UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT
CINCINNATI, OHIO

MICHAEL A. GALLUZZO,

PLAINTIFF-APPELLANT,

vs. **CASE NO. 04-3527**

CHAMPAIGN COUNTY, COURT OF COMMON PLEAS; ROGER B. WILSON; TERESA A. COOK, a/k/a TERESA A. GALLUZZO; STATE OF OHIO

DEFENDANTS-APPELLEES.

AMICUS CURIAE BRIEF OF FAMILIES IN TRANSITION IN SUPPORT OF PLAINTIFF-APPELLANT

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CERTIFICATE OF COMPLIANCE

I hereby certify to the best of my knowledge that the Amicus Brief complies with the type-volume limitation submitted under Federal Appellate Rule 32(a)(7)(B) pursuant to the computer processing system used to prepare the brief. The number of words is 6,852.

BURKE PROBITSKY, ESQ.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on June 12, 2004, a true copy of the foregoing motion has been served upon Jim Petro, Ohio Attorney General, c/o Elise W. Portor, 30 East Broad Street, 17th Floor, Columbus, Ohio 43215, Sanford Flack, Attorney for Teresa A. Cook, 101 North Fountain Avenue, Springfield, Ohio 45502 and Michael A. Galluzzo, Plaintiff, P. O. Box 710, 307 East Main Street, St. Paris, Ohio 43072 on the date same was filed by first class U.S. mail postage prepaid.

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BURKE PROBITSKY, ESQ.

TABLE OF AUTHORITY

STATEMENT OF INTEREST

Families in Transition, (FIT) is a non-profit organization based in New York. FIT advocates for children and parents involved in divorce proceedings and advances conflict resolution through alternative dispute resolution programs, legislative reform and review of judicial interpretation of current law. FIT is a gender neutral organization. FIT produces a public television program entitled: FAMILIES IN TRANSITION. The program deals with issues involving familial conflict, divorce and the family court system. The program is broadcast throughout New York, Washington D. C., and other areas across the United States.

FIT did not participate in the prior proceedings, but has reviewed all pleading, motions, papers and decisions had heretofore in said proceeding. This particular case is of interest because it involves a "fundamental right," perhaps "the" most fundamental right of all rights. FIT recognizes that the magnitude of the issues herein impact the heart of American society and, its successful continuation. Due Process of law and the Equal Protection of law are the heart of our civilization's legal foundation. These timeless principals promote and produce civility. When the State routinely abridges these traditional fundamental principals, absent a compelling interest, it creates within the citizenry animosity, belligerence, hostility, a lack of respect and a sense of contempt for the State. Such conduct serves no useful purpose and is self-destructive. It is an undisputed fact that in America today well over six million children go to bed each night having had no, or extremely little, contact with their other "fit" parent. This is a sad commentary on American culture. America has rampant fatherlessness. This condition is a direct result of State legislatures and State tribunals attempting to resolve, albeit ineffectively, familial discord. State efforts, by and large, lack and/or ignore fundamental constitutional protections in family law. Absent constitutional protections there can be no fundamental fairness, hence there is no meaningful and lasting conflict resolution.

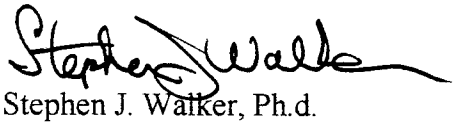
Moreover, consider that presently eighty-five percent (85%) of all children that exhibit behavioral disorders and seventy-five percent (75%) of all children in chemical abuse centers and sixty-three (63%) of youth suicides and eighty-five percent (85%) of youths incarcerated and seventy percent (70%) of teenage pregnancies come from fatherless homes. (U.S. Census Bureau). In addition, consider that fatherlessness is a burden on the mothers of America.

The majority of this self-destruction and the turmoil resulting therefrom is directly related to parent v. parent, "winner take all", child custody statutes. State family courts often times utilize out-dated and conflicting legislation and the judicial interpretation thereof to distort, negate and ignore the basic principals of fundamental fairness. Rather than promote communication and cooperation between parents most current legislation promotes acrimony. State custody statutes lack any sense of uniformity, making a "fundamental right" vary from State to State. Often times this lack of uniformity invites venue shopping and, sadly, the hijacking/kidnapping of children.

Upon information and belief, data available indicates that nearly four-thousand (4,000) "fit" fathers in America took their own lives during the year 2003, as a direct result of family court proceedings wherein they were denied access to their child or children. This epidemic is growing at an alarming rate.

The issues raised within this appeal directly contribute to a ripple of events that reaches all corners of our society. The ripple reaches into future generations and has a lasting affect therein. Domestic relations laws are evolving. They require constitutional principals of fundamental fairness to guide them. This Honorable Federal Appeals Court has a unique opportunity to set a proper guiding light for that evolution.

Respectfully submitted,



Stephen J. Walker, Ph.d.
Associate Producer, FIT

UNITED STATES COURT OF APPEALS
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Defendant.

CONSTITUTIONAL LAW

The Fourteenth Amendment to the United States Constitution guarantees Due Process of Law and the Equal Protection of Law stating thus:

> **"No state shall make or enforce any law which shall, abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.**

There is a *presumption* in law recognized by the Supreme Court of the United States that affirms that: *fit parents act in their children's best interests*. In State civil actions that involve separation and/or divorce [wherein minor children are present] said presumption is protected because it is an extension of and is inextricably intertwined with the recognized and protected liberty interest and fundamental right that parents have to *make decisions concerning the care, custody and control of their children*. To abridge, infringe, ignore, or violate said presumption without due process of law is a violation of the due process clause of the 14th Amendment of the Constitution because to do so abridges and infringes upon the recognized and constitutionally

protected liberty interest and fundamental right that parents have to *make decisions concerning the care, custody and control of their children.* Said *presumption* in law that *"fit parents act in the best interests of their children"* is at the heart of and intertwined with another presumption in law found at the very core of American jurisprudence i.e., the *presumption of innocence.*

POINT I: THE DISTRICT COURT MISINTERPRETED THE GRAVAMAN OF THE QUESTION PRESENTED. THE COURT'S DECISION IS ERRONEOUS AS A MATTER OF LAW

The District Court's opinion about the merits of a presumption for shared parenting in divorce situations notwithstanding,[1] the Court concluded that shared parenting in divorce cases is not guaranteed by the 14th Amendment. However, the decision places the cart before the horse.

The question before the Court was not whether shared parenting is guaranteed by the 14th Amendment, but whether the subject statutory scheme violates the due process protections of the 14th Amendment inasmuch as said statutory scheme abridges, contradicts and voids the *presumption* in law recognized by the Supreme Court, that *"fit parents act in their children's best interests."* Said subject statutory scheme deprives a "fit" parent of his/her recognized and protected liberty interest and fundamental right i.e., the interest of parents in the care, custody, and control of their children, to wit: **a)** said deprivation takes place under the subject statutory scheme without a due process of law hearing to determine parental fitness; **b)** said deprivation takes place without any evidentiary standard; **c)** said deprivation takes place without a threshold of what such evidentiary standard shall conclude; **d)** said deprivation takes place without a compelling state interest.

In essence, the subject statutory scheme creates a *de facto* presumption of parental unfitness akin to creating a presumption of guilt as opposed to a presumption innocence.

[1] **"Finally, the Court agrees that Plaintiff, the amici, and the commentators they cite make a strong case for a presumption of shared parenting in divorce situations. But Plaintiff contends this outcome is compelled by the Fourteenth Amendment and that is the question this Court must decide." (decision @ pg 14)**

LEGAL ARGUMENT

THE PARENT-CHILD RELATIONSHIP : A "FUNDAMENTAL RIGHT"

The Supreme Court has articulated the protected status of the parent[s]-child[ren] relationship on many occasions. Most recently in **Troxel v. Granville, 530 U.S. 57, 65-66, 120 S./ Ct. 2054, 147 L.Ed. 2d 49 (2000)** the High Court summarized its prior decisions in this very important area of social concern thus solidifying the fact that the 14th Amendment protects the "fundamental right" of parents to make decisions concerning the care, custody, and control of their children, [2] (see Decision @ page 14-15). The liberty interest of the parent-child relationship is a "protected liberty interest." Parents have a "fundamental right" to make decisions concerning the care custody and control of their children. The "liberty interest" and "fundamental right" are unquestionably protected by the Due Process Clause of the Constitution's 14th Amendment.

THE PRESUMPTION OF FIT PARENTS

In its wisdom, the Supreme Court has given added weight to the recognition and protection the Constitution affords parents regarding the liberty interest and fundamental right of the parent[s]- child[ren] relationship stating thus:

> **"There is a presumption that fit parents act in their children's best interests, Purham v J.R., 442 U.S. 684, 602; there is normally no reason for the state to interject itself into the private realm of the family to further fit parents' ability to make the best decisions regarding their children." Reno v. Flores, 507 U.S. 292, 304.**

In its wisdom, the High Court has recognized a "rebuttable" presumption in favor of parents. Rebutting a presumption requires a hearing to establish findings of fact. To rebut the presumption that *fit parents act in the best interests of their children* requires a due process hearing to establish findings of fact to determine parental fitness.

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[2] **.." 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." (See Troxel, supra)**

The subject statutory scheme fails to mandate a hearing be held prior to the deprivation of parental rights which are deemed "fundamental" and constitutionally protected interests. Said statutory scheme abridges and ignores the *presumption* as recognized by the Supreme Court, that *"fit parents act in their children's best interests"* because it fails to provide a due process of law hearing at a meaningful time prior to the deprivation of protected parental rights.

THE RIGHT TO A HEARING

A hearing is the most basic component of due process of law because it promotes fundamental fairness. The timing of a hearing is critical to that fundamental fairness. The Supreme Court in **Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed. 2d 287 (1970),** states:

> **"The fundamental requisite of due process of law is the opportunity to be heard. The hearing must be at a meaningful time and in a meaningful manner.... In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses..."**

The Supreme Court in **Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L. Ed.2d 548 (1972),** states as follows:

> **"When protected interests are implicated, the right to some kind of prior hearing is paramount. The Court has already made clear that property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels or money. "**

Moreover, the Supreme Court has consistently held that the right to raise one's children and to be with them, are *"[r]ights far more precious than property rights."* [3] The High Court has wisely recognized that a parent's rights to offspring are of considerably more significance and far more precious than property rights. Property rights are protected rights requiring a hearing be held prior to the deprivation of same. There is no legitimate argument raised to dispute the fact

[3] (see May v Anderson, 345 U.S. 528, 533, 73 S.Ct. 840, 843 97 L.Ed. 1221.) Such rights are *"deemed essential,"* Stanley v Illinois, supra, citing Meyer v Nebraska, 262 U.S. 390, 399, 43 S.Ct. 625, 67 L.Ed. 1042.

that prior to the deprivation of rights *"far more precious that property rights"* [i.e., a parent's fundamental right to to make decisions concerning the care, custody and control of child[ren]], the State must conduct a due process hearing to determine parental fitness prior to deprivation.

In State actions involving separation and/or divorce, the State has "reason to interject itself into the private realm of the family." However, that interjection into the private realm of the family where it will affect a fundamental right, must be done by the least restrictive means. Actions taken by the State, especially those *pendente lite,* which alter the *status quo,* must be strictly scrutinized as is further discussed hereinbelow.

Moreover, if and when the State interjects itself into the private realm of the family in actions involving separation and/or divorce, it may not abridge or infringe constitutionally protected rights without due process of law. In actions involving parents and their children the recognized presumption that *fit parents act in the best interests of their children*, must be protected. Allowing the State to alter the *status quo* by ignoring and violating that presumption thus depriving a fit parent of parental right, absent a hearing to determine parental fitness, is a far cry from the least restrictive means. Such action by the State violates due process of law.

The Supreme Court has stated:

> **"The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection. It is plain that the interest of a parent in the companionship, care, custody, and management of his 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." Stanley v. Illinois, 406 U.S. 645, (1972), citing Kovacs v. Copper, 336 U.S. 77, 95 (1949) (Frankfuter, J. concurring).**

The High Court in **Stanley** concluded that procedural due process is mandated in State actions involving the deprivation of the fundamental right to raise one's child[ren]. In **Nicholson v State of New York, et al, 344, F. 3d 154 (2nd Cir 2003)** the Second Circuit Appeals Court

recently cited **Stanley** stating:

> **"In other words the father has a procedural due process interest in an individualized determination of fitness."**

Moreover, the wisdom of the High Court in **Stanley** speaks about the essence of the parent-child relationship and the "momentum" such matters have in priority of importance and consideration. The High Court plainly states that appeals, as here, dealing with parent-child relationships command more respect than those dealing with "shifting economic arrangements." Herein the Court gives guidance to states and to subordinate courts regarding domestic relations priorities.

Divorce, represents "*shifting economic arrangements*" between parents. Children do not divorce their parents nor do parents divorce children. Consistent with the opinion of the High Court in **Stanley supra,** the "shifting economic arrangements" between divorcing parents should take a back seat in priority to the protection of the parent-child relationship. The State has an obligation to protect the constitutionally protected "parent-child" relationship.

THE DOCTRINE OF PARENS PATRIAE

In divorce and/or separation actions, states often utilize the doctrine of *parens patriae* to legitimize an intrusion into the realm of the family. The doctrine of *parens patriae* establishes that the State in its official capacity is the provider of protection and may intervene to protect those [including minor children] who are unable to protect themselves. However, minor children with fit parents have their fit parents to protect them. The State may not intervene under the doctrine of *parens patriae* unless there is some legitimate evidence that a minor child needs protection and that the child's parent[s] are unable or incapable of providing such protection. Otherwise the State is reckless and usurps constitutionally protected authority.

The Supreme Court has discussed the usurpation of parental authority, noting that the

authority of fit parents comes first.[4] The State may not mask the unjustified usurpation of parental authority, as here, under the cloak of *parens patriae* absent proof that parents are unsuitable or are unable, incapable or unavailable to protect their child[ren].

THE BEST INTERESTS OF THE CHILD STANDARD

Arguments by the State in support of the subject statutory scheme that invokes the "best interests of the child" standard as legitimacy for the deprivation of protected parental rights absent a hearing are misguided and without merit. Given the presumption that *"fit parents act in their children's best interests,"* the best interests of a child[ren] is not an issue nor can it be legitimately placed in issue in a state court proceeding until there has been a determination regarding parental fitness. State statutes, as here, which authorize the utilization of a "best interest" standard absent a hearing to determine parental fitness in parent verses parent familial disputes place the cart before the horse. The State may not abridge, deprive, or terminate a parent's rights to offspring under the cloak of "best interests" until a due process of law hearing is held to determine parental fitness and said hearing must be held prior to said deprivation.[5] Allowing the Court to look at the best interest of the child before determining parental fitness contradicts the presumption that fit parents act in the child's best interests.

THE STANDARD : CLEAR and CONVINCING EVIDENCE

A legitimate threshold for the State's infringement of a citizen's "fundamental right" of parenting was addressed by the Supreme Court which concluded that *clear and convincing evidence* is the least appropriate evidentiary standard to be applied when the State abridges a

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[4] **"It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." Prince v. Massachusetts, 321 U.S. 158, 88 L. Ed. 645, 64 S. Ct. 438 (1944).**

[5] The well respected New York State Family Court Judge Rivera in the matter of **Levy v Levy, 38897/99**, stated: **"allowing the courts to look at the "best interests of the child" before determining parental fitness was a contradiction of the principle that fit parents act in a child's best interests."**

parental relationship, thus altering a "fundamental right." [6] To abridge, infringe or terminate the "fundamental right" of the parent-child relationship requires a sustained pleading coupled with a high quantum of proof evidencing wrong-doing, culpability, action or, as the case may be, in-action that produces a detrimental consequence or potential consequence to a child(ren).

Upon information and belief, the Supreme Court has not produced a definitive holding on what constitutes *clear and convincing evidence* in these matters. There is case law to support the conclusion that "harm" is what the clear and convincing evidence must prove. There is a strong inference that the Supreme Court's majority holding in **Troxel, supra.** agrees with that conclusion.

In **Troxel**, the Washington State Supreme Court declared its own state statute unconstitutional, *inter alia*, reasoning that the Federal Constitution permits a State to interfere with the fundamental right of a fit parent(s) to make decisions in the best interests of their child(ren) only to prevent harm or potential harm to the child. The Washington High Court found that its statute did not require a threshold showing of harm and that it swept too broadly by permitting any person to petition at any time for visitation with the child.

The United States Supreme Court affirmed the judgment of the Washington State Supreme Court. With the opinion of Justice Souter in the majority concluding that the Washington Supreme Court's judgment was consistent with the United States Supreme Court's prior cases, the High Court ended the case and decided there was no need to discuss whether harm is required, thus letting the opinion of the Washington State Supreme Court stand in its entirety.

Given the magnitude and scope of the precedents set by the Supreme Court's prior decisions acknowledging that parenting is a "fundamental right," and given the conclusion in

[6] In Saniosky v. Kramer, **445 U.S. (1982).** The High Court states: **"The state needs at least *clear and convincing evidence* in order to sever a parental relationship."** (emphasis added)

Saniosky that an evidentiary standard, i.e., *clear and convincing evidence*, must be applied when the State abridges a parental relationship, thus altering a "fundamental right" a fair inference may be drawn that the majority of the Supreme Court agrees conceptually with the reasoning of the Washington State Supreme Court. A showing of harm or potential harm to the child(ren) is required to abridge and infringe upon the protected fundamental right of parenting. [7]

The Supreme Court has recognized an evidentiary standard, i.e., *clear and convincing evidence*. The State must acknowledge a lawful and logical threshold to establish the point at which it may utilize its authority to abridge the "fundamental right" of the parent-child relationship. Harm, established by clear and convincing evidence is the threshold. A definition of "harm" appropriately would be based upon the State's abuse statutes and definitions therein.

The subject statutory scheme lacks a threshold establishing the point at which the State may utilize its authority to abridge the "fundamental right" of the parent-child relationship. The "right" involved is indeed "fundamental". [8] The Supreme Court has unequivocally stated that rule of law . A parent's right is a "fundamental" right. It is a natural right, a GOD-given right. [9]

THE STANDARD OF REVIEW : STRICT SCRUTINY

Given the absolute constitutional certainty that a parent's right to make decisions concerning the care, custody and control of children is a fundamental right, the appropriate standard of review of laws which infringe upon fundamental rights is *strict scrutiny*. [10]

A strict scrutiny analysis requires that the State establish a compelling interest that

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[7] The threshold of "harm" is likewise recognized as the compelling justification for interference with the parent-child relationship in the state of Tennessee as addressed n **Hawk v Hawk, 855 S.W. 2d 573, 577 (Tenn 1993)**

[8] In **Troxel supra**, the Supreme Court states: **"In subsequent cases also, we have recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children."**

[9] Black's 7th Edition defines Fundamental Right as: **1.** A right derived from natural or fundamental law. **2.** *Constitutional law*. A significant component of liberty, encroachments of which are rigorously tested by courts to ascertain the soundness of purported governmental justifications. A fundamental right triggers strict scrutiny to determine whether the law violates the Due Process Clause or the Equal Protection Clause of the 14th Amendment.

[10] The issue was recently addressed by a member of the Supreme Court wherein the Honorable Justice Thomas, concurring in the majority opinion of **Troxel, supra,** stated: **" I would apply strict scrutiny to infringements of fundamental rights."**

justifies and necessitates the law in question. The Supreme Court in **Reno v Flores 507 U.S. 292, 301-302 (1993),** concluded that any infringement of a fundamental right after establishment of a compelling interest, must be **"narrowly tailored to serve a compelling state interest."**

In parent verses parent actions, a compelling state interest exists when an allegation(s) of unfitness is contained within a pleading and the pleading is sustained by clear and convincing evidence that harm or potential harm is, or may well be, a consequence detrimental to the child[ren]. When a Court concludes that a parent is unfit, the "best interests" standard may be invoked and the court may make and enter an order abridging or, as the case may be, terminating parental rights. Said court order must be "**narrowly tailored"** to evidence a nexus between the sustained pleading of unfitness and the best interests of the child[ren].

A divorce action, in and of itself, is not considered a "compelling" state interest. It is a *shifting economic arrangement,* which must take a back seat when parent-child relationships are involved. Those who marry do not invalidate or waive constitutional protections to fundamental rights. Fundamental rights are always fundamental rights. They are not statutory entitlements.

The District Court's evidently sees "danger" in reading rights language in Supreme Court case law too broadly and leans into the dissenting opinion of Justice Stevens in **Troxel.** (decision @ p18). [Perhaps the District Court and Justice Stevens likewise see danger in the Ninth Amendment]. Justice Stevens' opinion evidences a lack of understanding for the underlying fundamental issues. Parental rights are not absolute. They are fundamental and absent a compelling interest same may not be abridged, absent a threshold and due process of law.

Justice Steven's opinion notwithstanding, "visitation" is primarily a state issue which, by and large, is untested at the Federal Supreme Court level as relating to parent versus parent conflicts. The opinion of the Washington High Court [which hears many more "visitation" cases than does any federal court including the Supreme Court], is based upon first-hand observations.

Accordingly, its opinion must be accorded great weight. The underlying issue is whether due process of law is mandated prior to abridging a fundamental right and whether a threshold must be reached to abridge that right. It is evident from the precedents of the High Court that a pre-deprivation hearing is mandated and a sustained pleading with a showing of harm or potential harm by clear and convincing evidence is a rightful threshold from which the deprivation of a fundamental right of a parent may be sanctioned.

The District Court further cites the dissent of Justice Scalia in **Troxel,** (decision @ p18-19). However, the Supreme Court has already recognized the right for which Plaintiff contends... the "right" to ***due process of law when the deprivation of a fundamental right is at stake.***

The Supreme Court has determined that parents have within the context of the Constitution protected liberty interests that involve children. Parents have a fundamental right to parent their children. Contrary to Justice Scalia's opinion, parental rights exist because they are fundamental and GOD-given. He fails to recognize that the fundamental right is **"perhaps the oldest of the fundamental liberty interests recognized by this Court." (Troxel, supra**).

When the Constitution was written our ancestors lived in a world of patriarchal dominance. Children were considered to be property. Women had no equal standing. Our Constitution has allowed us to evolve from that myopic stance to a 21st century posture wherein individual rights and freedoms are recognized and cherished. Gender and race are not issues that prohibit the equal participation of all in our society. Had our Founding Fathers evidently realized that as this nation evolved, it would come to a point in time wherein the perpetual insanity of rampant divorce would so dramatically abridge and infringe upon fundamental rights of parents and likewise abridge and infringe upon the heirs apparent [children] to such a degree that millions of children would go to bed at night without having access to their "other fit" parent,.. it is fair to conclude the Founding Fathers might have enumerated "parental rights" into our Constitution.

For Justice Scalia to conclude otherwise is beyond comprehension. [The Founding Fathers added the Ninth Amendment in 1791].

Contrary to Justice Scalia's opinion time has evidenced that state legislatures need guidance from their own judiciaries, [as was the case in **Troxel**], and from the federal judiciary. Special interests can dominate legislative agendas. Erroneous stereotypical perceptions alter judgment. The current posture in this nation regarding domestic relations law shows great diversity so much so that litigants forum shop and high jack children to other venues in hopes of getting a better or more sympathetic jurisdiction. Such diversity often times and currently is producing a state of urgency that is crippled by inadequacy. Justice Scalia is correct in that legislators may be removed by the people. However, to believe that doing harm in a more prescribed area justifies the harm and that any legislature is capable of being able to correct its mistakes in a "flash" is naive and very unrealistic. Nothing happens in the legislative process in a "flash". In part, that is why our Founding Fathers built a system of checks and balances. It is the duty of the judiciary to interpret the our laws and to correct the course of their evolution as necessity and the Constitution commands. Constitutional judicial correction can ...take place in a "flash".

STANDING and RELEVANT STATE STATUTES

The Ohio subject statutory scheme involving separation and divorce actions wherein children are involved consists of Ohio R. Civ. P. 75(N)[11] which authorizes *pendente lite* relief and Ohio Revised Code § 3109.04 which authorizes permanent relief. Upon information and belief, the subject statutes are contained within the record on Appeal.

Rule 75(N) was the actual point of controversy from which plaintiff's injury flowed.

[11] The District Court concluded that plaintiff lacked standing to contest Rule 75(N) because plaintiff's initial *pendente lite* deprivation of a fundamental right had occurred some ten (10) [prior to the action filed] and his actual damage of "permanent" deprivation of said fundamental right emanated from a "final" state court order which invoked §3109.04. The District Court concluded that plaintiff had standing only to challenge §3109.04.

The Court failed to realize the point of controversy began with the application of Rule 75(N).[12]

The District Court concluded that plaintiff failed to meet the third prong of the standing test, i.e. redressability. However, plaintiff has standing to challenge Rule 75(N) prospectively from two directions. He faces prospective injury from either one. Firstly, plaintiff faces significant future injury when he elects to exercise his fundamental right to marriage and his fundamental right to procreate, (see **Skinner v Oklahoma, 316 U.S. 535, (1942); Loving v Virginia, 338 U.S. 1 (1967))** . Should marriage end in divorce, plaintiff faces the nightmare he faced 10 years ago; the *pendente lite* alteration of the *status quo*, i.e., the deprivation of the fundamental right to parent his children as a fit parent, absent procedural due process.[13] See **Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, (1978)**

Secondly, prospectively, plaintiff is burdened and coerced into foregoing his fundamental right to marriage based upon his knowledge of and personal experience with the application of Rule 75(N). The State, through the application of Rule 75(N), prospectively acts to burden, intimidate and/or coerce plaintiff into foregoing his fundamental right to marriage and to

[12] Rule 75(N) relates to *pendente lite*, i.e., interlocutory orders, and damage(s) flowing therefrom are capable of repetition but may evade meritorious review. Controversy is not moot. Injury flowing from Rule 75(N) is likely to recur. The analogy is similar to the analogy applied by the Supreme Court in **Roe v Wade, 410 U.S. 113 (1973)**. Therein the High Court concluded that even though plaintiff was longer pregnant at the time of appeal but, because pregnancy may come to a woman more than once, [as marriage may come to a man or woman more than once] and because the issue complained of was "capable of repetition but evading review" the controversy was not moot and entitled to judicial review. Plaintiff in the instant action suffered an "injury in fact", i.e., the deprivation of a fundamental right. The injury was concrete and particularized. Federal intervention will redress the injury. While no court action can replace the "lost time" from the initial deprivation of plaintiff's fundamental right, [i.e. being able to enjoy the fruits of exercising said fundamental right to parent his children], a federal declaration will allow plaintiff to return to State Court to compensate the injury. A federal declaration will assure plaintiff that in the future he will no longer be subjected to the injury caused by the subject Rule.

[13] The District Court erroneously concludes that, inasmuch as at the time of filing the federal action, plaintiff had not re-married or fathered any other children that "**therefore (plaintiff) has no likely future temporary custody issues.**" (Decision @pg 11) This conclusion makes an assumption that defies human nature. Plaintiff is a healthy male who is still young enough to father other children who has a constitutionally protected right to marriage and to procreation. This he may do tomorrow. And, he may be subjected to Rule 75(N) in less than a year. The court walked down the road of unwarranted speculation to avoid addressing the constitutionality of Rule 75(N). Plaintiff has met the criteria to establish standing

procreation because the future application of Rule 75(N) will cause him future injury in fact.[14]

Rule 75(N) affords no pre-deprivation procedural due process and allows the *status quo* to be altered thus moving plaintiff from the equal footing and class of "custodial" into the demeaning classification of "non-custodial". Plaintiff's good name and reputation have been tainted.[15] He is a "second class" parent and citizen. The stigma i.e., the scarlet letter of "U" [Unfit] is upon his back for all to see, notwithstanding the fact that he has not been declared an unfit parent. This stigma is demeaning. It is injury. It impacts not only upon plaintiff but upon his children as well. In their eyes he is "second class"...the less important parent.

Rule 75(N) authorizes *pendente lite* the deprivation of the fundamental right of a fit parent to raise his/her natural child "without oral" hearing. There is no established standard of evidence nor threshold to determine fitness. Said rule abridges, and contradicts, the presumption that *fit parents act in the best interest of their children* and is in violation of the 14th Amendment.

The Court's decision [footnote on page 11] states: **"the amicus curiae argue that award of custody pendente lite creates a status quo which is difficult to overcome at the time of trial."** [The issue was not addressed by the District Court] However, Rule 75(N) invites litigants to run and get to the courthouse and strike the first blow. [16]

[14] In **Zablocki v Redhail, 434 U.S. 378 (1978)** the Supreme Court held that a Wisconsin State statute violated the Equal Protection Clause of the Constitution because it sufficiently "burdened" and coerced citizens into "foregoing" their "fundamental right" to marry. The Wisconsin statute was facially unconstitutional because it openly forbid marriage without state approval to non-custodial parents who were in arrears of child support. The facial deficiencies of Rule 75(N), while not openly forbidding marriage could certainly act as a burden and coerce plaintiff into "forgoing" his "fundamental right" to marriage.

[15] An individual's "good name" and "reputation" is a protected liberty interest as defined by the United States Supreme Court in the matter of **Goss v Lopez, 419 U.S. 565 (1975)** wherein the Court states: **"Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, the minimal requirements of the [Due Process] Clause must be satisfied.**

[16] Altering the *status quo* "temporarily" can equate to permanent alteration. State courts are extremely reluctant to continue to move children. Whomever gets to the courthouse and strikes the first blow gets an upper hand in the outcome of issues in controversy. Allowing the State to alter the *status quo* pendente lite, raises the bar shifting the burden of proof from a level playing field to one created by the State which gives advantage to the first party to get to the courthouse. Rule 75(N) 2 states that once the *status quo* has been altered, without oral hearing, [wherein the scrutiny of fact finding and cross examination may determine parental fitness] an aggrieved party may request oral argument and the court may schedule same within twenty eight days. That can be a lifetime of deprivation in matters as sensitive as the fundamental right of a fit parent to parent a child. It allows an altered *status quo* to take root and taint the entire process thereafter.

The notion that an initial deprivation of a fundamental right absent a due process hearing can be purportedly corrected at a "later time" is unacceptable to the Supreme Court. In **Fuentes v Shevin, 407 U.S. 67 (1972),** the 14th Amendment's guarantee that "**No state shall deprive any person of life, liberty or property without due process of law**" was addressed. The High Court declared unconstitutional laws in Florida and Pennsylvania which denied due process by granting relief, when triable issues of fact existed, without a hearing prior to the deprivation.[17]

The subject statute herein, denies the "right" to be heard and allows the Court to deprive plaintiff of his liberty interest and fundamental right to parent his child(ren), *a right more precious that property rights.* Even if Ohio's *pendente lite* statutory scheme affords an opportunity to be heard after the deprivation, the initial denial of due process and resulting injury will not be condoned by this country's highest court.

§ RC 3109.4 is the Ohio statute which authorizes an award of child custody in divorce and separation actions. Said statute allows the Court to invoke the doctrine of *parens patriae* and embraces the "best interest of the child" standard as its reference for the Court's discretion in awarding child custody. It contains no constitutional provisions requiring that an allegation[s] of unfitness be made and that a sustained pleading of parental unfitness be required to invoke the "best interests" standard. It contains no evidentiary standard for the establishment of unacceptable parental conduct and no threshold of what such evidence must prove. It contains no constitutional protections to prevent the State from invoking the doctrine of *parens patriae,* as it should only when, and if, it is shown that a parent(s) is incapable, unwilling or unavailable to provide protection for the child. Said statute, as written and applied, abridges, ignores, and voids the presumption in law that: *fit parents act in the best interests of their children.*

[17] **Justice Stewart: "Damages may even be awarded to him for the wrongful deprivation. But no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred. This Court has not...embraced the general proposition that a wrong may be done if it can be undone." citing Stanley v Illinois, 405 U.S. 645, 647 (1972)**

Consistent with the foregoing, §RC 3109.4 is unconstitutional facially and as applied. Said statute violates the due process requirements of the 14th Amendment of the Constitution.

THE DOCTRINE OF VAGUENESS

Plaintiff argued before the District Court, *inter alia,* that §RC 3109.4 is unconstitutional because it is vague. The Court concluded in its Order on Reconsideration that the "void for vagueness" doctrine applied solely to criminal procedures and penal law. The Court erred. The "void for vagueness" doctrine can be and has been applied in civil actions.

A civil statute, as here, is unconstitutionally vague if it (1) does not give fair notice of what conduct may be punished, and (2) invites arbitrary and discriminatory enforcement by its lack of guidance to those charged with its enforcement.[18] The subject statute fails to define in any manner, inappropriate conduct. It gives no notice as to what parenting "conduct" is prohibited. The statute's vagueness invites an abuse of discretion and infringement into the protected zone of familial relations. Its vagueness and the discretion derived therefrom confuse the senses of any intelligent individual.[19] Such discretionary authority is derived from statutory indefiniteness. Often times this allows judicial prejudice, discrimination and value imposition to escape appellate scrutiny. Statutes affecting personal conduct cannot be open to speculative interpretation by the public nor the judiciary. Civil statutes require a "reasonable degree of certainty." The subject statutory scheme lacks a reasonable degree of certainty and is unconstitutionally vague.

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[18] Vagueness is most often used to challenge the validity of criminal statutes where fair notice of the prohibited criminal conduct is required as part of the constitutional due process limitations. In the case of civil statutes however, no more than a reasonable degree of certainty is required. (see **Rooms With A View, 7 S.W.3d at 845;** see also **Pennington, 606 S.W.2d at 689** (noting that greater leeway is given to civil statutes in applying the fair notice test); **Massachusetts Indem. & Life Ins. Co. v. Texas State Bd. of Ins., 685 S.W.2d 104, 114 (Tex.App.-Austin 1985, no writ)**. A statute is not automatically void for vagueness simply because it is difficult to determine whether certain marginal acts fall within its language. **Id.; Rooms With A View,7 S.W.3d at 845.**

[19] See **Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 102 S. Ct. 1186 (1982); Kolender v. Lawson, 461 U.S. 352, 103 S. Ct. 1855 (1983); Rectory Park, L.C. v. City of Delray Beach, & Block 77 Development Group L.C., USDC 208 F. Supp. 2d 1320 (2002); W.W. Management and Employment Co., Inc., v. Scottsdale Insurance Co., USDC 769 F. Supp 178, (1991); Hughes v. The Tobacco Institute, E.D. TEX 2000 WL 34004261 (2000)**

The District Court's Decision on Reconsideration reveals a misunderstanding about the merits of this action. The Court reinterprets one of plaintiff's objections to the original decision. The Court concludes that the Constitution does not "expressly forbid" the allocation of parental rights among divorcing parents. Therefore the Court is "bound" to condone it. With all due respect, the Constitution did not "expressly forbid" slavery nor did it expressly forbid the exclusion of women from an equal footing in our society. We are not "bound" to condone injustice nor procedures that fail to afforded constitutional protections. The Court conclusion is in error. Abridging, allocating, depriving, or terminating a fundamental right requires "due process of law". The Constitution guarantees no less. Due process of law is what the statutory scheme lacks and that is what renders it unconstitutional. [20]

The Court's conclusion within its Decision on Reconsideration is likewise revealing. [21]

Yes, even the most fundamental rights are subject to alteration and indeed absolute loss. However, alteration and/or absolute loss must be accompanied by the fundamental fairness derived from due process and equal protection. Jefferson would liken what takes place, [the deprivation of the fundamental right of a fit parent to parent a child, absent due process of law], to the lawlessness of a society with no Constitutional protections. The Founding Fathers carved out the Constitutional protections of due process and equal protection which are encompassing. The Constitution commands that due process and equal protection be afforded all citizens wherein their fundamental rights and liberties are at stake. Divorce, as here, is no exception.

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[20] **"This objection boils down to Plaintiff's question, "How does this Federal Court condone an[y] allocation of a fundamental right?" The answer is that the United States Constitution does not prohibit allocation of parental rights among divorcing parents. Therefore this Court is bound to condone it.** (decision on reconsideration of merits @ p 4)

[21] **"Even the most fundamental of rights, however, are subject to alteration and indeed absolute loss. Whether for good or ill, it is still the law in the United States that a state may take one's life itself if one has been convicted of murder under certain circumstances. Liberty, which Jefferson also ranked as fundamental, is subject to very severe restriction upon the conviction of a crime. And the rights of a parent to custody of his children, are subject to limitation when he is divorced from their mother. The Constitution of the United States does not command any different result. "** (decision on reconsideration of merits @p 5)

CONCLUSION

The parent-child relationship is a protected liberty interest. A parent has fundamental right to parent his or her child. That fundamental right is recognized by a presumption in law and protected by the United States Constitution. The State may not abridge that fundamental right without a compelling interest. Prior to abridging that fundamental right, as here, a parent is entitled to a due process of law pre-deprivation hearing wherein a sustained pleading by clearing and convincing evidence is required to abridge that fundamental right. The subject statutory scheme lack constitutional protections. In addition, the subject statutory scheme is vague.

The District Court's states in its Decision on Reconsideration:

> "**To put it another way, it is not unreasonable for the States to conclude that divorcing parents are not uniformly capable of jointly exercising their parental rights and therefore that those rights must be allocated between the parents in accordance with the best interests of the children.**" (p4)

This conclusion is seemingly well reasoned. However, it completely side-steps the issue. The law and procedure by which a State makes a conclusion is the issue. Laws that lack due process and equal protection produce arbitrary and capricious conclusions. The Constitutional protections for basic inherent fundamental rights do not evaporate upon marriage nor upon divorce. We are a nation of laws. At the foundation of our laws is the Constitution. Therein are the expressed and implied guarantees afforded each citizen regardless of their marital status. The Fourteenth Amendment has no expressed or implied exceptions. Ignoring the fundamental fairness that due process and equal protection afford the citizenry at the core level of our society, i.e., domestic relations laws, creates animosity, hostility, a lack of respect and contempt for the State. Such conduct is self-destructive.

The District Court never fully grasped the gravaman of this action. It never addressed the actual point of controversy nor identified the standard of review used (strict scrutiny is

appropriate). There is no analysis by the Court regarding the methodology employed in drawing its conclusion. This Appeals Court may remand this action back to the District Court for further adjudication.

In the alternative, this Honorable Court may, in its discretion and based upon the totality of circumstances and the record herein, declare the subject statutes unconstitutional. It is respectfully submitted that said statutes violate the Fourteenth Amendment of the United States Constitution. They are unconstitutional in their application and given the facial deficiencies therein, said statutes are likewise unconstitutional on their face.

Respectfully Submitted,

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