and maintaining access to children. Studies have shown that while fathers are more likely to make false accusations of sexual abuse, mothers are more likely to have their reports of sexual abuse questioned or subjected to unattainable proof standards.[16] A batterer or other abuser may, as part of an abusive cycle, threaten to take away the victim's children or otherwise interfere with the victim's custodial arrangement. This may already discourage voluntary reports of suspected abuse, and while the State's official policy may be to prevent such threats or punish abusers who make them, the Court of Appeals has tacitly encouraged anyone seeking custody of a child to point fingers at the reporting parents.

If adults are afraid to report suspected abuse, lest they themselves face an allegation of emotional abuse, the true victims are the children. The Court of Appeals' opinion is contrary to Texas's long-standing policy of protecting victims of abuse rather than empowering abusers or their proxies. The decision also places children in an incredibly difficult position regarding potential abuse. Instead of

[16] *See* Nicholas Bala & John Schuman, *Allegations of Sexual Abuse When Parents Have Separated*, 17 CANADIAN FAM. L.Q. 191 (2000); *see also* SILBERG ET AL., *supra* note 11, at 56–57.

simply telling the truth to a parent or authority figure, a child may now attempt to calculate the impact of any report before making it. In effect, the child is put in the position of having to determine whether a given act constitutes abuse and whether there is sufficient evidence to support such a conclusion. The goal of reporting requirements is to prevent anyone, including a child, parent, or therapist, from having to make a judgment call before reporting suspected child abuse. The decision by the Court of Appeals flips this policy on its head and puts children at risk.

III. THE BASIS FOR GRANDMOTHER'S APPOINTMENT AS JOINT MANAGING CONSERVATOR RESTS ON TWO GROUNDS THAT FAIL TO SATISFY THE "SIGNIFICANT IMPAIRMENT" REQUIREMENT

A. The Court of Appeals misapplied the Family Code's stringent standard for nonparent conservatorship in finding significant impairment in the present case.

"[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." *In re Mays-Hooper*, 189 S.W.3d 777, 778 (Tex. 2006) (quoting *Troxel v. Granville*, 530 U.S. 57, 68 (2000) (plurality op.)). To overcome the presumption that the appointment of a natural parent as managing conservator serves the best interest of the child, a nonparent must prove by a preponderance of the evidence that the appointment of a parent would significantly impair the child's physical health or emotional development. Tex. Fam. Code § 153.131(a);

Lewelling, 796 S.W.2d at 167. The significant impairment standard applies to situations where, as here, the court appoints a parent and a nonparent as joint managing conservators. *Compton v. Pfannenstiel*, 428 S.W.3d 881, 887 (Tex. App.—Houston [1st Dist.] 2014, no pet.); *Critz v. Critz*, 297 S.W.3d 464, 471 (Tex. App.—Fort Worth 2009, no pet.).[17] Acts or omissions that constitute significant impairment include, but are not limited to, physical abuse, severe neglect, abandonment, drug or alcohol abuse, or immoral behavior by the parent. *In re S.T.*, 508 S.W.3d 482, 492 (Tex. App.—Fort Worth 2015, no pet.). It is insufficient to show that a nonparent would merely be a better custodian of the child. *Lewelling,* 796 S.W.2d at 167. Indeed, when the inquiry is between a parent and nonparent, "close calls" go to the parent. *Chavez v. Chavez*, 148 S.W.3d 449, 458 (Tex. App.—El Paso 2004, no pet.).

The Court of Appeals held in this case that there was "sufficient evidence to support an implied finding that Mother's appointment as sole managing conservator would result in significant impairment of J.R.W.'s emotional development." Slip Op. 12. The Court of Appeals noted that "each factor discussed above—whether it be the repeated allegations of abuse to CPS that have been ruled out or Mother's request to reunify with J.R.W. with her stepfather—

[17] An interpretation to the contrary is arguably in conflict with the plurality opinion in *Troxel* because such interpretation would provide no "special weight to the parent's own determination" regarding conservatorship. 530 U.S. at 70.

might individually not be enough to overcome the parental presumption," but explained that when "taking them together in the aggregate," it was not convinced the trial court abused its discretion in appointing Grandmother as joint managing conservator. Slip Op. 12.

Like the items cited by the El Paso Court of Appeals in *Lewelling*, the two factors cited by the Dallas Court of Appeals constitute no evidence that appointing Mother as sole managing conservator would significantly impair the child. *See Lewelling*, 796 S.W.2d at 165–66. Texas courts have held in some cases that even parents who have violent criminal histories or place their children in dangerous situations (neither of which is the case for Mother) do not present significant impairment. *S.T.*, 508 S.W.3d at 497–98 & n.31 (holding evidence that father physically assaulted multiple women, had history of substance abuse and had made "bizarre allegations" to Child Protective Services about a sexual relationship between the child's mother and maternal grandmother factually insufficient to overcome parental presumption); *Chavez*, 148 S.W.3d at 454–55, 460 & nn.2, 3 (declining to find that appointment of parent would significantly impair children where parent "engaged in sexual intercourse in the backseat of car while the children were crying in front seat," parent had previously smoked marijuana in the children's presence, and parent's home was described as "falling apart, with the

roof caving in, nails and lumber strewn across the ground, and a walkway that was unsafe for the children").

There is nothing in the record to indicate that Mother uses illegal substances, physically abused her child, or endangered her child. To hold that the precautionary and sincere measures Mother took are a *worse* impairment than those outlined above defies reason. Additionally, as discussed in further detail below, courts facing similar cases found that the significant impairment standard was not met. Thus, the ruling by the Court of Appeals in this case represents an outlier among the Texas Courts of Appeal. This Court should therefore rule that, as a matter of law and consistent with sound public policy, the conclusions on which the Court of Appeals based its ruling constitute "no evidence" of significant impairment. *See Lewelling*, 796 S.W.2d at 167 ("Since there is no evidence in the record to show that appointment of [mother] as managing conservator would significantly impair [child's] physical health or emotional development, the court of appeals erred in affirming the trial court's award . . . .").

1. The punishment of a parent for being vigilant in her efforts to protect her child and report potential abuse is unsupported by Texas law and contradicts public policy.

In the present case, the Dallas Court of Appeals upheld the trial court's ruling based in part on the fact that Mother's reports of child abuse were "ruled

out." Slip Op. 12.[18] But at least one court has declined to find that good-faith reports of child abuse that were subsequently "ruled out" constituted evidence of significant harm. *In re De La Pena*, 999 S.W.2d 521 (Tex. App.—El Paso 1999, no pet.).

A parent who files good-faith reports of child abuse is not harmful to her child even if those reports are "ruled out," absent additional evidence to the contrary. In *De La Pena*, the child's counselor testified that, based on her visits with the child, the child was "somewhat stressed because of the allegations of child abuse" made by the father against his sister who cared for the child. *Id.* at 530. Relatedly, the sister in *De La Pena* "questioned [father's] conduct in initiating an investigation concerning suspected child abuse" and was "concerned about her brother's motivation." *Id.* at 531. The El Paso Court of Appeals concluded that the cumulative evidence, including evidence that the police did not determine that abuse had occurred, was legally insufficient to show significant impairment. *Id.* at 532–33. Its opinion emphasized that the father provided reasons for his decisions and efforts to protect his daughter. *Id.* at 533.

In the present case, even the parenting facilitator who voiced concerns about potential emotional harm to J.R.W. acknowledged at trial that Mother is "a very

[18] Anonymous allegations were also made to Child Protective Services regarding neglectful supervision of J.R.W. by Mother and sexual abuse of J.R.W. by Mother's stepfather, which were likewise investigated and ruled out. 4.RR.53. Presumably these allegations were not made by Mother.

good mom" who has tried to protect her child from the abuse she faced in her own childhood. 5.RR.23–24. The father making the child abuse report in *De La Pena* had similarly faced an abusive childhood, and the court recognized his "explanations for his decisions and the steps he believed were necessary to protect [the child]." *De La Pena*, 999 S.W.2d at 533. Absent specific evidence to the contrary, and consistent with the parental presumption, Mother should be given the same benefit of the doubt in this case.

Moreover, J.R.W.'s counselor also reported the potential abuse based on interactions with J.R.W. The counselor, who had been meeting with J.R.W. at least weekly for five months prior to appearing before the court,[19] testified at a status hearing that based on the emotions J.R.W. expressed, the words he used, and his difficulty "getting over what's happened to him," she did not believe he was lying or being coached by his mother to fabricate stories of abuse. 4.RR.6–7, 23, 27–28. The counselor found J.R.W.'s report of abuse to her to be reliable enough that she felt compelled to report the abuse. 4.RR.13.

Mother should not be penalized for acting responsibly to protect her son, especially when her concerns were corroborated by a trained professional who took J.R.W.'s complaints of abuse so seriously as to report them herself. Conversely, it

[19] Contrast the counselor with the parenting facilitator, whose opinion was relied on by the Dallas Court of Appeals, but who had not met J.R.W. prior to testifying in the trial. Slip Op. at 11; 5.RR.29.

seems likely that a court would have viewed Mother negatively if she had neglected to report potential child abuse despite having information compelling enough to cause a counselor to report potential abuse. If this is the case, then a court is equipped to rule against a parent to whom a child makes allegations of abuse regardless of whether the parent reports the suspected abuse or not. Such a result is neither fair nor predictable, and leads to situations in which parents cannot know whether their actions will be viewed negatively by the courts.

Texas law and sensible public policy dictate that no parent should lose the ability to decide what is best for their child unless their appointment as sole managing conservator would result in physical or emotional harm to the child. Particularly because Texas residents are legally obligated to report suspected child abuse, this Court should hold that the good-faith reporting of suspected child abuse, even if such reports are "ruled out," constitutes "no evidence" of significant impairment.

2. In addition to the reports of child abuse, the Court of Appeals' ruling relied on mischaracterization of Mother's actions to find risk of significant impairment.

The Court of Appeals based its holding in part on the fact that Mother herself was sexually abused by her stepfather (and the related concern that J.R.W. would be around him). However, Mother testified at trial that she agreed with a permanent injunction preventing J.R.W. from interacting with her stepfather.

5.RR.141. In fact, Mother testified with respect to her motion for a new trial that she had not and would not let her son be alone with her stepfather. 6.RR.59–60. Given that no evidence to the contrary was presented at trial, the fact that Mother has a familial relationship with her abuser and has in the past requested that visitation between J.R.W. and her stepfather be supervised should not constitute evidence of significant impairment.

This Court has emphasized that evidence of spousal abuse cannot weigh against the abused parent. *Lewelling*, 796 S.W.2d at 168. Evidence of past child abuse by a family member should similarly not weigh against a parent, especially when the parent is taking responsible steps to ensure safe interactions with the former abuser. "As the abuser cannot take advantage of his acts of abuse in a custody battle with the abused, so the abuser's parents also may not benefit from that abuse." *Lewelling*, 796 S.W.2d at 168. Although neither she nor her son abused Mother as a child, Grandmother improperly benefited in this case from Mother's past abuse and Mother's resulting caution in protecting her son.

The Court of Appeals thus erroneously relied upon two grounds to rebut the parental presumption in favor of appointment of Mother as sole managing conservator. *See De La Pena,* 999 S.W.2d at 532–33 (minimizing negative testimony by the child's counselor due to the fact that her conclusion was "based upon [the parent's] actions in investigating child abuse" and declining to find that

the parental presumption was rebutted where the parent spent the night with his children at the home of his stepfather, who had molested the parent and his sibling as children). This Court should prevent Mother from being punished due to her status as a survivor of child abuse and for seeking legal protections for her son against her former abuser and other family members, as these actions constitute no evidence of significant impairment to J.R.W.

B. The Court of Appeals' Ruling Improperly Relied on a Speculation of Potential Harm to Affirm a Finding of Significant Impairment.

To establish significant impairment, a nonparent must present evidence that does more than "merely raise a suspicion or speculation of possible harm." *In re B.B.M.*, 291 S.W.3d 463, 467 (Tex. App.—Dallas 2009, pet. denied); *see also In re Scheller*, 325 S.W.3d 640, 644 (Tex. 2010). Instead, the evidence must support the logical inference that "some specific, identifiable behavior or conduct of the parent will probably" harm the child. *In re M.W.*, 959 S.W.2d 661, 665 (Tex. App.—Tyler 1997, writ denied). Furthermore, the evidence must indicate that the potential harm would cause significant impairment in the present. *Critz*, 297 S.W.3d at 477 (Tex. App.—Fort Worth 2009, no pet.) ("Thus, while [mother's] drug use may have affected her fitness as a mother in the past, there was no evidence presented of any current drug use that *would cause significant impairment* to [child's] physical health or emotional development *in the present*" (emphasis added)).

The record in this case is insufficient to support a finding of significant impairment. In *In re J.C.*, the Houston Court of Appeals granted the same relief Mother requests in the present case: overturning joint managing conservatorship between a grandmother and parent in favor of sole managing conservatorship for the parent. 346 S.W.3d 189, 196 (Tex. App.—Houston [14th Dist.] 2011, no pet.). In that case, the court dismissed as inadequate the prediction of a psychologist, who had treated the child for nearly two years, of "some emotional danger" and an "immediate threat of some sort of damage" upon separation from her grandparents. *Id.* at 192. Similarly, in *De La Pena*, the El Paso Court of Appeals dismissed as inadequate a counselor's testimony that uprooting a child from the nonparent's care would be harmful because the record lacked identifiable indications of emotional harm or disruption after visits with the parent. 999 S.W.2d at 533; *see also B.B.M.*, 291 S.W.3d at 468 (finding insufficient evidence of negative effect on child, including testimony of psychologist, because "no specific evidence" of significant impairment was presented and all evidence was "theoretical in nature").

In the present case, the evidence of impairment is speculative and based on even less substance than the evidence presented in the foregoing cases. The parenting facilitator indicated a "high probability" that J.R.W. would suffer emotional harm from repeated false claims of sexual abuse. 5.RR.32. However, unlike the treating psychologist of *two years* whose testimony was inadequate in

J.C., the facilitator in the present case had never even *met* J.R.W. 5.RR.29. She admitted that, without having conducted even one face-to-face session with J.R.W., she had no first-hand knowledge or professional opinion of his physical or emotional health. 5.RR.29. The facilitator did not, and in fact due to her complete lack of interaction with J.R.W. *could* not, present specific evidence beyond that which is theoretical in nature demonstrating that J.R.W. had suffered emotional harm in the past or that the appointment of Mother as sole managing conservator *would* cause significant impairment to J.R.W. *in the present*.

Because there is nothing specific in the record to indicate that J.R.W. would suffer emotional harm if Mother was appointed sole managing conservator, Appellee's argument does not rise above speculation and is wholly inadequate to establish significant impairment as a matter of law. The Court of Appeals acknowledged that each ground—the ruled out, good-faith reports of child abuse and the requests for safeguards in interactions with Mother's stepfather—might not individually demonstrate significant impairment, but concluded that they did so in the aggregate. If either ground fails, there is thus no ruling that the other ground is adequate to overcome the parental presumption and this Court must reverse the judgment of the Court of Appeals.

Child Justice asks this Court to hold that, as a matter of law, the good-faith reporting of child abuse and a parent's status as a survivor of sexual abuse

constitute no evidence of significant impairment. Consistent with this holding and the foregoing, this Court should reverse the judgment of the Court of Appeals and remand this case to the trial court for further proceedings with direction to consider the extent to which an abusive parent has access to their child in determining whether a conservator appointment is in the child's best interest.

PRAYER FOR RELIEF

In light of the foregoing, and for the reasons set forth by Respondents and their amici, this Court should reverse the judgment and remand for further proceedings.

Dated: November 14, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

As required by Texas Rule of Appellate Procedure 9.4(i)(3), I hereby certify that this brief contains 8,384 words, according to the word count of the word-processing software used to prepare this brief.

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